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A COMPARISON OF THE AUSTRALIAN (' TORRENS ') SYSTEM OF LAND REGISTRATION OF 1858 AND THE LAW OF HAMBURG IN THE 1850S

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I INTRODUCTION[1]

The origins of the Torrens system of land registration introduced in South Australia in 1857-58, which later spread to other parts of Australia and the world, have been the subject of a great deal of debate over the years.[2] The debate has tended to concentrate on the sources available in the English language. Based on these sources, some scholars have put forward the view that the Torrens system is an entirely indigenous South Australian invention, developed by Sir R R Torrens without any help from outside sources.[3] Others, however, have asserted that Torrens received significant help from Dr Ulrich Hübbe,[4] a German lawyer from Hamburg who emigrated to South Australia in 1842 and died there in 1892, and who was consulted by Torrens in the preparation of the original draft of 1858.[5] Such views are given considerable force by assertions such as that in the South Australian Parliament during the debate on the request by Torrens in 1880 for a further pension from the colonial government based on his invention of the system that:

> it was perfectly well known at the time that Sir R R Torrens brought in the *Real Property Act* that Dr Hübbe provided the ideas, the brains and the work of the measure.[6]

Hübbe, as stated, was a German lawyer who was present in South Australia throughout the process of development and refinement of the Torrens system and who was familiar with the land law of his native city, Hamburg.[7] He had written a book, *The Voice of Reason*,[8] which was published in 1857 and promoted reform of the system of land transfer along the lines of the law of Hamburg.[9] In the first reform of the Torrens system, passed only three years after the original Bill was enacted in 1858 and after grave defects in the original enactment had been discovered,[10] Hübbe provided a detailed description of the system of land tenure in Hamburg at the request of Parliament for its consideration.[11] However, this article aims to investigate the possibility that Hübbe had contributed to the development of the system even before the first enactment had been passed. It will be shown, on the basis of a comparison of the system of 1858 with the law of Hamburg, that this explanation, at the very least, cannot be ruled out.

It is part due to the gaps in the original materials that the debate about the origins of the Torrens system has never been resolved one way or the other.[12] Space does not permit here a review of all the original sources, although some of the German-language materials available in South Australia still remain to be examined.[13] This article will instead consider similarities between the systems of Hamburg and South Australia which point to a common origin. While it may be that Torrens based his first draft of a system of land registration on the *Merchant Shipping Act* 1854 (Imp), the similarities between his system and that of Hamburg make it likely that he received assistance from Hübbe in drafting further versions of the proposed system before its introduction into and passing by Parliament in 1858. This is especially so given that the concepts of conclusiveness of the register and of indefeasibility of title were present in Hamburg's land law in the 1850s but not in the Imperial statute.

Analysing the law of Hamburg as it existed in 1858-1861 is by no means an easy task, as that system of land registration is now forgotten: not only was it altered soon after 1861 in various important respects;[14] it was entirely replaced by a completely different system when the federal German Civil Code came into operation in 1900.[15] By undertaking a comparison between the system in Hamburg and that in South Australia, it will be possible to determine whether the assertion that the law of Hamburg played an important role in the establishment of the Torrens system could possibly be true. We shall see that the law of Hamburg differed in at least one important respect from the Torrens system as it emerged in South Australia. However, it will be argued that this can be explained by the normal process of adaptation involved in the transplantation of a legal reform from one system to another.

Thus, while the question of the extent to which the Torrens system was in fact based on the law of Hamburg cannot be answered here, as that would require a full review of the available sources, the assertion that the law of Hamburg played a significant role in the creation and refinement of the Torrens system is one that cannot be dismissed as improbable.

In establishing the possible need for adaptations of the Hamburg system by the South Australian drafters, it has to be taken into consideration that Hamburg's land law lacked a consolidating statute. Whalan's assertion[16] that there was a Hanseatic code which could have been simply translated from German into English and used as the basis of the Torrens system is therefore incorrect. It is obvious that a comparative analysis cannot ignore the difference in the forms in which the law appeared in Hamburg and South Australia. Whereas the Torrens system was originally enacted in a single statute,[17] Hamburg's land law system was not. Rather, it was a conglomerate of ordinances ('Rath- und Bürgerbeschlüsse') and city council decisions ('conclusa')[18] accompanied by customary law which went back as late as the early seventeenth century.

This is of considerable importance when comparing Hamburg's law with the Torrens system, as one cannot compare the Australian statute with another single statute. Rather, the law of Hamburg may be found most conveniently in textbooks of the time.[19] The original statutes, the ordinances and city council decisions, were far too numerous to provide a practical guide to the law in question.[20] If people at the time wanted to know something about Hamburg's land law, they were obliged to consult either a professional lawyer or at least a contemporary textbook. There were at least two such textbooks in South Australia of which Dr Hübbe might have made use on the assumption that he was involved in the drafting of the *Real Property Act*.[21] His descendants, however, report that most of that material was destroyed in a flood which damaged his whole house and in particular the cellar where his material was stored.[22]

It is evident that the transfer of an entire legal system from one country to another is not simply a task of linguistic translation. Rather, the process of transplanting a whole legal system is likely to go hand in hand with an adaptation process. The adaptation processes which might accompany the adoption of legal systems require further explanation. In order to function, a legal system must become a living part of the overall body of law into which it is transplanted. The main task is therefore to adapt the transplanted system as well as possible so that it operates as smoothly as it did in its original home. Since the comparative legal analysis undertaken here attempts to trace the possible transfer of Hamburg's land law system to South Australia, such an adaptation process should be taken into account.

First, however, it is necessary to reconstruct the law of Hamburg as it existed at the time of the development and refinement of the South Australian reform. The major difference between the law of Hamburg and the Torrens system — the omission from the latter of a court proceeding essential to valid registration — will then be analysed. Finally, a comparative examination of the features of the system in Hamburg which did survive the transition to South Australia will be conducted based on the conclusion that the omission of a court stage is explicable without abandoning the hypothesis of an adoption, in whole or in part, of Hamburg's law in South Australia.

II AN OVERVIEW OF HAMBURG LAND LAW IN THE 1850S AND EARLY 1860S

Nineteenth-century Hamburg land law is almost certainly unknown to most scholars even in Germany itself.[23] First, therefore, the essential features of the law of Hamburg must be analysed. In addition, a general overview of the system of transfer of land in nineteenth-century Hamburg will lay the groundwork for the subsequent comparative analysis of basic institutions and principles.

A *The Court stage in Hamburg law and its part in a three-stage process of transfer of land rights*

Even under the original version of the Torrens system as enacted in 1858, the parties to a dealing in land were able to register the dealing immediately after making the contract and executing the memorandum of sale.[24] Thus, the transfer of land comprised two stages: the first stage, which took place between the parties (contract/memorandum of sale), and the second stage, which was the registration of the transfer in the land register. This two-stage process was and still is the basic principle of the Torrens system. It was different under mid-nineteenth-century law in Hamburg. There, it was also necessary to execute a contract and have the transfer registered.[25] While the process of contracting and registration were of course different in detail, they were at least the same institutions as were found in the Torrens system. However, between making the contract and registering the dealing, the parties were required, under the law of Hamburg, to participate in an act in court, called the 'Verlassung'.[26]

This was a traditional legal technical term which, given its archaic nature and precise meaning, it is difficult to translate in any meaningful way, but which could be translated roughly as 'abandonment'. One can therefore distinguish three stages of a dealing in land under the law of Hamburg. The first stage was the contract between the parties;[27] the second stage was the procedure in court, ie, the 'Verlassung'; and, finally, there was the third stage, the registration, which concluded the process and validated the transfer. Since the stages in the procedure in Hamburg and South Australia differed because of the addition in Hamburg of the court stage, the analysis in this section is mainly concerned with that stage. The description uses as its major source Anderson's textbook, because that book was available to Hübbe at the relevant time.

B *The court stage ('Verlassung') in Hamburg's law*

The court stage took place in a local court. In his textbook on Hamburg's land law, Anderson listed the specific courts and their areas of competence relative to the districts of Hamburg.[28] These courts dealt with the 'Verlassung' (court stage) only at certain times during the year as determined by a Hamburg statute of 1605.[29] According to this statute, the 'Verlassung' had to be held once a month except in February, June, August and November (when it was not held at all).[30] The 'Verlassung' had to be scheduled for a Friday following a declared religious holiday.[31] After having made a contract relating to the transfer of rights in land, the parties therefore had to wait for the next scheduled 'Verlassung' in the court of their district. It was thus hardly possible to agree on a dealing and then have it registered the very next day.

The fact that the statute regulating the times of the 'Verlassung' (court stage) was dated 1605 shows that the concept was very old. The archaic term 'Verlassung' derives from the fact that the original proprietor was required to 'abandon' his or her land symbolically and hand it over to the new proprietor.[32] In accordance with its antique origins, the 'Verlassung' was subject to a set

of traditional formal rules that regulated the procedure. In order to have a valid 'Verlassung', a distinct number of members of the city council had to be present,[33] including the mayor to represent the city community.[34] Only when the required number of members of the city council were present did the court session start. Sessions were all scheduled for 10 am, but the public were admitted to the court room only if the necessary number of city council members was present.[35] Not only were the parties involved in the dealings allowed to participate in these court sessions, but also everybody who was interested in land dealings in general could do so, as could the simply curious.[36] The unlimited access of the public was a basic feature of all court involvement in the transfer of land in nineteenth-century Germany.[37]

After the public were admitted, the court clerk ('Schenke')[38] opened the session. The parties involved in the dealing had to come forward, announce the intended transfer of land rights and ask the court for confirmation of the transfer.[39] This was the main act of the 'Verlassung' and was called 'Ausrufung', ie, the proclamation/declaration of the intended land dealing in court.[40] The 'Ausrufung' thus supplemented the private agreement of the parties in the earlier contract and represented a declaration of the intended transfer to the public. This accommodated the public interest in knowing the identity of the proprietor of the land. The contract and the 'Verlassung' therefore supplemented each other.

The court stage regulations did not furnish the parties with an exact set of words for the proclamations, although they did have to contain some basic words to make the dealings valid.[41] Anderson pointed out that, in every proclamation of a transfer of property rights, there had to appear the words 'verläßt' (he/she leaves) or 'verlassen' (they leave). If these words did not appear at some point the proclamation and thereby the transfer were invalid. Anderson, therefore, gave examples of the right wording for the most important dealings. An example is the wording for the transfer of absolute ownership in land (the interest corresponding in Anglo-Australian law to the fee simple absolute)[42]:

N.N. verläßt sein Erbe (Kathen, Garten usw.) an N.N. der bittet um Friede und Bann.

N.N. leaves his heritage (buildings, gardens etc.) to N.N. who seeks quiet enjoyment thereof.[43]

Some land was, however, exempted from the need to go through a 'Verlassung'.[44] Anderson listed 4 cases of such 'exempt land':[45]

1) land close to dams and dykes;

2) land which had always been public property of the city;

3) land governed by the monastery of St. Jonas; and

4) land belonging in trust to the forests of the aristocrats.

Such land was not subject to the 'Verlassung' but had to be registered in the respective register books in order to validate a transfer.[46] In these cases the transfer of land consisted of basically two stages.

C *Minutes of procedure ('Verlassungs-Protocolle') and the right of objection (Widerspruchsrecht)*

After the parties had made their respective 'Ausrufung' (proclamation/declaration) in the prescribed way, it was recorded on so-called 'Protocolle'.[47] The 'Protocolle' were the minutes of the procedure which recorded the proclamations in writing. These 'Protocolle' were of central importance to the whole 'Verlassung' since they were the basis for the later registration.[48] They established conclusively what had been proclaimed by the parties in the 'Verlassung'. Only what had been recorded in the 'Protocolle' was eventually allowed to be registered.[49] Thus the 'Protocolle' were the binding link to the third stage of the transfer of land, ie, the registration of the intended dealing. At the very end of the 'Verlassung', when no more parties came up to have any transfer proclaimed and the 'Protocolle' had been drawn up for all the proclaimed dealings, the

court clerk came up to announce the closing of the 'Verlassung'. Before the 'Verlassung' could be closed, however, the court clerk had to ask formally if there was anyone else who wanted to proclaim anything.[50] If no one else presented him/herself, the mayor of the city concluded the court session by recapitulating all the proclaimed dealings briefly.[51] Only then was the 'Verlassung' complete and the court session could be closed.

The purpose of the 'Ausrufungen', ie, the proclamations of the intended land dealings as well as their repetition by the mayor, was not only to give general notice to the public. These devices also were designed to inform persons with specific estates or interests in land about dealings taking place, so that they might have the chance to object before those dealings became valid. Hamburg's law provided an appropriate legal institution, called the 'Widerspruch' (objection) for such possible objections.[52] Often the Latin term 'Inhibitorium' was used as a scholarly term.[53] A person had the right to object to a dealing if it endangered his or her property rights (such as by transferring mortgaged land). The 'Widerspruch' (objection) was only valid if it was noted on the respective 'Protocoll' (minute).[54] If the objection did not appear on the 'Protocoll', registration could take place and validate the dealing.[55] In order to have a 'Widerspruch' recorded on the 'Protocolle', the objector had to obtain an order from the 'Obergericht' (Supreme Court).[56] This order was called a 'Commissorium' and ordered the registration to be suspended.[57] The 'Commissorium', however, was granted only if the objector could show a right to object ('Widerspruchsrecht').[58]

The procedure of obtaining a court order took time, and Hamburg's law therefore provided that all registrations were to be suspended until the following Monday after the 'Verlassung'.[59] This time frame enabled a person to obtain a court order and to have an objection ('Widerspruch') noted on the 'Protocoll' (minutes). The requirement of suspending registration during the initial period after the 'Verlassung' was based on a city ordinance of 1619 ('Bürger-Convent vom 28 Januar 1619').[60] The eventual effect of a recorded and successfully justified 'Widerspruch' was that the Court's 'Commissorium' prevented the registration of an intended dealing.[61]

It can be seen that, in contrast to the two-stage Torrens System, the transfer of land in Hamburg provided an additional intermediate stage in court. After having made the contract, the parties had to proclaim their dealings in a court open to public. Those proclamations were recorded on the minutes of procedure of the court session. The registration then took place after a certain period of time unless an objection had been noted in the relevant minutes. The registration then validated the intended transfer of rights. This basic compulsory procedure, however, was supplemented by a set of optional customary rules which seem to have been designed to mitigate some disadvantages of the procedure. These customs are described in the following paragraphs.

D *The customary use of 'lists' from the registry office (Stadtschreiberey)[62] in connection with the court stage*

The customs attached to the transfer of land were important to Hamburg's land law because it was not only based on statutory law but also on the steady transfer of customs into enforceable rules of customary law. Of course, this was a long process, which unfolded throughout the centuries. In any case, in the absence of a consolidating statute, customs played an important role. A considerable part of the procedure described above is based on such established customary law and not statutory law, ie, ordinances or decrees of the city council. An important custom which was in the process of turning into enforceable law at the beginning of the nineteenth century was the optional use of 'lists' in connection with the court stage.

The lists were drawn up by the registry office (Stadtschreiberey) before the 'Verlassung' took place.[63] They were intended to facilitate the 'Ausrufung' (proclamation) by establishing the most important details of the future proclamations beforehand. Immediately after having made a contract the vendor could go to the 'Stadtschreiber' (town clerk) and have him write down the essentials of the later court proclamation in the list provided for the forthcoming 'Verlassung'. Since the town clerk could copy the particulars of the rights in land in question out of the 'Stadterbebuch' (city hereditaments book, ie, Hamburg's register book), mistakes during the actual ceremony could be almost entirely excluded.[64] The list therefore precisely reflected the dealings as they were intended by

the parties.

After a certain time had elapsed, the lists drawn up in the registry office were given to a special civil servant at the court, called the 'Pronotarius'.[65] Since the 'Pronotarius' (secretary of minutes)[66] had all the details of the upcoming proclamations already written on the lists, he was able to draw up the 'Protocolle' (minutes of procedure) before the 'Verlassung' had even started.[67] The use of the lists affected the whole procedure in court. When the parties to the dealings had chosen to make use of the lists of the registry office, they had to make their proclamation in court by reading the 'Protocolle' which had been made according to the list.[68] This rule reversed the 'normal' relationship between the 'Ausrufung' (proclamations) and the 'Protocolle' completely. Originally the 'Protocolle' were meant to merely record what had been officially proclaimed. Using the 'lists' of the registry office, however, the pre-drawn 'Protocolle' determined the content of the 'Ausrufungen' (proclamations).

Notwithstanding that the use of the lists and their conversion into 'Protocolle' before the 'Ausrufung' was merely optional to effect a valid transfer of land rights, this procedure was chosen by most parties. Using lists had become a very common and established custom by the mid-1850s.[69] This is underlined by the fact that the registry office had introduced a separate fee for entry on the list.[70] The strong advice in Anderson's textbook[71] to make use of these lists also shows that they were widely acknowledged. Even though the use of lists was not obligatory in Hamburg's law at the beginning of the nineteenth century, rules developed which encouraged, indeed almost enforced their use. It was the rule that all parties who were not entered in the lists and therefore could not produce a pre-drawn 'Protocoll' (minute) had to wait until the very end of the court session before they were allowed to proclaim their dealings.[72] On the other hand, all parties who could produce a pre-drawn 'Protocoll' were allowed to make their 'Ausrufungen' (proclamations) at the beginning of the 'Verlassung'.[73] It also proves that the custom of using lists was very much the rule at that time, while conducting the court stage without the preliminary participation of the registry office had become the exception. This, in turn, shows that the 'Verlassung' had become an empty ceremony.

E *The customary assignment of 'Procuratoren' within the court stage*

Another custom which contributed to the gradual realisation that the 'Verlassung' was losing its original purpose as an opportunity for the parties personally to appear in court was the assignment of special public servants in the course of the 'Verlassung'. These special public servants were called 'Procuratoren'[74] and their main function in the transfer of real property rights was to act on behalf of the parties involved in the dealing by making the 'Ausrufung' (proclamation) for them. Instead of appearing in court themselves, the parties were allowed to empower a 'Procurator' (official representative)[75] to do so.[76] It was up to the parties whether or not to employ a 'Procurator'. The 'Procurator' had to be an officially authorised public servant.[77] The 'Procuratoren' were therefore a distinct professional group of public servants who maintained an exclusive right to act on behalf of parties in the transfer of real property rights at the court stage.

This limitation on the choice of representatives applied only to the court stage. The first stage of the transfer of real property rights, ie, the act of contracting, was not embraced by this rule.[78] This follows mainly from the fact that representation in court had a different function from representation in negotiations. Being represented by a 'Procurator' (official representative) in court was more of an administrative help to the parties. The task of the 'Procurator' was merely to proclaim a predetermined declaration in court.[79] He might have to put the declaration in the formally correct words, but he had no influence whatsoever on its actual content. Thus the 'Procurator' is not to be mistaken for an agent. Anderson made no comment on the number of dealings a 'Procurator' was usually responsible for. One can, however, assume that one 'Procurator' took care of several dealings and thereby represented several parties as it would not have made much sense to have special public servants appointed if they could only conduct the court dealings on a one-to-

one basis. Given that a 'Procurator' took care of several dealings, that clearly facilitated the 'Verlassung' (court stage) enormously. Instead of hundreds of laypeople, just a handful of professionals were present.

The assignment of a 'Procurator' when the entry in the list was made at the registry office very much served the convenience of the parties. With one visit to the registry office, they made sure that their business was taken care of professionally, and they also did not have to go through the tiresome procedure themselves. Since there were only a few 'Verlassung' ceremonies throughout a year, every court session had to deal with many 'Ausrufungen' (proclamations). These court sessions would have been quite crowded if every party appeared in person. It is understandable that the parties did not want go through all this only to speak aloud a few declaratory sentences after waiting an indefinite time until it was their turn.

Using a 'Procurator' also ensured that the 'Ausrufung' was conducted in the correct formal manner. Anderson points out that even though everyone had the right to proclaim their dealings themselves, the bulk of the parties assigned 'Procuratoren' to act on their behalf.[80] Accordingly, when the city council members had gathered together and the court sessions were opened, mainly 'Procuratoren' came in to do the 'Ausrufungen'.[81] Indeed, it was openly discussed whether it should be forbidden altogether for laypersons to do their own proclamations.[82] This would have required the repeal of Hamburg's rules of court of 1711 ('Neue Gerichtsordnung von 1711 Tit. LVI, Art. 7'), which provided an express right for everyone to appear in court themselves.[83] Anderson pointed out, however, that there were some districts in which that old law did not apply and which had already made the rule that only 'Procuratoren' were allowed in court.[84]

Following from the above discussion, the usual mode of proceedings can be summarised as follows. After the town clerk had recorded the dealings of the parties in the lists, a 'Procurator' was charged with carrying out the court stage.[85] The list was then passed on to the 'Pronotarius' (secretary of minutes) who turned it into pre-drawn 'Protocolle'.[86] Each 'Protocoll' dealt with a separate transaction. In the court sessions the pre-drawn 'Protocolle' were read out by the 'Procurator', who was charged with the respective dealings.[87] After the 'Protocolle' were proclaimed in the 'Verlassung', they formed the basis for the consequent registration of the dealing.[88]

F *Compelling reasons to remove the court stage in Hamburg's land law*

The mutual relationship of the 'Verlassung' (second stage) and the registration (third stage) in Hamburg's real property law at the beginning of the nineteenth century must be understood as the result of a steady evolutionary process. These concepts did not coexist from the very beginning of Hamburg's land law. Even though it is not within the scope of this article to trace back the history of Hamburg's land law to its first recorded times in the twelfth century, it is important to note that the concept of proclaiming dealings publicly was developed at a very early stage. The custom of registering the land dealings in separate register books, on the other hand, came later and supplemented the 'Verlassung'.[89]

The original purpose of the 'Verlassung' was to effect the transfer of real property rights and simultaneously to give notice of the transfer to the public.[90] Accordingly, the stage of public proclamation, ie, the court stage, was originally the final stage of the transfer of real property rights. Thus before registration supplemented the procedure, Hamburg's land law had only a two-stage process. At that time the court stage was the essential part which concluded the transfer.

By the beginning of the nineteenth century, however, registration was established as the essential part which concluded the transfer of real property rights. Hence registration had taken over the function of the 'Verlassung' in this respect.[91] Despite this change, the 'Verlassung' was not abolished, nor was its formal procedure adjusted in any way. Even though the 'Verlassung' no longer operated so as to immediately transfer the rights in land and had degenerated to a mere preliminary stage, it was conducted without much alteration. This was chiefly a matter of custom and not because the 'Verlassung' was nevertheless indispensable for other reasons (for example, the making public of the dealing). Hamburg was by this time a large city, and any value in publicly proclaiming

transactions in the hope that all concerned would hear of them had long since disappeared.

The chiefly symbolic nature of the ‘Verlassung’ is clearly indicated by the formal procedure at the closure of the court sessions.[92] The traditional rules of procedure provided that, after all parties had proclaimed their dealings, a certain phrase had to be spoken to conclude the ‘Verlassung’ [93]:

So entwältige ich allen denjenigen, die auf gegenwärtiger Verlassung Immobilien aufgerufen haben, und bestätige sie wieder an die künftigen Besitzer von Erben zu Erben, und gebe Frieden und Bann zum ersten, zum anderen und dritten mal.

A literal translation of this archaic sentence is:[94]

So I deprive everyone, who has proclaimed land at the present ‘Verlassung’, and confirm it again to the future possessors from heir to heir, and I give quiet enjoyment, for the first, second and third time.

The speaker had to touch a sword while speaking these words. Anderson points out that until the end of the eighteenth century the sword had played a more active role. At that time the phrase had been said after every single ‘Ausrufung’ (proclamation/declaration) whilst the sword was beaten on a table three times (‘for the first, second and third time’).[95]

The symbolic wording clearly reflected the traditional function of the ‘Verlassung’ as the concluding act for the transfer of rights. Taking away the land rights from one person (‘I deprive...’) and conferring them on the future possessor described the transfer of rights vividly. The sword symbolised this act and the power of the state which lay behind it.

After the development of a system of registration of title in Hamburg, the ‘Verlassung’ and registration coexisted for some time. This was despite the fact that, over time, the system of registration made the ‘Verlassung’ entirely redundant. When registration first arose in addition to the ‘Verlassung’ in Germany, its purpose was merely to evidence what had been proclaimed.[96] Since the land rights were transferred in the ‘Verlassung’ itself, registration only attested the particulars of the already concluded transfer. The custom of registering the ‘Ausrufungen’ (proclamations) had evolved out of the custom of issuing deeds for every ‘Ausrufung’. In the beginning every deed was handled separately. Later the deeds were bound into books, which were the predecessors of the register books. Whereas at first registration of the ‘Ausrufungen’ had only evidential purposes, it eventually evolved into the essential validating part of the transfer of real property. When there was no entry of a dealing in the register books, it followed conclusively that there had been no ‘Verlassung’ and thus no transfer of rights at all.[97] In other words, the entry in the book validated the transfer. This change in function of the registration went hand in hand with the increasing need of society for security within land dealings.[98] In order to check whether a transfer had taken place and what particulars had been agreed upon, one could easily look up the relevant registration. Once the advantages of writing down the transfer and attributing conclusiveness to such records had been acknowledged, this act came to be regarded as the crucial act in the whole process.

Even though the ‘Verlassung’ was no longer the essential act within the transfer of real property rights, at the beginning of the nineteenth century it was still the only public event of the whole procedure. Everyone who was interested was invited to attend the ‘Verlassung’.[99] Whereas the first stage of transfer of rights (the contracting) and the third and concluding stage (the registration) were executed in the absence of the public, the second stage (the court stage) evidently had the purpose of involving the public. However, the growing use of written records also made this purpose redundant, as anyone who was interested in the ownership of land needed only to consult those records and would be unlikely to attend at a ‘Verlassung’. And then written records came to be used to determine the procedure at the ‘Verlassung’ in advance as well.

The above analysis shows that the court stage in Hamburg's law at the beginning of the nineteenth century had become superfluous. Its original function of transferring rights in land was now carried

out by registration, which initially had had a merely evidential function. A system of transfer by registration had arisen.

G *The court stage as a defect in Hamburg's system*

The fact that Hamburg's court stage was no longer indispensable to the working of the system does not necessarily mean that it had to be removed from the proceedings. A system that is based on customs and inherited rules inevitably carries to some extent redundant regulations. Matters are different, however, when the regulations have become a burden on the overall system. In such cases, any reasons for maintaining the custom out of mere tradition are likely to be outweighed by the need for change. This was the case in Hamburg at the beginning of the nineteenth century in relation to the 'Verlassung', because it had become not only superfluous but also a defect in the system of transferring land rights. Anderson's book alerts us to these defects by giving advice about the risks connected to them. [100] Every risk connected with the system reflected a defect of the system that made dealings insecure, at least to the extent that the risk was unnecessary because the procedure with which it was connected was also unnecessary. As Dr Ulrich Hübbe used Anderson's book, he must have been aware of these risks and problems.

A seemingly obvious defect of the court stage is described by Anderson on the first few pages of his book[101]. He draws attention to the fact that the procedure was mainly conducted orally. The problem with every oral procedure is the possible risk of inaccuracy and misunderstanding. Anderson displays this problem vividly with the example of an inaccurately recorded name.[102] He gives an impressive list of cases in which names had been confused. The consequences of such inaccuracy were quite far-reaching in Hamburg's law. Once the proclamations had been recorded in the 'Protocolle' (minutes) and accordingly registered, the mistakes were perpetuated. The result then was either that the transfer had not taken place at all or that it took place, but not as intended. This followed from the strict conclusiveness of the register. This is no doubt the reason why pre-drawn lists were often used and special experts were employed to carry out the prescribed procedure.

Another defect of the 'Verlassung' – one that could not be mitigated by any customary rules – was that it greatly prolonged the duration of the process of transferring land. This followed from the fact that the court sessions only took place on certain days throughout the year. At the most there was one session a month, in some months not even that.[103] That meant that the parties had to wait at least one month if they had just missed the last date. This delay in the transferring of rights did not of course meet the interests of the parties in having dealings completed as quickly as possible.

This tension between the needs of society, on the one hand, and the rigid rules of land law, on the other, might be explained historically by the developing needs of society. The law which governed the dates of Hamburg's court sessions dated from 1605.[104] At that time the delay in the transfer of rights perhaps did not burden Hamburg's society unduly. At the beginning of the nineteenth century, however, the Industrial Revolution was knocking on the door and accordingly trade steadily increased. That applied also to trade in land.[105] The needs of society had changed significantly between 1605 and the nineteenth century, and this necessitated a speedier procedure. Yet the rules applying to the 'Verlassung', which caused the delay in the transfer, were still the same. To some extent this was inevitable: the principal purpose of the 'Verlassung' was to give public notice of dealings in land, and this in turn assumed that persons interested in land dealings would attend every 'Verlassung'. If additional court sessions had been held, this assumption might have become even more unreasonable than it already was. Thus it follows that the time consuming aspect of the 'Verlassung' could not be remedied except by abolishing the 'Verlassung' itself.

It is noteworthy that the court stage meant not only a significant loss of time, but also a significant loss of money. All the people involved in the 'Verlassung' had to be remunerated. There were the members of the city council, the town clerk who prepared the list of dealings, the 'Pronotarius' who prepared the 'Protocolle' and the 'Procuratoren' who proclaimed those

'Protocolle'.[106] All these people were likely to oppose reform.

As discussed earlier,[107] one major purpose of the 'Verlassung' was to enable people to object to the proclaimed dealings. Associating the right to object ('Widerspruchsrecht') to the 'Verlassung', however, inevitably weakened the effect of any objection. That was because the objection at the 'Verlassung' by the entry in the 'Protocoll' did not guarantee protection of the rights/interests in question for long.[108] Every objection had to be renewed with each following 'Verlassung' if the same dealing was proclaimed again. Otherwise the objection was not entered in the latest 'Protocoll' and was therefore not effectual as against future registrations. The 'Verlassung' therefore did not possess the continuous effect of, for instance, a register book.

Referring to this weakness of the 'Verlassung,' Anderson could only advise his readers to be alert at every following 'Verlassung' in order to have an objection recorded in every relevant 'Protocoll'. He pointed out that, otherwise, even a party who could easily justify an objection ran the risk of losing the relevant interest in land. When the court stage was the last and concluding stage of transferring rights, there was no other alternative to associating the right to object to this stage. After title by registration had been established, however, this was no longer compelling.

H *Summary*

Hamburg's court stage at the beginning of the nineteenth century had not only lost most of its original functions; it also showed considerable defects. It was the most time-consuming stage within the whole procedure of transferring rights. Its mainly oral procedure contained a risk of inaccuracies and weakened the effect of the right to object since it only gave temporary effect to the objection. Since the court stage involved the participation of a great number of civil servants, it was also the most expensive part of the whole procedure. Customary rules had evolved out of the need to mitigate some of the defects of the 'Verlassung'. These customs, however, could not fully compensate for the defects of the court stage, in particular because most of them were of a merely optional nature. Anderson's manual put forward this analysis, and so Dr Ulrich Hübbe would have been aware of these weaknesses in the system.

The 'Verlassung' was in fact abolished in Hamburg by a statute of 1868.[109] Needless to say, it had long been apparent that the 'Verlassung' was superfluous.[110] This must have been known to those who were aware of the concept of exempt land and could see that the system worked perfectly well without the 'Verlassung'. However, there were many people who earned money through the 'Verlassung', and its abolition thus affected many vested interests. That explains its longevity.

III CONSEQUENCES FOR A POSSIBLE ADOPTION OF HAMBURG'S LAW BY SOUTH AUSTRALIA

Given that the South Australian system was, from its very beginning in 1858, a two-stage system, and that the system in Hamburg until 1868 had three stages, it is tempting to conclude that the latter could not have been the model for the former. However, it is much more likely that, if South Australia had tried to adopt Hamburg's land law system, the reformers would have left out those parts of the system which were superfluous and/or defective. That would have applied especially to defects already acknowledged and about to be removed in Germany itself. The above analysis of Hamburg's early nineteenth-century land law shows that this was the case regarding the court stage. The author submits that it was almost inevitable that the court stage would be left out when Hamburg's land law was transferred to South Australia. This is partly because of the inherent nature of an adoption process in general and partly because of the special situation in South Australia at the time of the reform.

A *The omission of the court stage in the Torrens System as a process in line with the internal logic of a sensible adoption of Hamburg's law*

Every process of adopting law from a different country requires processes of adaptation to some extent. In these processes of adaptation, the need to improve the system which is to be adopted is one major consideration. Only in very few cases would there be no need to make improvements or

alterations, either because no real defects are recognised or because amendments are not required in the process of adaptation.

The need to improve the system in the course of its adoption derives from a variety of factors which might not be very obvious at the first glance. The mere wish to transfer a 'perfect' system freed of all its original drawbacks and defects is the most obvious, but not the only reason.

Proponents of a new system carry a burden of proof. Only if the system and its principles are 'healthy' ones, i.e. free of evident defects, will it have a fair chance of enactment. Things are different when a system is not proposed, but is long established. Defects may be tolerated owing to inertia and vested interests. An analysis of Hamburg's law has shown, for instance, that customary law had been developed to compensate some of the defects of the court stage. Of course, South Australia did not have the same set of customary regulations or the same set of vested interests as Hamburg.

Another important reason to improve a system is the need to make it acceptable politically. At least in democratic systems such as South Australia's, the adoption of a legal system in the form of a statute is preceded by a parliamentary decision, and any proposed new system can only be sufficiently persuasive if it is free of evident defects. In the course of a possible adoption of the law of Hamburg in South Australia, the omission of the court stage meant an improvement to the system, and was therefore in line with the logic of the adoption process. Since Hamburg's law was on its way to removing the court stage in any event, the Torrens system merely foreshadowed a foreseeable development in the law of Hamburg.

B *The situation in South Australia in 1857/58*

When considering a possible adoption of Hamburg's real property law in South Australia in 1858, the particular political situation existing at that time also has to be taken into account. Land law reform had evolved to be the main issue in the election campaign in 1857/58.[111] None of the politicians running for election could afford to ignore the topic. The pros and cons of every suggestion regarding land law were discussed in public to a degree which can hardly be imagined today. This political focus on land law in South Australia would have made it impossible to adopt a system without first freeing it from its obvious defects.

Not only were the politicians keen to analyse any suggestions vigorously, but the legal profession was almost completely opposed to any land law reform.[112] Accordingly, the lawyers were ready to criticise any Bill which established a new system. Leaving out the court stage from the system was therefore essential if the reformers did not want to expose the system to the risk of being proven as defective by the lawyers. In connection with these expected attacks from the legal profession and politicians, the basic aim of the intended law reform in particular gained importance. It was the principal goal of South Australia's law reformers to lower the costs and shorten the time for land dealings. The court stage in Hamburg's land law, however, meant an unnecessary extension of the overall duration of the proceedings and thereby a considerable additional cost.[113] Incorporating the court stage would have therefore involved perpetuating the very defect in the system which South Australians were keen to remove. It would had been almost impossible to promote the adoption of Hamburg's land law without first removing its superfluous court stage.

C *The Real Property Act 1858 (SA) as an improved form of Hamburg's law and an anticipation of a foreseeable development*

Having set out the internal and political reasons for leaving out the court stage in the course of an adoption of Hamburg's land law, the Torrens system can be looked at from a new perspective. The *Real Property Act* 1858 (SA) provided a two stage process for the transfer of real property rights. In contrast to Hamburg's law, it did not incorporate court participation in the procedure. This difference can now be explained easily as being in accordance with the adoption process. It can readily be deduced, supposing that Dr Hübbe was the author of the reform, that he reduced the three-stage process of Hamburg's law to two stages, so that the process consisted of contracting (first

stage) and registration (third stage) only. This is certainly how he proceeded in his book, in which he barely mentioned the 'Verlassung'.[114]

By leaving out the court stage, the Torrens system reduced Hamburg's law to its written part, i.e. the contracting and registration, thus increasing accuracy by the use of writing and exact wording. Objections, in the form of caveats, appeared on the register and did not have to be renewed as Hamburg's law had required. Transactions under South Australian law could take place immediately, since there was no intermediate stage which unnecessarily prolonged the transfer of rights. Last but not least, money was saved because fewer public servants were involved. In these respects South Australia's *Real Property Act* can therefore be regarded as an improved form of Hamburg's system. Furthermore, the Torrens system of 1858 anticipated a foreseeable development of Hamburg's system: Hamburg's law, as well as the later law of federal Germany, left out the court stage in later reforms. Thus, South Australia merely anticipated a development of the original German system if it adopted it in the course of its land law reform. Since the adoption of legal systems implies a tendency to make improvements, this analysis is in line with the hypothesis that the *Real Property Act* 1858 (SA) represented an adoption and adaptation of Hamburg's land law.

It is true that it would have made sense to leave out the court stage in the course of an adoption of Hamburg's land law system in South Australia in 1858, but this does not conclusively prove that such an adoption actually took place. It does, however, support this hypothesis. It suggests that other authors[115] who did not see a need to analyse the Torrens System as a legal transplant may have failed to appreciate this point.[116] In any case, the comparative analysis has to be seen as an important supplement to the interpretation of historical sources. In addition, this explanation of the structural difference provides an important source for further work.

Let us turn, then, to a consideration of the other features of the system in Hamburg and see whether the hypothesis that the South Australian system may be an import from Hamburg can be supported by a comparison between the institutions which did survive the transfer from Hamburg to Adelaide which has been suggested.

D *Comparison of basic institutions and principles of the Torrens System with Hamburg's land registration system*

The above comparative legal analysis has focused on the major structural difference between the Torrens system and Hamburg's land registration system. It is suggested that if one removes the court stage from Hamburg's land registration system and considers the similarities, one would virtually be left with the Torrens System.

1 *The register book/das Stadterbebuch*

The *Real Property Act* 1858 (SA) provided a register book as the central means of land registration in the new South Australian system.[117] Grants, certificates and instruments were to be bound up in this register book.[118] A separate page was alloted to each certificate on which the particulars of the land were precisely registered according to public maps.[119] Any estate or interest in existence had to appear on the respective pages. The book was to be kept by the Registrar General.[120]

Hamburg's register book was called the 'Land oder Stadterbebuch' (State or City Heritage Book).[121] Its structure and function were to a great extent identical with the register book of South Australia. Hamburg's register book also provided a separate page for every piece of land. Such a page was given the Latin term 'folium'. Allocating a separate 'folium' to each independent allotment of land was regarded as an improved form of earlier register books in Germany, which referred to proprietors ('Personalfolium') instead of to the land ('Realfolium').[122] Hamburg's law provided that every right in or over land had to appear on the register book.[123] The pages in Hamburg's register book referred, like South Australia's register book, to public maps. These maps were updated by the 'Stadtschreiber' (town clerk).[124]

Aside from the 'State/City Heritage Book', Hamburg's law provided a 'Rentenbuch' (book of

charges), which recorded encumbrances on land. Hence Hamburg provided two books for registration. Yet this duality had mere historical reasons and gradually disappeared.[125] Although Hamburg still had two register books at the beginning of the nineteenth century, this was a mere formality. Accordingly, textbooks such as Anderson's treated the register books as a unity and did not differentiate between the two regarding the description of the legal rules applying to the register. Clearly, the Torrens system's provision for one register book instead of two meant a simplification and thereby an improvement of the system rather similar to, if less extensive than, leaving out the court stage.

2 *The Registrar General/Der Procurator und der Stadtschreiber*

As mentioned above, the South Australian land registration system required the Registrar General to keep the register book.[126] Section 4 of the *Real Property Act* 1858 (SA) provided that the Registrar General was required to superintend all dealings in land and was responsible for the execution of the Act's provisions. The Registrar General supervised the register and the execution of instruments and grants.[127] The Registrar General discharged mortgages and encumbrances, and documents sealed by him/her were received as evidence.[128] With the sanction of the Governor, the Registrar General might even set new rules for entries in the register and issue new forms of instruments.[129] The Registrar General's was (and still is) an office which exercises considerable powers. That the *Real Property Act* 1858 (SA) gives great importance to the office of the Registrar General is also stressed by the fact that his/her functions and powers are listed among the first sections of the Act.[130]

Hamburg's law, on the other hand, since it incorporated an additional stage in court, provided for two positions: the 'Niedergerichtlicher Procurator' (clerk of the local court)[131] and the 'Stadt-schreiber' (town clerk).[132] The former dealt with land dealings during the court stage, [133] while the latter took care of the dealings as regards the registration itself (registration stage). Both stages took place successively, but the 'Verlassung' (a public procedure) took place in court and the registration took place privately in the 'Schreiberey' (city office). However, the need for two officers ceased when the superfluous court stage was removed from the procedure. As analysed above, that would very likely have been the case if South Australia had adopted Hamburg's land law. Hence the reduction of Hamburg's three-stage process to a two-stage-process in the Torrens System made civil servants superfluous at the court stage. The establishment of the powerful office of Registrar General can therefore be explained as a result of a structural simplification of the adopted land law of Hamburg.

3 *Certificates of title and duplicates/Realfolium und Extracte*

Under the original South Australian land registration system, all certificates of title were to be bound in a register book.[134] These certificates of title (in the form prescribed by Schedule A of the Act) refer to a specific allotment of land and precisely describe the estates and interest in the land. With regards to the location and boundaries of the land, the certificates refer to public maps. [135] As for the legal status of the land, the certificates refer to the grants and instruments leading to the legal situation.[136] In this way, a certificate of title shows exactly who is the proprietor of each piece of land and to what extent the land is encumbered.

The South Australian statute provided that, whenever the situation regarding registered land was to be changed, this had to be noted on the certificate.[137] This ensured that the title certificates always indicated the current legal situation of the respective land. A duplicate of each certificate was then issued to the proprietor of the fee simple.[138] This duplicate was received as evidence in court[139] and its production was indispensable for any transaction involving the land.[140]

Hamburg's law contained an impressively similar concept to the South Australian certificate of

title. Hamburg's certificates were called 'foliums' (several pages) and were also bound up in the 'Stadterbebuch' (City Hereditaments Book). Each separate 'folium' (original certificate) referred to a specific allotment of land. The piece of land to which the 'folium' referred was indicated by a reference to Hamburg's public maps.[141] According to Hamburg's law, all rights in land had to appear on such a 'folium' if those rights were to be effective.[142] In this respect the 'folium' corresponds completely with the certificate of title under the *Real Property Act* 1858 (SA). Additionally, Hamburg's land law provided that each proprietor of land received a copy of the respective 'folium'.[143] Such copies were called 'Extracte'. This word derives from the fact that the copies were mere extracts from the register. The 'Extract' is therefore functionally identical to the duplicate of the inaugural Torrens System. Like the duplicate of the certificate under the *Real Property Act* 1858, Hamburg's 'Extract' was considered evidence in court.[144] This was especially important for the court stage (the 'Verlassung').[145]

There was a difference in the application of the rules. Even though both systems provided that the duplicate certificate/Extract had to be returned to the register office/Stadtschreiberey when a change was to be made to the original certificate/folium, Hamburg's law did not enforce this rule as strictly as the South Australian land registration system.

Under the Torrens system no other certificate (duplicate) could be in circulation other than the certificate that accurately corresponded to the original in the register book. The *Real Property Act* 1858 clearly provided in s 9 that, when the original certificate in the register book was to be changed, the old duplicate had to be returned to registry office and cancelled. No exception was allowed to this rule. Even in the case of a lost certificate, the *Real Property Act* provided that only a provisional certificate could be issued.[146]

In Hamburg, however, the duty of returning the duplicates was not so strictly enforced. Quite often the 'Stadtschreiber' executed a registration of a transfer even though the old duplicate had not been produced. Under Hamburg's law an out-of-date 'Extract' could therefore be in circulation.[147] This, however, did not endanger the security of dealing. Anyone who wanted to secure the validity of dealings could ask for an up-dated 'Extract' (duplicate certificate) from the 'Stadtschreiber' (town clerk).[148] This seemed tolerable in a small city state like Hamburg, since everyone could get a new 'Extract' without much effort, unlike South Australia with its expansive areas of land. The distances to the Adelaide Register Office could be much greater than within Hamburg and surroundings. It made dealings a lot easier when colonists could negotiate relying on the information given on the duplicates of the certificates. Having only updated duplicates in circulation meant that parties could be sure about the content of the register book simply by examining the duplicate, regardless of their location within the colony. The duplicates therefore constituted a form of mobile register which met the needs of South Australia perfectly. Furthermore, the law of Hamburg knew nothing of equitable interests which could be created by transferring the possession of the duplicate certificate. The requirement that there should be only one such certificate in existence at any time was therefore much less important in Hamburg than in South Australia, in which, as it turned out in practice, equitable interests could be created in the manner described.

It is noteworthy that Anderson expressly cautioned against this defect of the Hamburg's law in his textbook.[149] Given that Dr Hübbe made use of Anderson's textbook, he must have been well aware of the need for improvement.

4 *Schedules of Instruments /Lateinische Modelltexte*

The *Real Property Act* 1858 referred to several instruments that were needed for all kinds of transfers of property rights.[150] According to s 3, an instrument is 'any land grant, certificate of title, or other document in writing relating to the transfer, encumbrance or other dealing with land'. For these instruments the Appendix of the Act provided 19 distinct schedules for transaction such as sale, lease and so on.

Each of these schedules contained a predetermined set of words which had to be used to make the execution of the instrument and thereby the intended transfer or other dealing valid. The schedules

left some blank spaces so that the parties could fill out the particulars of the specific dealing. Such particulars were, for instance, the location of the land, the names of proprietors/parties, the estates/interests involved, the date and so on.

The schedules purported to make dealings safe and to prevent the use of wrong or insufficiently precise terms.[151] Since the parties had to fill out only a few particulars in the prescribed schedules, not much could go wrong. The predetermined set of words in the schedules had been laid down by lawyers,[152] ensuring accordance with formal rules. The schedules were also sufficient for common dealings because there was only a limited number of property rights anyway.

Although Hamburg's land law had no statute with an annexed set of schedules, it provided something very similar to those forms of instruments prescribed by the *Real Property Act*. In Hamburg, every transfer or dealing with land also had a fixed set of words which traditionally had to be used.[153] These fixed sets of words were all in Latin, leaving blank spaces to be filled out in German. Similar to the schedules of the *Real Property Act*, only the particulars of the specific dealings were meant to be written into those blank spaces while the basic terms were predetermined. In Hamburg, however, these sets of words had already been fixed in the seventeenth century.[154]

Anderson gives numerous examples for the more difficult sets of words.[155] He strongly advises the use of the correct set of words in order to validate the intended transfer or dealing. The example given below provided a pattern for an instrument where a proprietor wishes to transfer only part of his/her land and wishes to combine the remaining part with a contiguous allotment which he/she also happens to own. The transferor's name in the example is Fedder Karsten and the name of the transferee is Adolph Köncke:

Libro Hered. A A 19. St Petri p Franc 1784. fol 35 (register book A 19 of St Peters, 1789, folium 35):[156]

Sciendium quod pars residuae hereditatis Fedderi Karstens, sita retro hereditatem braxatoriam nunc Magni Adolphi Köncke in Magna Divitum Platea; (Pet. A. 22) dicto proprietario Karstens coram petente et praevia resignatione publica, consensu unius creditoris hypothecarii; cum hac hereditate combinata sit et ideo ad hanc hereditatem in Chono Pontis Telonii nunc spectet atque pertinea, declarato, hic sit notata. Act p Nat Mar 1796.

Apart from the fact that Hamburg's forms of instrument were written in Latin, the forms provided by the *Real Property Act* 1858 also differ from Hamburg's forms in another way. Hamburg's forms were based on a sort of case law.[157] Since the system had been in force in Hamburg for centuries, the Stadtschreiber (town clerk) only had to look up old instruments and copy them. Whereas the schedules of the Torrens system guaranteed the validity of the words by statute, Hamburg's forms had validated dealings through centuries of use. By the nineteenth century those fixed Latin terms had become customary law in Hamburg.[158]

It is clear that, if South Australia's system was taken over from Hamburg, the schedules annexed to the Act substituted for Hamburg's customary law, which obviously did not exist in South Australia. Moreover, it is clear that the introduction of Hamburg's land registration system in South Australia would have necessitated such forms. South Australia's geographical vastness also has to be taken into consideration. Whereas it was appropriate for a city state like Hamburg to make the Stadt-schreiber (town clerk) copy the relevant set of words, this was not appropriate for South Australia. In a colony of its size, it was better to provide schedules and forms which could be printed and sold all over South Australia. In this way, people living far out in the country were also able to make use of the prescribed instruments without having to get a copy prepared in Adelaide first. The schedules provided by the *Real Property Act* may well have been, in function, an adapted and improved form of the fixed set of Latin words that were traditionally used in Hamburg.

5 *Public Maps and Surveyor General/Landkarten und Landvermesser*

The introduction of public maps under the Torrens system[159] does not seem to be very remarkable at first glance. Of course it is sensible for every country to be properly mapped. It must, however, be

taken into consideration that most land in South Australia was not mapped in 1858.[160] The existing maps did not give any notice as to the legal ownership of the land, nor could their accuracy be guaranteed. It is therefore surprising to a certain extent that, under such conditions, a colony as vast as South Australia would promote land law reform which presupposed that the entire area was to be mapped.

Nevertheless, the *Real Property Act* 1858 provided that certificates of title and their duplicates had to refer to official maps in order to identify the land. This is not expressly stated in the relevant sections of the Act,[161] but was implied by the respective schedules in the Appendix of the Act which left blank spaces to be filled out with references to those public maps.[162]

As with the Torrens system, the reference to maps was essential to Hamburg's land law. All the 'foliums' (certificates) and 'Extracte' (duplicates) had to refer to public maps to identify the land in question. It is true that Anderson's textbook does not stress the significance of maps expressly, but his examples of 'foliums' (certificates) all refer to such maps by giving the index numbers of the land in question. In the example given above it is 'St Petri A A 19';[163] in other examples it is given in brackets eg, 'vide Hauptbuch Nicol A A 272 a' [164] ('see the main book Nicol A A 272 a').

Hence South Australia's concept of a map system was identical with the one used in Hamburg's land registration system. Whereas South Australia had to appoint the Surveyor General[165] to develop, copy and certify maps, Hamburg had been well mapped for a long time. The 'Stadtbuchschreiber' (town clerk) administered the maps and had to make changes to them if, for instance, a subdivision of land made this necessary.[166]

For South Australia as well as for Hamburg, the reference to maps considerably increased the accuracy of the information given in the certificates/foliums and duplicates/Extracte. By relating the certificates to public maps, it was precisely indicated which rights applied to which land. Thus the system of maps helped to avoid errors caused by inaccurate legal descriptions of land. The concept is therefore in line with the overall idea of the system of predetermined schedules and forms to minimise the chance of violating formal rules in land dealings and/or invalidating dealings negligently.

6 *Title by Registration and Conclusiveness of the Register/Eigentumsübergang durch Eintragung*

Having now discussed the resemblances between the most important institutions and instruments of the inaugural Torrens system and Hamburg's land law, let us consider the legal principles applied to these institutions. The central principle which South Australia's and Hamburg's land registration system obviously have in common is that they are both systems of *title by registration,* which requires *conclusiveness of the register*. This is a concept which, importantly, is found, prior to the enactment of the Torrens system, only in the law of Hamburg and not in the *Merchant Shipping Act* 1854 (Imp).

A system of title by registration means that registration itself vests title in the proprietor.[167] In other words, title passes by the act of registration; conversely, if there is no entry in the register, no title has passed. This principle is stated in ss 36 and 37 of the *Real Property Act* 1858. In Hamburg, the notion of title by registration had developed by the seventeenth century.[168] In the Middle Ages, the transfer of rights was validated by the procedure in court, and registration was simply for the purposes of proof.[169] However, Schlüter points out that as early as 1709 registration alone was the means of transfer of rights in land.[170]

The notion of title by registration corresponds to the principle of conclusiveness of the register. [171] This principle basically ensures that no title or interest in land can exist unless it is noted on the register. In the *Real Property Act* 1858 the conclusiveness of the register was established in s 33:

Every certificate of title or entry in the register book shall be conclusive, and vest the estate and interest in the lands therein mentioned in such manner and to such effect as shall be expressed in

such certificate or entry valid to all intents, save and except as is hereinafter provided in the case of fraud or error.

Sharing the principle of the conclusiveness of the register, Hamburg's law did not acknowledge any rights in land if they did not appear on the register. The entry in Hamburg's register book therefore constituted 'conclusive evidence against the whole world'.[172] Hübbe calls it the 'most important principle' of the system.[173] Clearly this is so, as it is this principle which fundamentally distinguishes the Torrens system from the inherited common law of England, which relies on private parties to pass on a chain of title. That this principle is present in both systems is therefore quite significant, although it, too, cannot be conclusive given that a similar principle might have been copied from some other system or even independently invented by Torrens. But it does rule out the *Merchant Shipping Act* 1854 as the source of at least this feature of the Torrens system.

However, one cannot note this similarity without pointing out an important difference between the general concepts of law in the two countries. Whereas Hamburg had a unitary concept of its law, South Australia, as a British colony, distinguished between legal and equitable rights.

This duality of legal and equitable rights in English land law caused considerable tension with the principle of the conclusiveness of the register.[174] On the one hand, the conclusiveness of the register (without exception) was clearly a strict rule; on the other hand, it was the very nature of equitable rights that they were independent of formalities.[175] Moreover, the concept of equitable rights purported to compensate for the harsh and unconscionable results of the strict application of formal rules in accordance with the maxim: 'Equity looks to the intent rather than to the form'. [176]

Robinson regards these partly contradictory principles as the central problem of the Torrens system, which the drafters had not sufficiently taken into consideration.[177] It is suggested, however, that there are indications that the drafters had considered the problem and even thought that they had taken care of it sufficiently.[178] It is clearly stated in the first section of the *Real Property Act* 1858 that concepts that interfered with the principles of the Act were to be regarded as abolished:[179]

All Laws, Statutes, Acts, Ordinances, rules, regulations, and practice whatsoever, relating to freehold and other interest in land, so far as inconsistent with the provisions of this Act, are hereby repealed, so far as regards their application to land under the provisions of this Act, or the bringing of land under the operation of this Act.

This section seemed to say, on its face, that equitable rights in land were no longer in existence. This was then confirmed by the Supreme Court of South Australia in *Lange v Ruwoldt*.[180] However, the concepts of equitable rights were rooted too deeply in the Anglo-Saxon tradition so that in later decisions[181] the courts, instead of denying the existence of equitable land rights under the *Real Property Act* 1858, began to develop a sophisticated number of exceptions to the conclusiveness of the register. In this instance, then, the system in Hamburg proved too simple for the more complicated South Australian law. Nevertheless, this does not destroy the hypothesis that the South Australian law was an adoption of Hamburg's. Rather, it is consistent with the drafters' hope that a similar system might also be able to exist even with regard to equitable rights. That this did not, in the end, turn out to be the case was, of course, not known in 1858.

7 *Exceptions of error and fraud/Einrede bei Irrtum und Betrug*

As discussed above, s 33 of the *Real Property Act* 1858 provided for the conclusiveness of the register 'except as is [hereinafter] provided in the case of fraud or error'. These exceptions to the principle were regulated more concretely in ss 93-96 of the Act. According to s 95, if registration was achieved by fraud or misrepresentation, it was within the discretion of the court to direct the Registrar General to cancel the registration and re-vest the estate or interest in the person to whom it originally belonged. Hamburg's land law provided exactly the same exceptions to the conclusiveness of the register:[182] it was also at the discretion of the courts in Hamburg to order the correction of the register in the case of fraud or misrepresentation.[183]

Under the *Real Property Act* 1858, a registered proprietor was granted indefeasibility of title even when the registration was achieved by fraud, error or misrepresentation, provided that he/she was registered 'as a purchaser or mortgagee for *bona fide* valuable consideration, or by transfer, or transmission from or through a purchaser or mortgagee for *bona fide* valuable consideration'.[184] Similarly under Hamburg's land law, the exception of fraud and misrepresentation did not apply when the registered person was a '*bona fide* possessor for valuable consideration'.[185] In such a case the registered proprietor enjoyed indefeasibility despite the fraud or misrepresentation, although the court had a discretion in such a case to remedy the former proprietor's loss.[186]

Regarding the cases of fraud, error or misrepresentation, the South Australian system, as well as Hamburg's law, did not prevent persons deprived of estates or interests from applying for a correction of the register. As an alternative, both systems also permitted actions for damages.[187] In order to prevent fraud and misrepresentation in registration, Hamburg had issued a city order as early as 7 January 1799 which instituted severe penalties for such cases.[188] Similarly, the *Real Property Act* 1858 s 121 declared cases of fraud and misrepresentation in registration to be a felony with the possibility of up to four years' imprisonment.

8 *Priority rules/Prioritäten*

The *Real Property Act* 1858 and Hamburg's land registration system also had very similar provisions regarding the priority of registered estates or interests. Both systems make the priority of a right in land dependent on whether it was registered before or after a competing right. Sections 58 and 59 of the *Real Property Act* 1858 state that mortgages and other encumbrances have priority according to the date on which the instrument was recorded. The date of execution or notice of the instrument was of no importance. In accordance with this priority rule, s 37 established that estates and interests were to be registered in the order of the production of the instruments to the registry.

Hamburg's land law also provided that estates and interests had priority according to the date of their entry into the register book.[189] This rule was affirmed by the Latin phrase noted on the register book:[190]

cum prioritate prae sequentibus (with priority over anything that follows).

These priority regulations were appropriate to a system which applied a strict conclusiveness to the register. As long as estates and interests were only recognised when they were registered, priority was easily determined by the order of the entries. When a system begins to recognise proprietary rights outside the register, priority cannot depend on the entry. Since the South Australian courts came to recognise equitable estates and interests outside the register, they had to develop an appropriate regulation for the prioritisation of interests.[191]

9 *Caveat/Widerspruch*

Since systems of title by registration only provide complete recognition to estates and interests in land appearing on the register, there is a need to protect unregistered rights. Hamburg's registration system, as well as the South Australian system, contained provisions that enabled a person to suspend future registration by a notice on the register, so that the rights of that person in land which were endangered by the possible registration of the rights of another person were protected.

Under the Torrens system this device is called the caveat, and its procedure was regulated in ss 101-113 of the *Real Property Act* 1858. This procedure provided that the person who wanted to protect a right had to lodge the caveat in the prescribed form, set out in Schedule P of the Act, with the Registrar General. The form in Schedule P required that the caveator had to specify the estate or interest in land to which he or she claimed to be entitled.[192] After the caveat was lodged in the prescribed form, future registration was suspended.

After the Registrar General had received the caveat, he was required to publish it in the Government Gazette and give notice to the registered proprietor of the land.[193] Having received notice of the

lodging of a caveat, the registered proprietor was entitled to summon the caveator before the Supreme Court to establish why the caveat should not be withdrawn.[194] However, whether the registered proprietor decided to take such action or not, the caveat had to be justified in a petition brought before the Supreme Court three months after it was lodged.[195] The judge was to hold a hearing in which the registered proprietor had to show cause or swear an affidavit opposing the petition.[196] In this hearing, the Court decided whether the relief sought in the petition attached to the caveat should be granted or if there was need for further inquiry.[197] The Court could declare the existence of the claimed estate or interest, and the Registrar General would be obliged to act according to that declaration.[198] If the registered proprietor was not present, the Court decided the case on the evidence of the caveator.[199]

Under Hamburg's land law there were originally two devices that protected unregistered rights within the register book. One was called the 'impugnatio'[200] and the other was called the 'inhibitorium'.[201] Both were objections lodged by persons claiming unregistered rights which were noted on the 'Protocolle' (minutes of court procedure) with the effect of suspending future registration.[202] Both procedures eventually led to a final decision in court.[203] The difference between the two was that the 'impugnatio' was an objection that could be achieved by a mere declaration of the objector, whereas the 'inhibitorium' was an order by the court for which the objector first had to show cause.

Both modes of suspending registration were used in Hamburg until the beginning of the nineteenth century. However, in 1802 the 'impugnatio' was abolished[204] owing to its increasing misuse.[205] The misuse of the device was possible because it enabled anyone to suspend the registration for at least a month without showing cause for the objection or specifying an estate or interest in the land.[206] The simple declaration of an objection for any reason was the only requirement for an 'impugnatio'.[207] Since Hamburg's law already provided an alternative method for suspending registration, ie, the inhibitorium (order of the city council), there was no need to change the rules applying to the impugnatio. In Hamburg, the impugnatio could be simply abolished without taking away the possibility of objecting and thus suspending registration.[208]

With respect to the comparative legal analysis of Hamburg's law with that of South Australia, it is not enough merely to state that both systems provided means to suspend registration as a provisional protection of unregistered rights before an eventual settlement in court. It is true that this additional similarity is significant with regard to the possible adoption of Hamburg's land law in South Australia. However, a closer look at the details of the procedure shows that the South Australian caveat corresponds to an improved form of Hamburg's impugnatio, ie, Hamburg's form of objection, which gave way to the inhibitorium in 1802. The caveat, as well as the impugnatio, did not begin in court, but rather with a simple application for suspension of future registration. The caveat, however, was designed to avoid the risk of misuse. Additional provisions stated, first, that the caveator must specify the right claimed,[209] and, secondly, that the registered proprietor was entitled to summon the caveator before the Supreme Court to show cause for his/her caveat.[210] Above all, because of the latter provision, a caveator had little chance of effecting a suspension of registration for insufficient reasons. In such a case the registered proprietor would have summoned the caveator immediately. The requirement to specify the estate or interest in land provided additional protection against possible misuse of the caveat.

Assuming that the South Australian land registration system began as an adoption of Hamburg's land law, it would have been sensible to choose the impugnatio from the two methods developed in Hamburg. There is no need to involve the courts before the actual trial. Until a court hearing takes place, it seems fair to leave the decision to the registered proprietor as to whether he/she accepts or objects to a suspension of registration and thereby a restriction of his/her right to dispose of the land.

Hamburg's land law, in contrast, eventually allowed only suspension of registration by way of court orders. This is to be explained on historical grounds. (Indeed, all nineteenth century textbooks on Hamburg's land law discuss the inhibitorium by explaining the history and the abolition of the impugnatio.)[211] If Hamburg had not had the alternative form of the inhibitorium, it would probably have altered the impugnatio so that it could no longer be misused. After all, the inhibitorium had some considerable disadvantages. For example, in cases in which the objector applied showing reasonable cause, the court was involved even though there had been no misuse of the right to suspend

the registration. In these cases the inhibitorium prolonged the procedure and made it unnecessarily expensive. Finally, the diminution of the role of the courts in the process for objecting to possible infringements of one's property rights corresponds, of course, to the wider project of removing unnecessary court stages from the system.

10 *Mortgage/Hypothek*

The mortgage is one of the most important interests in land. In an increasingly industrial and commercial society it is often necessary for securing credit. The mortgage has often provided an impetus for the development of the law of real property in general.[212] The *Real Property Act* 1858 brought a remarkable change to the law on mortgages in South Australia.

Before the introduction of this Act, the mortgage procedure under the common law provided that the mortgagor had to transfer his or her entire title to the mortgagee[213] (subject to the equitable right of redemption). The Torrens system, however, substituted for this concept the notion of a mortgage by way of a charge over land.[214] In this way, the fee simple absolute remained with the mortgagor. In order to create or transfer a mortgage, an entry in the register book was sufficient.[215] Nonetheless, the mortgaged land was subject to sale by the mortgagee in the case of non-repayment of the secured debt.[216] In such cases, the sale money was used to cover the default as well as the cost of the sale.[217] As long as the land was subject to a mortgage, the mortgagor was allowed to dispose of the mortgaged land only with the consent of the mortgagee.[218]

This new mortgage procedure in South Australia was identical to the concept of the 'Hypothek' (mortgage) in Hamburg. The 'Hypothek' was a mortgage by way of a charge and was introduced in Hamburg in the Middle Ages. However, until the thirteenth century, a mortgage by transferring the title to the mortgagee also existed in Hamburg.[219] By the beginning of the nineteenth century, the only mortgages in Hamburg were by way of charge and were created and transferred by mere registration.[220] In the case of default, the debt was paid through the sale of the mortgaged land by the mortgagee.[221] If the mortgagee realised more than the sum owed and the costs of the sale, he or she had to pay back the difference to the mortgagor.[222] Under Hamburg's law as well, a mortgagor could only deal with his or her land with the consent of the mortgagee.[223]

It is evident that the mortgage under the Torrens system corresponded to a great extent with the mortgage under Hamburg's land law. This is again of particular significance to the hypothesis that the *Real Property Act* 1858 constituted an adoption of Hamburg's land law. South Australia's concept of the mortgage was assimilated to Hamburg's only with the introduction of the Torrens system. This change in the concept of the mortgage was not necessarily a result of the implementation of a system of title by registration. Such a system merely permits existing forms of rights over land to be registered, but does not necessarily change the nature of the rights themselves. The South Australian land registration system would equally have functioned with a concept of a mortgage that required the mortgagee to pass the fee simple to the mortgagor. This points to an adoption of Hamburg's land law as an entire system, including the concept of land rights, instead of a mere adoption of the principle of title by registration. Loyau, writing in Adelaide in 1885, when Hübbe was still alive, particularly stressed that the change of English law regarding the mortgage in South Australia was due to the adoption of Hamburg's law.[224] It must be said, however, that this cannot be conclusive of the issue given that a similar rule to that adopted in the *Real Property Act* existed in the *Merchant Shipping Act* 1854 (Imp).[225]

11 *Trust/ Treuhand (ad fideles manus)*

It is important to examine the concept of the trust in land law because it has been argued that it was unlikely that the *Real Property Act* was modelled on German law given that the notion of trust is alien to German law.[226] The latter assertion is however incorrect. The old Roman-German common law (which was finally abolished by the enactment of the Civil Code in 1900) had developed, independently of the Justinian inheritance, a concept that was called 'Treuhand',[227] which has many similarities to the equitable trust.

Under English trust law, while the legal estate in land was vested in the trustee, the equitable estate was considered the property of the beneficiary. The *Real Property Act* 1858 integrated this inherited concept of trusts into a system of title by registration. The Act provided for a pre-formed instrument for the creation of trusts which was called a 'bill of trust'.[228] According to ss 56 and 58, on the production of such a bill of trusts, estates or interests under a trust had to be registered in the order of their production. The *Real Property Act* 1858 also provided regulations for the discharge of trusts.[229] Even though the basic structure of the trust was already predetermined by equity prior to the *Real Property Act* 1858, the Act declared that the legal estate was vested in the trustee.[230]

Although there was no distinction between common law and equity in Germany, Hamburg's land law provided for the aforementioned concept of 'Treuhand', which closely resembles the equitable trust. Hamburg's Treuhand, like the equitable trust, provided for the modification of strict rules of law. For example, a person could only become registered as a proprietor of land if he/she was a citizen of Hamburg.[231] Likewise, it had been the rule until the eighteenth century that aristocrats could not be registered as land owners.[232] However, making use of the Treuhand, a non-aristocratic citizen of Hamburg could register for the benefit of a person who was not eligible to become a registered proprietor. The Hamburg citizen who was legitimately registered held the land 'ad fideles manus' (in faithful hands) and he/she was called 'Fiduziar' (trustee) of the beneficiary. This basic concept of Treuhand had already developed in Hamburg by the fourteenth century.[233] It could thus be said that the English law and Hamburg's law had developed the parallel devices of trust/Treuhand to overcome restrictions in transfer of real property. The equitable trust developed to overcome certain restrictions in the modes of transfer, whereas Hamburg's law made use of the Treuhand to overcome certain restrictions as to the eligibility of ownership in land.

Under Hamburg's land law, the 'Fiduziar' (trustee) as well as the beneficiary had to be registered.[234] The Latin term of registration was 'ad fideles est A ad fideles manus et ad usum C' (*A is trustee holding in faithful hand and for the use of C*).[235] Hamburg's law regarded the beneficiary as the 'real' proprietor and allowed the 'Fiduziar' (trustee) to dispose of the land only with the consent of the beneficiary.[236] A dealing in the land without the consent of the beneficiary was invalid.[237] This, however, only applied if the Treuhand had been registered according to the rules. If the entry in the register did not indicate that the registered proprietor was holding the estate or interest as 'Fiduziar' (trustee), a dealing was valid without the beneficiary's consent. In such a case, the beneficiary was limited to contractual rights of compensation against the trustee.[238]

The comparison of the English concept of trusts under the Torrens System and the Treuhand in German law shows considerable similarities. Assuming that the *Real Property Act* 1858 was an adoption of the Hamburg's land registration system, one could claim that the concept of trust was integrated into the adopted system. After all, it is logical to make use of existing institutions as long as they are compatible with the system to be adopted. The drafters of the *Real Property Act* 1858 might well have assumed that the trust concept was interchangeable with Hamburg's concept of 'Treuhand' and could be incorporated without detrimental effect on the functioning of the system. The author submits, however, that this assumption must be questioned, because the English concept of trust not only incorporates the rights of the trustee and the beneficiary, but also carries with it broader ideas of equitable rights. The latter are truly foreign to the German system, since the distinction between legal and equitable rights is a particular relic of English legal history. Whether these distinctions turn out to be purely artificial or whether they require a further amendment to the systems, as Robinson suggests,[239] would necessitate additional analysis and is not within the scope of this comparative legal overview. What can however be said is that the existence of the concept of the trust in English law and its recognition in the 1858 Act does not mean that the Act could not have been copied, in whole or in part, from the law of Hamburg.

IV CONCLUSION

The analysis presented here does not, of course, establish conclusively that the Torrens system was an adaptation of the law of Hamburg. However, it has been shown, despite assertions to the contrary, that this is a possible explanation of the shape which the Torrens system took when it was first enacted in 1858.

As was shown, the major difference between the systems – the removal of the court stage from the Torrens system – is not fatal to such a conclusion. Rather, it may be explained by a well understood process of simplification and adaptation which is almost inevitably associated with legal transplantation. This is all the more so given that the court stage was recognised in Hamburg itself as a relic of past procedure which had been made obsolete by the system of written registration which it was proposed to adopt in South Australia. The fact that Hamburg abolished this requirement only ten years after the South Australian statute was enacted shows that this was a natural and logical improvement of the system, which, it is tempting to speculate, had been held up in Hamburg not so much by its charming antiquarian formality but by the vested interests of those who derived fees from this practice.

As far as the other features of the South Australian system is concerned, it was shown that the chief features of the system in Hamburg are all present in the South Australian system. Sometimes the resemblance is remarkably close, as is the case, for example, with the respect to the institution of register books, public maps, the use of pre-determined formulae to effect transactions and the mortgage. In addition, the principle of conclusiveness of the register, which is the crux of the system and does not exist in the *Merchant Shipping Act* 1854, was adopted in South Australia as it had existed in Hamburg. Even the recognised exceptions to this principle were not without their similarities.

This does not prove, of course, that the South Australian system was a copy of Hamburg's. Further work on the sources would be required to prove (or disprove) this hypothesis. In particular, the German-language sources are of importance for this task, but their assessment is a task for another day. What certainly cannot be said, however, is that any feature of the Hamburg system disqualifies it automatically from having been the chief model for the South Australian system.

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[1] This article is an adaptation of a part of the author's thesis for the degree of Master of Laws at the University of Adelaide, *The History of the Torrens System of Land Registration with special reference to its German origins* (2000). The thesis has been submitted and is available in full in that University's Law Library. The author wishes to thank, in the first instance, Professor Adrian Bradbrook, whose unfailing enthusiasm and wide knowledge greatly assisted in the writing of the original thesis. Thanks are also due to Dr Greg Taylor, who assisted with the adaptation of the thesis for publication.

[2] Fox, 'The story behind the Torrens System' (1950) 23 *Australian Law Journal* 489; Stanley Robinson, *Equity and Systems of Title to Land by Registration* (PhD thesis, Monash University, 1973) 1; Robert Stein and Margaret Stone, *Torrens Title* (1991) 17; D J Whalan, 'The origins of the Torrens System and its introduction in New Zealand' in G W Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1991) 1; Mary Geyer, *Robert Richard Torrens and the Real Property Act: The Creation of a Myth* (BA(Hons) Thesis, University of Adelaide, 1991) 1; P A Howell, 'Constitutional and Political Development, 1857-1890' in Dean Jaensch (ed), *The Flinders History of South Australia: Volume 2, Political History* (1986) 95, 158.

[3] Donald Kerr, *The Principles of the Australian Land Titles (Torrens) System* (1927) v; Fox, ibid 489.

[4] Kelly, 'Ulrich Hübbe' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (1972) vol 4 (D-J) 436.

[5] George Loyau, *Notable South Australians* (1885) 156.

[6] South Australia, *Parliamentary Debates*, House of Assembly, 20 July 1880, 427 (Mr Henning).

[7] Loyau, above n 5, 156; Howell, above n 2, 159.

[8] Ulrich Hübbe, *The Voice of Reason and History brought to bear against the present absurd and expensive Method of Transferring and Encumbering Immovable Property* (1857).

[9] Ibid 64.

[10] Whalan, above n 2, 11 suggests that 1861 enactment should be regarded as the true Torrens system.

[11] South Australia, *Title by Registration in the Hanse Towns* (by Dr Ulrich Hübbe), Parl Papers No 212 (1861).

[12] Modern textbook writers are content with leaving this question unresolved: Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (2002) 107; Peter Butt, *Land Law* (2001) 620; Ronald Sackville *et al*, *Sackville and Neave Property Law: Cases and Material* (6th ed, 1999) 418.

[13] This applies in particular to contemporary German-Australian newspapers published in South Australia.

[14] Hamburg's land law was consolidated: *Gesetz von 1868 über Grundeigentum und Hypotheken*.

[15] The German Civil Code has only been reformed recently at the beginning of 2002 after being almost unchanged for a hundred years.

[16] Whalan, above n 2, 7.

[17] *Real Property Act* 1858 (SA).

[18] Anderson, *Anleitung für diejenigen welche sich oder anderen in Hamburg oder dem Hamburgischen Gebiete Grundstücke oder darin versicherte Gelder zuschreiben lassen wollen* (1810) 26, 70.

[19] At the time the leading textbook was still Schlüter, *Historischer und rechtsbegründeter Traktat von unbeweglichen Gütern* (1709).

[20] See for a collection: Wulff, Hamburgische Gesetze und Verordnungen, 4 Volumes (Hamburg 1891/1897); Lappenberg, Sammlung der Verordnungen der Freien und Hansestadt Hamburg, 34 Volumes (Hamburg 1774/1865).

[21] Anderson, above n 18; Georg Lührsen, *Das Stadterbe- und Rentenbuch der Stadt Hamburg*, 1860.

[22] Interview with Hübbe's great-grandson, Mr Simpson (Stonyfell, Adelaide, 1 November 1996).

[23] A different system was chosen for Germany after the unification in 1871.

[24] *Real Property Act* 1858 (SA) ss 35 and 36.

[25] Anderson, above n 18, 2, 6.

[26] Ibid.

[27] The contract is substituted by other acts in the case of transmission of death and/or marriage.

[28] Anderson, above n 18, 4-6, 8-13.

[29] Ibid 3, 6.

[30] Ibid.

[31] Baumeister, *Privatrecht* (1856) 131, 202.

[32] Schalk, *Einführung in die Geschichte des Liegenschaftsrecht der Freien und Hansestadt Hamburg* (1931) 14, with reference to the related term 'Auflassung' which is still in use in the German civil code (§ 925 *Bürgerliches Gesetzbuch*).

[33] Anderson, above n 18, 17.

[34] Ibid 7, 18.

[35] Ibid 7, 17.

[36] Ibid.

[37] Hedemann, *Die Fortschritte des Zivilrechts im XIX. Jahrhundert, Die Entwicklung des formellen Bodenrechts* (1935) 194.

[38] German archaism for servant.

[39] Anderson, above n 18, 18.

[40] Ibid 21.

[41] Ibid.

[42] Ibid 9, 18.

[43] Author's translation.

[44] Schlüter, above n 19, 764.

[45] Anderson, above n 18, 4.

[46] Ibid 14, 40.

[47] Ibid 6, 15.

[48] Ibid 14, 40.

[49] Ibid 6, 15 with special reference to names and details recorded in the 'Protocolle' (minutes).

[50] Ibid 7, 18.

[51] Ibid.

[52] Ibid 12, 39.

[53] Baumeister, above n 31, 134.

[54] Anderson, above n 18, 39.

[55] Ibid 12, 40.

[56] In a decision of 31 January 1817 Hamburg's Supreme Court declared its exclusive competence for such court orders: cited by Baumeister, above n 31, 134.

[57] Anderson, above n 18, 39.

[58] Ibid 12, 39.

[59] Schlüter, above n 19, 673.

[60] Anderson, above n 18, 39.

[61] Ibid 12, 40.

[62] Archaic German term.

[63] Anderson, above n 18, 14.

[64] Ibid 6, 16.

[65] Ibid 6, 15.

[66] This translation has been chosen for the purpose of this discussion only.

[67] Anderson, above n 18, 15.

[68] Ibid 7, 18.

[69] Ibid 6, 14.

[70] Ibid 6, 15.

[71] Ibid 6, 15.

[72] Ibid 6, 15.

[73] Ibid 7, 18.

[74] Ibid 4, 8.

[75] This translation has been chosen for the purpose of this discussion only. The word ‘Procurator’ derives from the latin verb ‘procurare’, i.e. to look after or to take care of.

[76] Anderson, above n 18, 12.

[77] Ibid 6, 14.

[78] Anderson mainly left out the contracting of the parties.

[79] Ibid 6, 15.

[80] Ibid 6, 13.

[81] Ibid 7, 18.

[82] Ibid 6, 12.

[83] Ibid 6, 13.

[84] Ibid.

[85] Ibid 6, 14.

[86] Author ' s thesis, above n 1, 105.

[87] Baumeister, above n 31, 198.

[88] Anderson, above n 18, 44.

[89] Schlüter, above n 19, 594 referring to the first book of 1274.

[90] Baumeister, above n 31, 126.

[91] Mascher, *Das deutsche Grundbuch- und Hypothekenwesen* (Berlin 1869) 370.

[92] Anderson, above n 18, 18.

[93] Ibid § 9, 19.

[94] The translation tries deliberately to reflect the peculiars of the wording which may therefore sound odd.

[95] Anderson, above n 18, 19.

[96] Schlüter, above n 19, 697.

[97] Ibid.

[98] Mascher, above n 91, 55.

[99] Anderson, above n 18, 17.

[100] Ibid 1, 1.

[101] Ibid 2, 4.

[102] Ibid 6, 15.

[103] Author ' s thesis, above n 1, 101.

[104] Anderson, above n 18, 6.

[105] Baumeister, above n 31, 55.

[106] See list of fees in the appendix of Anderson's book.

[107] Author ' s thesis, above n 1, 103.

[108] Anderson, above n 18, 12, 39.

[109] *Gesetz von 1868 über Grundeigentum und Hypotheken*, 1.

[110] As pointed out as early as1833 by Kellinghusen, *Über die Abschaffung oder Beibehaltung der öffentlichen Verlassungen bei dem Hamburgischen Hypothekenwesen* (1833).

[111] Pike, ' Introduction of the Real Property Act in South Australia ' (1960-62) 1 *Adelaide Law Review* 178.

[112] Bradbrook, MacCallum and Moore, above n 12, 108.

[113] Author ' s thesis, above n 1, 122.

[114] Hübbe, above n 8, 66.

[115] Fox, above n 2, 489; Robinson, above n 2, 1; Whalan, above n 2, 4; Stein and Stone, above n 2, 17; Geyer, above n 2, 1, 30; Howell, above n 2, 158; James Edward Hogg, *The Australian Torrens System* (1905) 21; Bradbrook, MacCallum and Moore, above n 12, 108; *Sackville et al*, above n 12, 419; Pike, above n 111, 178.

[116] Robinson is the only one who undertakes an incomplete comparison. See Robinson, above n 2, 84.

[117] *Real Property Act* 1858 (SA) s 27.

[118] *Real Property Act* 1858 (SA) ss 28, 29.

[119] *Real Property Act* 1858 (SA) s 114.

[120] *Real Property Act* 1858 (SA) s 30.

[121] Anderson, above n 18, 4.

[122] Hedemann, above n 37, 201.

[123] Schalk, above n 32, 132.

[124] Anderson, above n 18, 30, 81.

[125] Hedemann, above n 37, 202.

[126] *Real Property Act* 1858 (SA) s 28.

[127] *Real Property Act* 1858 (SA) ss 9, 37.

[128] *Real Property Act* 1858 (SA) ss 4, 5.

[129] *Real Property Act* 1858 (SA) ss 6, 7.

[130] *Real Property Act* 1858 (SA) ss 4 ff.

[131] Anderson, above n 18, 6, 12.

[132] Ibid 6, 14.

[133] Author ' s thesis, above n 1, 107.

[134] *Real Property Act* 1858 (SA) s 30.

[135] *Real Property Act* 1858 (SA) s 114.

[136] *Real Property Act* 1858 (SA) s 29.

[137] *Real Property Act* 1858 (SA) s 37.

[138] *Real Property Act* 1858 (SA) s 30.

[139] *Real Property Act* 1858 (SA) s 30.

[140] *Real Property Act* 1858 (SA) s 37.

[141] See collection of certificates in Schalk, above n 32, appendix II.

[142] Schlüter, above n 19, 719.

[143] Ibid 676.

[144] Anderson, above n 18, 20, 63, 78.

[145] Ibid 20.

[146] *Real Property Act* 1858 (SA) s 100.

[147] Anderson, above n 18, 26, 63.

[148] Ibid.

[149] Ibid.

[150] See schedule A-S in the appendix of the Act.

[151] Hübbe, above n 8, 81, 94.

[152] Fisher, *The Real Property Act as passed in the Parliament of South Australia, Session 1857-8, with analytical and critical notes* (1858) 109.

[153] Schalk, above n 32, 55; Schlüter, above n 19, 675; Baumeister, above n 31, 203.

[154] Ibid 675.

[155] Anderson, above n 18, 15, 42.

[156] Ibid 31, 83.

[157] Schalk, above n 32, 66.

[158] Ibid 67.

[159] *Real Property Act* 1858 (SA) s 114.

[160] As stated in the Report of the Real Property Law Commission, South Australian Parliamentary Papers, 1861, No 192, Evidence, Question No. 243, most maps of South Australia had been destroyed in a fire in 1839.

[161] *Real Property Act* 1858 (SA) ss 27.

[162] See for instance schedule A for the certificate of title.

[163] Anderson, above n 18, 31, 83.

[164] Ibid 82.

[165] *Real Property Act* 1858 (SA) ss 114.

[166] Anderson, above n 18, 81.

[167] *Breskvar v Wall* (1972) 46 *ALJR* 68, 70.

[168] Schalk, above n 32, 129.

[169] Baumeister, above n 31, 126.

[170] Schlüter, above n 19, 719.

[171] Sackville *et al*, above n 12, 430.

[172] South Australia, *Title by Registration in the Hanse Towns* (by Dr Ulrich Hübbe), Parl Papers No 212 (1861) 6.

[173] Ibid.

[174] Robinson, above n 2, 102.

[175] Ridall, *Introduction to Land Law* (1991) 379.

[176] Catriona Cook *et al, Laying down the law* (5th ed, 2001) 19.

[177] Robinson, above n 2, 115.

[178] Hübbe ' s Official Statement accepted by Secretary Office, 1884, SA-Archives, D 5257 (T).

[179] Hogg, above n 115, 23.

[180] (1872) 6 SALR 65.

[181] *Cuthbertson v Swan* (1877) 11 SALR 102.

[182] Schlüter, above n 19, 746.

[183] Ibid 747.

[184] *Real Property Act* 1858 (SA) s 95.

[185] South Australia, *Title by Registration in the Hanse Towns* (by Dr Ulrich Hübbe), Parl Papers No 212 (1861) 25.

[186] Schlüter, above n 19, 747.

[187] South Australia: *Real Property Act* 1858 (SA) ss 93, 94

Hamburg: Baumeister, above n 31, 128, Schlüter, above n 19, 750.

[188] Anderson, above n 18, 130; South Australia, *Title by Registration in the Hanse Towns* (by Dr Ulrich Hübbe), Parl Papers No 212 (1861) 25.

[189] Anderson, above n 18, 34, 94; South Australia, *Title by Registration in the Hanse Towns* (by Dr Ulrich Hübbe), Parl Papers No 212 (1861) 15; Schlüter, above n 19, 796.

[190] Schalk, above n 32, 81.

[191] See Sackville *et al*, above n 12, 488.

[192] Schedule P, appendix to the Act.

[193] *Real Property Act* 1858 (SA) ss 101, 102.

[194] *Real Property Act* 1858 (SA) s 102.

[195] *Real Property Act* 1858 (SA) s 103.

[196] *Real Property Act* 1858 (SA) s 105.

[197] *Real Property Act* 1858 (SA) s 107.

[198] *Real Property Act* 1858 (SA) s 109.

[199] *Real Property Act* 1858 (SA) s 106.

[200] Schalk, above n 32, 53.

[201] South Australia, *Title by Registration in the Hanse Towns* (by Dr Ulrich Hübbe), Parl Papers No 212 (1861) 22.

[202] Anderson, above n 18, 12, 40, Schalk, above n 32, 53.

[203] Schalk, above n 32, 53.

[204] Hamburg City ordinance of 21 May 1802 cited by Baumeister, above n 31, 134, footnote n 19.

[205] Anderson, above n 18, 12, 39.

[206] Baumeister, above n 31, 133.

[207] Ibid 133.

[208] For a description of the procedure see also above.

[209] Schedule P, appendix to the *Real Property Act* 1858 (SA).

[210] *Real Property Act* 1858 (SA) s 102.

[211] Anderson, above n 18, 12, 39, Baumeister, above n 31, 133, Schalk, above n 32, 53.

[212] Hedemann, above n 37, 32.

[213] C M Sappideen *et al*, *Real Property - Cases and Materials* (3rd ed, 1990) 389.

[214] *Real Property Act* 1858 (SA) s 51.

[215] *Real Property Act* 1858 (SA) ss 51, 62.

[216] *Real Property Act* 1858 (SA) ss 51, 53.

[217] *Real Property Act* 1858 (SA) ss 53.

[218] *Real Property Act* 1858 (SA) ss 24, 49.

[219] Baumeister, above n 31, 168.

[220] Anderson, above n 18, 33, 87.

[221] Ibid 79; Baumeister, above n 31, 174.

[222] Baumeister, above n 31, 168.

[223] Ibid 179.

[224] Loyau, above n 5, 157.

[225] *Merchant Shipping Act* 1854 (Imp) s 70.

[226] Whalan, above n 2, 7.

[227] Coing, *Die Treuhand als privates Rechtsgeschäft* (1973) 11, 28.

[228] *Real Property Act* 1858 (SA) appendix, schedule F.

[229] *Real Property Act* 1858 (SA) s 57.

[230] *Real Property Act* 1858 (SA) s 60.

[231] Schalk, above n 32, 121. This is no doubt because Hamburg had no ruling aristocracy and was a city-republic.

[232] Ibid 120. This may be explained by the fact that Hamburg, unlike most other German states, had a republican form of government rather than a monarchical one.

[233] Ibid 120.

[234] Baumeister, above n 31, 205.

[235] Schalk, above n 32, 120 (author's translation).

[236] Ibid.

[237] Baumeister, above n 31, 208.

[238] Ibid.

[239] Robinson, above n 2, 98.