Knocking down the house? The Introduction of the Torrens System to Tasmania

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The Torrens 'system of registering titles' to land can be regarded as one of the most important albeit controversial Australian law reforms of the nineteenth century. It was named after Sir Robert Richard Torrens (1814-1884), who had developed the system in the mid-1850s from a number of influences, including his experience as Collector of Customs in South Australia (1841 to 1852) and earlier writers on land titles law reform.[1] Torrens, who was not a lawyer or a surveyor, was an unorthodox and combative public servant, totally committed to his various causes. He was elected to the House of Assembly in 1857. Despite much opposition from lawyers, he piloted his Real Property Bill through the South Australian Parliament and then resigned to become Registrar-General in July 1858.[2] As Registrar-General he was responsible for administering what became known as the Torrens system and did his utmost to persuade other colonial legislatures in Australia and New Zealand to adopt it.[3] Torrens was asked by the Tasmanian government to visit the island in 1861 and he later drafted the Tasmanian Real Property Act 1862 based on his 1861 South Australian Act.[4]

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1 For Torrens see D.J. Whalan, "Sir Robert Richard Torrens (1814-1884)", *Australian Dictionary of Biography (ADB)*, 6, Melbourne, Melbourne University Press, 1976, 292-3; R. Stein, "Sir Richard Torrens 1814-1884: select documents", *South Australiana*, 23 (1984), 2-53; K.T. Borrow, "Bentham, Col. Torrens's Self-supporting Colonization and the *South Australian Real Property Act*", *South Australiana*, 23 (1984), 54-125.

2 D.Pike, "Introduction of the Real Property Act in South Australia", (1960) 1 *Adelaide Law Review*, 169-189; R. Stein, "Sir Robert Richard Torrens and the Introduction of the Torrens System", *Journal of the Royal Australian Historical Society*, 67 (1981), 119-131.

3 D.J. Whalan, *The Torrens System in Australia*, Sydney, Law Book Co., 1982, Ch.1; --, "The Origins of the Torrens System and its Introduction into New Zealand" in G.W. Hinde (ed.), *The New Zealand Torrens System: Centennial Essays*, Wellington, Butterworths, 1971, 1-32; R.T.J. Stein and M. Stone, *Torrens Title*, Sydney, Butterworths, 1991, 20-26.

4 Amendments in 1860 and 1861 to the *Real Property Act* 1858 substantially altered Torrens' original statute. See W.N. Harrison, "The Transformation of Torrens's System into the Torrens System", (1962) 4 *University of Queensland Law Journal*, 125-132; D.J. Whalan, "Immediate

No satisfactory explanation exists of why the Torrens system was introduced in Tasmania and who supported and opposed it. One of the leading authorities on the Torrens system has recently stated that, as a government measure, the *Real Property Bill* 1862 passed through the Tasmanian Parliament 'with little difficulty'.[5] That brief account disguises more than it reveals. It implies that there was no opposition to the Torrens system and that the local legal profession blithely accepted this rival to one of their cherished sources of revenue, general law land conveyancing. Not so. The path of true land law reform did not run smooth. A substantial number of the legal profession in Hobart opposed the introduction of the Torrens system. In Launceston, on the other hand, most lawyers seemed to support very influential landowners in their campaign to reform the real property laws. Torrens often called land law reform 'the people's question' and the general public were apparently for rather than against his reforms.[6] In what follows I will present the arguments for and against the introduction of the Torrens system to Tasmania and examine more closely its passage through Parliament. I will first note contemporary observations on the English real property laws on which Tasmanian laws were based.

In 1860 the Hobart *Mercury* commented on proposals to reform the English real property laws, which were the most 'complicated' on the statute books.[7] In England, wrote the *Mercury*, men became proprietors 'by so many tenures'; title was 'a term of such infinite variety'; it was 'not surprising' that the law relating to real property and regulating its transfer had developed into 'a most subtle science'.[8] To determine who had the right to hold an area of land, it was necessary to record 'every act of transfer'. Each occupant had to 'derive his right from a precedent' and the 'chain whose last link is found in the owner for the time being must constitute an unbroken series or it fails to confer a valid title'. The occupancy or use of land gave no 'presumption of *title*'. To sell land was 'all a matter of search and record'. The English system placed great difficulties on a man wishing to invest in 'a landed estate'. He could never be sure that after he had handed over his money, and the deeds had been 'all properly signed and sealed' that someone would not someday 'step forward with a better title'. As English titles could be of great antiquity the time, delay and cost of searching was often great. Real

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Success of Registration of title to Land in Australia and Early Failures in England" (1967) 2 *New Zealand Universities Law Review*, 416-438.

5 Whalan, *Torrens System in Australia*, 9.

6 Local supporters followed Torrens in calling it "the people's question" see Launceston *Examiner*, 10 September 1861, two letters by T. Bartley.

7 Hobart *Mercury*, 20 June 1860. Some English reforms are discussed in Avner Offer, *Property and Politics* 1870-1914: *Ownership, Law, Ideology and Urban Development in England*, Cambridge, Cambridge University Press, 1981, ch.2 and J.S. Anderson, *Lawyers and the Making of English Land Law 1832-1940*, Oxford, Clarendon Press, 1992, Part 1.

8 *Mercury*, 20 June 1860, emphasis in original.

property reform had languished in England because of the 'conservative' nature of lawyers, who were 'distinguished' by their 'extreme jealousy of all innovations upon established practice'.

In the Australian colonies the situation was at first glance less complicated than in England. All titles to land were derived from the Crown 'by direct grant'.[9] The oldest titles had been granted comparatively recently leaving 'little difficulty' in tracing the various transfers from one owner to another.[10] But even in a small and recently settled colony like Tasmania complications (causing celebrated disputes) were evident and, as land changed hands more quickly than in England, disputes would multiply as time went by. In 1832 the Caveat Board was established to remedy the decision of the Supreme Court that the location orders and grants made by Governors Macquarie and Brisbane '*conferred no Title on those who hold them*'.[11] But this 'very serious evil' had not been fully remedied by 1858 when the jurisdiction of the Caveat Board was transferred to the Supreme Court, where the Clerk took responsibility for receiving claims and recording titles.[12] The Registry of Deeds Office had been set up in the Supreme Court Registry in 1827. In Tasmania 'numerous instances' had occurred whereby:

> purchasers of property in quiet and happy possession have had their lands to which they had succeeded by an apparently equitable law of nature, and their improvements which they had effected at their own cost, taken from them by "heirs-at-law".[13]

No one doubted, asserted the *Mercury*, the desirability of disposing 'forever of the cumbrous system of Conveyancing with its elaborate investigations, recitals and so forth'.[14] It was a 'most troublesome, dilatory, and costly' system affecting the vendor, the mortgagee and the lessee. Indeed the cost of conveyancing was so high that the term had become synonymous with 'surreptitiously abstracting coin from the pockets of Her Most Gracious Majesty's liege subjects'.[15] Some efforts had been made to simplify the law. Francis Smith, when Attorney-General from 1856 to 1860, reformed

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9 *Ibid.*

10 For a brief statutory history of land registration in Tasmania see B.C. Casey, "The Process and Problems of Land Registration in Tasmania". unpublished Dip.Pub.Ad. dissertation, University of Tasmania, 1962, 8-26.

11 *Mercury*, 14 December 1861 letter by J. Allport. emphasis in original; L.L. Robson, *A History of Tasmania: Volume 1*, Melbourne; Oxford University Press, 1983, 205-6; S. Morgan, *Land Settlement in Early Tasmania: Creating an Antipodean England*, Cambridge, Cambridge University Press, 1992.

12 R.L. Wettenhall, *A Guide to Tasmanian Government Administration*, Hobart, Platypus Publications, 1968, 81-2.

13 *Mercury*, 20 June 1860.

14 *Ibid*, 13 February 1861.

15 *Examiner*, 15 February 1862.

and shortened 'the mode of granting leases and other legal documents' but this 'did not go far enough'.[16] A more sweeping reform was needed.

South Australia was the first colony thoroughly to reform the law of real property by introducing the Torrens system. From 1 January 1858 title to all land alienated in South Australia was to be derived from a certificate of sale or grant issued by the Registrar-General.[17] The *Mercury* editorials outlined the advantages of the system. Every time the land was sold or transferred the fact would be registered in a book and a new certificate would be exchanged for the old one. The Register Book and the certificate would contain a description of the property, the name of the person holding it in fee, and a reference to the first grant of the property. They would also contain a memorandum of 'all lesser transactions affecting the estate and of encumbrances on it', such as leases or mortgages. The landowner could not lease or mortgage or 'secure any charge' on his land without registering the transaction at the Land Office.

The advantage was that a purchaser, lender or other person dealing with a registered owner did not have to carry out an historical investigation of the 'owner's' title.[18] The certificate constituted 'the indefeasible title of the person holding it'. Another advantage was the effective prevention of 'the possibility of fraud' and the elimination from every transaction of 'the element of uncertainty' because 'every incumbrance and liability' resting on the land would be disclosed. There was 'no room for concealment' nor 'occasion for search'. Unlike the present system, land could be used as 'a security for loans' with 'exquisite simplicity'.

Perhaps the worst feature of the old system, continued the *Mercury*, was that under a mortgage, the land had to be conveyed to the mortgagee with 'a power of redemption by the mortgagor'.[19] Once a loan was discharged, the estate had to be conveyed back to the original owner, causing much expense and delay. Under the Torrens system, loan details were written on the certificate. If the interest or repayment conditions were not fulfilled, the lender was empowered 'to sell and pay himself, handing over the balance'. If the debt was paid, the fact was registered and the liability was removed from the certificate. All this occurred quickly, with a small fee for the Land Office. The upshot of this cheaper, quicker and more secure system was to increase the value of real estate. It was not puzzling to learn therefore that landowners, actual and potential, were 'the parties most directly and most largely interested' in the Torrens systems.

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16 *Hobart Town Advertiser*, 15 February 1862.
17 *Mercury*, 14, 16 February 1861.
18 *Ibid.*
19 *Ibid.*

It was also no surprise that in South Australia the legal profession were vociferous opponents of a reform which was mainly directed to 'the destruction of one of the most lucrative branches of professional practice'.[20] The *Mercury* thought their concerns were unfounded. As population increased, as trade expanded, and as 'new social interests' developed, 'the legitimate' business of the lawyer would grow. In November 1860 the *Mercury* criticised South Australian lawyers for basing their objections on casuistry and technicalities. The important issues were whether the Torrens system was:[21]

> so far as the public interests are concerned, an improvement upon the old system or not; whether it will make transactions in land as safe as it promises to render them simple and prompt; whether in the attempt to produce an absolute uniformity of title, and to establish a date beyond which no enquiries shall be carried back, it sufficiently provides for the protection of long derived rights.

The *Mercury* called for public debate on these issues before any attempt was made at reform.

The attention of the Tasmanian government was officially drawn to the advantages of the Torrens system in November 1860 when the South Australian Governor Richard Donnell sent copies of Torrens' latest Act to the Tasmanian Governor Henry Fox Young.[22] Young had been Donnell's predecessor in South Australia and was an 'esteemed friend and long-standing acquaintance' of Torrens.[23] With Young's backing, the Tasmanian government invited Torrens to Tasmania to explain his system in more detail.

Soon after his arrival in February 1861 a number of 'very influential' citizens, including 'many' leading lawyers asked Torrens to lecture on the principles of his system.[24] On 14 February Torrens lectured on 'The Conveyancing by Registration of Title' to 'a numerous and highly respectable assembly' at Del Sarte's Rooms in Harrington Street.[25] Governor Young chaired the meeting. Torrens was greeting by many with a standing ovation. He proceeded to give 'a plain business like statement' of his system. He traced the history of dealing with land from the Norman conquest and examined various nineteenth century proposals for reform in Britain and the Australian colonies. He outlined how his system operated in South Australia. He stressed that the radical part of his reform was discarding the 'derivative' or 'retrospective character of the title immediately' once the title had been 'cleared of all defects' and to

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20 *Ibid*, 24 November 1860.
21 *Ibid*.
22 Archives Office of Tasmania, Colonial Secretary's Department (AOT CSD) 1/161/5288, Donnell to Young, 2 October 1860.
23 *Mercury*, 15 February 1861.
24 *Ibid*, 12 February 1861.
25 *Ibid*, 15, 16 February 1861.

establish 'an indefeasible title in each transaction'. They should not 'palliate' or 'compromise' by 'a short form of deeds': unless they 'cut off the retrospective title to prevent future accumulation nothing would be done'. This was not antagonistic to English law as similar provisions could be found in insolvency legislation, Imperial statutes regulating the Ordnance Department, and in colonial Registration Acts. Torrens assured his audience that his system provided 'ample security against theft or forgery'.

Torrens was charitable towards the South Australian legal profession. Their opposition and obstruction was not based on 'motives of a sordid character' but on 'a superstitious reverence for old forms'.[26] He encouraged the local lawyers present to ask questions. Although there was 'a large attendance' of lawyers, including Tasmania's 'most eminent Conveyancers and the leaders of the Tasmanian Bar', not one pointed out objections or asked Torrens to provide 'further explanations'. Unless the local lawyers succeeded in presenting 'a counter manifesto', the *Mercury* predicted that Torrens' thoughtful arguments will 'very generally carry ... public opinion' and the lawyers will lose 'by default'. The *Mercury* now dismissed all objections to the Torrens system and gave it 'cordial and earnest support'. The *Hobart Town Advertiser* was impressed with the simplicity of the scheme.[27] Only a lawyer, who looked upon 'notwithstanding', 'nevertheless' and 'provided always' as 'biblical terms' would object to the Torrens system.

In Launceston support for the Torrens system was generally stronger than in Hobart. The expense and delay of the existing system were even more loudly denounced as affecting the interests of the wealthy and not so wealthy. The 'enormous expenses' of transfer precluded 'altogether the humble classes' from possessing 'a home of their own' and tended 'to depreciate the intrinsic value of property itself'.[28] Torrens repeated his lecture in Launceston on 27 February.[29] Theodore Bryant Bartley (1803-1878), perhaps Torrens' greatest supporter in Tasmania, proposed a vote of thanks to Torrens. Bartley was a farmer and large landowner, who had for some time taken a keen interest in land law reform.[30] As a founder of the Anti-Transportation League, Bartley had proved himself an implacable opponent of convictism and applied the same determination to reform of the real property laws. He estimated that conveyancing

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26 *Ibid.*

27 *Hobart Town Advertiser*, 18 February 1861.

28 *Cornwall Chronicle*, 23 February 1861; *Examiner*, 26 February 1861, letter by "A Working Man", 28 February, 9 March 1861.

29 Torrens' lecture was reproduced in *Examiner*, 2 March 1861.

30 C.E. Vickers and Y.A. Phillips, "Theodore Bryant Bartley (1803-1878)", ADB, 1 (1966), 63-64. Vickers and Phillips wrongly refer to the RPA 1862 as the *Real Property Act* 1847. For the Cressy estate see K.R. von Stieglitz, "The Cressy Establishment", *Tasmanian Historical Research Association Papers and Proceedings*, 2 (1953), 107-110.

charges in Tasmania were fifty per cent more than in England. He cited the example of the recently sold 20,000 acres Cressy estate, which cost almost £10,000 in conveyancing costs. Moreover, the cost of deeds was 'so great' that less wealthier citizens could not afford to buy a small lot on which to build a house. High conveyancing costs meant 'we actually could not do as we liked with our own land'. He proposed that at the next election 'not a single man should have their votes unless he pledged himself to do away with this system'.

Bartley was a founder of the Lands Titles Reform Association (UTRA), which was formed in Launceston after Torrens' lecture.[31] Other prominent and wealthy property owning members were William Stammers Button MLC as chairman, John Crookes MHA, and Robert de Little. A number of prominent Launceston lawyers joined the LTRA. The solicitor W.B. Campion, was secretary. Another solicitor, Robert Byron Miller agreed with the aim of securing a 'simple and cheap act of transfer of real property'. While Miller favoured the 'leading principles' of the Torrens system, he had 'many objections' to the details but would still join the LTRA.

The LTRA acted as an effective pressure group to promote the virtues of the Torrens system throughout Tasmania and countered criticism whenever it emerged. The LTRA urged the Governor and the Premier to introduce legislation immediately.[32] The Association was active during the mid-1861 elections, when 'a number of candidates' made 'the speedy adoption' of the Torrens Act a part of their platforms.[33] The voters did not let successful candidates forget their pledges. Between 16 August and 15 October 1861 both Houses of Parliament received a total of sixty-one petitions from landowners and other citizens from all over Tasmania in support of the Torrens system.[34] Torrens played his part by agreeing to draft free of charge a bill for Tasmania based on his South Australian *Real Property Act*.[35]

Despite growing public support for a thorough reform of the real property laws, the government was wary of precipitate action. The government thought it prudent to wait until the South Australian Real Property Commission, appointed in February 1861, had

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31 *Cornwall Chronicle*, 16 March 1861.

32 AOT CSD 1/161/5288, Button to Young, 22 May 1861; petition from a number of Launceston residents to the Colonial Secretary, 25 July 1861.

33 L.L. Robson, "Press and Politics: A Study of Elections and Political Issues in Tasmania from 1856 When Responsible Government was Granted, to 1871", unpublished M.A. Thesis, University of Tasmania, 1954, 107.

34 *Journals of the House of Assembly*, VI, 1861, 7, 15, 25, 33, 41, 49, 57, 71, 77, 83, 89, 101, 107, 119, 145, and 152; *Journals of the Legislative Council*, VI 1861, 9, 15, 25, 26, 31, 43, 47, 51, 52, 64 and 74.

35 *Mercury*, 19 February 1861.

completed its investigation into the working of the Torrens system.[36] Time was also needed for the public to hear what the local legal profession had to say about the Torrens system and the direction reform should take.

The main, if not sole, public spokesman for local lawyers was Joseph Allport (1800-1877).[37] Allport had received his legal training in England and had practised in Hobart since 1832. Like Bartley, Allport had been active in the Anti-Transportation movement and was a tenacious opponent. He had a reputation 'as a jurist thoroughly well read in the law of real property, and well-versed from an extensive experience in all its intricacies'.[38] The belated case for the lawyers could not have been 'more worthily represented'. Allport's response took three forms. One was to draft four bills, to which I shall return later. His other responses were to present a public lecture and to write a series of letters to the *Mercury*, which began to express reservations about the Torrens system in the latter part of 1861.

Allport gave his lecture on 31 August 1861.[39] He admitted that the real property laws cried out for reform but he wanted to 'sweep away the cobwebs without knocking down the house' and 'deprecated rash measures'. He believed that the public had 'a right to the best laws' without reference to lawyers or anyone else. The four main objectives of any real property law should be - 'safety' for the money invested; 'legal certainty' to present vexatious litigation; 'the power of disposition'; and it should be 'simple and cheap'.

In over forty years as a lawyer Allport had dealt with thousands of titles and tens of thousands of deeds but, strangely, had 'never heard of one forged deed'.[40] This was so because the purchaser had the duty to protect his 'own interests before he pays his money'. He must establish 'the identity of the property he buys and must see that he obtains a genuine signature to his conveyance'. He claimed that collusion was impossible for 'the interests of the vendor and purchaser are diametrically opposed'. Under the Torrens system 'the probability of fraud and forgery was high' because the only evidence needed for transfer of land was the memorandum of sale, 'purporting' to have been signed in the presence of a Justice of the Peace or a witness who made a declaration of the fact before a Justice of the Peace. Too much depended on the vigilance and expertise of the Registrar and his staff. Torrens had encouraged

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36 AOT CSD 1/161/5288, Henty to Button and others, 12 August 1861; Harrison, "The Transformation of Torrens's System into the Torrens System", 128.

37 H. Allport, "Joseph Allport (1800-1877), ADB, 1 (1966), 9-10.

38 *Mercury*, 3 September 1861.

39 A report of his lecture appeared in *Mercury* 2 September 1861 and the lecture was reproduced in *Ibid*, 9 September 1861.

40 *Ibid*.

'fraud and wrong, for the sake of economy'. Allport's argument was spurious as most contemporary observers believed that the Torrens system made collusion and fraud very risky.[41]

Allport made a number of other criticisms. He had a principled dislike of offering compensation 'out of any fund, or for any purpose'.[42] By establishing a compensation fund for those 'deprived' of their property illegally Torrens acknowledged the probability of fraud. Allport felt that excessive powers were given to trustees and opposed the compulsory use of short printed forms, which might not meet the requirements of the deeds. He predicted that the fees would not cover expenses and that the Treasury would have to pay the deficit, a shrewd argument to use in those economy conscious times. He had a point. In the past six years the average number of land transactions was not more than 2,000 and the fees 'barely covered' the expense of maintaining the Registry Office. Now it was proposed to set up another and 'much more expensive' Registry Office and to reduce fees. He contended that the small number of transactions would result in a fee of £3 per transaction and not the proposed ten shillings. Those who wanted the new law should bear the 'cost and risk and not seek to cast the burden on the public'.

Allport questioned the integrity of and the necessity for licensed landbrokers, who could conduct transactions for individuals under the Torrens system.[43] The Registrar, with 'his judicial powers and his high salary' was exempted from 'all care and responsibility', while the landbrokers, earning a 'miserable pittance', were 'to guarantee the accuracy, to bear the responsibility, and pay the penalties'. The system will thus be worked by landbrokers who have 'neither money nor character to lose' and not respected legal practitioners. It was also a mistake to bestow 'judicial powers' on the Registrar who 'ought to discharge only ministerial duties' - the Registrar should be a servant, not a master.

Allport gleefully attacked the claims that the Torrens system had worked well for three years.[44] Within one year the original Act was amended resulting in seventy sections being struck out, six more being altered, and ninety-six new sections being enacted. Then the two Acts were repealed and a new statute of 139 sections was passed on 17 October 1860.[45] Allport argued that they should wait until the latest South Australian government report on the system had been

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41 For example see *Hobart Town Advertiser*, 27, 31 March 1862, letters by AB.

42 *Mercury*, 2, 9 September 1861.

43 Ibid; to overcome opposition by lawyers the appointment of landbrokers was included in section 133 of the South Australian Real Property Act 1860, see Whalan, "Immediate Success of Registration of Title to Land", 419-20.

44 *Mercury*, 2, 9 September 1861.

45 For the effect of the changes see Harrison, "The Transformation of Torrens's System into the Torrens System".

completed and should never compel all lands to come under the Torrens system.[46]

In his letters published mainly in September 1861, Allport described his own proposals for reform and questioned the expertise of local devotees of the Torrens system.[47] Allport's four bills can be summarised as follows: one was 'to simplify the registration of deeds and wills, to shorten memorials, and to facilitate searches'; another extended the powers of the Supreme Court 'to the jurisdiction formerly exercised by the Caveat Board' and gave it the functions of the Irish Landed Estates Court; the third relieved persons selling land from part of the expense 'usually incurred in making out of their title to the property sold'; the final bill shortened mortgage deeds and made them 'less expensive'.[48] Collectively his measures, which some members of the government intended to submit to Parliament, would 'simplify the law and save expense to the public'.

Allport acknowledged Torrens' role in making his system to some extent work, but doubted that anyone in Tasmania possessed Torrens' 'energy, talent, devotion and experience'.[49] Few Tasmanian supporters of the Torrens system had studied the provisions of the South Australian law and would 'not understand' them if they did. Parliamentarians who had been elected after pledging their support for real property reform, did not pause to consider whether it was 'a safe or just measure' or even whether it was really 'a cheap one'. The chief advocates of reform were the landowners, who rightly wanted the transfer of property made 'as cheap and simple as is consistent with safety and conscience' but 'the bulk' regarded 'hasty and ignorant legislation' as anathema. Allport claimed to have spoken to 'many wealthy proprietors' who almost without exception opposed the compensation clauses, the powers given to trustees, and any form of compulsion. He denied that 'short sighted selfishness' was 'the only motive' behind the opposition of the legal profession.[50] The 'character, reputation, and public confidence' earnt by lawyers would be shattered if they did not warn of 'the mischief and danger of rash and ignorant legislation'.

Allport's counter-attack was challenged in ferocious terms. Launceston's *Cornwall Chronicle* likened Allport's bills to 'the ruses sometimes adopted at elections' of nominating a number of 'imbecile candidates', each with 'a few admirers', in order to weaken 'the voting power in favour of a candidate of real worth and merit'.[51] The LTRA denigrated the government for, what Bartley called, fathering 'the

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46 For an early response to Allport's lecture see *Mercury*, 10 September 1861, letter by George Wetton.
47 *Ibid*, 11, 13, 14, 16 and 17 September, 12, 14 and 16 December 1861.
48 *Ibid*, 14 December 1861.
49 *Ibid*, 16 September 1861.
50 *Ibid*, 17 September 1861.
51 *Cornwall Chronicle*, 31 August 1861.

bantlings' or 'abortions' of a private solicitor.[52] The LTRA told the government that Allport's bills in no way removed 'the great and crying evils' of the existing system of dealings in land and other real property. Only legislation based on Torrens' Act 'will remedy those evils and satisfy the earnestly expressed wishes of the community'. Bartley wrote a series of letters to the *Examiner* to counteract Allport's 'rabid denunciations' of Torrens and to further explain the need for reform in areas such as mortgages, which Allport had not fully understood.[53] The LTRA had sought the advice of lawyers on Allport's bills, which they described as 'a further mystification' of the real property laws and would *'perpetuate the vested interests of lawyers'*.[54]

In Parliament both sides had influential supporters. For the Torrens system was the Solicitor-General, R.B. Miller (1825-1902), a member of the LTRA, who introduced into the House of Assembly on 20 September 1861 the *Real Property Bill* drafted by Torrens.[55] Miller had obtained the permission of his Cabinet colleagues to introduce the bill but they were not 'committed to any responsibility on the subject'. He did not expect to pass 'any radical legislation' this session as the results of the Torrens' system had not yet been of 'a sufficiently decisive character'.

After receiving 'numerous petitions' in favour of the Torrens system, Miller moved the second reading on 24 October.[56] All of Tasmania, he said, desired the legislation 'without delay seeing the depression of the times and the necessity of the measure for their agricultural population'. Moreover, Governor Young, who had taken 'a great interest' in the subject, was about to leave Tasmania and passing the law would be 'a graceful recognition' of his services.

Immediately after Miller had spoken, the anti-Torrens system forces were mobilised by the youthful Attorney-General, W.L. Dobson (1833-1898). Dobson, who was one of Tasmania's most accomplished nineteenth century lawyers, had been a commissioner of the Caveat Board before beginning a political career.[57] Dobson introduced Allport's *Registration Bill*, not 'in an antagonistic spirit', but to improve the law for those not wishing to place their property under the Torrens Bill.[58] Dobson advocated 'free trade in conveyancing': property owners should be allowed to choose the system under which to bring their property. Miller reacted predictably. He moved that the *Registration Bill* be read a second time

52 *Examiner*, 29 August, 3 September 1861.
53 For Bartley's letters see *Ibid*, 3, 5, 10 and 17 September 1861.
54 *Ibid*, 7 September 1861 letter by Robert de Little, emphasis in original.
55 *Mercury*, 21 September 1861; "Robert Byron Miller (1825-1902)", ADB, 5 (1974), 253-4.
56 *Mercury*, 25 October 1861.
57 E.M. Dollery, "Sir William Lambert Dobson (1833-1898)", ADB, 4 (1972), 78-79.
58 *Mercury* 25 October 1861.

in six months. He objected to measures which perpetuated 'a dying system'. He wanted 'a cheap system of conveyancing' to benefit 'the poor man'. To raise the issue of free trade was simply 'specious'.

Dobson was supported by key men in the government. The Premier, T.D. Chapman, wanted the 'experimental' Torrens system to be 'permissive' and not compulsory. The *Registration Bill* would simplify mortgage deeds and help many landowners. Dr Henry Butler, MHA for Brighton and a wealthy doctor, argued that, if two systems were to operate, 'let them both be as perfect as possible'. Some misguided souls might regard such arguments as logical and sensible but they failed to sway the House, which voted seventeen votes to seven for Miller's motion. This overwhelming defeat showed the strength of the pro-Torrens forces. Dobson accepted the inevitable and withdrew Allport's four bills. On 28 October Miller's *Real Property Bill* was referred to a Select Committee for detailed scrutiny.[59]

Allport lamented that, although his bills had been 'sanctioned by the approval of the Attorney-General and of many experienced lawyers', they were contemptuously dismissed 'without examination or inquiry' by Parliament.[60] Of the seven members of the Select Committee, only Miller 'can be even suspected of possessing any knowledge' of real property law. Allport maintained his rage against 'the principle of State Aid to conveyancing' but his opinions were not totally dismissed. The *Mercury* reported that on 7 and 14 December 1861 the London *Solicitor's Journal* praised his analysis, by claiming that nothing had been published on the registration of titles that contained 'so masterly an exposition of its difficulties and dangers'.[61]

By January 1862 many of these 'difficulties and dangers' had been ironed out. On 16 January the report of the Select Committee on the *Real Property Bill* was adopted by a very thinly attended House of Assembly.[62] Debate on the bill raised surprisingly few areas of controversy. An early dispute concerned the title of the head of the Lands Titles Office. Solicitor-General Miller favoured the title Registrar-General to give the office 'pre-eminence' over the Registrar of the Supreme Court and the Registrar of Births, Deaths and Marriages.[63] Attorney-General Dobson disagreed and after discussion the title Recorder of Titles was accepted. Miller wanted 'a first class man' as Recorder and suggested a salary of £1,000 per annum.[64] But this was reduced to £600 on the deciding vote of the Chairman of Committees. The government, according to J.D. Balfe,

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59 *Ibid*, 29 October 1861.
60 *Ibid*, 14, 16 December 1861.
61 *Ibid*, 26 March 1862.
62 *Ibid*, 17 January 1862. A copy of this Select Committee report has not been located.
63 *Ibid*.
64 *Ibid*, 21 January 1862.

had tried to persuade Torrens to accept appointment as Recorder but he declined.[65]

Much debate centred on whether the Torrens system should be compulsory. Robert Patten Adams, member for Hobart, who had been trained as a conveyancer in Chancery Lane and was Solicitor-General from 1867-1887, led the opposition, backed by Dobson.[66] They wanted the compulsory clause 13 struck out.[67] Existing landowners who were compelled to place newly acquired property under the Torrens system would hold their land 'under two different titles'; should it be let, two forms of lease would be required and it would lead 'to interminable confusion both in the sale of the land and its devise'. Miller accused Adams (and other Hobart lawyers) of doing 'all he could by hook and by crook to prevent the bill coming into the House at all, and now it was here he wished to emasculate it'.[68] If the bill was made permissive, Miller argued that it would take 'the very life and soul' out of the bill. He was willing to concede, however, that clause 13 should only apply 'to all lands not yet alienated from the crown'. Adams' motion was accordingly lost by seventeen votes to one. The unanimity of the vote surprised the press as at least twenty-five members had earlier opposed all compulsion.[69] Some opponents such as Attorney-General Dobson simply left the chamber rather than expose their 'convictions to ... popular clamour'.

Apparently no attempt was made to include clauses on landbrokers, perhaps in deference to Allport. Two new clauses were added to the bill. Clause 67 made the Recorder of Titles a trustee or 'official protector of the settlement of the will of the proprietor'.[70] This clause was inserted to meet one of Allport's 'objections'. The other new clause 131 provided that any 'costs, charges, or expenses' incurred by the Recorder as a trustee would be paid out of the Assurance Fund. The final change was, on Adams' motion, to remove from the preamble references to the 'losses, heavy costs, and much perplexity' suffered by colonists under existing laws, which were 'complex, cumbrous, and unsuited' to their requirements. The excessively sensitive Adams described these words as 'a libel on the profession'. Miller pointed out that the words referred to the law not lawyers but if Adams wanted 'the pill to be gilded' he would withdraw the words.

In the Legislative Council opposition was exiguous. T.G. Gregson complained that he had 'never seen' a 'worse drawn' bill:

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65 *Ibid*, 6 September 1862.
66 E.R. Pretyman, "Robert Patten Adams (1831-1911)", ADB, 3 (1969), 16-17.
67 *Mercury*, 17 January 1862.
68 *Ibid*, 17, 21 January 1862.
69 *Ibid*, 22, 23 January 1862; *Hobart Town Advertiser*, 21 January 1862.
70 *Mercury*, 21 January 1862.

some explanations and sections were 'inconsistent' and the bill, he predicted, would not secure 'a safe title'.[71] Some members wanted the second reading postponed for two days to give more time to scrutinise the bill. W.S. Button, a pillar of the LTRA, argued that postponement would jeopardise the chances of enactment this session as the Governor might prorogue Parliament any day.[72] The motion for postponement was defeated by seven votes to five. Others wanted the 'errors' corrected before the bill was passed but this was not accepted.[73] The *Real Property Bill* passed through the Legislative Council without amendment on 30 January 1862 and the news was received with cheers in the House of Assembly. There was little doubt, however, that any measure benefiting landowners would be passed by Parliament as both Houses were filled with 'landed proprietors or their representatives'.[74] The *Real Property Act* came into force on 30 June 1862 with William Tarleton (1820-1895) as first Recorder of Titles.[75] Tarleton, who had been Police Magistrate for Hobart since 1857, was a respected public servant but not a lawyer.

While admitting the advantages of the Torrens system, the *Mercury* doubted the expediency of making 'so radical and momentous a revolution in the law of real property' with such speed and with little discussion.[76] The *Hobart Town Advertiser* had no such qualms. Real property law reform accorded with 'the spirit' of the age, which seemed determined 'to sweep away all antiquated monopolies and mischievous privileges' in the name of 'common sense'.[77] Tasmanians were no longer 'compelled to believe that law must be good because it is dear' or that to secure a title the cost of transferring land 'should sometimes equal the whole amount of its value'. Like the Reform Bill and the repeal of the Corn Laws in England, the *Examiner* believed that the *Real Property Act* will 'rescue' real property in Tasmania from 'a cruel, crushing, and costly despotism', which gave lawyers 'a vested right in the acres of everybody'.[78] The Torrens system will help 'to revolutionize society' and will 'greatly benefit those who have dealings in landed property' from the smallest to the largest landowner.

Exuberant press support was crucial to the acceptance of the Torrens system. But a system purportedly so simple and cheap was

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71 *Ibid*, 25 January 1862.

72 Button later noted that if there had been another day's delay the bill would have been lost for the session, *Examiner* 8 July 1862.

73 *Mercury*, 31 January 1862.

74 Robson, "Press and Politics", 97-8, 145-7.

75 *Mercury*, 8 July 1895; *Journals and Printed Papers of Parliament*, 1892, paper 64, Retirement from Office of William Tarleton, Esquire, Police Magistrate, Hobart. Tarleton refers to his 'ignorance' of the law of conveyancing in *Journals of the House of Assembly*, XIII, 1866, paper 41, Succession Duties: Correspondence with the Lands' Titles Department.

76 *Mercury*, 26 March, 26 June 1862.

77 *Hobart Town Advertiser*, 4 February 1862.

78 *Examiner*, 13 February, 1 July 1862.

bound to have wide appeal in new colonies where many either owned land or aspired to land ownership.[79] The Lands Titles Reform Association also played an important part in publicising the advantages of the Torrens system and urging successive governments to legislate. Torrens' lectures and practical help in drafting legislation won many converts. Two other individuals deserve mention. Theodore Bartley for some time 'stood almost alone' in advocating the Torrens system despite much 'obloquy' and the opposition of 'even his friends'.[80] R.B. Miller's role in pushing the bill through Parliament clinched victory.[81] Other helpful factors included the absence of public judicial opposition as occurred in South Australia and the divided opinion of lawyers (the pro-Torrens stance of the Northern lawyers and the anti-Torrens stance of their Southern counterparts gave a new slant to the term divided profession). No Law Society existed to match the organized voice of the Lands Titles Reform Association.[82] But the lawyers did not submit 'quietly to their defeat'.[83] When both Houses offered their thanks to Torrens in September 1862, grumblings surfaced.[84] Only in 1895 could the Recorder of Titles confidently report that no lawyer was 'actively opposed' to the principles of the Torrens system.[85] How the opposition of lawyers manifested itself and how the Torrens system worked in practice will be dealt with on another occasion.[86]

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79 Whalan, "Immediate Success of Registration of Title to Land", 423.
80 *Examiner*, 4 July 1862.
81 *Mercury*, 26 June 1862.
82 The Southern Law Society was not formed until 1888 see *The Cyclopedia of Tasmania*, 1, Hobart: Maitland and Krone, 1900, 295-6.
83 *Hobart Town Advertiser*, 8 May 1862.
84 *Mercury*, 5, 6 September 1862.
85 *Journals and Printed Papers of Parliament* 1896 paper 26, Report of the Recorder of Titles for 1895, 4.
86 It is proposed to write a collection of essays on the history of land law in Tasmania under the editorship of Rick Snell, Faculty of Law, University of Tasmania.