



## ARTICLES

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### **ULRICH HÜBBE OR ROBERT R TORRENS? THE GERMANS IN EARLY SOUTH AUSTRALIA**

#### ABSTRACT

Robert R Torrens is still popularly regarded as the author of the Torrens system of land title registration as well as its political promoter. Since the 1970s the view has been gaining ground that the true author was Ulrich Hübbe, a German lawyer from Hamburg. The extent of Hübbe's contribution is controversial, but most legal historians now accept it as substantial and as having received too little credit. Claims that anti-German sentiment caused Hübbe's contribution to be undervalued are implausible, for German migrants were generally welcome and German jurisprudence was highly regarded in the Colony. Relations with Hamburg were close; some influential English colonists had worked and prospered in Hamburg and were well-inclined towards Germans. Comparing the personalities of Hübbe and Torrens is more promising. The former was poor and self-effacing, the latter rich, influential and ambitious. At best, Torrens accorded persons like Hübbe anonymous acknowledgment. He might have justified this by regarding Hübbe as simply the conveyor of information about the Hamburg system, not the skilled professional advisor that he was.

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## I INTRODUCTION

In the 1850s Robert R Torrens (later Sir Robert R Torrens) led the political campaign for the conveyancing system, which now bears his name, to be enacted in South Australia. It has never been doubted that he was the promoter of the new system and that he provided the initiative, energy, political skill and influence needed for the revolutionary *Real Property Act 1858* (SA) to be enacted. If anyone else supplied as much political momentum as Torrens did, it was that ‘fanatical iconoclast’, Anthony Forster.<sup>1</sup> Forster had been the editor of Adelaide’s leading newspaper, *The South Australian Register*, and, in the mid-1850s, had used this position to start the political campaign for change. In 1857 he steered the legislation through the Legislative Council, of which he had become a member.<sup>2</sup>

Torrens claimed that he was not only the promoter, but also the designer of the system.<sup>3</sup> Although this claim was widely accepted, it did not remain unchallenged. In a statement dictated to his grandson in 1884, Dr Ulrich Hübbe, a German lawyer who migrated to South Australia in 1842, claimed that he had been the author of the Act:

I translated the German system as used in the Hanseatic cities, of which Hamburg was one. Mr Torrens adopted this system and I drafted the Bill finally on those lines which Mr Torrens piloted through the House of Assembly and it was taken through the Legislative Council successfully and became the law of the land.<sup>4</sup>

<sup>1</sup> D Pike, ‘Introduction of the Real Property Act in South Australia’ (1960–1962) 1 *Adelaide Law Review* 169, 178.

<sup>2</sup> Ibid 180–1.

<sup>3</sup> He spoke of ‘the measure of which I claim the authorship. . .’ – see R R Torrens, *The South Australian System of Conveyancing by Registration of Title with Instructions for the Guidance of Parties Dealing, Illustrated by Copies of the Books and Forms in Use in the Land Titles Office* (Adelaide 1859) v. A K Esposito mentions a letter dated 24 August 1864, in which Torrens repeated this claim – see A K Esposito, *The History of the Torrens System of Land Registration with special Reference to its German Origins* (University of Adelaide, Masters thesis, 2000) 1, at footnote number 3. See also D Kerr, *The Principles of the Australian Lands Titles (Torrens) System; being a Treatise on the Real Property Acts of New South Wales, Queensland, South Australia and Tasmania; the Transfer of Land Acts of Victoria and Western Australia; and the Land Transfer Act* (1927) xiii; R M Hague, *Hague’s History of the Law in South Australia 1837–1867* (written in 1936, published in 2005) 789–93; G Taylor, *A Great and Glorious Reformation. Six Early South Australian Legal Innovations* (2005) 14–49. The President of the South Australian Law Society still echoed this view in 2001 – see Martin Keith, ‘How Torrens Cleaned Up Property Title’ in *The Advertiser* (Adelaide), 21 April 2001, 66.

<sup>4</sup> ‘The Real Property Act’ in *Proceedings of the Royal Geographical Society of Australasia, South Australian Branch (Incorporated)* vol XXXII, 109, 112. Hübbe died in 1892.

On 10 February 1892, in an obituary on Hübbe, the German-language *Australische Zeitung* stated:

Dr. Ulrich Hübbe . . . was little rewarded for the law that he brought into existence, which was of such immense importance for the security of land ownership. He was the right hand of Sir Robert Torrens. Unfortunately his services relating to the *Real Property Act* have never been properly acknowledged by South Australia. Others received all the rewards, whereas Dr. Ulrich Hübbe never received any remuneration.<sup>5</sup>

Hübbe was their countryman, so the Germans in the Colony might not have needed much evidence to accept such a view. Less likely to have been affected by bias, and thus of greater evidentiary weight, is the following observation made by Anthony Forster, one of Torrens' close friends and collaborators, in a letter to his niece, Annie Ridley, on 15 May 1892:

I may however say, at the close of a long life, that the Real Property Act originated in a series of leading articles that I wrote in the South Australian Register . . . But as all the lawyers of the colony were hostile to the proposed new measure, it never could have been brought to a final consummation but for the efficient help of a German lawyer, Dr. Hübbe who has unfortunately had too little recognition in connection with it.<sup>6</sup>

Except for a few voices, like that of Anthony Forster,<sup>7</sup> Hübbe received no credit during his lifetime for the role he played in designing the system. In the last few decades, however, the view voiced by Forster has gained great weight as a result of detailed historical research. In his two substantial contributions, A K Esposito seems to have evaluated almost all the available historical evidence, including even the appendices to the British Royal Commission Reports of 1829/30, and has concluded that Hübbe supplied the decisive model upon which the system embodied in the *Real Property Act 1858* (SA) was based.<sup>8</sup> Robinson and Raff have drawn similar conclusions from their examination of the evidence.<sup>9</sup> The only

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<sup>5</sup> Written by Mücke and Basedow, the editors of the paper, and quoted by Esposito (translated from the German) – see A K Esposito, 'Ulrich Hübbe's Role in the Creation of the "Torrens" System of Land Registration in South Australia' (2003) 24 *Adelaide Law Review* 263, 268.

<sup>6</sup> Quoted by Esposito, above n 3, 24–5.

<sup>7</sup> G E Loyau, *Notable South Australians, or, Colonists – Past and Present* (Adelaide 1885) 156–7.

<sup>8</sup> Esposito, above n 3, 24–5; see also A K Esposito, *Die Entstehung des australischen Grundstücksregisterrechts (Torrenssystem) – eine Rezeption des Hamburger Partikularrechts?! [The development of the Australian Law Relating to the Registration of Real Estate (Torrens System) – a Transplant of the Law of Hamburg?!]* (2005).

<sup>9</sup> S Robinson, *Transfer of Land in Victoria* (1979) 13; M Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003) 25–60; see also M Raff, 'Torrens Land Title Registration – the Influence of

dissenting voice among recent legal historians is that of Greg Taylor, who, while conceding that Hübbe's contribution 'to certain details of the system as it matured' after its first enactment was 'considerable', insisted that his contribution prior to the enactment of the Act of 1858 was only 'minimal to moderate'.<sup>10</sup>

Even if one accepts Taylor's view, the fact remains that, until recently, Hübbe was denied due credit. The purpose of this contribution is to shed light on the historical reasons for this denial. The Torrens/Hübbe controversy will thus be placed in the context provided by the foundation of the young Colony, German migration, the reputation and standing of the German community in South Australia before the World Wars of the twentieth century, the reputation of German law in English-speaking countries and the significance of the South Australia–Hamburg connection.

## II SUPPORT FOR TORRENS IN NINETEENTH AND TWENTIETH CENTURY LITERATURE

Torrens' fame as the father of the system has its origin in the literature of the 1860s. Frederick Sinnett was a man of letters, not a lawyer. Having arrived in Adelaide in 1849 and having spent about two years in South Australia, he moved to Victoria, but returned to Adelaide in 1859, where he founded and ran the first evening newspaper, *The Daily Telegraph*.<sup>11</sup> His interest in the land question had preceded his return to Adelaide, for in 1857 he had written to John Stuart Mill asking for advice.<sup>12</sup> In 1862, at the request of the Colonial Government, Sinnett published a book on the development of the Colony. It included a chapter on the *Real Property Act*.<sup>13</sup> He was not intimidated by 'so incomprehensible a mystery as the law of property',<sup>14</sup> for he referred to it sarcastically as 'an assiduously acquired system of occult lore', and to the professionals who administered it as 'the gentlemen of the long robe'.<sup>15</sup> He defined the essence of the new system as follows:

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German Law' (Paper presented at 'The German Presence in South Australia', the University of Adelaide, 30 September and 1 October 2005).

<sup>10</sup> G Taylor, 'Hamburger To Go? The German Contribution to the Torrens System Examined' (Paper presented at 'The German Presence in South Australia', the University of Adelaide, 30 September and 1 October 2005) 8; see also Taylor, *Reformation*, above n 3.

<sup>11</sup> See the biographical introduction by Cecil Hadgraft in F Sinnett, *The Fiction Fields of Australia* (1966, first published in 1856) 120. A descendant of Frederick Sinnett, Ms R B Sinnett, lives in McLaren Vale.

<sup>12</sup> Ibid 2–3; An extract of Mill's answer is also to be found there.

<sup>13</sup> F Sinnett, *An Account of the Colony of South Australia, Prepared for Distribution at the International Exhibition of 1862* (Adelaide 1862) 94–9.

<sup>14</sup> A W B Simpson, *An Introduction to the History of the Land Law* (1961) 252.

<sup>15</sup> Sinnett, above n 13, 94–5.

... in South Australia [we have substituted] 'title by registration' for 'title by deed' and [have applied] the 'Stock-book system' to dealings in real property.<sup>16</sup>

Understandably, Sinnett had turned to Torrens for information to enable him to write the chapter and had credited Torrens with

his customary readiness to afford information as to the important cause to which he has devoted himself . . .<sup>17</sup>

Sinnett's approach to this topic shows that, for contemporaries, Torrens was the public face of the new system. In 1857 Torrens even owed his election to the House of Assembly to his reforming activities. Hübbe, despite occasional letters to the newspapers, had remained a background figure.

Another contemporary writer who treated Torrens as the true originator of the system was Robert Harrison, who resided in the Colony from 1856 to 1861. His book, *Colonial Sketches*, also published in 1862, generally treated South Australia as hell on earth and its people as either rogues or fools.<sup>18</sup> However, he had nothing but praise for Torrens. He refers to him as

a Goliath . . . in the shape of a civilian of no legal training whatever, who undertook to bring the mysteries [of the colonial lawyers in the plundering line] to the scrutiny of common sense, and produced a Bill entirely upsetting the old system of conveyancing, and by a public registration of title made the transfer of land as cheap and expeditious as any other commercial transaction, and in fact sounded the death knell of slow conveyancing in the colony of South Australia.<sup>19</sup>

Torrens was not named and the term 'civilian' is puzzling. It would be very far-fetched indeed to think of Hübbe, a person who had in fact made 'the Civil Law . . . the object of his study', thus fitting the first of the nineteenth and twentieth century dictionary senses.<sup>20</sup> Torrens was probably referred to as a 'civilian' because he was not a lawyer.

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> R Harrison, *Colonial Sketches or Five Years in South Australia with Hints to Capitalists and Emigrants* (1862).

<sup>19</sup> Ibid 114–15.

<sup>20</sup> J A H Murray (ed), *A New English Dictionary on Historical Principles* (1893) defines 'civilian' in the first place as 'One who makes the Civil Law . . . the object of his study'. Another meaning given is 'A member of the Indian Civil Service of the Crown'. W Somerset Maugham used the expression 'Indian Civilian' for 'a man who, in his day, had ruled a province' in 'Sanatorium', one of his short stories in the collection *Creatures of Circumstance* (1951).

One suspects that much support for Torrens' claim could be found in English-language South Australian newspapers of the period. After all, Torrens was promising to bring down the oppressive cost of conveyancing. An early example, selected randomly, is the letter from 'An Old Colonist', published in *The South Australian Register* of 10 February 1857:

Much has been said about the promised boon from the head and pen of our talented Treasurer, Mr. Torrens, . . . and if the . . . simplification . . . be only one tenth of what it is expected to be, South Australians need be proud of their Torrens.

It is typical of later literature, published around the turn of the century, that Torrens is given all the credit and that Hübbe is rarely even mentioned.<sup>21</sup> The *Cyclopedia of South Australia*, published in 1907,<sup>22</sup> expresses pride in the fact that

the youngest then-existing Legislature in the British Empire should have introduced such an innovation, which revolutionized time-honoured practices, and commended itself, on its merits, in other lands . . .

It compliments the members of the Parliament for their originality and courage and, in an unmistakable reference to Torrens, extends the same compliments to 'the author of the Bill'.<sup>23</sup>

South Australian legal historians of the 1920s and 1930s tended to regard Hübbe's contribution as negligible. Kerr claimed to have examined Hübbe's book<sup>24</sup> and to have concluded that 'the diffuse language of the Bill bears internal evidence that Hubbe could not have been the Draftsman'.<sup>25</sup> Writing a few years later, Hague considered that Kerr had really said all that needed saying, but thought 'killing the slain' was nonetheless worthwhile.<sup>26</sup> In the event, he articulated a view of Hübbe's contribution which was somewhat kinder than his opening comment leads one to expect:

The real services rendered by Torrens were not that he was the actual inventor or first discoverer of the principles of the Real Property Act but that he took the matter in hand when others shrank from it, that he went to

<sup>21</sup> See, for example, H Hussey, *More than Half a Century of Colonial Life and Christian Experience with Notes of Travel, Lectures, Publications, etc* (1897) 100; A Sutherland and G Sutherland, *The History of Australia and New Zealand from 1606 to 1890* (1894) 165.

<sup>22</sup> H T Burgess (ed), *The Cyclopedia of South Australia (Illustrated)* (Adelaide 1907) I, 134.

<sup>23</sup> Ibid.

<sup>24</sup> U Hübbe, *The Voice of Reason and History Brought to Bear Against the Present Absurd and Expensive Method of Transferring and Encumbering Immoveable Property* (1857).

<sup>25</sup> Kerr, above n 3, xiii.

<sup>26</sup> Hague, above n 3, 790.

considerable trouble to embody the principles in a bill, and that he persisted with the bill in the face of great opposition until he forced it through parliament. He had assistance all the way through – he could not have succeeded without it, nor did he ever attempt to conceal it. Dr Hubbe sat just outside the bar of the House during the consideration of the bill and was frequently consulted by Torrens.<sup>27</sup>

It may be that Kerr's view was coloured by the resentment of all things German which was common in Anglo-Saxon communities after World War I. In South Australia, that attitude manifested itself very powerfully when 69 South Australian German place names were changed.<sup>28</sup> Place names such as Basedow, Krichauff, von Doussa and Homburg, named after Germans who had rendered public service, disappeared from the map. Only three, Klemzig, Hahndorf and Lobethal, were later restored.

### III DENIAL OF RECOGNITION TO HÜBBE: UNCONVINCING EXPLANATIONS

#### A *Anti-German Sentiment?*

Raff considers that anti-German sentiment was one substantial reason why Hübbe's contribution was suppressed. Such prejudice is said to have been prevalent in early South Australia and then to have reached a high point with the outbreak of World War I. For this, Raff relied on the researches of Gerhard Fischer,<sup>29</sup> who had concluded that the early German migrants in South Australia were faced with continual anti-German agitation. The fact is that the early Germans who came to South Australia, either as visitors or as permanent residents, enjoyed a reputation and acceptance, based simply upon their origins, which twentieth century migrants, who came after World War II, could only dream about. German origins were no disadvantage in South Australia in the days before the Kaiser, Queen Victoria's grandson, with his belligerent speeches and short-sighted chauvinistic policies, and, worse still, Adolf Hitler with his paranoid obsessions, had ruined the previously-good German name.

The argument that anti-German sentiment was responsible for the suppression of Hübbe's contribution has also been advanced by Esposito. He points out that German migration accelerated around 1853 and 1854 and that the South Australian House of Assembly resolved in June 1857 that the Land Fund, which the British Government had placed at the disposal of the Colonial Government, should in future be used for bringing labourers from the British Isles to SA, but not labourers from Germany or any other foreign country. From these facts he infers that a

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<sup>27</sup> Ibid 792.

<sup>28</sup> H Homburg, *S.A. Lutherans and Wartime Rumours* (1947) 19–22. See also the *Nomenclature Act 1917* (SA).

<sup>29</sup> Raff, *Private Property*, above n 9, 33–4; Gerhard Fischer, *Enemy Aliens – Internment and the Homefront Experience in Australia* (1989).

majority of the leading politicians were anxious to protect the British character of the Colony from being swamped by a wave of Germans:

The author submits that in this situation it would not have been politically very sensible to propose an adoption of German law in South Australia.<sup>30</sup>

It is true that there were critical voices which suggested in the debate that the Germans were keeping too much to themselves. As Mr Burford stated in the House of Assembly in June 1857: '[The Germans are] not nearly so willing to associate with us as we had been to mingle with them.'<sup>31</sup> Esposito's admittedly plausible argument fails to convince, if only because it ignores a distinction between limiting the influx of German migrants and suppressing German cultural achievements such as useful legal institutions. Whilst the British of that time may, with some justification, have looked down upon German political and constitutional arrangements,<sup>32</sup> such disdain in no way extended to the Roman law traditions of Europe or the German efforts to modernise and codify the law.

### B *The Standing of the Germans in Early South Australia*

The considerable impact made upon early South Australia by German migrants is well known and much documented.<sup>33</sup> The migrants under Pastor Kavel established a settlement on the banks of the Torrens and called it 'Klemzig' after their home town in Brandenburg. Although there were occasional critical voices,<sup>34</sup> they soon acquired a reputation for hard work and thrift, and provided the new Colony with much needed fruit and vegetables. In the parliamentary debates to which reference has been made above, the Germans are given credit for their willingness to stay and

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<sup>30</sup> Esposito, above n 3, 75.

<sup>31</sup> *The South Australian Register* (Adelaide) 6 June 1857. Issues of *The South Australian Register* were not paginated. Microfilm of the newspaper is available in the State Library of South Australia.

<sup>32</sup> Ibid. Mr Burford is reported to have stated in the House of Assembly in June 1857 that he 'had heard of men among them who spoke of instructing us in the method of government . . . They [are] at least half a century behind us [in their political thinking]'.

<sup>33</sup> D Schubert, *Kavel's People. From Prussia to South Australia* (1985).

<sup>34</sup> 'The number of sheep in the Colony is 1,000,000. A regular demand exists for agricultural and pastoral, as well as mining labor, but the Commissioners send out regularly one vessel per month, averaging 250 Emigrants to each vessel, and that is believed to be an adequate supply. There are very few natives and these are perfectly harmless. Until lately there were no Irish in the Colony, and very few Scotch; but as many as 4000 Germans, who live mostly together, and although the men are somewhat idle, smoking all day long, yet the women among them are very hardworking, and make the best nurses and servants.' – *The Emigrant's Friend, or Authentic Guide to South Australia, including Sydney; Port Philip, or Australia Felix; Western Australia, or Swan River Colony; New South Wales, Van Dieman's Land; and New Zealand* (1848) 13.

work here when many migrants from the British Isles ran off to the Victorian goldfields in search of riches.<sup>35</sup>

One of the aims of the Wakefield scheme was to enable migrants from Britain to establish prosperous, compact communities, similar to the best in Britain. It was thought that the Wakefield scheme of colonisation would

enable a concentration of settlement (as opposed to the reckless dispersion of population in other colonies), in which all the advantages of British civilisation and culture could immediately be transplanted.<sup>36</sup>

There is some irony in the fact that, whilst this aim was hardly achieved by the British migrants, the Germans were prompted by ties of religion, common language and a sense of tradition to create a kind of New Prussia, which was as good a replica of their German home communities as was achievable in circumstances so vastly different from the ones they had left behind. Early accounts of the settlements of Klemzig and Hahndorf, and of the somewhat later settlements in the Barossa Valley testify to the fact that folk culture, religious practices, craftsmanship, church architecture and even organ building were very similar to the models in the Prussia which they had left.

The German migrants of the first few years were not simply uneducated peasants. They concentrated on tilling the land, but among them were many different types of craftsmen, together making up an impressive picture of rural, pre-industrial society. Noris Ioannou reports that one, August Klaehn, wrote home on 9 January 1848 as follows:

South Australia is indeed a paradise for the independent farmer, for the smith, wheelwright, saddler, carpenter, cobbler, tailor, potter, mason; for builders, millers, shepherds, tanners, painters, miners, butchers, locksmiths, turners, linen weavers, gardeners, coopers, labourers.<sup>37</sup>

The craftsmanship which some of these early German migrants brought with them was indeed impressive. Ioannou's book has many illustrations of early German ingenuity. Nor were the activities of the community confined to fine craftsmanship. Music was cultivated in home-country fashion. The Tanunda Liedertafel, a men's choir with a repertoire of mainly German Lieder, was founded in 1861, but interest in such ventures must have existed long before.

Although the Barossa community was self-contained, some members showed a lively interest in the political issues of the day. In the 1850s, one of the important issues was self-government, and another was the reform of the system of

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<sup>35</sup> See Mr Bagot's comments reported below n 41.

<sup>36</sup> Pike, above n 1, 170.

<sup>37</sup> N Ioannou, *The Barossa Folk. Germanic Furniture and Craft Traditions in Australia* (1995) 20.

conveyancing. One correspondent, 'Vitis' (grape vine), wrote to *The South Australian Register* from Tanunda in August 1856 under the heading, 'Registration of landed property', forwarding an extract from the Prussian Code of Criminal and Civil Law, and explaining that a system of land registration existed in Prussia and would be worthy of the attention of the local legislator.<sup>38</sup>

According to an editorial in *The South Australian Register* of 5 May 1857, the one problem with the Germans was that they were too keen to preserve their 'Germanness':

We may ask whether Germans naturalized in haste, and coming out here with their Teutonic habits and preferences entirely unchanged, would so quickly resolve themselves into loyal subjects of Queen Victoria. . . . the Germans now settled in this colony – though peaceable subjects, though good cultivators, though useful members of the society – are to a very great extent isolated, living together in the spirit of clanship, forming their own townships and villages, and generally preserving as much as they can, their German characteristics.<sup>39</sup>

The arguments advanced in the debate concerning the Land Fund, which took place in the House of Assembly in June 1857, were too complex for the resolution simply to be treated as an expression of anti-German sentiment,<sup>40</sup> for even those members who were opposed to the use of the Fund for German migration, expressed admiration for the contribution the South Australian Germans had made to the Colony.<sup>41</sup> The Land Fund had been established to relieve poverty in Britain rather

<sup>38</sup> *The South Australian Register* of 16 August 1856.

<sup>39</sup> Quoted by Esposito, above n 3, 76–7.

<sup>40</sup> *The South Australian Register* of 6 June 1857 contains a full account of the resolution and the debates.

<sup>41</sup> Ibid. The following selection of contributions to the debate may be of interest.

*In favour* of making the Land Fund available for German migration:

MR CHARLES BONNEY, the Commissioner of Crown Lands and Immigration, stated that 'he . . . thought that the Germans who were already settled here had a right to the concession he proposed. He confessed he had no great regard to British interests, and he did not think England had very carefully regarded ours when she sent us the sweepings of her goals and workhouses.'

MR TORRENS, the Treasurer, said that he 'would not . . . ignore the claim of their German fellow-colonists.' . . . 'the German race [was] congenital with ourselves, and their habits were similar to those of the Anglo-Saxon'.

MR BAGOT stated that the Germans 'had proved themselves good citizens, and had remained here when the majority of Englishmen went away to the diggings, and he thought they had a fair right to the means of bringing out their friends.'

MR LINDSAY stated that 'It had been said that the German differed from us in point of education. He admitted that but the difference was in their favour. They were far better educated than the majority of English emigrants.' 'To exclude Germans seemed particularly inconsistent, if we termed this a British colony, when in England they had for two centuries been importing Germans to reign over them.'

than in Germany. As Mr Hallett pointed out in the debate, South Australia was a British colony; Mr MacDermott added that the Land Fund 'was a trust held by the colony for the benefit of the parent state'. Such understandable sentiments might well have proved decisive.

An editorial, published in *The South Australian Register* on the same day, approved the action of the House of Assembly and stated:

Our German fellow colonists have received a hearty welcome to our shores, and they have deserved it. Their loyalty, industry, and integrity have been exemplary. . . . But they have had their reward. A sphere of enterprise has been opened up for them which they could never have looked for in their

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MR SMEDLEY stated that 'the Germans had proved themselves the most useful class of colonists we had known . . . ' ' . . . he should most strenuously support the introduction of Germans in proportion of the number of their countrymen residing in the colony. He felt most strongly that Germans had a claim on us which no other nation on the face of the earth had . . . '

*Against making the Land Fund available for German migration:*

MR WARK stated that he 'would welcome [the Germans] on their arrival, and was happy to see a naturalized German sitting in that Chamber.' . . . 'Heretofore men of enterprise found their own way from Germany to the colony, but what warranty would they have that an inferior class would not come out by means of the assistance asked for?'

MR BURFORD said he 'would not open a door to facilitate the introduction of discontented politicians from the continent of Europe. The Germans should, in common decency, be thankful for the advantages given to them on arrival.' . . . 'the Germans were welcome here – always had been and always would be; but it was another question whether we would bring them out with our Land Fund. It must be remembered that the Germans were not very numerous at present; but as their numbers increased, they would be inclined to show us their strength.' ' . . . foreigners, who, though naturalized, preserved their home affections, as we did, and would not hesitate, when they had amassed property, to go home if they felt so inclined, and throw off their allegiance.'

MR FINNISS, the Chief Secretary, stated that 'We held out the hand of fellowship to all foreigners against whom there is no social objection, and gave them facilities which many of them did not possess in their native countries; but beyond that he could not go.'

MR HANSON, the Attorney-General, stated that 'he could not consent to any part of our Land Fund being expended in the introduction of foreigners. He was not, however, opposed to Germans . . . they had always encouraged the Germans – had welcomed them here, and given them as great, perhaps greater facilities than even in the United States. They had always received a welcome here, for whatever cause they had left their native land – whether from religious persecution, political oppression, or the force of poverty; but South Australia was the heritage of the British nation.'

The compliment which Mr Bagot paid the Germans is also to be found in much greater detail in H Hussey, above n 21, 64 and in J I Watts, *Family Life in South Australia Fifty-Three Years Ago Dating from October, 1837* (1978) 94–6.

own land. . . . *There is no office of the State that is not open to them, nor a point of laudable ambition which they may not attain, in common with every member of the community.* [emphasis added]<sup>42</sup>

The last sentence of this statement is fully borne out by such records as are available to us. Prussian officers, the monocled satans of the twentieth century, were more than welcome here in the nineteenth century. After all, without the help of Blücher, Wellington might have lost the battle of Waterloo!

In 1846 Alfred von Doussa arrived on the *Heloise* and settled in Balhannah and later in Hahndorf. His family remained in South Australia, but Alfred spent much of his time abroad, apparently in search of glory and money.<sup>43</sup> His son, Alfred junior, was a successful businessman in Hahndorf, a member of the Masonic Prince of Wales Lodge at Mount Barker, and one of the founders of the Onkaparinga Racing Club. In 1901 he was elected to represent the Southern District in the Legislative Council.<sup>44</sup> The von Doussa family has remained prominent in South Australia to this day. Alfred senior had served in the same Prussian regiment as Albert, who was to become the Prince Consort in England. Alfred senior's father had also been an officer in the Prussian army and had been decorated for his service at Waterloo.

Carl von Bertouch, who had fought in the Prussian-Danish war of 1864 and had risen to the rank of Premier Lieutenant, arrived in 1851 and established himself as an auctioneer, surveyor and landbroker, first in Tanunda and then in Adelaide. Matthias Erichsen arrived somewhat later. His military career had been more varied. Having fought on the Danish side in the Prussian-Danish war of 1864, he then took part as an officer in the Prussian-French war of 1870–1871. He came to Australia in 1878 and established himself as storekeeper in Yorketown on Yorke Peninsula. He served as mayor of Yorketown for nine terms.

On 6 November 1867 the Duke of Edinburgh, who was in South Australia to lay the foundation stone of the Adelaide Post Office building, appeared on the Cavalry Ground, North Terrace, dressed in the uniform of a Colonel of the Prussian Guards.<sup>45</sup>

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<sup>42</sup> Ibid.

<sup>43</sup> His times away from South Australia were as follows: Californian gold fields: 1857–1861; New Zealand gold fields: 1861–1863; Franco-Prussian war: 1869–1871; Cape Diamond Fields and Europe: 1872–1877 – see *Cyclopedia of South Australia* above n 22, I, 201; R Butler, *A College in the Wattles. Hahndorf and its Academy* (1989) 463–4.

<sup>44</sup> For an account of early members of the South Australian parliament of German extraction, see I Harmstorf, *Germans in the South Australian Parliament* (BA Honours thesis, University of Adelaide Department of History, 1959).

<sup>45</sup> Homburg, above n 28, 22.

German origin and even German birth and education, were no handicap to a German who was self-confident, intelligent, enterprising and fluent in English. There can be no more convincing illustration of this fact than is provided by the career of the Honourable Robert Homburg, a native of Brunswick. He came to Australia with his parents in 1854, at the age of six. Two years later the family moved to Tanunda, where he attended an English/German school. He became a lawyer and was admitted to the Bar in 1874. His political career began with his election to the House of Assembly in 1884. He was Attorney-General and Minister of Education and might have become Premier had he not resigned in 1905 to accept a judgeship on the Supreme Court. His son, Hermann, attended Prince Alfred College and followed his father into politics. He resigned his position as Attorney-General at the outbreak of World War I, for, as he told me when I met him in 1960, he did not want to be held responsible if the war should be lost.

It would be easy to multiply these examples. They show that, before World War I, the Germans here faced few obstacles on their way to high positions in politics, business or any other important pursuit, particularly if they had mastered the basics of cricket, had become fluent in English and, better still, had had the benefit of an education at St Peter's College or Prince Alfred College.

Among the earliest German migrants were a few academically trained people. One was the remarkable and rather eccentric Johannes Menge, a German geologist and linguist who helped explore South Australia, having found employment with the South Australian Company.<sup>46</sup> Another was Ulrich Hübbe. These men were exceptions. It was the failure of the liberal German revolution of 1848 which caused many a well-educated, disaffected liberal to turn his back on Germany and seek greener pastures overseas, including in Australia. There was Dr Carl Muecke<sup>47</sup> from Berlin, who worked for the *Südaustralische Zeitung*, which had been founded by Otto Schomburgk, father of the renowned Richard Schomburgk, Director of the Adelaide Botanic Gardens.<sup>48</sup> In medicine, Dr W H Scholz, founder of the Willows Hospital, opened in 1883, deserves to be mentioned.<sup>49</sup>

In the field of music, one remembers Carl Linger, composer of the *Song Of Australia*,<sup>50</sup> and Immanuel Gotthold Reimann, who, in 1883, established the

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<sup>46</sup> *Australian Dictionary of Biography* (2) [1788–1850] 222; see also J H Voigt, *Australia-Germany. Two Hundred Years of Contacts, Relations and Connections* (1987) 48–9.

<sup>47</sup> Muecke, 'a shining example of the best of his native country's education system' had fled after unsuccessful attempts at political reform in Germany – Butler, above n 43, 16.

<sup>48</sup> Voigt, above n 46, 46.

<sup>49</sup> *Cyclopedia of South Australia*, above n 22, II, 307–8.

<sup>50</sup> Butler, above n 43, 16, 287, 386.

Adelaide College of Music and later became the principal piano teacher at the newly established Elder Conservatorium of Music.<sup>51</sup>

In the fine arts, the most important German painter to have worked in Australia in the nineteenth century, was Eugene von Guérard.<sup>52</sup> He was based in Melbourne, visited South Australia in 1855 and created some remarkable oil paintings in the romantic style of Caspar David Friedrich, by whom he had been strongly influenced when still in Europe.<sup>53</sup> We owe some of our glimpses into early South Australian life to Alexander Schramm, another German painter of some prominence in early Adelaide.<sup>54</sup> The great Hans Heysen, of Hamburg origin and based in Hahndorf, came to prominence somewhat later.<sup>55</sup>

In Science, Germans were so richly represented that it is impossible to name more than just a few representatives. In no field was the German connection as intense as in botany. Dr Darrell Kraehenbuehl has given an account of 14 German botanists who came out on visits or permanently, and enriched the world's knowledge of Australian flora.<sup>56</sup> The best-known of these were Ferdinand von Müller, Dr H H Behr and Moritz Richard Schomburgk.<sup>57</sup>

A German technological contribution was the spring-stump-jump cultivator, patented by John Emanuel Steicke.<sup>58</sup> This was the first attempt to incorporate a spring in a stump-jump implement and enjoyed great popularity. Even the game of cricket owes something to the Germans, for Ewald Paul Kumnick pioneered the making of cricket bats from Australian willow.<sup>59</sup> His father, Carl Ferdinand Kumnick, made the first wooden looms used in the Kleinschmidt, Kumnick and Kramm tweed mills, which later became the Onkaparinga Woollen Mills.<sup>60</sup>

The contribution of such men was highly appreciated here rather than resented. The fact that a South Australian correspondent addressed von Müller, a German Baron, as 'My Lord' in correspondence, may serve as some, perhaps minor, indication that skilled and educated Germans were indeed held in high esteem in the Colony.

<sup>51</sup> *Cyclopedia of South Australia*, above n 22, II, 185–6.

<sup>52</sup> A Caroll and J Tregenza, *Eugene von Guérard's South Australia* (1986).

<sup>53</sup> Ibid 3.

<sup>54</sup> Ibid 11; Tracey Lock-Weir, *Visions of Adelaide, 1836 – 1886* (2005) 70–4.

<sup>55</sup> *Australian Dictionary of Biography* (9) [1891–1939] 279–81.

<sup>56</sup> 'Pioneer German Botanists in Colonial South Australia. The Ones who Stayed – and those who Left', paper compiled by Darrell Kraehenbuehl for the Barossa Festival April 1993, kindly lent to the author by the Hon Christopher Legoe, QC; see also Darrell Kraehenbuehl, 'Dr H H Behr's two Visits to South Australia in 1844–45 and 1848–49' (1981) 3(1) *Adelaide Botanic Gardens* 101–49.

<sup>57</sup> *Australian Dictionary of Biography* (6) [1851–1890] 91–2; *Cyclopedia of South Australia* above n 22, I, 315.

<sup>58</sup> *Cyclopedia of South Australia* above n 22, II, 562–563.

<sup>59</sup> Ibid 820.

<sup>60</sup> Ibid 818, 820.

### C *The Reputation of German Law*

The Germans regard law as yet another field of science (*Geisteswissenschaft*). That view is not shared by common lawyers, and one must concede that foreign legal institutions may not have enjoyed the ready acceptance in South Australia which was accorded to scientific discoveries and innovations. The *Cyclopedia of South Australia* comments on the Torrens system as follows:

... its methods and leading principles were certainly foreign to those of British law, and it is easily conceivable that some minds might be so constituted as to regard what was foreign as antagonistic.<sup>61</sup>

The argument that the legislation was repugnant to English law and therefore null and void was to gain some prominence in later litigation.<sup>62</sup> Nevertheless, in England German law was highly regarded, at least in its academic form. Just as common lawyers had translated works of the great French writers of the 18<sup>th</sup> century and English judges had found guidance in them,<sup>63</sup> others turned for the same purpose to great German jurists of the nineteenth century like Friedrich Carl von Savigny (1779–1861).<sup>64</sup>

It would be a mistake to think that the impact of these German sources was confined to the British Isles. Their reputation had well and truly found its way to South Australia, as is shown by the following extract from a letter dated 31 March 1904, which Frederick William Pennefather, the first Professor of Law in the University of Adelaide, wrote after his retirement to Sir Samuel Way, then Chancellor of the University:

If you happen to come across the Law Magazine for last February, do look at the article on legal education in Germany. It interested me specially for this reason: of course their system is far more searching than anything we ventured to introduce at Adelaide, but the general principles are something the same as the syllabus which I drew up under your supervision while I was Professor. For instance at Gottingen (which is a celebrated school) Roman

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<sup>61</sup> Ibid I, 134.

<sup>62</sup> A C Castles and M C Harris, *Lawmakers and Wayward Whigs. Government and Law in South Australia 1836–1986* (1987) 125–34.

<sup>63</sup> See for example, Robert Joseph Pothier, *A Treatise on the Law of Obligations or Contracts*, 2 volumes (translated by Sir William David Evans) (1806) and Robert Joseph Pothier, *Treatise on the Contract of Sale* (translated by L S Cushing) (1839).

<sup>64</sup> Friedrich Karl von Savigny, *The History of Roman Law during the Middle Ages* (translated by E Cathcart in 1831) and *The Roman Law of Persons as Subjects of Jural Relations* (second volume of Savigny's *System of Modern Roman Law* (translated by W H Rattigan) (1884); on Savigny's standing as an important jurist, see J E G Montmorency, 'Friedrich Carl von Savigny' in J Macdonell and E Mason (eds), *Great Jurists of the World* (1913) 561–589. Contributions on Alciati, Cujas, Gentilis, Zouche and van Bynkershoek were written by Coleman Phillipson, Professor of Law at the University of Adelaide from 1920–1925.

Law and Constitutional History come first; then Real and Personal Property, Jurisprudence, Commercial Law, and then Criminal Law, International Law and Civil Procedure. This shows that we were not far wrong in our scheme.<sup>65</sup>

John Salmond, Professor of Law from 1897–1905, persuaded the University to purchase a number of German law books for the Law Library and used them in Adelaide when he was writing his great works on jurisprudence and on torts.<sup>66</sup> To give just one example: Salmond lists Dernburg's book on the *Pandects* (3 volumes) in his bibliography with the following explanation: 'This is one of the best examples of the German works on Pandektenrecht, that is to say, the modern Roman law which was in force as the common law of Germany until suspended by the recent Codes'.<sup>67</sup>

Salmond's successor, William Jethro Brown (1906–1916), showed a similar interest in the works of the great German writers. In his critical edition of John Austin's *Jurisprudence*, Brown deals in his extensive annotations with French legal literature and also with the works of Gottfried Wilhelm Leibniz, Samuel von Pufendorf, Otto von Gierke, Niels Nikolaus Falck, Rudolph von Jhering and Friedrich Carl von Savigny.<sup>68</sup> In his brief biography of Brown, Michael Roe called von Jhering 'Brown's favourite jurist'.<sup>69</sup> John Austin himself had been an ardent admirer of the German academic legal scene.<sup>70</sup>

#### D *Hamburg: Cosmopolitan and Anglophile*

On 4 June 1857, Torrens, then Treasurer in the Finnis Government, introduced his Bill for a new system of conveyancing in the House of Assembly and stated that a similar measure had been in force in Hanse towns like Hamburg for 600 years and had resulted in very low land transaction costs:

<sup>65</sup> Sir Samuel Way correspondence, South Australian State Library Archives, Private Record Group 30/3, Folder: Letters Received 1900–1904.

<sup>66</sup> J W Salmond, *Jurisprudence or the Theory of the Law* (1902).

<sup>67</sup> Ibid 649.

<sup>68</sup> W Jethro Brown, *The Austinian Theory of Law, being an Edition of Lectures I, V and VI of Austin's 'Jurisprudence', and of Austin's 'Essay on the Uses of the Study of Jurisprudence' with Critical Notes and Excursus* (1906) 70, 74, 91, 159, 160, 249, 337, 354, 368. See also Brown's comments on comparative and historical jurisprudence, 367–8.

<sup>69</sup> Michael Roe, *William Jethro Brown, an Australian Progressive 1868–1930* (Occasional Paper, University of Tasmania, 1977) 31.

<sup>70</sup> S Vogenauer, 'An Empire of Light? Learning and Lawmaking in the History of German Law' (2005) 64 *Cambridge Law Journal* 481.

No one in this House will assert that this which is accomplished by Germans in Hamburg cannot be accomplished by German and English colonists in South Australia.<sup>71</sup>

Torrens was no fool and would not have used such an argument if it had been likely to activate jingoistic opposition. The great seaport of Hamburg was very cosmopolitan, having absorbed people from many parts of Europe. Huguenot refugees, Dutch fruitgrowers, Sephardic Jews, English businessmen and many people from other lands had been welcomed in Hamburg and had found it a place in which to live, work and prosper. When the first German Empire ceased to exist in 1806, Hamburg became legally an independent state and conducted its own foreign relations. It did not become a constituent part of the second German Empire until 1871. In the 1830s, it was Hamburg and British legislation that validated marriages solemnised before a minister of the English Church in Hamburg.<sup>72</sup>

The links between Hamburg and Britain, and later South Australia, were close and there was nothing exclusively German about the Hamburg connection. Altona, cheek by jowl to the Hamburg harbour and now part of it, was Danish in the 1830s. In his reminiscences Captain Dirk Meinertz Hahn, after whom the town of Hahndorf in the Adelaide Hills is named, reports that, when he took about 200 Prussian migrants to South Australia in 1838 on his Danish sailing ship, the *Zebra*, he had to sail from a Danish port in order to be allowed to land in a British Colony. To comply with this requirement, he moved his ship from Hamburg to Altona and loaded it there.<sup>73</sup>

It was unfortunate that, in July 1836, Hamburg suggested that its convicts might make suitable migrants to the new Colony.<sup>74</sup> That was promptly rejected by the British Government, for South Australia was intended to be a convict-free settlement, unburdened, as *The Emigrant's Friend* explained in a fit of hyperbole, by 'the moral pestilence . . . of emancipated and runaway convicts' which afflicted New South Wales and Van Dieman's Land.<sup>75</sup> After this inauspicious beginning, relations between Hamburg and South Australia became close and important. There was a Hamburg Hotel in Rundle Street, one of the 'haunts of sportsmen and country

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<sup>71</sup> *Speeches of Robert R Torrens Esq, Explanatory of his Measure for Reform of the Law of Real Property: to which is Appended Copy of the Bill, as Passed by the House of Assembly of South Australia* (1857) 11 (held by the State Library of South Australia).

<sup>72</sup> The documentation concerning was supplied by the Hamburg Archives and concerns the marriage between Osmond Gilles and Patience Oakden, sister of Gilles' business partner, Philip Oakden: see below n 104 and accompanying text. One of Adelaide's suburbs is named after Patience Oakden.

<sup>73</sup> F J H Blaess and L A Triebel (transl), 'Extracts from the Reminiscences of Captain Dirk Meinertz Hahn, 1838–1839' [1964] III *South Australiana* 97, 101–2. Captain Hahn was of Danish nationality.

<sup>74</sup> Ian Harmstorf, 'Some Common Misconceptions about South Australia's Germans' in (1975) 1 *Journal of the Historical Society of South Australia* 42, 42–3.

<sup>75</sup> *Emigrant's Friend*, above n 34, 10.

visitors', owned by Digby R Trew who later founded the famous South Australian Hotel on North Terrace.<sup>76</sup> Hamburg played a major role as a centre of German migration to South Australia.<sup>77</sup> Between 1838 and 1870, 43 Hamburg shipowners were involved in 250 departures of sailing ships to Australian ports, with Johann Cesar Godeffroy (of Huguenot extraction), trading under the firm name Johann Cesar Godeffroy & Son, being responsible for 150 of these.<sup>78</sup> Before 1850 Godeffroy had acquired a financial interest in the big copper mine in Burra, having been advised of its potential by German migrants in South Australia,<sup>79</sup> and from 1848 onwards the firm traded between Hamburg and Port Adelaide for 20 years at the rate of about seven round trips a year, carrying migrants to South Australia and copper ore back to Hamburg. Robert M Sloman, an Englishman, was the founder of another of Hamburg's great shipping companies, which became involved in the Australian trade in the nineteenth century.<sup>80</sup> The contract to carry the group of Germans led by Pastor Fritzsche to Adelaide on the *Skiold* was made with R M Sloman.

The South Australian Company, established by George Fife Angas, played a vital role in solving the practical problems involved in the foundation of the Colony. It purchased the first vessels to carry migrants and supplies. Arrangements were made to obtain further supplies when needed from Van Diemen's Land and from Hamburg.<sup>81</sup> Many of the German migrants who settled in South Australia had Hamburg connections, if only in the sense that they had used the city as a staging post.

The most important South Australian links with Hamburg were provided, not by Germans, but by Englishmen who resided and worked in Hamburg before either coming to South Australia, or at least playing a significant role in the development of the young Colony while remaining in Hamburg.<sup>82</sup> The presence of Englishmen in Hamburg had a long history. It went back to the 15<sup>th</sup> century and was given a solid foundation in 1611, when the Right Worshipful Company of Merchant Adventurers was granted, by contract with the City of Hamburg, the right to maintain a trading post there and to conduct their church services in English.<sup>83</sup> They were expelled by

<sup>76</sup> Butler, above n 43, 462.

<sup>77</sup> The full story is told in E Hodder, *George Fife Angas, Father and Founder of South Australia* (1891) 156–95.

<sup>78</sup> R Parsons, *Migrant Sailing Ships from Hamburg* (1993) 4.

<sup>79</sup> Ibid 5–6.

<sup>80</sup> Ibid 7.

<sup>81</sup> *Cyclopedia of South Australia* above n 22, I, 55.

<sup>82</sup> For an account of the presence of English merchants in Hamburg, see Hamburger Wirtschafts-Chronik (ed), *Hamburgische und englische Kaufleute. Englandfahrt – Hamburgfahrt. Aus der Blütezeit des deutsch-englischen Handels zwischen 1400 und 1800 und vom Bau der englischen Kirche in Hamburg* (Hamburg 1975). See, in particular, the list of the English clergymen who ministered in Hamburg from 1612–1975 – ibid 59–60.

<sup>83</sup> Maria Möring, 'Die englische Kirche in Hamburg und die Merchant Adventurers' in *Hamburger Wirtschafts-Chronik*, above n 82, 29–58.

Napoleon after he had occupied the city in 1806. The Merchant Adventurers and their families did not return after Napoleon's defeat, but other English merchants took their place. Hamburg welcomed their presence and supported, financially and otherwise, the building of the English Church on the *Zeughausmarkt* which is still active today. As I shall explain presently, some of these merchants and their descendants became persons of wealth and influence in the young Colony of South Australia. Whether one was English or German, Hamburg origin implied a good deal of *prima facie* prestige in the Colony. Henry Nootnagel, a wine merchant, who arrived in Adelaide in 1848, is said to have borne 'the authority of one bred in Hamburg'.<sup>84</sup>

Frederick Sinnett<sup>85</sup> was the son of Edward W P Sinnett, an Englishman and a member of the English Church congregation. Edward and his wife moved to Hamburg in 1828, where he first became a co-editor of the *Hamburg Reporter* and the *Gleaner*, and, from 1831, a teacher of languages at the Johanneum,<sup>86</sup> one of Hamburg's great schools. Frederick, born in Hamburg, lived there during the first six years of his life and later in life was just as fluent in German as he was in English. Australia owed his presence to the fact that he suffered from tuberculosis and hoped that the change of climate would be beneficial. Although there is no evidence of his having sought contact with the South Australian Germans, he had much contact with German artists, scientists and scholars when he lived in Melbourne for about eight years during the 1850s.<sup>87</sup>

George Fife Angas, the father of South Australia,<sup>88</sup> was prompted by religiously based sympathy to grant much financial support to the first group of German migrants under Pastor Kavel, and thus enabled this group to migrate and establish themselves in the new Colony. Angas never established a residence in Hamburg, but he had English connections there. In 1840 he faced financial difficulties and was unable to buy provisions for a group of Germans who were keen to migrate, but were temporarily stranded in Hamburg. Angas turned to a 'Mr Swaine', whom he described as 'a Hamburg merchant, a Christian friend, and a man deeply interested in the German movement'.<sup>89</sup> Hodder reports that Swaine and a Mr Delius from Bremen, the son of a wealthy retired merchant, took over the role of financiers previously played by Angas.<sup>90</sup> Hodder provides little detail about the nature and extent of this support, but it must have been significant to have been deserving of mention.

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<sup>84</sup> J W Warburton (ed), *Five Creeks of the River Torrens* (1977) 54.

<sup>85</sup> See above n 11 and accompanying text.

<sup>86</sup> He published four books in German on English grammar: Sinnett, above n 11, 1.

<sup>87</sup> *Australian Dictionary of Biography* (6) [1851–1890] 130, 131; Sinnett, above n 11, 18.

<sup>88</sup> Hodder, above n 77.

<sup>89</sup> *Ibid* 186.

<sup>90</sup> *Ibid* 192.

Swaine is mentioned without initials, but from information provided by the Hamburg Archives, it seems likely that he was Edward Swaine, who had married Cardina Christina Schmidt (presumably German). Edward Swaine's nationality is not mentioned by Hodder, but he must have been English, for he was a member of the English Church congregation.<sup>91</sup> Edward Swaine's son, Robert Victor Swaine (born 25 September 1794) seems to have regarded Hamburg as his permanent home, for he is listed in the Hamburg Marriage Register of 1835 as the Consul for Weimar to the City of Hamburg.<sup>92</sup> This would not have been the only example of English residents of Hamburg remaining there and their families becoming German. The Sloman family of shipping fame is one particularly prominent example.

One of the earliest Hamburg merchants of English extraction to have come to Australia and to have played a significant role in Van Diemen's Land as well as in South Australia was John Leake, a Tea Merchant of Hamburg and yet another member of the English Church congregation.<sup>93</sup> He took his family to Van Diemen's Land, arriving in Hobart in 1823. He must have been of good standing in the English community in Hamburg, for the British Consul, J L Mellish, supplied him with a letter supporting his application to the authorities in Van Diemen's Land for settlement and for a grant of land. Leake established a pastoral property in central Van Diemen's Land where he ran pure Saxon Merino sheep, the first imported from Europe.

John Leake's third son, Robert Rowland Leake, accepted employment with the South Australian Company as supervisor of sheep, and in April 1837 transported a large number of sheep, oxen and horses to South Australia from Van Diemen's Land. He later set up a substantial pastoral property in South Australia and became a significant figure in the early wool industry here. His story is told very fully in E M Yelland's book.<sup>94</sup>

The South Australian Company had sent Lewis William Gilles to Launceston as an agent to help prepare the ground for the establishment of the Colony of South Australia. His brother, Osmond Gilles, a fluent French and German speaker and, for many years, a dealer in continental wheat and wool in Hamburg,<sup>95</sup> soon understood

<sup>91</sup> His name (W E Swaine) appears, together with those of Osmond Gilles and E W P Sinnett, in a request sent to the British Government to support moves to enhance the legal standing of the English Church in Hamburg – House of Commons 181 (1835) XLVIII, 117 (Correspondence Relative to Complaints of British Subjects at Hamburg).

<sup>92</sup> R V Swaine is mentioned in the literature as the emigration agent who signed the official list of passengers for the *Bengalee*, one of the first two ships to have taken German migrants to South Australia from Hamburg. See Schubert, above n 33, 159.

<sup>93</sup> E M Yelland, *Sheep Shall Safely Graze (Osmond Gilles' legacy)* (1999) 30.

<sup>94</sup> E M Yelland, *The Barons of the Frontiers. South Australia – Victoria. Robert Rowland Leake (1811–1860)* (1973).

<sup>95</sup> Yelland, *Sheep*, above n 93; *Australian Dictionary of Biography* (1) [1788–1850] 445–6; Blaess and Triebel, above n 73, 117 n 18.

that the new Colony offered great riches to courageous investors.<sup>96</sup> Accordingly he invested £ 10,000 in land orders. He was closely associated with George Fife Angas and Colonel Torrens and, despite opposition, was appointed as the first colonial treasurer. When the Colony was approaching bankruptcy, Osmond Gilles supported it by advancing large personal loans (as Governor Gawler did later). He had to relinquish his office in October 1839 on the ground of conflict of interest. Osmond Gilles became one of South Australia's richest men because of his landholdings and his financial stake in the Glen Osmond silver mine. This 'influential and well-known early colonist'<sup>97</sup> had prospered in Hamburg and had been well-connected with leading German and Danish community leaders. He had been a supporter of the English Church in Hamburg and, in Adelaide, he assisted with the establishment of the Holy Trinity Church on North Terrace.

During his first year or two in South Australia, Gilles' interest in making money seems to have outweighed his pro-German sentiments. Captain Hahn<sup>98</sup> in his reminiscences relates a conversation with Osmond Gilles, which took place at some time after Hahn's arrival on 2 January 1839. Instead of going home immediately, Hahn had accepted some responsibility for his German passengers and tried to find a place where they could build their huts and till the land. He had been told that Gilles ('who loved to give himself the title of Finance Minister'<sup>99</sup> – he was in fact the Colonial Treasurer) was the wealthiest man in South Australia. Hahn thought that Gilles might help settle his Germans. Gilles explained that he had lived in Hamburg for 20 years, considered himself half-German and was keen for Hahn to convey greetings to his German friends in Hamburg and Altona.<sup>100</sup> Much encouraged by these remarks, Hahn pointed out how impressed Gilles' Hamburg friends would be if he could report to them that Gilles had helped the group of German migrants whom Hahn represented in their plight. To his disappointment, Hahn found that Gilles declined, suggesting that the Germans were not a good business proposition: '... these people pray and sing too much; such people are generally bad workers.'<sup>101</sup> The Captain was obviously very unhappy with Gilles' outlook; his reminiscences continue:

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<sup>96</sup> According to Wakefield, £ 20,000 in South Australia would yield as much profit as £ 100,000 in England – Sutherland and Sutherland, above n 21, 68.

<sup>97</sup> Gerald Fischer, 'Osmond Gilles (1788–1866) and the Hamburg connection 1816–1834' (1996) 10 *Historical Facts and Events* 58, 59. Yelland reports that Osmond Gilles was so important to early South Australia because of his great knowledge of the wool industry and his close commercial and financial connections with Van Dieman's Land: Yelland, *Sheep*, above n 93, 26–27; *Australian Dictionary of Biography* (1) [1788–1850] 445–6.

<sup>98</sup> Blaess and Triebel, above n 73.

<sup>99</sup> Ibid 117.

<sup>100</sup> Four of these were mentioned by Gilles – Anton Hutwalker, Consul Schwenne, and Messrs Baniser and Donner in Altona: Blaess and Triebel, above n 73, 117. Schwenne was in the shipping business – see ibid 101. The others are likely to have been well-connected people in business or politics.

<sup>101</sup> Blaess and Triebel, above n 73, 117.

I replied that if he, as half-German, was unwilling to do anything for the poor people, what then is to be expected from the English, and what is to become of my people? It would have to be made known in all parts of the world, so that it would not occur to any foreigner to emigrate to this Colony. If, with God's help, I do return, I shall indeed warn our Germans. However, all my representations were preached to deaf ears.<sup>102</sup>

Gilles' hard-headed business mentality was not the result of an anti-German or anti-Hamburg outlook. Later in life, when amassing his fortune had perhaps become less important to him, he gave generously to a number of charities. The annual gatherings of the German Rifle Club were held on his property. He took a special interest in the welfare of German immigrants and, in 1852, gave land in Adelaide for the establishment of a German hospital.<sup>103</sup>

English merchants in Hamburg had no reason to resent their adopted place of residence and business. Osmond Gilles' partner, Philip Oakden, failed financially in London, went to Hamburg and made enough money to be able to satisfy all his English creditors.<sup>104</sup> Philip Oakden migrated to Van Diemens' Land in 1833, *ie* before Gilles' departure for the antipodes, and became involved in a range of business activities including banking. He was a director of the Tamar Bank in Van Diemens' Land and, in that capacity, travelled to England in 1837. His negotiations with George Fife Angas for the improvement of the capital position of the Tamar Bank resulted in the foundation of the Union Bank of Australia, of which Angas was the leading promoter.<sup>105</sup> That bank later took over the Tamar Bank and became very successful, benefiting the young Colony in the process.<sup>106</sup> According to E M Yelland, Oakden also had substantial interests in South Australia. He is supposed to have owned the first warehouse in Port Adelaide as well as South Australian sheep stations.<sup>107</sup>

After Hahn's conversation with Osmond Gilles and other unsuccessful attempts made to find land for the Germans, the Duttons of Cuxhaven, and later of Anlaby near Kapunda in South Australia, came to the rescue.<sup>108</sup> According to the Hamburg Archives, Frederick Hugh Hampton Dutton was British Vice-Consul and agent for

<sup>102</sup> Ibid.

<sup>103</sup> *Australian Dictionary of Biography* (1) [1788–1850] 445–6.

<sup>104</sup> Ibid (2) [1788–1850] 290.

<sup>105</sup> For further information concerning the Union Bank, see *Cyclopedia of South Australia* above n 22, I, 511–12.

<sup>106</sup> The full story is told in Hodder, above n 77, 133–139.

<sup>107</sup> Yelland, *Sheep*, above n 93, 5. According to Ms H Hartshorne, Port Adelaide historian, this information may be suspect. There is no mention of his presence in South Australia in *Australian Dictionary of Biography* (2) [1788–1850] 290. There he is said to have died in Hobart in 1851. But see R Cockburn, *Pastoral Pioneers of South Australia* (1927) II, 120–121.

<sup>108</sup> Concerning the significance of the Dutton family to the early history of Kapunda, see R Charlton, *The History of Kapunda* (Melbourne 1971).

the Lloyds Shipping Company in Cuxhaven in the 1830s.<sup>109</sup> Cuxhaven is a harbour town at the mouth of the Elbe River, which, from 1394 to 1937, was part of Hamburg. Three of Frederick Hugh Hampton's five sons, William Hampton, Frederick Hansborough and Francis Stacker, migrated to Australia. Geoffrey Dutton claims that a fourth son also migrated to Australia, but does not mention him by name.<sup>110</sup> He might have been the C C Dutton, who, according to James C Hawker's account of early South Australia, went missing when transporting sheep from Port Lincoln to Adelaide.<sup>111</sup> The Vice-Consul's fifth son, Henry, remained in Hamburg, working in maritime insurance.

Captain Hahn relates that William Dutton,<sup>112</sup> who had settled in Port Phillip, but happened to be in Adelaide, visited him on board his ship, *Zebra*, in Port Adelaide and informed him that he, a Captain John Finnis and a Mr Duncan McFarlane owned 4,000 acres of land in the vicinity of Mount Barker in the Adelaide Hills.<sup>113</sup> An excursion to the area was arranged and resulted, on 29 January 1839, in the conclusion of a contract enabling the Germans to settle on 150 acres of that land on advantageous terms. That is how the prosperous German community in Hahndorf, named in honour of the Captain, became established.

Hahn was so impressed with the beauty of the land and the quality of the soil that he is said to have exclaimed: '... nature has lavished her choicest gifts on South Australia. I should like to end my days here, and never return to the busy world.'<sup>114</sup> Perhaps William Dutton and his associates took this more literally than it was intended, for they offered Hahn five acres of land, two cows and free passage of his choice for himself and his family. The Captain pleaded the need to consult his wife to explain his inability to either accept or reject this generous offer there and then. The *Southern Australian* of 29 January 1839 published the following note:

<sup>109</sup> The British Consul-General for Hamburg at that time was Henry Canning, a nephew of the English politician and one-time Prime Minister, George Canning.

<sup>110</sup> Geoffrey Dutton, *A Taste of History. Geoffrey Dutton's South Australia* (1978) 37–8.

<sup>111</sup> James C Hawker, *Early Experiences in South Australia* (2<sup>nd</sup> series 1899) 3 *et seq.*

<sup>112</sup> According to Hodder's account it was Francis Dutton who assisted Hahn to settle the Germans: Hodder, above n 77, 187. However, this appears to be mistaken. Francis did not come to South Australia until some time after 1840, having first been with his brother William in Port Phillip: *Australian Dictionary of Biography* (1) [1788–1850] 341–2; see also 'Blakiston, Mount Barker, Hahndorf' in EM Yelland (ed), *Colonists, Copper and Corn in the Colony of South Australia 1850–51* (1970) 179, 185 (A collection of accounts of travels through South Australia by 'Old Colonist', which were published in *The South Australian Register* in 1850 and 1851). The German settlers are reported as having obtained the land 'on comfortable credit'.

<sup>113</sup> Blaess and Triebel, above n 73, 118–9. According to James C Hawker, the application to purchase this land had been made on 11 January 1839 under new arrangements initiated by Governor Gawler – Hawker, above n 111, 33.

<sup>114</sup> Hodder, above n 77, 187.

Mr. Dutton has made an offer to a number of Germans to get them on his section at Mount Barker. This village thus formed will be named Hahndorf, in compliment to Captain Hahn of the Danish ship *Zebra*.

In some ways Francis Stacker Dutton is the most significant of the Duttons for our purposes. He was educated in Berne in Switzerland and then spent six years in mercantile pursuits in Brazil. In 1840 he moved to Australia to assist first his brother William, who had become a pastoralist and businessman in Port Phillip, and later his brother, Frederick Hansborough, who had established what was to become a splendid sheep property at Anlaby in South Australia. Francis was destined to become an important political figure in South Australia. While working at Anlaby, he and C H Bagot discovered copper in the vicinity of Kapunda. In 1851, and again in 1855, he was elected as the member for East Adelaide in the Legislative Council, a semi-democratic body, which had been established under the *Australian Colonies Government Act, 1850*.<sup>115</sup> He played a leading role in framing the democratic constitution for the Colony. After responsible government had been granted, Francis was elected to the new House of Assembly in 1857. He became Minister for Crown Lands and Immigration. Being well-inclined towards the Germans,<sup>116</sup> he published a pamphlet in German entitled *Constitution fuer Suedaustralien: Gesetz zur bessern Regierung der australischen Colonien Ihrer Majestaet* [A Constitution for South Australia: the Law for the better Government of her Majesty's Australian Colonies].<sup>117</sup> The dedication reads:

*Mit meinem freundlichen Gruss uebersende ich hiermit meinen deutschen Mitcolonisten die ins Deutsche uebersetzte neue Constitution fuer Suedaustralien zur bessern Verstaendigung* [Herewith I am sending to my German fellow-colonists with friendly greetings the new Constitution for South Australia translated into German to improve communication].

Yet another link with Hamburg is provided by Thomas Wilson, an important early settler, remarkable for his varied talents and achievements. He was born in England in 1787 to well-connected parents, was sent to Hamburg at a young age and attended school there, studying amongst other subjects Latin and other foreign languages<sup>118</sup> and, obviously, becoming fluent in German. He was still at school when his father died in 1800, leaving him a legacy of £ 500. Having returned to England in 1802 he entered into articles and was enrolled as an attorney in 1807. His position as solicitor and agent for Lord Portman seems to have been very rewarding financially, for he was able to lead a life of 'cultivated leisure',<sup>119</sup> until he suffered severe financial reverses, which prompted him to migrate to South Australia with his family in 1838. He became established in Adelaide as a solicitor,

<sup>115</sup> 13&14 Vic, c 59; Castles and Harris, above n 62, 40.

<sup>116</sup> See his comments as reported in Geoffrey Dutton, *A Taste of History. Geoffrey Dutton's South Australia* (1978) 31.

<sup>117</sup> The pamphlet, published in 1850, is held by the State Library of South Australia.

<sup>118</sup> S C Wilson and K T Borrow, *The Bridge over the Ocean* (1973) 36.

<sup>119</sup> Ibid xvii.

making a comfortable living for himself and his family until his death in 1863. Ralph Hague has written about his role as the Clerk of the controversial Court of Appeals, to which he was appointed in 1841.<sup>120</sup> In 1842 Thomas Wilson became the second mayor of Adelaide. He was a man of wide culture and interests, a linguist, art connoisseur and organ builder. His lectures on the fine arts and the poems he published in Adelaide did much to foster an interest in the arts and in cultural pursuits, which has remained one of the characteristics of the city.

His schooling in Hamburg must have been a very formative influence and might have accounted for his friendship with Ulrich Hübbe.<sup>121</sup> This and the fact that he and Lord Portman had given evidence to Lord Brougham's Royal Commission on Real Property in 1829<sup>122</sup> have led to speculation that he might have played a significant role in the development of the Torrens legislation.<sup>123</sup> He must have been aware of the political agitation which surrounded the plans for a new system of conveyancing, but there is no evidence to show he knew the Hamburg system or that he took an active part in the debates surrounding the Forster/Torrens agitation. Although the submission to Lord Brougham dealt with the question of registration, it did not mention the Hamburg system and made no mention of one of the main characteristics of it and of the Torrens system, *viz* that registration is a prerequisite to the validity of land transactions.<sup>124</sup> One must remember that the legal profession was opposed to Torrens' plans and Wilson might not have been able to support them without jeopardising his professional position.

#### IV TORRENS AND HÜBBE: CONTRASTING PERSONALITIES

Torrens and Hübbe and their respective supporters have made conflicting claims to authorship. This should not surprise us, for, as Taylor says, 'success has a thousand fathers'.<sup>125</sup> Commentators have taken sides and have put forward some extraordinary claims, ranging from charges of deceitful conduct against Torrens, to a suggested

<sup>120</sup> Hague, above n 3, 610.

<sup>121</sup> Wilson and Borrow, above n 118, 233.

<sup>122</sup> Ibid 58.

<sup>123</sup> Ibid 233.

<sup>124</sup> *First Report Made to his Majesty by the Commissioners Appointed to Inquire into the Law of England Respecting Real Property, Appendix. Part the Third – House of Commons, Paper No 263, Session 1829, 440, 441.* Raff mentions a 'Mr Wilson' as having written to the British Registration and Conveyancing Commission in 1850, supporting a registration system: Raff, *Private Property*, above n 9, 49, footnotes 156 and 165. This was a Mr Robert Wilson, a resident of London. Robert Wilson also gave evidence before the Commission and mentioned the laws of Bavaria and Prussia, but not those of Hamburg.

<sup>125</sup> Taylor, *Reformation*, above n 3, 30. This aphorism seems to be an adaptation of Ciano's 'Victory has a hundred fathers, but defeat is an orphan.' – A Partington (ed), *The Concise Oxford Dictionary of Quotations* (3<sup>rd</sup> ed, 1994) 100, footnote 12.

general conspiracy of silence intended to hide the German origins of the system. Such theories might make for good theatre, but the truth is likely to have been less dramatic.

### A Hübbe's Personality

Hübbe's father, a notary and registrar in the Hamburg admiralty,<sup>126</sup> sent young Ulrich to the Johanneum, the school at which Edward Sinnett later became a teacher of English.<sup>127</sup> The standard of English teaching must have been excellent, for Hübbe's command of English left little to be desired. Hübbe studied law in Kiel and Jena, and then in Berlin where he had the benefit of instruction from Friedrich Carl von Savigny.<sup>128</sup> He is said to have earned his doctoral degree, conferred by the University of Kiel on 10 March 1837,<sup>129</sup> with a thesis entitled *On the Customary Holdings in the Ancient Marquisate*, a somewhat antiquarian topic even in those pre-codification days.<sup>130</sup> When he was a young legal practitioner in Hamburg, he travelled to England with Pastor Fritzsche in order to assist with the arrangements for Fritzsche's group of German migrants (the Lobethal Germans) to travel to Adelaide. He was 26 years old when he decided to emigrate, and he arrived in Port Adelaide in mid-October 1842 on the Barque *Taglione*.

<sup>126</sup> *Australian Dictionary of Biography* (4) [1851–1890] 436–7.

<sup>127</sup> See above n 85 and accompanying text. See also Hans Schröder, *Lexikon der hamburgischen Schriftsteller bis zur Gegenwart*, vol 3 (1857) 408–9 which contains the following note on Ulrich Hübbe (translated from the German):

'Brother of Hans, Heinrich and Hugo Hübbe, born 1 June 1805, attended the Johanneum and Gymnasium, studied law from 1826 to 1830 at Kiel, Jena and Berlin, became a trainee in law (*Ausculator*) at the Royal Chamber Court (*Kammergericht*) at Berlin, graduated doctor of laws at Kiel in 1837, became an advocate in Hamburg and emigrated to Australia in 1842.' The word 'Ausculator' (obsolete) seems to be misspelt; it should have been '*Auscultator*' or '*Auskultator*' (the current expression is 'Gerichtsreferendar' – Gerhard Wahrig, *Deutsches Wörterbuch* (1991) 211.

<sup>128</sup> Above n 64.

<sup>129</sup> E H Tilbrook, 'The Hubbe Memorial At Clare' in *Proceedings*, above n 4, vol XLI, Session 1939–40, November 1940, 39.

<sup>130</sup> This is Hübbe's English translation of the original German title as it appears in Hübbe's letter of 7 December 1874 to the Council of the newly founded University of Adelaide (University Archives). The letter also states that the thesis was published in *Von Kamptz Annals of Prussian Jurisprudence*. Dr Georg Asmussen of the Landesarchiv Schleswig-Holstein, Prinzenpalais, is unable to find a record of Hübbe's graduation as doctor of laws. He is certain that he could not have graduated in 1837. Dr Asmussen wonders whether the following publication could be a printed version of Hübbe's doctoral dissertation:

Hübbe, Ulrich, 'Bauernrechts- und Gerichtsordnung der alten Mark Brandenburg: ein Landtagsschluß vom Jahre 1531; mit Anmerkungen und einer Übersicht des altmärkischen Gerichtswesens vom Jahre 1100–1806' Part I, Berlin 1835, in *Jahrbücher der Preußischen Gesetzgebung*, Issue 89. Hübbe might well have translated 'Mark Brandenburg' simply as 'Marquisate', although 'Marquisate Brandenburg' might have been more appropriate.

Hübbe might have been motivated by the hope of making his fortune, but his life in South Australia was to be marked by setbacks, misfortunes, failures and financial difficulties. As Kelly has said: ‘. . . he never freed himself from the financial difficulties which plagued him from his earliest years in the Colony’.<sup>131</sup> This is not the place for a biographical account of Ulrich Hübbe, for several have already been written. For present purposes, it suffices to report briefly some of Hübbe’s financial and personal difficulties as he made his way in the Colony.

Hübbe came at a time when land speculation was making some of the early arrivals rich, while ruining others. Hübbe lacked the advantage of some, who, like Osmond Gilles, had commercial experience and sometimes even occupied official positions which could be exploited for financial advantage. He soon became a victim of the speculative land bubble. Unsuccessful land dealings in the Barossa Valley landed him in the debtor’s prison in June 1843.<sup>132</sup> He was forced to surrender his last £ 25, sent by his father, in legal fees to the Government, even though his more merciful creditors had agreed that he should keep this money for his own use.

About a year later Hübbe was farming on a section of Angas Park,<sup>133</sup> made available to him by George Fife Angas’ agent, Charles Flaxman.<sup>134</sup> During this period his hut caught fire and his library of classic, legal, and historical standard works was destroyed.<sup>135</sup>

According to real estate records, Hübbe lived in Grenfell Street in 1846 and was then working as a clerk to John Warner Nicholls, barrister, of Gawler Place, Adelaide.<sup>136</sup> Considering his background, learning and professional status in Hamburg, this must have been an inferior and poorly paid position.

In 1857 he was appointed by the Attorney-General, Richard Hanson, to the government position of German interpreter. His office was in Freeman Street (the former name of the section of Gawler Place between Grenfell and Wakefield Streets).<sup>137</sup> Considering that he was a married man,<sup>138</sup> his annual salary of £ 100 must

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<sup>131</sup> Lutheran Church of Australia Archives, Adelaide, Hübbe file, document ACC no 69/32 – 8 May 1969, R 483, p 3. Written by D StL Kelly, this is a more detailed version of the Hübbe entry in the *Australian Dictionary of Biography*. It contains useful footnotes as well as the titles of nine publications authored by Hübbe.

<sup>132</sup> Hague, above n 3, 538–9.

<sup>133</sup> Hübbe’s letter of 7 December 1874 to the Council of the newly founded University of Adelaide (University Archives).

<sup>134</sup> Angas himself did not come to South Australia until 1850: Hodder, above n 77, 307.

<sup>135</sup> Hübbe’s letter of 7 December 1874 to the Council of the newly founded University of Adelaide (University Archives).

<sup>136</sup> I owe this information to Mr Reg Butler, who is compiling a comprehensive data base on early ship arrivals and migration from the records of the General Registry Office of the Department of Administrative and Information Affairs at 39 Carrington Street, Adelaide.

<sup>137</sup> Information Butler – see above n 136; see also *Australian Dictionary of Biography* (4)

have been modest. Nevertheless, it would have sustained him during the period of his intense activity as an agitator for, and defender of, the new conveyancing system, and it must have come as a blow when the Government abolished this position in 1866.

Almost all Hübbe's law reform work was unremunerated. He explained in his 1884 petition to the Parliament for a pension that, when Torrens had asked him to revise the draft Bill, he had insisted on some remuneration; however, Torrens induced him to do the work for nothing, promising that he could look forward to later being appointed to a position in the Registrar-General's office.<sup>139</sup> Torrens became Registrar-General after the new system had taken effect in July 1858, and though far from universally popular, he was influential and would have had no difficulty in arranging an appointment for Hübbe. One can only speculate why Torrens failed to live up to his earlier promise. Hübbe's only reward was a desk in the Registrar-General's office where he followed the progress of the new system as an unpaid hobby. Even this very minor form of recognition was eventually withdrawn.

When the University of Adelaide was founded in 1874, Hübbe wrote to the Council applying for the position of Professor of Law or lecturer in law. He was unsuccessful, perhaps because the Faculty of Law was not established until nine years later.

It appears that Hübbe was a candidate for the Barossa District in elections for the State Parliament held in 1875. This must have been yet another failed venture for, had he been successful, that fact would hardly have escaped the attention of the many authors who have written about him.<sup>140</sup>

A string of misfortunes such as these rarely afflict truly forceful people. Perhaps one may be forgiven for drawing inferences about Hübbe's personality. Does the explanation for Hübbe's failure to assert more vigorously and more successfully his, at least partial, authorship of the new system lie in his personality, and, by contrast, in the personality, standing in the community and attitude of Robert R Torrens?

Hübbe may have been a little like the proverbial German 'Michel'. Despite his Hamburg origins, he probably shared the common German fault of being too subservient to persons in authority.<sup>141</sup> He had received his practical training as a

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[1851–1890] 436–7 and Hübbe's letter of 7 December 1874 to the Council of the newly founded University of Adelaide (University Archives).

<sup>138</sup> On 18 November 1847 he married Martha Gray of Glasgow, Scotland, in the Congregational Chapel in Adelaide: Information Butler – see above n 136.

<sup>139</sup> Raff, 'Torrens Land Title Registration', above n 9, at footnote 116.

<sup>140</sup> Letter by J W Albert Sudholz, published in the *Australische Zeitung* of 8 June 1875, Extra Beilage no 23; see also letter by F J H Blaess to D StL Kelly dated 28 February 1969 (Hübbe file, Lutheran Archives, Adelaide).

<sup>141</sup> See, for example, the sense of pride with which he reported that after his arrival in the Colony he was introduced to 'His Honor Mr Justice Cooper by the then Advocate General, the late Mr Smillie' – Hübbe's letter of 7 December 1874 to the Council of the newly founded University of Adelaide (University Archives).

lawyer in the authoritarian Prussian court system.<sup>142</sup> It is easy to accept that he was a very sincere man. There may be some significance in the fact that his letters to *The South Australian Register* were signed 'Sincerus'. His sincerity may have been of the kind which verges on naivety. He may also have been a little 'bookish'.

If his personality lacked punch, he was also too honest to have compensated for this deficit by employing guile and flattery to his own advantage. Although he owed his appointment as government interpreter to the Attorney-General, Richard Hanson, he did not hesitate to criticise Hanson in public. In June 1857, Hanson had opposed the use of the Land Fund for German migration with the cynical argument that this did not involve inequality. Germans, so he argued, who could not bring over their relatives, were in the same position as British colonists like himself, who had no relatives to bring over. In a letter to the *South Australian Register* Hübbe accused Hanson of 'marble-hearted coldness':

... a most essential ingredient of [true sound-hearted liberality] is humanity; and humanity is not the character of the sentiments thus expressed determinedly by the Attorney-General this night. *Dixi et animam salvavi* ('I have spoken and have saved my soul').<sup>143</sup>

Hübbe's open advocacy of conveyancing reform should be seen in a similar light. Another man of such modest standing in the community might have been more discreet in advocating a law reform measure so widely unpopular in the legal profession.

Honesty often goes hand in hand with trust in the honesty of others. Hübbe's letters to *The South Australian Register* and his book show how much he admired Torrens. It might have taken quite some time for him to realise that Torrens was denying him, whether expressly or impliedly, the credit which was his due for his contribution to the reform effort. Asserting any kind of claim against Torrens, such an influential and self-confident British politician, was indeed a formidable proposition. Raff's observation that 'the famously modest Dr Hübbe was prepared to allow [Torrens] the limelight'<sup>144</sup> has the ring of truth. It seems to have been lack of money which finally prompted Hübbe to seek financial recognition for his contribution in the form of a pension in 1884.<sup>145</sup> By that time Torrens had long since returned to England, so there was never any open conflict with him.

### B *Torrens' Personality, Influence and Attitudes*

By contrast, Robert R Torrens emerges from the literature as self-seeking, arrogant and aggressive, disrespectful of authority and with a streak of ambition which

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<sup>142</sup> Above n 127.

<sup>143</sup> *The South Australian Register* of 6 June 1857.

<sup>144</sup> Raff, 'Torrens Land Title Registration', above n 9, at footnote 230.

<sup>145</sup> Esposito, *History*, above n 3, 19–24.

verged on the unscrupulous.<sup>146</sup> It appears that he shared with other colonial gentlemen, like Jeffcott, Osmond Gilles and Gouger, the capacity to turn into a ruffian if provoked.<sup>147</sup> When he wrote his book, Torrens had already been charged with ‘having borrowed, without acknowledgment, from the labour and genius of others’.<sup>148</sup> He is said to have defended himself vigorously against such suggestions of plagiarism, on one occasion even by assaulting a journalist.<sup>149</sup> Gaining credit for all aspects of the new system was important to him, for it was on his reformist achievement, for which he was knighted,<sup>150</sup> that he built his future career. He returned to England in the early 1860s, but failed in his efforts to introduce there a registration system based upon the South Australian model.

Torrens, who had no legal training, never denied that he had had assistance from others. In November 1856, when he had been requested to explain his very first draft to the Legislative Council, he had stated:<sup>151</sup>

I had thought of the subject for some time and submitted the draft of the Bill to several gentlemen in whose judgment I had confidence; but I did not call in a large number. I have been benefitted by their advice and have altered many parts of the Bill . . . I am happy to say that all approved of the principle, and I am preparing a fresh copy embodying their suggestions with regard to details. I have also had the assistance of a high legal authority – one who has devoted much time to that branch of law.

The reference to ‘a high legal authority’ is puzzling. J H Fisher, the first Resident Commissioner and Registrar-General, had certainly devoted much time to problems of conveyancing, for he had drawn up the first reform measures in 1836,<sup>152</sup> but had

<sup>146</sup> See the list of offences and reprimands from his superiors provided by Robinson, above n 9, 12 footnote 8.

<sup>147</sup> See the accounts of Jeffcott’s duel and of the fights between Gilles and Gouger in Hague, above n 3, 52–4, 78–80.

<sup>148</sup> Torrens, above n 3, v.

<sup>149</sup> Esposito, *History*, above n 3, 1 and references therein. See also the account of Torrens’ conduct in J Brown, *Town Life in Pioneer South Australia* (Adelaide 1980) 174–8. The author reports the comment made by B T Finnis, Premier at the time, that Torrens ‘wounded rather than persuaded, preferring invective . . . to logical reasoning, for which he seldom exhibited much capacity’ – *ibid* 178. Indicative of Torrens’ character is also his profession of disdain for ‘mawkish affectation of humility’, a comment made when he was appointed collector of customs at the age of 26 – *ibid* 174. Francis Dutton, a fellow parliamentarian, is said to have observed that, if one wanted to gain Torrens’ political support, one had to ‘be ready to kiss the dust at [his] feet’ – Hague, above n 3, 312.

<sup>150</sup> *Australian Dictionary of Biography* (6) [1851–1890] 292–3; Geyer, *Robert Richard Torrens and the Real Property Act: The Creation of a Myth* (1991).

<sup>151</sup> *The South Australian Register* of 21 November 1856.

<sup>152</sup> J H Fisher, *A Sketch of Three Colonial Acts: Suggested for Adoption in the New Province of South Australia, with a View to Ensure the Most Perfect Security of Title to Property, to Simplify and Facilitate the Mode, and Moderate the Expense of its*

failed to have them enacted. However, he was bitterly opposed to the Torrens project and subjected it to detailed criticism once it had been enacted.<sup>153</sup> The reference could conceivably have been to Thomas Wilson, although there is no other indication that he had had any connection with the Torrens project.<sup>154</sup> Taylor has suggested that Torrens might have had Charles Mann in mind,<sup>155</sup> but there is no indication that he was involved in the reform project. Moreover, in view of the fact that he had been an Acting Justice of the Supreme Court at various stages, Torrens would have mentioned him by name in his book as one of his supporters. If one accepts Esposito's speculative but quite plausible suggestion that Hübbe was the author of the 'Vitis' letter of 16 August 1856,<sup>156</sup> the most likely person referred to was Hübbe, for the description fits him perfectly. On this basis, Torrens might have met Hübbe before he presented his first draft to the Legislative Council in October 1856. Admittedly, the suggestion that Torrens and Hübbe met in mid-1856 does not fit very comfortably into Hübbe's own account of their meeting.<sup>157</sup>

In his book, published in 1859, Torrens again referred to 'several gentlemen' from whom 'I received some valuable suggestions, which are embodied in the measure as it now stands'.<sup>158</sup> Prominent personages like the Chief Justice, Sir Charles Cooper, and Anthony Forster were mentioned by name, but no such honour was bestowed upon other helpers, whose status and influence in the Colony did not rival Torrens' own, or rival that of the gentlemen whom he named. There can be no doubt that Hübbe was one of these helpers, although his name does not appear anywhere in the book. Identifying the others has proved difficult. To those already identified in the literature on the Torrens/Hübbe dispute,<sup>159</sup> one might add Edwin Alfred Heath, Deputy Registrar-General in the Land Titles Office when Torrens was Registrar-General of Deeds in the early 1850s and reputedly a quiet and efficient man, who is said to have worked closely with Torrens in establishing the *Real Property Act*.<sup>160</sup> Under the Wakefield scheme, with its explicit distinction between capitalists and labourers, nineteenth century South Australia was not a particularly egalitarian place. Torrens, the 'crown prince of the Colony',<sup>161</sup> is likely to have regarded the other helpers as his underlings, as persons who were privileged to be allowed to work for him, even if they did so without recompense or recognition. After all, as one must concede, he led a public interest project of immense

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*Transfer: with Proposed Forms of Deeds* (1836).

<sup>153</sup> J H Fisher, *The Real Property Act, as Passed by the Parliament of South Australia, Session 1857–8: with Analytical and Critical Notes* (Adelaide 1858).

<sup>154</sup> Above at n 122.

<sup>155</sup> Taylor, *Reformation*, above n 3, 118.

<sup>156</sup> Esposito, *Entstehung*, above n 8, 139.

<sup>157</sup> Above n 4.

<sup>158</sup> Torrens, above n 3, vi.

<sup>159</sup> One of these was Richard B Andrews, later to become a Supreme Court judge: Taylor, *Reformation*, above n 3, 40.

<sup>160</sup> Butler, *A College*, above n 43, 339.

<sup>161</sup> It seems likely that he owed his early advancement, at the age of 26, to his father, Robert Torrens, the Chairman of the Colonization Commission.

importance. Why should Ulrich Hübbe be treated differently from the other helpers? Hübbe had few assets and no particular standing in the community. His contribution might have been useful, but how was it to be assessed as a professional effort?

Taylor may well have provided a decisive clue to Torrens' outlook when he called Hübbe a 'transmitter of certain aspects of the law of Hamburg with which he was familiar'.<sup>162</sup> This characterisation may be appropriate for Hübbe's post-1858 activities, for which Taylor intended it. It seems not unlikely that Torrens evaluated Hübbe's pre-1858 work in exactly the same way; after all, Hübbe did not hold copyright over the Hamburg system. Had he not merely provided information which could have been obtained in some other way, albeit somewhat less conveniently? If Hübbe had been no more than a source of generally available information, Torrens would have had no reason to give Hübbe greater recognition than he gave to his other helpers.

It seems likely that Torrens and Hübbe simply entertained different views of the nature of Hübbe's contribution. The latter must have told himself with some justification that he was the only person in South Australia who really understood the fundamentals of a system of registration of titles rather than of deeds,<sup>163</sup> and that his book, *The Voice of Reason*, and also his discussions with Torrens, even if they took place after much work had already been done, had given Torrens a much firmer foundation for his campaign. Whether or not Hübbe did all the drafting as he seems to have claimed later, he must have regarded himself as an invaluable professional adviser rather than as a mere transmitter of information.

## V CONCLUSIONS

The quest for a new system of conveyancing in early South Australia was a cooperative venture involving a group of dedicated people, with Torrens as the leader and Hübbe as probably the most important legal adviser. Torrens himself saw the new system as something to be achieved by 'German and English colonists'.<sup>164</sup> Torrens' fame need not be diminished by any recognition accorded to Hübbe. If flaws of character were a good reason for the denial of credit for great achievements, innumerable famous names would disappear from the history books. Torrens' immense and successful efforts at creating the new system provide ample justification for it having been named 'the Torrens system'. At any rate, that name is so well established around the globe that any attempt at change would be futile.

As Esposito has rightly pointed out, the actual authorship of the *Real Property Act 1858* (SA) is less important than the question whether it represents a genuine legal transplant of the Hamburg land title system to the young Province of South

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<sup>162</sup> Taylor, 'Hamburger To Go?', above n 10, 1.

<sup>163</sup> There are many insightful observations in Hübbe, above n 22.

<sup>164</sup> See above n 71 and accompanying quotation in text.

Australia.<sup>165</sup> This question is important from a comparative point of view because the Torrens system itself has become a model for all the other Australian colonies and also has been adopted by numerous jurisdictions around the world,<sup>166</sup> thus becoming one of the most successful legal transplants of all time. The question of Hübbe's authorship remains important because it and the transplant question are so closely linked that they cannot be separated. Moreover, it is not without a sense of satisfaction that one greets the largely successful attempts made in recent years by legal historians to rescue Ulrich Hübbe's name from oblivion.

This article is not intended as a direct contribution to the search for the true intellectual author of the Torrens system. Raff's researches, Esposito's remarkably comprehensive review of the relevant historical evidence,<sup>167</sup> and Taylor's spirited recent attack on the conclusions drawn by these two authors will ensure that the controversy will continue for some time. A realistic appreciation of the historical frame in which the actual events occurred seems desirable. Some of that background, particularly the relevant economic history of South Australia, is well understood.<sup>168</sup> The contribution presented here has focused on aspects of the historical background which have hitherto received rather less attention than they deserve. In particular, there has been a tendency to view the standing of the Germans in early South Australia through twentieth century glasses.

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<sup>165</sup> Esposito, *History*, above n 3, 2–3.

<sup>166</sup> Taylor, *Reformation*, above n 3, 14; Esposito, *Entstehung*, above n 8, 7 n 7 and references therein.

<sup>167</sup> See above nn 3, 8 and 9.

<sup>168</sup> See, for example, Pike, above n 1.