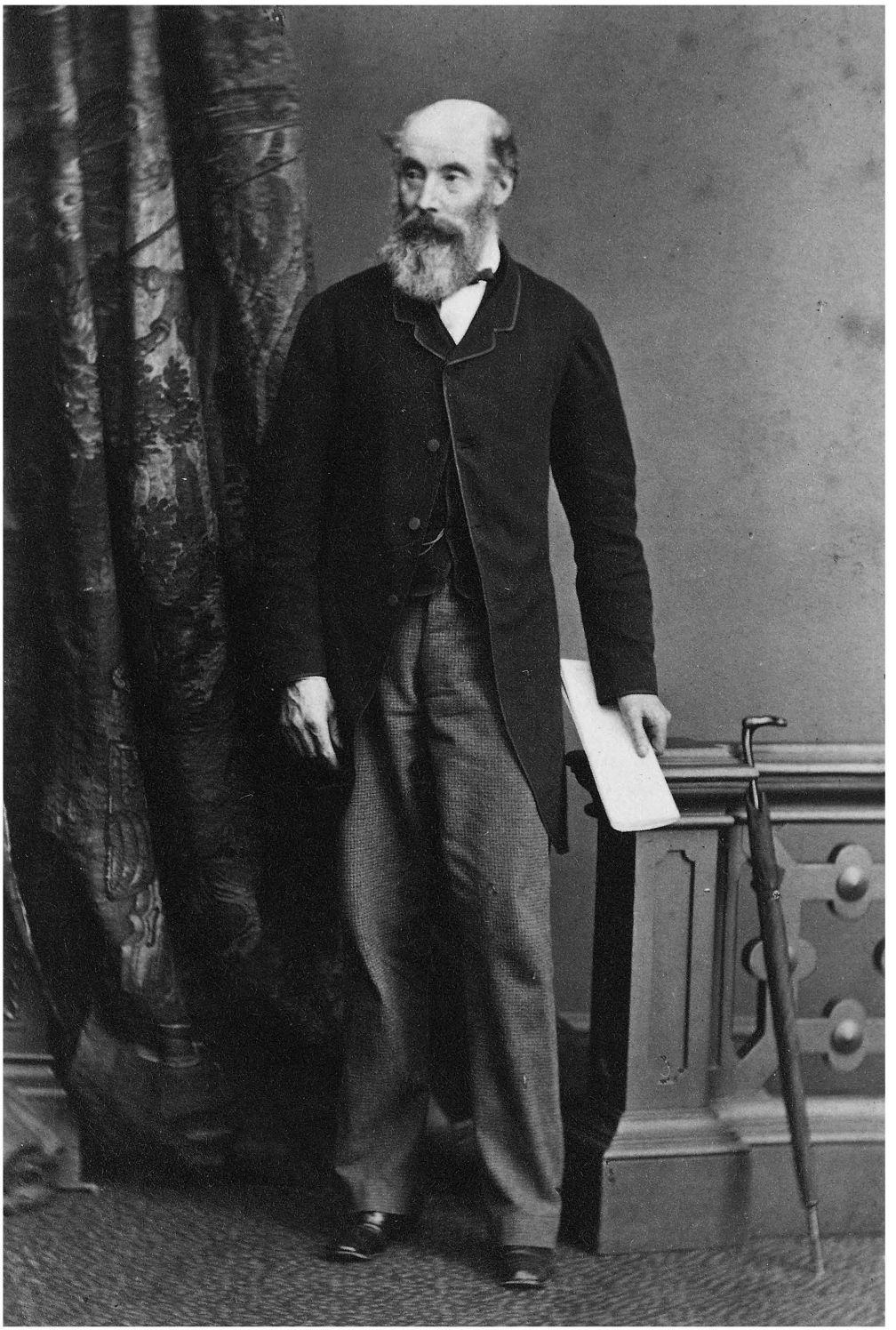
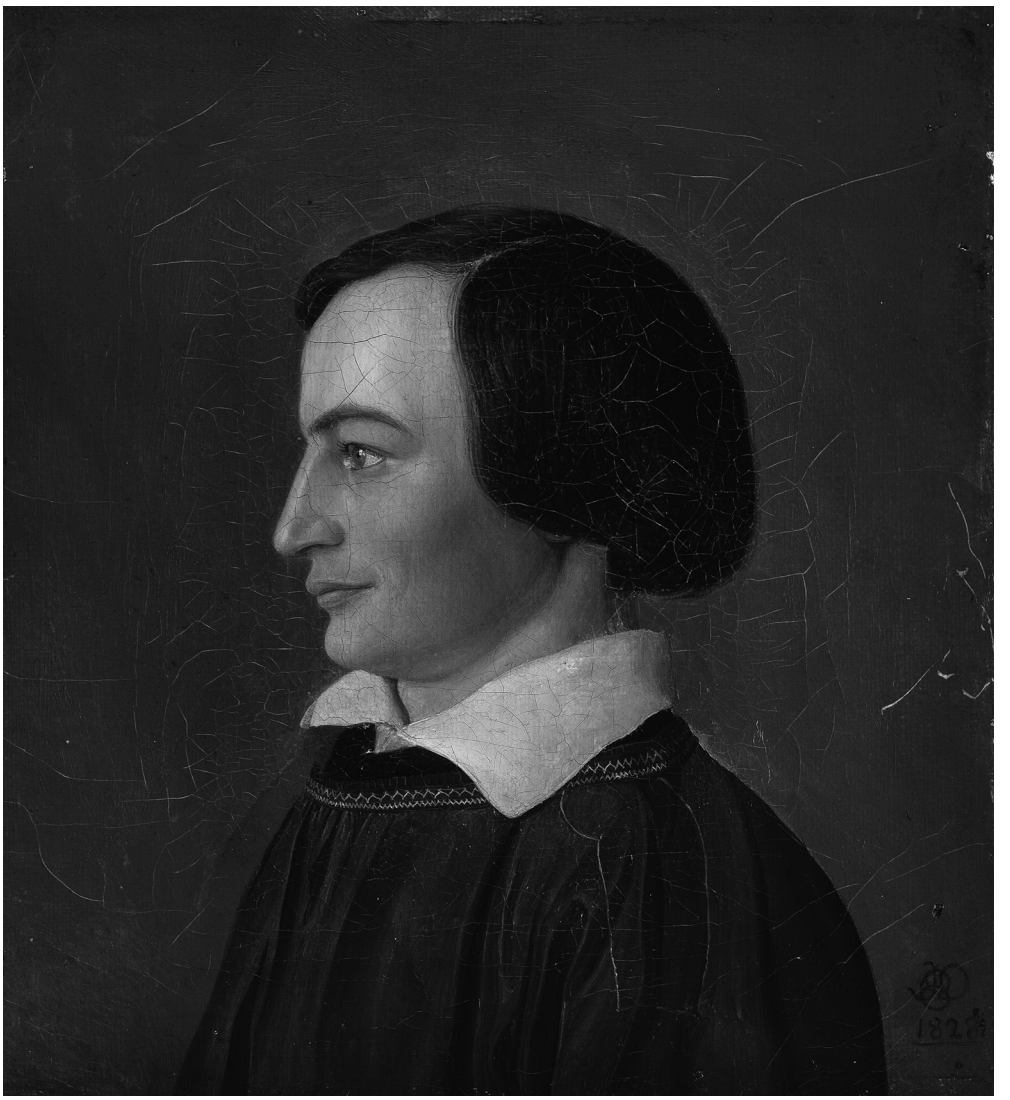


Sir Robert Richard Torrens

Image courtesy of the State Library of SouthAustralia.
SLSA: B 10232 Sir Robert Richard Torrens, ca. 1880



'Der Freund, Ulrich Hübbe'

Hamburger Kunsthalle, painted 1828 in Hamburg
by Julius Oldach.
Size of original: 16.1×15 cm.

*Greg Taylor**

THE TORRENS SYSTEM – DEFINITELY NOT GERMAN

ABSTRACT

This article gives an overview of the reasons why the Torrens system cannot be considered a German import, having regard not so much to the detail of times and dates (which I have examined in detail elsewhere) but to aspects of early South Australian society which tend to disprove a crucial element in the case for considering it a German import: namely, that early South Australians would not have accepted the Torrens system had they known the 'truth' that it was of German origin. This accusation is a risible under-estimation of the broadmindedness of early South Australians, and the simple reason they were not told that it was of German origin is that it was not. A response is also provided to the accusation that Torrens was just a self-serving hypocrite when he claimed to be undertaking conveyancing reform in the interests of the public at large.

I INTRODUCTION

As I was writing this article, I was preparing for a journey across western and central Canada, from Vancouver to Toronto. That journey[1] covered a distance of 4466 km and encompassed five of the ten Canadian provinces. Without any interruption, however, I remained during the whole length of the journey within the area in which the Torrens system, invented here in South Australia 150 years ago, is the predominant system of lands titles registration. Shortly afterwards I went to Halifax, Nova Scotia, making a detour on the way back to Toronto via Fredericton, New Brunswick, for both of those Canadian provinces have also recently adopted the Torrens system, largely because it is far more suited to e-technology than its competitors.[2] It is a remarkable tribute to the basic soundness of the principles of the Torrens system that it should rightly appear to those two Canadian provinces to be the best available system 150 years after its invention and after a technological revolution has occurred. Admittedly, on my journey to the Torrens system's latest conquests, Nova Scotia and New Brunswick, I passed through a great deal of non-Torrens territory, for although modern writers have pointed out that Quebec would benefit from the adoption of the Torrens

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1 By rail – my chosen method of transport.

2 See Greg Taylor, 'The Torrens System in Nova Scotia and New Brunswick' (2009) 16 *Australian Property Law Journal* 175.

system, its basically French private law inheritance and other factors have stood in the way of the system's adoption there since it was first unsuccessfully proposed in the 1880s.[3]

The geographical extent of the Torrens system is not my topic in this article. But it is right that I should mention it briefly in connexion with my argument that the Torrens system is not German. By doing so, I indicate that the question to be discussed is not some insignificant quibble without any major importance. Rather, the Torrens system is by far the most important system of lands titles registration in the British Commonwealth and exists also in a significant number of countries outside the British Commonwealth. The Torrens system is a phenomenon of world importance in the law and the question of its origins is an important question in legal history.

By its 17th birthday, in 1875, the Torrens system applied in all five Australian colonies and in Tasmania and New Zealand,[4] sweeping feeble attempts at reform based on English law or English proposals triumphantly before it. Having gained a foothold in part of British Columbia in 1861, the Torrens system was extended to the whole of British Columbia in the early 1870s and then in the 1880s to what are now Canada's three prairie provinces and with somewhat more hesitation to Ontario also — it is only in recent years, again because of its suitability for computer-based systems, that the Torrens system has become the principal lands titles system in that great province with a population of 12 or 13 millions. In Asia and Oceania the system has been adopted not only in Papua New Guinea, not surprising given its status as an Australian colony for much of the 20th century, but also in Malaysia and Singapore; and it has been adopted too in many African countries, particularly those that are part of the British Commonwealth, and in the Caribbean.

No attempt has ever been made to enumerate the jurisdictions in which the Torrens system does apply. There are two reasons for this, which, traducing the familiar language of torts law, may be described as remoteness and causation. First, some of the jurisdictions in which the Torrens system is said to exist are rather remote: for example, Madagascar and Iran.[5] Of course someone could get into a 'plane and go to those places, but such a person would obviously also need to be able to read the land law of those countries and assess its meaning in the context of all its other statutes; perhaps it would be necessary also to read some case law and interview

3 I deal with the export of the Torrens system to Canada in my book, Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (2008).

4 Cf Atkinson A-G in South Australian Parliamentary Debates, House of Assembly, 4 June 2008, p. 3449. I add that, politically, Tasmania is now part of Australia, but there was no single political entity 'Australia' in those days. Geographically Tasmania is not part of Australia, or at least was not always treated thus before Federation in 1901.

5 For this and other references to the spread of the Torrens system, see: Greg Taylor, *'A Great and Glorious Reformation': Six Early South Australian Legal Innovations* (2005) 14; Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (2008) 4.

those who actually administer the system in order to determine whether the law on the ground is the same as the law in the books. Finally, one would need to be able to conduct general historical research in order to determine when the prevailing system of lands titles law was in fact adopted there and what part Torrens principles actually played in that.

Secondly, causation: there are some jurisdictions — and the most prominent of them is the very home of the common law itself, England — in which campaigning for lands titles registration, and even some limited systems of registration, existed long before the Torrens system did, but a modern system of registration with some distinct Torrens-like features has taken off only more recently. It is certainly true to say that the wider adoption of lands titles registration in England, for example, has been due in part to the success of the Torrens system elsewhere, encouraging the idea that a registration system is something of value. But to how great an extent has the inspiration come from Torrens alone? What would the law of England look like now if the example of South Australia's successful Torrens system, exported throughout the common law world, had not been available for English reformers to point to? This is of course an insoluble question.

If England were the only jurisdiction which might be said to have adopted South Australia's Torrens system, it would perhaps be worth devoting some attention to the problem anyway, but in fact the list of battle honours that can without any doubt be inscribed upon the Torrens system's colours is long enough as it is.

II The Main Points Summarised

In an article published in the *Journal of Legal History*[6] I examine in detail the recent claims that the Torrens system is actually a transplant of the law of Hamburg, with some slight adaptations, as it existed at the time of the invention of the Torrens system in 1856–58 and as transmitted to South Australia by one Dr Ulrich Hübbe, a German lawyer who had emigrated to South Australia and whose life and deeds Horst Lücke has already outlined for us.[7] The conclusion is that the case fails all along the line. There is not a single point made in favour of the hypothesis that the Torrens system is actually a legal transplant from Germany that stands up even to the briefest scrutiny.

Much of what I say in my article, however, is rather detailed and depends on things such as the date of publication of letters or draft Bills and their precise contents. Even if all the information connected with that can fairly be inflicted upon the readers of the *Journal of Legal History*, I wish to take a step back in this article and

6 Greg Taylor, 'Is the Torrens System German?' (2008) 29 *Journal of Legal History* 253. As this article went to press I was informed that that article has been honoured, to the surprise and gratification of its author, by a mention in the advice of the Privy Council to Her Majesty: *Louisien v. Jacob* [2009] UKPC 3, [2].

7 See Horst Lücke, 'Ulrich Hübbe and the Torrens System: Hübbe's German background, his life in Australia and his contribution to the creation of the Torrens system' (2009) 30 *Adelaide Law Review* 213.

to consider the general intellectual climate in debates on the law in South Australia. This is of course relevant to the debate on the history of the Torrens system, all the more so because the case for its being a German import depends at a crucial point on the nature of early South Australian society. This is because the accusation is made by those who push the transplant-from-Hamburg thesis that there is a reason why no one said, when the adoption of the Torrens system was being discussed in South Australia, that it was a German import: namely, that early South Australians would have rejected any proposed reform simply on the ground that it emanated from Germany, and therefore the true origins of the Torrens system could not be revealed to them. It will be my submission that this is an absurd caricature of South Australians in the 1850s, and the reason why no one pointed to the supposed German origins of the Torrens system in the 1850s is that there is and was not the slightest ground for making such a claim.

Nevertheless I am going to start off with a summary of the main points in my earlier article before I take a long step back and look at another field entirely as a means of illustrating the general intellectual atmosphere in South Australia in the 1850s.

I refer first to nothing more complicated than the dates. Obviously Ulrich Hübbe, the supposed source of the transmission of the law of Hamburg, could have had no influence at all on Robert Torrens before they even came into direct or indirect contact. Hübbe's own account is that he and Torrens came into contact as a result of Hübbe's letters to the editor of what was then South Australia's leading newspaper, the *Register*. There were three of these letters between 18 February and 29 April 1857. But two weeks before this series of letters had finished, in the middle of April, Torrens published a long draft Bill which, from the summary of it published in the newspaper[8] and from other sources to which I refer in the *Journal of Legal History*, we know contained all the principles of the Torrens system bar one, which I shall shortly discuss. Such a Bill does not, of course, come into being overnight, and even having the manuscript printed might well have occupied the best part of a month. Of course, time must also be allowed for the development of the principles thus printed and for the manuscript containing them to be written out by hand and considered as a whole before being sent for printing. On the other side of the equation, so to speak, before meeting Hübbe Torrens would have had to find out who Hübbe was (he published his letters under a pseudonym, as was then usual) and make time to go and see him.

If Hübbe's own story is right, therefore, the conclusion must be that the meeting between Torrens and Hübbe occurred — at the very earliest — only after the principles of the Torrens system had been developed and at the very least were about to go off to the printer's, if not already there. The better conclusion is actually that Torrens did not in fact hear from Hübbe until as late as May 1857, by which time the printer had already printed Torrens's draft Bill and it had been summarised in the newspaper. First, Hübbe's last letter appeared on 29 April. Furthermore, Torrens stated in Parliament at the start of June that he had just found out that his proposal

8 *Register* (Adelaide), 14 and 15 April 1857, 2 (in each case).

was similar to the Hamburg system.[9] Torrens and Hübbe were recorded in the newspaper as being together at a dinner at the end of May at which Torrens also referred to the coincidental similarity.[10] It is most likely therefore that May 1857 is the month in which they met, following on Torrens's identification of Hübbe as the author of the series of letters that concluded on 29 April. May 1857 was well after the principles of what was to become the Torrens system had been revealed to the world (including Hübbe) through the newspaper which in mid-April published an extended summary of Torrens's draft Bill, and through the availability of that Bill itself to the public — a Bill which included all except one of its central principles. This conclusion may not please those who would like Hübbe recognised as the source of the main ideas in the Torrens system, but unless time ran backwards or the months of the year were in a different order in 1857 it is an inevitable conclusion.

Torrens did not actually claim to have operated without any models at all in his development of the Torrens system. He stated over and over again that one of his chief models for the wording of his Act was what was then a recent British statute on the registration of title to ships, the *Merchant Shipping Act 1854* (UK) 17 & 18 Vict c 104. Numerous provisions attributable in greater or lesser part to that Act, and not to the law of Hamburg, are still clearly visible to the naked eye in the first Torrens statute passed on 27 January 1858 and which came into operation on the following first day of July. But Torrens used that Act mainly as a source of sufficiently 'legal' wording, and of course he also did considerable work of his own on the essential underlying concepts. Early on he explained the aim and principle of his system in a manner which owed nothing to either that Act or to Hamburg: he said that, under his system, title to land should be as secure as title to land was immediately after it had been granted by the Crown.[11] This is a statement which can owe nothing to a system for the registration of ships' titles and also nothing to the law of Hamburg, not because Hamburg is an old city-republic but for the more substantial reason that large-scale grants of newly surveyed land did not feature nearly as prominently there as they did in early South Australia. As far as the other similarities to which Stanley Robinson points are concerned, I show in my article that the more important of them have much more obvious sources than Hamburg: thus, the Torrens mortgage was not merely the same shape as that in Hamburg but also the same shape as that under the *Merchant Shipping Act 1854* (Imp) s 70, which Torrens always acknowledged as a source.

I mentioned above that there was one principle that was part of the Torrens system and that is not found in the draft of mid-April 1857. That is the Assurance Fund. This is a system, as is well known, under which everyone who used the Torrens system was required to pay a small tax which goes into a state-run fund to support the occasional person who loses an interest in land by the operation of the Torrens system's principles. This idea cannot be taken from Hamburg, because there was no such thing in the law of Hamburg. Torrens in fact wrote to one of his chief sounding-boards, the Member of the Legislative Council and newspaper editor

9 South Australian Parliamentary Debates, House of Assembly, 4 June 1857, col. 210.

10 *Register* (Adelaide), 1 June 1857, 3.

11 See, eg, *Register* (Adelaide), 17 October 1856, 2.

Anthony Forster, as late as November 1857 in order to float this idea with him (not Hübbe!). The idea may well have been suggested to Torrens by some English proposals of the day. But the addition of this idea at so late a stage from a source outside Hamburg is also completely inconsistent with the Hamburg hypothesis, and the fact that Torrens consulted someone other than Hübbe also gives the lie to the idea that the system, by this stage, was really just a copy of the Hamburg system as described by Hübbe to a compliant if fraudulent Torrens.

I might also go through here the very few statements which are cited by the Hamburg camp as evidence that Torrens's contemporaries knew 'the truth'. But they turn out without exception to have been made by persons who were literally not present at events which they were presuming to describe. One set of frequently cited statements doubting Torrens's claims to the invention of the system — although not, be it noted, mentioning any German contribution or Hübbe — was made by Sir Dominick Daly, who was in Prince Edward Island, now part of Canada, throughout the whole period during which the Torrens system was being proposed, passed and introduced! As historical testimony such statements are of course worthless, and Daly's view, so far from being supported by any contemporaries who were there as Professor Raff would have us believe, is simply overwhelmed at this period of history by a vast mass of contemporary statements and events such as banquets in praise of Torrens, the great hero who had reformed real property law. Some of those statements and events are referred to in my piece in the *Journal of Legal History*, but far from all of them as space would not have sufficed. Equally worthless is the claim that chaos broke out in Parliament when Torrens applied for a pension.[12] This claim first appears in a book the standard of which little exceeds that of the coffee-table variety and which was published in 1980![13] The book cites no contemporary source for this claim, nor am I aware of one. A reading of the debates from 1880 shows a moderate tone. Time and effort should not be wasted dealing with worthless claims of the nature of that found in the book of 1980 unless some better source can be produced for the claim. The claim that Hübbe sat outside Parliament as an adviser to Torrens first emerges in 1931, when it is made by Hübbe's own daughter. No source from the 1850s reports such a claim. The daughter claims to base her knowledge on what she says were the observations of a long-dead parliamentarian, who, however, did not become a member of Parliament until 1871, thirteen years after the period when he is supposed to have made the observation.[14]

It is regrettable that a wider point about basic historical method needs to be made about the case for the Hamburg hypothesis. A lot of things were said about the Torrens system in the 1850s and 1860s, as it was at first a very controversial and then a very popular innovation. In the huge volume of statements about the system there are bound to be one or two oddities. Historical method requires us

12 *Contra* Murray Raff, 'Torrens, Hübbe, Stewardship and the Globalisation of Property Law Systems' (2009) 30 *Adelaide Law Review* 245.

13 Judith Brown and Barbara Mullins, *Town Life in Pioneer South Australia* (1980) 178.

14 I provide chapter and verse on this point in Greg Taylor, *A Great and Glorious Reformation: Six Early South Australian Legal Innovations* (2005) 41.

to assess the opportunity which the persons concerned had to observe the events of which they give an unusual account, and to accept or reject their statements accordingly — not to accept them blindly because it suits an argument, while disregarding a much larger, indeed overwhelming number of statements which do not suit the Hamburg thesis. Conducting such an assessment, as I do in my article in the *Journal of Legal History*, it is easily perceived that there is no value in the statements cited as evidence of the supposed Hamburg origins of the Torrens system. It says little for the Hamburg case that its proponents have not even bothered to check whether the makers of the statements on which they so willingly and frequently rely actually knew what they were talking about, as distinct, for example, from being in Canada at the crucial time.

III Another Snapshot[15]

Now I wish to take a step back and look at a remarkable document that, at first sight, has nothing to do with the Torrens system. But, as well as the inherent interest I hope it holds, it does give us an insight into the sort of society which generated the Torrens system and allows us in addition to assess another of the claims of the pro-Hübbe forces.

One of the major issues in all Australian colonies in the 19th century was the legal status of the Aborigines. The issues are familiar from our own time. Were Aboriginal customs to be recognised as law? If so, what was the relationship between that system and the newly arrived English one? What about Aborigines who had not yet had contact with the settlers — were they to be treated as subject to the rule that ignorance of the law was no excuse and thus subjected to English criminal law just like the inhabitants of (say) Gloucestershire? To what extent were Aborigines able to enjoy the protection of the law, particularly if they were not, or not always, subject to the burdens it imposed? To reduce the dilemma to its starkest: if it were to be the law, in some cases or always, that Aborigines could not be subjected to British punishment for killing each other, or even for killing Europeans, how could it be that Europeans were subjected to British punishment for killing Aborigines?

South Australia operated, or claimed to operate, a 'one law for all' policy as a reaction to abuses elsewhere on the continent which South Australia, as a free settlement thinking itself superior to all those convict settlements to its east, hoped to avoid. Of course the one law to which the Aborigines were subject was the English law. Given the differences between the two societies and power relationships more generally the converse choice could scarcely have been made. This choice was made with the best intentions and for the best reasons, in the light of experience elsewhere and in the light of lessons learned in one very early case in South Australia. However, it was an imperfect solution to a problem which actually did not admit of any perfectly just solution.

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15 This section is based largely on a chapter in my book, Greg Taylor, *A Great and Glorious Reformation: Six Early South Australian Legal Innovations* (2005) ch 3.

Thus the official law in South Australia was that the Aborigines were to be treated just like everyone else and subjected to English law. I turn now to the remarkable protest of a grand jury which was required to apply that English law to two cases in May 1851, each involving the killing of one Aborigine by another. The grand jury had to decide whether there was enough evidence to try the Aborigines for murder (a function that today would be carried out by a Magistrate hearing committal proceedings, but at this point South Australia had not abolished the common law grand jury). While not every South Australian was eligible to sit on the grand jury, the 'franchise', so to speak, for the grand jury was still broad enough that its composition was representative of the adult male members of the community in general, and particularly adult male members of some community standing, whether that standing arose from running a small business or being a Justice of the Peace or owning real estate of a significant although not impossibly high value.[16]

Now the grand jury, as they were required to do under the law, loyally found that the Aborigines had a case to answer and should go on trial, but in doing so these representatives of early South Australian opinion said that they had done 'violence to their own natural feelings of equity and justice'. They continued:

> The Grand Jurors believe, from the evidence adduced, especially of the Protector of the Aborigines, that the slaying of the native at Yorke's Peninsula [who had strayed into the territory of another tribe with which there seemed to be some hostility] was in accordance with a law common in all the native tribes — a law analogous to that which regards spies in civilised countries — that the native who was killed knew the law — that he ran the risk of violating it, and suffered in consequence: and that in the other case, the native seems to have been the victim of a prevalent superstition among the aborigines.
>
> That the Grand Jurors apprehend that, prior to the occupation of this country by the colonists, all these native tribes, as distinct communities (however small)[,] would have been held by all jurists to be in a situation to make laws and adopt usages for their own protection and government — that it can scarcely be even assumed that the limited intercourse which has yet subsisted between the colonists and the aborigines, especially on the confines of the province, should have sufficed to impart such information to these uncivilised men as would justify us in breaking up their own internal system for the punishment of offences to which all their previous traditions and habits give force and sanction.
>
> That if the character of British subjects is to be enforced upon them, and they are at once to be made amenable to the severe penalties of British law for moral offences between themselves, then it becomes a serious question whether we ourselves are not committing a similar offence (presuming the extreme penalty of the law [*i.e.* death] were inflicted) by punishing that as a crime which, in the minds of the persons punished, was simply the enforcement of their own mode of justice.

16 I go into this in detail in Greg Taylor, 'The Grand Jury of South Australia' (2001) 45 *American Journal of Legal History* 468, 479f.

Stripped of the 19th century's elaborate phrasing, this means that the British settlers would themselves be murderers if they executed the Aborigines for carrying out their mode of justice which, like the settlers' law then, involved the death penalty. The grand jury finished:

> That, admitting the aborigines are to the fullest extent entitled to the protection of British law, it is but reasonable that before the awful severities of its infraction are enforced, the blessing and advantages in relation to personal protection and security which it affords, should be made appreciable to those whom by our own voluntary act, and without provocation, we have forced to submit to our sway, and now seek to coerce to our habits.[17]

Thus spake, to its eternal credit, a grand jury of only slightly above average South Australian men in May 1851.

This call for the recognition of Aboriginal customary law is a remarkable document and worth reading as a salutary corrective to the modern tendency to think that everyone before approximately 1970 was a racist, a bigot and a fool.

That however, would be another argument. What I want to ask now, because it leads me back into the discussion of the Torrens system, is what this document says about the nature of early South Australian society in 1851 — the society from which the Torrens system was about to emerge. We may first notice that, although all the members of the grand jury were non-lawyers, they were still quite confident in making assessments of the law. This applies both to in-depth consideration of its justice and its general appropriateness for the aims it purported to pursue and also to the jurors' pronouncement about how 'all jurists' would have regarded the state of pre-contact Aboriginal society. The latter was a statement about the alleged point which jurisprudence had reached internally, so to speak, rather than an assessment of the law from an external observer's perspective. The jurors make all these assertions with great confidence and boldness. This was not unusual in the 19th century in which many people without a legal education held posts requiring them to apply the law with a fairly high degree of sophistication such as that of Magistrate or Justice of the Peace.

Secondly, let us note the 'advanced' nature of these opinions. That hardly needs emphasising given that even today, over 150 years later, the views expressed would still be controversial and very markedly to the left. But this, on reflection, should not surprise us. Many of the founders of South Australia were middle-class intellectuals associated with radical causes such as dissent from the Church of England, Jeremy Bentham's utilitarian critique of English society in general and English law in particular and so on. An excellent example is John Bentham Neales, Bentham's ward, who emigrated to South Australia and sat in the first Parliament of South Australia, the one that passed the Torrens system into law. It is no exaggeration to say that many of the founders of South Australia, if they were alive today, would be members of the Greens, 'GetUp!' and other left-activist groups.

17 *Register* (Adelaide) 16 May 1851, 3.

They would be campaigning for the alleviation of poverty in the third world and against United States imperialism and Islamophobia and making noises about the need to reduce our 'carbon footprint'. Some of these grand jurors in particular along with many other early South Australians would have been in the forefront of moves for a national apology to Aborigines and a 'treaty' between the Commonwealth and Aborigines and (this at least is not speculation) for the recognition of Aboriginal customary law. I am not saying for a moment that any of these causes deserves uncritical support, but merely making a point about the early South Australians on this grand jury.

We should not imagine either that chance had thrown up an unrepresentative group of left-wing activists on this grand jury: its foreman, one A H Davis, was known for the general conservatism of his opinions and opposed the secret ballot even once it had been introduced. Yet still this remarkable document was produced by what was clearly a bold, self-confident and high-minded, but equally clearly not an unrepresentative group of early South Australians. It should also be added that some of the grand jurymen were about to stand at an election to the Legislative Council and would hardly have associated themselves publicly with opinions that were wildly out of touch with those of the electors.

There is an extraordinary belief among people with a simpler view of history — called the Whig view in earlier decades — that history is a linear story of progress and that each generation is more enlightened than the next. Obviously, each succeeding generation would be flattered if that were so; perhaps that is one reason why that belief is still widely held. At any rate, the belief is false. As soon as you free yourself from that illogical superstition, you will no longer find yourself surprised to find a group of South Australians expressing views in 1851 which are remarkably progressive even by today's standards.

IV Contemporary South Australian Society

What has this got to do with the Torrens system? Nothing, directly. It might well be irrelevant according to the standards of the law of evidence — but not perhaps according to historical standards, as I shall try to show. For the Hamburg hypothesis includes a further claim which can be assessed only if we know something about South Australian society as a whole.

The grand jury's remarks certainly do show the cast of mind and level of intelligence in early South Australia. We are not talking about a group of uneducated bigots such as we might find in some places in another English-speaking country which, as the Torrens system was being passed in South Australia, was preparing to conduct a civil war. We are talking about a highly educated and intelligent group of people who were open to new ideas and saw the law not as some arcane semi-divine mystery inaccessible to them or as a means of oppressing people they did not like, but in the best Benthamite spirit, as a human institution open to criticism and improvement depending on how well or badly it fulfils human needs. In this atmosphere, we should not wonder that so many legal

innovations came from early South Australia that I have written a whole book about them.[18]

This spirit of early South Australia is of course also precisely the same spirit that led to the conception and introduction of the Torrens system. These people did not need to be pushed and prodded into thinking up models for reform by lawyers, whether from Germany or elsewhere. In the episode involving the grand jury and the Aborigines, as also in the creation of the Torrens system, we find laymen taking the lead over lawyers and judges in successfully reforming the law. The grand jury's plea was in fact successful. One group of Aborigines was acquitted of all crimes by the next jury, the one that decided the outcome of the trial, while the other Aborigines, although found guilty, were swiftly pardoned.

My main point though is a different one. It is that South Australian society would not have refused to accept the Torrens system because it was German, as the proponents of the Hamburg hypothesis are forced to postulate, and that there was not the grand conspiracy they postulate to cover up this fact. This argument has two limbs.

First, I point to the complete absence of any reference in any of the numerous contemporary public debates, or in any contemporary private sources that have since become available, to the supposed real source for the idea in the law of Hamburg or to Ulrich Hübbe. There are no such references at the time of the conception and introduction of the Torrens system nor for two decades thereafter. While isolated statements derogatory of Torrens, such as that by our friend from Prince Edward Island, can indeed be found in the early 1860s, no one claimed positively that Hübbe was the true source until much later, in 1880[19] — over twenty years after the Torrens system had been developed and when Torrens was, incidentally, safely out of the way in England. Needless to say the person making the claim in 1880, one Rudolph Henning M P, also had had no role at all in the events which he presumed to describe and was barely an adult when they occurred. The treatment given to this statement by Hübbe's modern champions is however another example of their tendency to seize on isolated statements supporting their case, while ignoring a much larger mass of other statements against them, and without considering for a moment whether the favoured statement is entitled to any credit at all. At the symposium at which this paper was first presented Henning's statement was again wheeled out for the benefit of the audience and his name adorned with 'M P' but there was no reference even to the decade in which he made his statement, let alone any discussion of whether he was a reliable source. Nor do Hübbe's champions ever find time to mention a slightly later statement by Henning in which he downgrades Hübbe to a mere helper.[20] As I have mentioned, all this does not reflect proper historical method.

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18 Taylor, above n 12.

19 South Australian Parliamentary Debates, House of Assembly, 20 July 1880, col. 427 (Rudolph Henning).

20 South Australian Parliamentary Debates, House of Assembly, 17 September 1884, col. 1025 (Rudolph Henning).

There are indeed only scattered references to German law at all in any contemporary sources — the best-known was mentioned earlier, namely Torrens's own statements referred to above in May and June 1857, after he had presented the outlines of his system, that he had been informed (presumably by Hübbe) that he, Torrens, had coincidentally come up with a system that was like the Hamburg one.

In summary then there is no contemporary support at all for the Hamburg hypothesis. The contemporary record is, rather, as near to unanimous as they ever are in describing the system as Torrens's. There are many, many statements to this effect. This is partly because the Torrens system had many enemies, from Sir J H Fisher, President of the Legislative Council, to an early conservatively minded newspaper, the *Adelaide Times*. The Torrens system's enemies, who thought that it would be a failure, had no reason to be backward in coming forward with anything they knew about the system. Torrens was accused of being an ignorant non-lawyer meddling in an area that he did not understand; he, for his part, responded not by saying that he was actually copying a German system that had worked for centuries, a response that would have easily answered that accusation had it been so, but rather by saying that he did know what he was doing because he had been Registrar-General of Deeds, that is, responsible for the pre-Torrens system of lands titles. That remained his answer until late May 1857, when he was delighted to be able to add to his armoury of responses to that accusation having learnt a new fact from Hübbe, namely that he had coincidentally designed a system somewhat like Hamburg's.

The Torrens system also had many friends, and there was a circle of people (such as Anthony Forster MLC, whose advice Torrens sought on the proposed Assurance Fund) who helped Torrens with its development. Lands titles reform was a very popular cause in Torrens's day because many South Australians wanted the reduction in the cost of land conveyancing and the increased security of ownership which Torrens promised. The inherited English law did not allow for these things because it was a law for a society in which (slightly simplifying) only rich people owned land and they held on to it for a long time, whereas South Australia was a place in which even people of very modest means could aspire to own land in their own right and trade up in the market if their fortunes improved. So the Torrens system also had many friends and was the subject of a very lively debate extending literally over several years. At no stage did either the proposal's friends or enemies, or Torrens himself, point to any substantial German influence, let alone a take-over of a German system, with the exception of Torrens's statements about a coincidental similarity in late May and early June 1857, well after the outlines of the system had been published.

Had there been any substantial German influence, Torrens would actually have been only too keen to point out from the very start that, no, he was not actually proposing a system developed just by him, an enthusiastic non-legal amateur, but was actually taking over a system developed in Germany that had worked for hundreds of years successfully there. But he did not refer to Germany until those statements of May and June 1857 about the coincidental similarity, after the scheme had been revealed to the world.

And where is Dr Hübbe, loudly complaining that he is the victim of plagiarism? Not only did he not do that; he also himself referred to the system on a number of occasions in 1857 and afterwards as Torrens's. As late as 1874, Hübbe applied for a Professorship at the newly-established University of Adelaide and said that he had 'assisted' with the 'preparation, promotion and defense [sic]'[21] of the Torrens system.

Of course in 1857 the Torrens system had not been enacted, so there can be no thought that Torrens was reluctant to share the credit for its phenomenal success and its spread around the world, events which had not yet happened. In fact Torrens regularly did quite the opposite and shared the credit: even in 1861 when the success of the system was already apparent, he pointed out that contributions and suggestions had come to him from various South Australians and were adopted by him.[22] So we can dismiss from our mind the idea that Torrens, despite his many character flaws, was determined in 1857, when there was no credit yet to be had for the success of the system, to downplay other people's suggestions in order to hog all the credit for himself. In fact his aim in 1857, as the system still remained to be passed by Parliament and allies were needed, was to bring as many people into the tent as possible.

The contemporary evidence, which almost uniformly gives the lion's share of the credit to Torrens and — even including on this point our friend from Prince Edward Island — does not mention Hübbe at all, is another important reason, although far from the only one, why the Hamburg hypothesis must be rejected.

There is a second limb to this argument. The pro-Hübbe forces, if I may call them that, are of course aware that some explanation is required for what, if their account is true, is a remarkable state of affairs: the true source of the invention is being concealed by everyone involved, including the very person, Hübbe, who himself was supposed to be the source, and by Torrens, who would have had everything to gain from pointing to it from the very start as proof that his proposal would work! And their explanation for this remarkable state of affairs is simple. It is that the South Australian public was so bigoted against foreigners, or Germans at least, that it would have refused to accept the innovation which it so desperately needed in order to make land dealings simpler and that it would have rejected the system had it known the 'truth' that the system was really a German one.[23] At the same time, though, Professor Raff now praises South Australia for being capable of a sophisticated, multilingual, multicultural and multi-disciplinary approach to reform. As a simple matter of logic, this does not sit well with his other claim that the German origins of the scheme could not be revealed to the public.

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21 Letter from Ulrich Hübbe to the Council of the University of Adelaide, 7 December 1874, available at: http://www.adelaide.edu.au/records/archives/series169/169–009.htm, *s.n.* 009–0010.

22 *Register* (Adelaide), 10 April 1861, 3.

23 Antonio Esposito, *The History of the Torrens System of Land Registration with Special Reference to its German Origins* (LL.M. thesis, University of Adelaide, 2000) 70–80.

As Professor Horst Lücke has pointed out elsewhere,[24] this explanation is also an anachronism. If we were gathered to celebrate the 90th anniversary of a Torrens system conceived in 1918 it would be easy to understand the suppression of any German contribution, although then we might still sensibly ask whether, even assuming the will to suppress, a way to do so would really have been found, especially given the sophisticated, multi-disciplinary reform effort that was going on. But for the people of the 1850s the dangerous militarists and threats to world peace were not the Germans but the French, who had within living memory made the attempt to conquer the world which the Germans would try only in the following century. In the 1850s Germans had not yet begun their efforts to acquire a bad reputation; indeed, there was no Germany as a political entity and the popular image of Germany was of a somewhat intellectual and philosophically inclined people with their heads in the clouds. As Heinrich Heine wrote in the 1840s, in a work published in Hamburg:

> Franzosen und Russen gehört das Land,
> Das Meer gehört den Briten,
> Wir aber besitzen im Luftreich des Traums
> Die Herrschaft unbestritten.[25]

In looking at the Torrens system's migration to Victoria I even came across one expression of surprise in a newspaper in Melbourne that land registration was known in a country as 'intellectual' (i.e. impractical) as Germany![26]

No doubt in early South Australia there were sometimes the usual minor tensions between the British and German settlers, but there was no serious trouble — no riots, for example. After all, the Germans had come to the colony by invitation at a time when it desperately needed a population and were generally respected for their hard work and adherence to the law. As Professor Lücke has suggested elsewhere in this issue,[27] many South Australians had amicable connexions of their own with Germany and could hardly be said to be anti-German. Perhaps some South Australians were concerned that trends might develop so that the Germans would become too big a minority; but in those days immigration from far-away Germany was easily controlled; and if the colonists had taken a bit of German law (translated into English), that would not have added a single German speaker to the population. If it had been the case that the Torrens system was a copy of the Hamburg system,

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24 Horst Lücke, 'Ulrich Hübbe or Robert Torrens? The Germans in Early South Australia' (2005) 26 *Adelaide Law Review* 211, 217–235.

25 *Deutschland. Ein Wintermärchen*, Caput VII. I have seen this well translated somewhere roughly as follows: 'France and Russia control the land,/ Great Britain rules the sea./ Ours [Germans'] is the cloudy realm of dreams,/ Where there's no rivalry'.

26 See Greg Taylor, 'The Torrens System's Migration to Victoria' (2007) 33 *Monash University Law Review* 323, 347 fn 176.

27 Horst Lücke, 'Ulrich Hübbe and the Torrens System: Hübbe's German background, his life in Australia and his contribution to the creation of the Torrens system' (2009) 30 *Adelaide Law Review* 213.

there would have been no reason not to admit it at the time, and indeed every reason to do so.

As we saw, as soon as Torrens did find out from Hübbe that his system was coincidentally similar in outline to the Hamburg system, he went into Parliament and proclaimed that fact to the world because it assisted his cause. In the newspapers in 1856 and 1857, the letters to the editor also contained numerous vague references to the law of Germany (and Austria and France also)[28] as countries in which land registration worked well, leading to the conclusion that it could work well also in South Australia. Where does all this leave the view that a cover-up of the 'truth' about the German contribution was necessary because of the mindless opposition it would have aroused?

The belief that merely branding an idea as foreign would be the death of it in the South Australia of the 1850s is really just another outgrowth of the view that everyone before about 1970 was a racist, a bigot and a fool. As we have seen, that is not so, and certainly not in relation to South Australia in that era.

Let us then recall what our grand jury in 1851 said about Aborigines and what their utterances tell us about their intellectual and moral tone. The Hamburg hypothesis is compelled to presume that early South Australians were so bigoted and racist that they would reject a desperately needed reform, if it could be proved to be desirable in itself, simply because it had emanated from another European country. Can we believe this for a moment? As the grand jury's protest of 1851 shows, these early South Australians included people of the highest intellectual level and cast of mind — they were people who stood up boldly for the utmost outsiders in their society, defying the principal Judge of their own province and the law he had laid down to them. These were people who pleaded the cause of homicidal Aborigines and urged the law to see things from their perspective, and who were sensitive to the problems they had created by their uninvited appearance among a pre-existing human community (which they nevertheless considered to be of a far lesser standard of civilisation than their own) to a degree that I believe to be understated by calling it astonishing. Yet the Hamburg forces are compelled to maintain that people of this stamp would have closed their minds to a reform as soon as they heard the word 'German'! Is it plausible that such people would have rushed screaming from the room if the 'truth' had been revealed to them that the reform before them was actually a German production?

I suggest to you that the idea is absurd. The reason why there was no reference in the contemporary sources to any substantial German contribution to the Torrens system is the simple and obvious one suggested by all the other facts we know: there was no such contribution. It is as simple as that. There was no conspiracy of silence. There was nothing to be silent about.

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[28] One example is the letters from 'Vitis', which I discuss in my piece in the *Journal of Legal History*, Taylor, above n 6.

V Torrens's Motives[29]

At the symposium at which this paper was originally presented, there was again reference to the rather shopworn stories according to which Torrens introduced his system to benefit himself as a landholder. No one has ever pointed to the specific piece of land which Torrens held and from which he obtained these supposed benefits.[30] These stories never go beyond the snide assumption that Torrens must have had some hidden interest or he would not have bothered to do anything at all, and their chief appeal seems to me to lie in the apparently widespread belief that no one ever does anything except from self-interested motives, our good selves of course excepted. This cynical view appeals also to our suspicion that there is always a 'real story' involving nefarious conduct and pulling the wool over people's eyes which has not been presented to the gullible public but which we, being cleverer than the average, can recognise.

One might have thought however that the fact that a symposium was held 150 years after the introduction of the Torrens system discussing its spread around the world, following its adoption by all Australian colonies with extraordinary speed in the 19th century, would suffice to acquit Torrens of acting solely in his own interests, and would furthermore make it clear that his proposal, whatever it might have done for him personally (about which we seem to have no information), was principally of benefit not to himself, but to his own and also many other communities.

The best answer to this type of accusation has already been provided — almost two-and-a-half millennia ago:

> ἤν τις καὶ ὑποπτεύηται κέρδους μὲν ἕνεκα τὰ βέλτιστα δὲ ὅμως λέγειν, φθονήσαντες τῆς οὐ βεβαίου δοκήσεως τῶν κερδῶν τὴν φανερὰν ὠφελίαν τῆς πόλεως ἀφαιρούμεθα. …. μόνην τε πόλιν διὰ τὰς περινοίας εὖ ποιῆσαι ἐκ τοῦ προφανοῦς μὴ ἐξαπατήσαντα ἀδύνατον· ὁ γὰρ διδοὺς φανερῶς τι ἀγαθὸν ἀνθυποπτεύεται ἀφανῶς πῃ πλέον ἕξειν.[31]

In context, this appeal might be rendered into English as follows — and perhaps even put into the mouths of South Australians in 1857 as they debated the Torrens system:

> If someone is suspected of having proposed good actions for personal gain, let us not deprive ourselves, being envious of the gains we suppose to exist,

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29 Some of the material in this section is taken from: Greg Taylor, 'Hamburger To Go? The German Contribution to the Torrens System Examined', (Paper presented at the Conference on the German Presence in South Australia, Adelaide, 30 September 2005).

30 Torrens did hold the salaried post of Registrar-General under the new system. (Was he supposed to work for free? Were his previous government posts unsalaried?) I refer here to the absence of any knowledge about his personal landholdings.

31 Thucydides, *Peloponnesian War* Book III, ch. 43, allegedly quoting the Athenian politician Diodotus.

> of the clear benefit to the polity in the proposal. … That would be too clever by half, and then it would be only the polity to which good could not be done openly and without deception; for he who did good openly for the polity would merely end up being suspected of making something on the side.[32]

In the same spirit, at once pragmatic and principled, let us also examine the assumption implicit in the criticism of Torrens just mentioned that the only true benefactors are those who get absolutely nothing out of the reform they propose. A little reflection will show that it is quite unreasonable and unrealistic to expect people to spend a good deal of time and effort promoting law reform from entirely disinterested motives. Torrens was human; indeed, no one could propose him for sainthood. Human beings who are not saints have the right to be more concerned about things that personally affect them than about things that do not. Think of any recent or proposed legal change and you will normally find behind it people who would be advantaged by it or feel that it would redress a wrong they have suffered. Thus the agitation for gay and lesbian marriage is led by gays and lesbians, the push for tougher sentencing laws is led by victims of crime, the consumer rights movement is led by consumers, and so on. There is nothing wrong with that. People will not normally campaign for law reform just because it fills in the time (and we should be *extremely* wary of those who do!). They will do it because they have something to gain from a change which they say is also in the broader public interest for some reason.

Torrens was (perhaps, if the stories referred to are true) in exactly the same position as campaigners of our own era, and there was nothing wrong with that in the 1850s either. I think it beyond all argument that the world in general has got far more use from Torrens's system than whatever Torrens himself may have got out of it, and he is therefore to be accounted, as Thucydides suggests, as a benefactor and not as a despicable schemer in his own interests.

For what it is worth, Torrens's own story was that he — having had the opportunity to see and reflect upon the defects of the old system when he was Registrar-General of Deeds — was motivated to do something about the state of lands titles not because of anything he hoped for for himself, but because a friend or relative of his had suffered when he lost land under the old system of titles and because of its defects.[33] No one has ever disproved this or given any account of Torrens's supposed personal profits under the legislation that he conceived, had passed through Parliament and then administered.

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32 In making this translation I have consulted but varied widely from that of Rex Warner, *Thucydides' History of the Peloponnesian War* (1972) 218f. The original is mostly in the present indicative ('… we deprive ourselves …') but in context it is an appeal not to act in the manner indicated and it can therefore be rendered as I do here without distortion of sense.

33 The sources may be found conveniently in P M Fox, 'The Story behind the Torrens System' (1950) 23 *Australian Law Journal* 489, 489f.

It is also probably true that Torrens enjoyed his trips to the other colonies to promote his system just as we might enjoy a junket today. But the fact remains that it was Torrens who did all this, not any other landowner or tourist.

VI Conclusion

It might be a good thing if we could conclude that the Torrens system was really just the Hamburg system in disguise. No one doubts the great contribution made to South Australia by the German migrants, a contribution that was rather forgotten in the hysteria of the First World War. I am in fact, as my friends and acquaintances know to their cost, about the last person to denigrate Germans and Germany without cause. And we are all anxious nowadays to be good multiculturalists. Enthusiasm for multiculturalism and no less noble motive is a prime reason why the Australian side of the pro-Hübbe forces is so keen to have the alleged German contribution recognised. But the fact is that, whatever we might like history to say, the sources show beyond reasonable doubt that the Torrens system was developed without any substantial German contribution and is unrelated to any past or present German system of lands titles registration.

Historical sources are never completely unequivocal. There is always the odd statement that does not fit. But the sources here are as close to unequivocal as can possibly be imagined.

As I mentioned in the introduction, the Torrens system is a legal institution of world significance. Its history is thus also a matter for serious scholarship. Its history is not to be written in accordance with what we might wish were the case, nor should it be the subject of attempts at history which ignore the most basic commandments of historical method.

Sometimes — often — the historical record on this or that question is incomplete or leaves room for argument. Here the historical record, as I wrote in my article in the *Journal of Legal History*,[34] is as close to unequivocal as they ever are. There is to my mind only one conclusion which can be reached on any review of the evidence in this case, unless one starts with a conclusion and seeks evidence to support it such as a tiny number of statements by people who describe events in which they had no involvement and which they did not witness.

Fortunately there are many other more fruitful avenues than a misattribution of the Torrens system for the recognition of the continuing contribution of the German settlers of the 19th century to today's South Australia. When I originally presented this paper to an audience in the National Wine Centre, I judged that the location rendered elaboration on that point superfluous; and I doubt that any elaboration is necessary in the pages of this journal either.

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[34] Taylor, above n 6.