



BOOK REVIEWS

*Greg Taylor**

***DIE ENTSTEHUNG DES AUSTRALISCHEN
GRUNDSTÜCKSREGISTERRECHTS (TORRENSSYSTEM) –
EINE REZEPTION HAMBURGER PARTIKULARRECHTS?***
*(The Origins of the Australian Law of Real Property Registration – A Reception
of the Law of Hamburg?)*

**By Antonio Esposito
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In this work — actually the published version of his doctoral thesis at the Philipps-Universität, Marburg, Germany, under the supervision of the eminent comparative law scholar Hans Leser — Dr Antonio Esposito makes a considerable contribution to the ongoing debate about the origins of the Torrens system.

As is moderately well known, the Torrens system of title to land by registration first appeared in South Australia in January 1858. Its subsequent wide adoption throughout the British Commonwealth and even beyond it has converted what was originally a considerable improvement in the law of one fairly minor British colony into a reform of world significance. The Torrens system is one of the very few models of land titles registration in the world. Its origins are therefore worthy of careful study.

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In recent years debate has tended to concentrate on whether the Torrens system was in fact a transplant of the system of lands titles registration used in Hamburg (the link being the presence in South Australia in the 1850s of a lawyer from that jurisdiction, Dr Ulrich Hübbe). Before reading this work, I tended to think that most if not all of the surviving evidence on this point had been unearthed, and that all legal historians could do is consider what it proves. On the issue of what the evidence proves, Dr Esposito and I have disagreed (although very cordially), as he supports the transplant hypothesis while I do not.

In this work, however, Dr Esposito has made a further considerable contribution to the debate on the origins of the Torrens system because he has transcended the confines of the existing debate in part of his work and performed the difficult task of adding to our store of information and knowledge.

Chapters 1 and 2 of the work are mostly introductory and written for Germans who do not know the basic history of the Torrens system. Chapter 3 of the work contains the new material. In it, Dr Esposito does not restrict himself to presenting, again, the evidence in favour of the transplant hypothesis, but rather deals with the contribution of the newspaper editor Anthony Forster. Forster's claim to some participation in the origination of the system has long been known.¹ However, Dr Esposito has put himself through the ordeal of reading in detail the full reports of a British Royal Commission in 1829 and 1830 and has shown with great attention to detail and scholarly skill that Forster, 25 years later in promoting debate on what became the Torrens system, more or less followed the line of argument to be found in certain of the dissenting reports attached to the main Commission report. By so doing, Dr Esposito has made a new and very useful contribution to the debate which is worthy of wide scholarly attention. As a result of his research, the British Royal Commission reports of 1829 and 1830 may need to be added to the source material from which the authors of the Torrens system drew, and Anthony Forster's contribution may well be seen to be more substantial than has been acknowledged to date.

In this respect it is also worth noting that the Hon. Ian Wilson A.M. has pointed out to me that a relative of his, Thomas Wilson, participated in the Royal Commission of 1829,² had coincidentally been educated in Hamburg and was also present in Adelaide when the Torrens system was being developed.³ Here is a possible source for Forster's knowledge.

¹ A letter survives in which he writes that the Torrens system 'originated in a series of leading articles that I wrote': Forster to Miss A. Ridley, 15 May 1892, South Australian Archives A792.

² A communication from him and another person may be found in the Commission's first report, British Parliamentary Papers, 1829 vol. X, pp. 440-444.

³ See S C Wilson and K T Borrow, *The Bridge over the Ocean: Thomas Wilson (1787 – 1863), Art Collector and Mayor of Adelaide* (privately published, Adelaide 1973), pp. 58, 154f, 233.

As background to this, Chapter 3 also contains a very useful and systematic survey of the discussion in Forster's newspaper, *The Register*, on Forster's proposals for reform.

In relation to Chapter 3, I have only two quibbles, minor in themselves but somewhat symptomatic of the means by which arguments in support of the transplant hypothesis are sometimes conducted. Dr Esposito states at p 52 that it 'is to be assumed' that discussions of the reform of lands titles law are to be found in German-language newspapers published in South Australia which are no longer extant. At p 84, he also assumes without any evidence that Anthony Forster provided access to the reports of British Royal Commissions to his fellow reformers. In each case, this is no more than conjecture, unsupported by evidence. In the absence of evidence supporting their case, proponents of the transplant hypothesis are sometimes compelled to have recourse to such bold assumptions. At any rate, any discussions in German-language newspapers, if they occurred, can have been of limited influence on Torrens himself, as he did not speak German.

In chapter 4 of his work, Dr Esposito presents the view that the Torrens system was indeed a legal transplant from Hamburg. As with one or two other attempts to prove the same thing, his case might be criticised on a number of grounds: it takes at face value and uncritically all contemporary statements supporting the case; it ignores the very numerous contemporary statements contrary to the case; it makes heroic assumptions; and it does not consider some substantial differences between the Torrens system and the system on which it was supposed to be based. In relation to the last point, Dr Esposito does consider the non-appearance of Hamburg's curial stage in the Torrens system — something he has done elsewhere⁴ — but he does not favour us with any explanation of why the Assurance Fund is missing from the Hamburg model but present in the Torrens system. Given the great importance of the Assurance Fund particularly in the early stages of the Torrens system, when the guarantee it offered was a chief means of persuading people to have their land brought under the Torrens system, this is a notable omission. I have not read any even remotely convincing explanation suggesting how its inclusion in the Torrens system could be reconciled with its being a transplant from Hamburg, where no comparable thing existed.

Dr Murray Raff would have us believe, however, that the Pauline action, available to those who had lost their land under the law of Hamburg, was the true precursor to the Assurance Fund.⁵

⁴ A Esposito, "A Comparison of the Australian ('Torrens') System of Land Registration of 1858 and the Law of Hamburg in the 1850s" (2003) 7 *Australian Journal of Legal History* 193, 197–212.

⁵ M Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003) 110.

I do not find Dr Raff's argument convincing at all. It is probably true to say that every legal system on the planet is going to have some more or less efficient means of enabling people to get compensation if they have been defrauded out of their land by a trickster. So we should not be surprised that the law of Hamburg had some means of achieving this end. Indeed, the English common law applying in South Australia before the invention of the Torrens system obviously allowed people to sue fraudsters who had tricked them out of their land. The problem under that system was actually a practical one, not a legal one: first, one had to catch one's fraudster, and then one had to get money out of him.

The question is thus not whether the Pauline action served vaguely the same purpose as the Assurance Fund, for every legal system will have some means of serving that purpose, but rather how similar they are in detail. Only if they are similar in detail could one conclude that one might have inspired the other.

The Pauline action in Hamburg appears to have been of a quite different type from the Assurance Fund. I have to confess to a merely casual and intermittent acquaintance with Roman law, from which the Pauline action is ultimately derived, and the source that Murray Raff quotes in his work, which I have myself referred to, does not greatly advance my state of knowledge. However, another learned author whose description of the Pauline action is available to me says that it was an action

which could be instituted against a debtor who became insolvent through transferring his property to others. What was more important was the fact that the action could also be instituted against third parties with the purpose of reclaiming what they had received, fraudulently or gratuitously but in all innocence, from an insolvent debtor.⁶

The usefulness of this in land transactions is obvious. But unlike the Assurance Fund, a person who sued using the Pauline action did not sue against a permanent fund maintained by the state. This is in fact the great innovation of the Torrens system in this field, as the state has more money and is less likely to disappear than are private persons, particularly fraudsters. It is missing from the supposed 'model' for it. Furthermore, the Pauline action was not funded by a tax on land transactions, as the Assurance Fund is. It is therefore quite different from the Assurance Fund in two significant respects. Only with the eye of faith, a very discerning faith, could it be seen as a precursor of the Assurance Fund under the Torrens system.

The Pauline action is not similar to the Assurance Fund at all, except at the broadest level of purpose. It is however very similar to the pre-Torrens arrangements under the inherited

⁶ van Warmelo, *An Introduction to the Principles of Roman Civil Law* (1976) 225. Similar: Buckland/Stein, *A Text-Book of Roman Law from Augustus to Justinian* (3rd ed, 1963) 596.

English common law under which a defrauded person was reduced to suing private parties, if they could be found and had enough money to be worth suing. The Torrens system took a step beyond this, and beyond Hamburg.

Chapter 4 of Dr Esposito's work concludes with what appears to be an attempt to demonstrate that the early case law in South Australia on the Torrens system also supports the transplant hypothesis. I have to say that the evidence produced by Dr Esposito seems quite equivocal to me, and could not be seen to support that conclusion except by those who are already convinced of it. However, as I have already expressed myself unfavourably to the transplant hypothesis, I am perhaps not the most neutral judge of this.

Taking the work as a whole, it seems to me, too, that there is an obvious potential contradiction between the idea that the Hamburg system was the basis for the Torrens system and the evidence that Anthony Forster conceived large slabs of it as a result of reading dissenting reports of British Royal Commissions. Not everyone will be convinced by attempts to maintain that both of these propositions are true at the same time. Nor, of course, does the public advocacy of Forster in his newspaper in July 1856 exclude the possibility that Torrens and his helpers were beavering away in private on the development of the Torrens system as Forster wrote. Indeed, it might be possible to see Forster's articles making use of the Royal Commission's reports as attempts not only to stir up public interest in reform, but also to assist with work already going on behind the scenes. Public advocacy of reform as the reformers laboured on their model would have served a number of obvious purposes. It would have awakened public interest in the topic, given direction to the debate in a fashion that prepared the public for the innovation which it was about to be asked to consider and also possibly provided material for the assistance of the workers. This possibility is also suggested by the fact that Forster's newspaper reported on 17 October 1856 that Torrens had been proceeding with work on the first draft of his system which was now to be revealed to the public,⁷ suggesting that the process of public advocacy and private labour may well have been simultaneous.

In summary, however, Dr Esposito's work, and in particular chapter 3, makes a considerable contribution to the debate on the origins of the Torrens system. It is to be hoped that scholars are not deterred by its being in the German language from referring to it.

⁷ *The Register*, 17 October 1856, p 2.