A New Look at Anthony Forster's Contribution to the Development of the Torrens System

ANTONIO ESPOSITO†

This article offers a fresh insight into the origins of the Torrens system of land registration.

UNTIL some years ago the academic community contented itself with the view that the Torrens System was based on different sources and was drafted with the help of several persons. This was for two obvious reasons. First, it seemed impossible to untangle the real course of events back in 1856/1857, in particular because Torrens and the other protagonists of this famous Australian law reform contradicted each other in their later accounts of the drafting process. To give full credit exclusively to one person and/or legal source was held to be rather a matter of belief and bias than of scholarly deduction. In addition, it seemed to have become commonly accepted that determining the precise historical facts was not a matter of high academic necessity; there seemed to be more important issues than those involving mere questions of recognising the contributions of various individual drafters.

However, by 2005 the academic controversy had flared up again.[1] Contradictory positions were presented at a conference in Adelaide, the native city of the land

† Master of Laws, University of Adelaide; Doctor of Laws, Philipps-Universität Marburg, Rechtsanwalt (German Lawyer). This article is an adaptation of a part of the author's thesis for the degree of Doctor of Laws at the Philipps-Universität Marburg, *Die Entstehung des australischen Grundstücksregisterrechts (Torrenssystem) – eine Rezeption Hamburger Partikularrechts?!* (Berlin 2005). The thesis is available in full at the Law Library of the University of Adelaide and at the University of Canberra Library. There is also an online version accessible under: http://www.jurawelt.com/dissertationen/werke/10658. The author wishes to thank, in the first instance, Professor Hans G Leser, whose wide comparative legal knowledge greatly assisted in the writing of the original thesis. Thanks are also due to Dr Greg Taylor (Law School, Monash University, Melbourne), who translated, and assisted with the adaptation of, the present part of the thesis for publication. It was his idea in the first place to publish these results of my research in English.

1. See eg, in addition to the works cited in the text, H Lücke, 'Ulrich Hubbe or Robert R Torrens? The Germans in Early South Australia' (2005) 26 Adel LR 211.

registration system in question. Recent publications took more polarised points of view. Greg Taylor argued that Robert Richard Torrens was to be regarded as the sole author of the system which bears his name.[2] Similarities to other pre-existing systems were merely coincidental. Other claimants to authorship were not reliable because they were late and obviously 'wanted to elbow Torrens aside' only after the system proved to be impressively successful.[3] In contrast to this position, the author of this article has suggested elsewhere that the original Torrens System had started as an adapted form of 19th century Hamburg land registration law and therefore should be analysed to a great extent as a legal transplant.[4] This conclusion was chiefly based on a legal comparison and numerous statements of contemporaries, amongst which two persons who were commonly known to have actively supported Torrens in the reform process, Anthony Forster and Ulrich Hübbe.

It has been argued that the postulated reception of Hamburg's land law was contradicted by the fact that the German lawyer and Lutheran immigrant Ulrich Hübbe only joined the reform activists a few months after Torrens' first rough draft proposal was presented in Anthony Forster's newspaper. But if the system had already taken shape in some of its important features before any German lawyer was involved, how can it be that a reception of German law (that is, the law of a German city state) took place? Taylor argues that the astonishing similarities between the systems are to be explained by coincidence.[5] It is, he says, quite plausible that the same ideas might coincidentally pop up independently in two different places.[6]

It will be shown that the missing link in this South Australian reform history need not be explained by coincidence, but lies in the preparatory work of the newspaper editor Anthony Forster. He laid out the basic principles of the reform long before Torrens had considered the matter and he based his work on old British Royal Commission reports to which he had access. Having realised, however, that these principles were already at work in Hamburg's land registration system, Torrens persuaded the German lawyer to take over and assist in the adoption of the system in an improved and adapted form.

The claim of Anthony Forster, the editor of the *South Australian Register,* to a considerable share of the credit for the origination of the system of land titles registration introduced in South Australia in 1858, commonly referred to as the 'Torrens' system, has long been known. In a private letter written in 1892, he claimed

---

2. G Taylor, *A Great and Glorious Reformation – Six Early South Australian Legal Innovations* (Adelaide: Wakefield Press, 2005) 22 ff.
3. Ibid 37.
4. A Esposito, *Die Entstehung des australischen Grundstücksregisterrechts* (PhD thesis, Philipps-Universität Marburg, 2005)135 ff.
5. Taylor, above n 2, 33.
6. Taylor names calculus, which was supposedly invented by Isaac Newton and Gottfried Wilhelm Leibniz independently: ibid.

that the Torrens system 'originated in a series of leading articles that I wrote'.[7] But the true significance of his series of articles on the reform of lands titles registration has not been fully understood. These articles have been occasionally mentioned in connection with the history of the Torrens system,[8] but no thorough analysis of them has taken place and it has not been appreciated that they not only set the reform bandwagon in motion politically, but were also the basis of the registration system itself.

This failure may be due to the fact that, even 20 years after the introduction of the system in South Australia, hardly anyone was aware of the historical background. Thus, one reads in a letter to the editor of the *South Australian Register* on 12 June 1882 that the author was surprised at what he had found in its archives.

> I wondered at this first, but after going through your files for the past four and twenty years I have ceased to wonder, for I find that you have not only always been a consistent supporter of the scheme, but that you were, in fact, the originator of it, as it was a series of articles in your paper that set Mr Torrens to work.[9]

The following analysis of Forster's series of articles in 1856 is important because it shows that they contained, for the first time, the basic principles of what became the Torrens system. It shows also that the articles are the key to the introduction into the reform discussion of external sources of legal ideas, which were repeatedly used independently of Forster's suggestions as possible bases for the later Torrens Act. These external sources are, first, the reports of a British Royal Commission,[10] and, secondly, what was then a very progressive British shipping law.[11] The idea of using German law as a possible model for the system can also be traced back to the

---

7. Forster goes on: '[B]ut as all the lawyers of the colony were hostile to the proposed new measure, it never could have been brought to a final consumation but for the efficient help of a German lawyer, Dr. Hübbe' (Forster to Miss A. Ridley, 15 May 1892, South Australian Archives A792). See for further analysis of the letter: A Esposito, *The History of the Torrens System of Land Registration with Special Reference to its German Origins* (LLM thesis, University of Adelaide, January 2000), 24.
8. D Pike, 'Introduction of the *Real Property Act* in South Australia' (1961) 1 Adel LR 169, 178; S Robinson, *Equity and Systems of Title to Land by Registration* (PhD thesis, Monash University, 1973) 3, 11; RTJ Stein & MA Stone, *Torrens Title* (Sydney: Butterworths,1991) 20; M Raff, *German Real Property Law and the Conclusive Land Title Register* (PhD Thesis, University of Melbourne, 1999).
9. *South Australian Register* (12 Jun 1882). See also EAD Opie, *Correspondence on the Real Property Act* (Adelaide: Carey & Page, 1882) 62. In his letter to the editors Opie gives thanks for the generous access to the archives of the *South Australian Register* which he was granted for his research.
10. *Report Made to Her Majesty by the Commissioners to Inquire into the Laws of England Respecting Real Property*: First Report (London, 1829); Second Report (London, 1830). These examinations were followed by a further Report (London, 1850) and by the *Report of the Commissioners Appointed to Consider the Subject of Registration of Title with Reference to the Sale of Lands*, Parliamentary Papers No. 2215 (London, 1857).
11. Merchant Shipping Act 1854.

public discussion of Forster's suggestions.[12] His articles of July and August 1856 are thus important for the comprehension of the reform movement and its later path. They explain where the external sources for the reform originated. This process of historical development of the system might be summarised as a progression from a search for a coherent overall concept to a search for a suitable external model for adoption.

ANALYSIS

Overview

Forster's series of articles did not develop his argument in a linear fashion, but rather in three separate stages. One can, however, see a structure emerging early on which reflects the contemporary search for ideas. The first two articles contained something close to Forster's whole concept.[13] The articles that followed amplified the basic ideas and dealt with objections received, principally in letters to Forster as editor of the *South Australian Register*.[14] In a second step, rather than following up the discussion with draft provisions of a reform Act, Forster discussed the then two-year-old[15] and newly codified shipping law, the Merchant Shipping Act 1854 (Imp)[16] as a possible model for refinement and adoption. Its provisions, Forster suggested, should be used to translate his previously presented ideas into reality.[17] In a third step, the proposed system was discussed in the public forum provided by Forster's newspaper. In this forum other existing systems were considered for adoption. The following analysis of Forster's articles reflects this three-stage development of his proposals. The picture is completed by a consideration of Forster's responses to the reactions of lawyers, which he published in his newspaper.

First stage: Forster's proposed concept

In his first two articles of 3 and 4 July 1856, Forster explained the basic idea behind his proposals.[18] Reflecting perhaps his intention of promoting public debate and discussion, he used a question-and-answer format.[19] In his answers, Forster developed a concept which was to remove the deficiencies of the law of South Australia on registration of lands titles. He began by asking, provocatively, what

12. *South Australian Register*, 16 Aug 1856.
13. Ibid, 3–4 Jul 1856.
14. See the letters to the editors: ibid, 29 Jul 1856, 8, 14, 19, 22, 29.
15. In the *South Australian Gazette,* the text of the statute was published only by the end of July 1856: see the reference in ibid, 4 Aug 1856.
16. Merchant Shipping Act 1854.
17. *South Australian Register*, 9 Jul 1856 (Forster refers to 'elements and formulae necessary for dealing with landed property').
18. Ibid, 3–4 Jul 1856.
19. Ibid, 3 Jul 1856.

differences really existed between land, ships, shares in mining companies and moveable goods which justified the existence of such complicated forms of transfer of ownership in relation to land only.

On 3 July 1856, Forster outlined his basic idea.[20] The article, like all others that followed it, was headlined 'The Transfer of Real Property'. To remove deficiencies in the existing law, he suggested that a court, a statutory authority or a commission should be empowered to declare definitively the true position in relation to the ownership of parcels of land.[21] The Registry Office, already in existence, could perform this role.[22] It would create a register based on parcels of land (rather than on their owners). The register would be a standardised book enabling entries to be made in it with ease. A register book of this nature, combined with a law enabling the register office to perform the function mentioned, would include every parcel of land. It would not merely establish priority of interests existing independently, but also conclusively establish the legal validity of the titles it contained.

On 4 July 1856, Forster continued the previous day's musings at greater length.[23] He now explained more precisely what he meant by the proposal to enable the register office to declare the validity of lands titles. An interest in land examined by the office should, by its declaration of validity, be made indisputable. The constant uncertainty relating to what interests existed in land, which was involved in the need for each to be proved valid by means of a chain of title, would thus become a thing of the past. Each parcel would have clear titles attached to it which would obviate the need to prove validity in the future. Even in difficult cases it would be possible to establish, at least for future interests, complete certainty once a thorough examination of the pre-existing legal position had occurred. Forster did not distinguish between interests at law and in equity.[24] In a later article he indicated that he had deliberately not done so, as both types of interests should be embraced by the system he proposed.[25]

On 4 July 1856, we find Forster for the first time describing his proposal as involving the creation of an 'indefeasible title'[26] to land. This is worthy of note as it is a fundamental principle of the Torrens system.[27] It is also identical to the terminology used in the law today, although it was not found as such in the Act of 1858.

---

20. Ibid.
21. Ibid.
22. Since 1842 the registry office recorded the order of conveyances: KT Borrow, 'Col. Torrens' "Self-Supporting Colonisation" and the South Australian Real Property Act' (1984) 23 *South Australiana* 55ff.
23. *South Australian Register*, 4 Jul 1856.
24. See for an analysis of the initial frictions between equitable interest and Torrens system: Esposito, above n 4, 209 ff.
25. *South Australian Register*, 31 Jul 1856.
26. Ibid, 4 Jul 1856.
27. For further explanation of the principle, see AJ Bradbrook, SV MacCallum & AP Moore, *Australian Property Law: Cases and Materials* (Sydney: Law Book Co, 2007) ch 5.

Forster considered that the practical operation of his system would require state-authorised maps.[28] Every title to land would refer to an identifiable parcel so that interests in land could be related definitively to a parcel.[29]

It is easy to appreciate that a register book referring to parcels of land as the basic unit of registration would require reliable maps. However, this proposal was also one of the greatest obstacles to the practical realisation of Forster's proposals. The system existing at that stage took as its basic unit of registration the identity of owners, rather than parcels of land, and did not require a system of maps.[30] The very few official maps in existence had no legal status.[31] The inadequate surveying of South Australia meant that Forster's proposal, relying as it did on exact maps, appeared more of a brave dream for some indefinite future time than a realistic proposal that could be introduced straightaway.

The fact that Forster's proposal nevertheless caused a public discussion to begin is to be attributed to the fact that, from the first, he advocated the step-by-step introduction of the new register rather than its immediate application to the whole of South Australia.[32] Only land in relation to which reliable maps already existed could be subjected to the new system on the application of the owner.[33] Forster's view was, therefore, that the new system should be optional rather than immediately binding on everyone.[34]

It is interesting to note that, over a year after Forster's articles on this topic, Torrens wrote a letter to Forster in which he considered the question of the compulsory introduction of the new system and also the need for comprehensive maps.[35] Some authors have wrongly concluded on the basis of these letters that the ideas in them were Torrens's own and that therefore he was the originator of them.[36] But the above analysis shows that Anthony Forster had long before brought this matter into focus. Against this background, the letter is to be understood as an attempt by Torrens to make use of Forster's knowledge.

---

28. *South Australian Register*, 4–5 Jul 1856.
29. Ibid, 5 Jul 1856.
30. Usually the deeds contained a more or less precise description of the land in question: Real Property Law Commission, *Report*, South Australian Parliamentary Papers No. 192 (1861) Evidence, question no. 24.
31. Robinson, above n 8, 4.
32. Ibid.
33. *South Australian Register*, 4–23 Jul 1856.
34. This question was discussed even after Torrens introduced his first draft into Parliament: South Australia, *Parliamentary Debates*, House of Assembly, 4 Jun 1857, 201 ff.
35. Letter from Torrens to Forster, 12 Nov1857, as cited in Stein & Stone, above n 8, 24.
36. In particular, DJ Whalan, 'The Origins of the Torrens System and Its Introduction in New Zealand' in DJ Whalan, *The New Zealand Torrens System Centennial Essays* (Wellington: Butterworths, 1971) 7. More cautious, Robinson, above n 8, 9 and Stein & Stone, ibid 24, who conclude merely that there must have been a collaboration between Torrens and Forster.

As far as transfers of interests in land were concerned, Forster as early as his first article of 3 July 1856[37] had stated that the most urgent task of a new law would be to make it possible to effect transfers cheaply and securely.[38] Forster's initial suggestion on 3 July 1856 was that transfers should be possible only via the registry.[39] On 4 July, he described this system in more detail.[40] Once the registry had officially declared the state of interests in any parcel of land, no further proof would be required. That would greatly simplify the transfer of interests as the previous need to prove in great detail the existence of a right to dispose of an interest would no longer exist.[41] All subsequent transfers would require only a simple notation. Forster did not, however, indicate in this introductory series of articles the precise procedure for making the notation or the legal requirements for making one. In particular, it was not clear whether he was proposing a notation in the register or on documents outside it.

However, there are reasons for thinking that Forster, even at this early conceptual stage, was proposing that the transfer of an interest in land would occur by means of an entry by the registry.[42] This at least was how 'A Conveyancer' understood Forster's proposals.[43] This correspondent, after initially rejecting Forster's proposals completely,[44] did agree on 29 July 1856 with Forster to the extent that transfers should in future be effected by means of an entry on the register.[45] Forster, who published this contribution in his newspaper, did not object to this description of his proposals, which we may take as a confirmation of the accuracy of the description.[46]

The initial lack of detail in Forster's description of the precise manner in which his system would operate is not necessarily due to a lack of care in the presentation of his proposals. His intention was not to present a completely articulated, fully detailed system. His constant exhortations to his readers to participate creatively in the reform debate[47] presupposed that his proposals were not intended to be seen as fixed in stone. (Later, in connection with his description of shipping law, he would

37. *South Australian Register*, 3 Jul 1856.
38. See also A Forster, *Adelaide Observer*, 5 Jul 1856.
39. *South Australian Register*, 3 Jul 1856.
40. Ibid, 4 Jul 1856.
41. According to the old law it was necessary to produce all deeds and documents to show an unbroken chain of title. For a more detailed description, see Stein & Stone, above n 8, 4 ff; Esposito, above n 4, 16 ff).
42. First references can be found in the *South Australian Register:* 3 Jul 1856 ('Conveyances being issued out of the Registry Office'), 12 & 15 Jul 1856.
43. Using the pseudonym 'A Conveyancer', a real property lawyer published his views and responses in Forster's newspaper: *South Australian Register*, 8, 17, 22 & 29 Jul 1856.
44. *South Australian Register*, 8 & 22 Jul 1856.
45. Ibid, 29 Jul 1856.
46. See Forster's next article: ibid, 31 Jul 1856.
47. Ibid, 3 & 15 Jul 1856.

indicate in much greater detail his idea of how transfers would be made.)[48] Forster at this early stage specifically left open to his readers such questions as whether a statutory authority or a court should keep the register.[49] That he nevertheless had a personal view on this point is shown by his guest appearance in the *Adelaide Observer* on 19 July 1856, in which he advocated that a court should examine existing titles and declare their validity.[50]

Although this subject was not strictly part of Forster's basic scheme, his proposals for the procedure to be adopted in cases of sales coupled with partition should be mentioned in this connection. Forster's view was that transfers of part of a parcel of land only should be effected by means of the creation of a completely new legal title to the partitioned and sold land.[51] This 'fresh title' could then be treated independently of the remaining unsold part. A new folio in the register book would be created for the new parcel so that an original and independent series of transactions could then be recorded in respect of it.

Before Forster cast his eyes towards the Merchant Shipping Act 1854,[52] he published a further article in which he summarised his basic concept.[53] The summary was to the effect that his basic proposals were for the creation of a central register, a state guarantee of an examined and registered title, official maps and transfer by simple notation.

It might be thought surprising that Forster at this early stage published a summary rather than a more detailed explanation of his proposals. The reason for this method of proceeding is, however, apparent: what was to follow was the presentation of detailed proposals on the basis of the provisions of the new law on registration of title to ships.[54] The summary was thus meant to mark a caesura in his discussion. He did not mention details because he wanted to present the basic pillars of the proposed new system without the additional complication of discussing the shipping law as well. As the following discussion shows, Forster did not analyse the shipping law for its general principles, but rather for its detailed provisions that could be used to supplement the basic concept as it had been presented on 3 and 4 July 1856.

Second stage: refinement of the basic concept using shipping law

The idea of using the registration-of-title provisions of the Merchant Shipping Act 1854[55] in order to fill out the detail of his proposal was first presented by Forster in

48. *South Australian Register*, 9, 12, 23 & 31 Jul 1856.
49. Ibid, 3 Jul 1856.
50. *Adelaide Observer*, 19 Jul 1856.
51. *South Australian Register*, 4 Jul 1856.
52. Ibid, 9, 11, 23 & 31 Jul 1856.
53. Ibid, 5 Jul 1856.
54. Ibid, 9, 12, 23 & 31 Jul 1856.
55. Act 17 and 18 Victoria, c 104.

an article of 9 July 1856.[56] All subsequent articles by Forster had the same goal, even if he did not always refer to it expressly.[57] Forster now began to refine his basic concept taking as his text the modern British shipping-law codification. His suggestion was, in essence, to adopt two features of the new shipping law: first, the use of schedules to the Act to set out the manner in which instruments of transfer would be set out for the most important cases,[58] and secondly the use of certificates of title.[59] Forster took for granted that the formal frame of the shipping register, which took as its basic unit the registered property rather than the owner, would be an excellent model for his proposed lands titles register.[60]

In relation to all these ideas, to be presented in greater detail shortly, it is necessary, however, to guard against the misapprehension that Forster thought it possible to copy the shipping law slavishly. As I have shown elsewhere, Torrens did that very thing in his first draft of the Act about three months after Forster's articles had appeared.[61] In contrast, Forster thought from the beginning that only a limited degree of guidance could sensibly be found in the precise provisions of the Act.[62] Forster always had as his guiding star his own basic concept, which the shipping law was merely intended to supplement.

Without any discussion of the point, Forster maintained that the adoption of the named features of the shipping law would be possible, as ships and land as objects of ownership were quite similar.[63] Forster relied heavily on the shipping law's scheduled forms to provide templates for the form in which the most common transactions relating to land would be conducted.[64] Within the basic framework he had already proposed, the schedules would be used in land law as well. As in shipping law, the schedules would be used for all types of disposition. Forster pointed to the form for the creation of a mortgage as a particularly important example.[65] The forms would be available cheaply at the register office or from any bookseller.

Forster thought that the register of lands titles should also be built up by means of certificates of title, as in shipping law.[66] A certificate would be a folium which would indicate the legal status and history of a parcel of land in a standardised form. Every

56. *South Australian Register*, 9 Jul 1856.
57. Ibid, 11, 15, 17, 23 & 31 Jul 1856.
58. Ibid.
59. Ibid.
60. Ibid.
61. See for further analysis Esposito, above n 4, 97ff. Torrens' first draft was also published in Forster's newspaper: *South Australian Register*, 17 Oct 1856.
62. *South Australian Register*, 9 Jul 1856. Forster refers to 'elements and formulae', that should be transferable to the new law.
63. Ibid.
64. Ibid, 9, 11, 17 & 23 Jul 1856.
65. Ibid, 11 Jul 1856.
66. Ibid, 9 Jul 1856.

disposition would be indicated by means of a notation on the certificate. The certificates would refer to the official maps which would be required for a register of lands (as distinct from shipping) titles.[67] The register would be available for all to see against the payment of a small fee so that there would be complete certainty in relation to the state of interests in any parcel of land.

Forster declared that the transfer of interests under his proposal would be conducted by the completion of the appropriate form in the schedules by the parties to the transfer (in case of a sale of the fee simple, for example, by a bill of sale), and that they would then apply for it to be registered by the registry.[68] The advantages of this method of proceeding, he thought, were obvious. There would be no need for expensive deeds to be drafted for every single disposition, but at the same time one could be certain that the form, drafted by experts, would achieve the desired legal effect.[69] It would not be necessary to make this procedure compulsory, as its inherent advantages would secure its general adoption without compulsion.[70]

In order to promote further the idea of adapting parts of the shipping law in the introduction of his system, Forster published two articles on 4 and 5 August 1856, which contained nothing besides a description of the provisions of the Merchant Shipping Act 1854.[71] He highlighted, in particular, the procedures for the transfer of interests and registration. It is noteworthy that, in these articles, Forster made no further suggestions about how these rules could be adapted for land law. Instead, he called upon legally trained readers to supply him with suggestions. This was a call upon which Torrens acted in October 1856, in his first draft Bill, by directly carrying across the provisions of the shipping law to an extent which Forster did not contemplate.[72]

Third stage: the public debate on Forster's proposals and the consideration of other models for adoption

Forster's proposals promoted a lively discussion on the necessity for, and feasibility of, reform.[73] The discussion gives us considerable insight into the development of the reform over time, as it indicates implicitly the extent to which the various pre-existing external sources of legal ideas and provisions were incorporated into the search for a new concept of real property law. Unfortunately the available materials are largely limited to the newspaper correspondence, so far as it has been preserved

67. Ibid, 4 & 9 Jul 1856.
68. Ibid, 9 Jul 1856.
69. Ibid, 11 & 12 Jul 1856.
70. Ibid, 23 Jul 1856.
71. Ibid, 4 & 5 Aug 1856.
72. For the analysis of each single draft bill, see Esposito, above n 4, 97 ff.
73. *South Australian Register*, 8, 14, 19, 22 & 29 Jul 1856.

in the State Library of South Australia.[74] It can, however, be assumed that the views ventilated in these daily newspapers were largely reflected in unrecorded discussions, as the former, in the final analysis, largely dictated the content of the latter. Moreover, the newspaper correspondence indicates that a variety of opinions were held, a fact which is to be attributed to the thoroughly ecumenical stance of Anthony Forster. As early as his second article in the series 'The Transfer of Real Property', he declared himself willing to publish all readers' letters received and expressly called for expressions of opinion on his proposals.[75] Although Forster repeatedly called upon the legal profession to join in the exchange of views,[76] the profession took little part in the critical discussion by means of letters to the editor. The chief professional critic was a lawyer writing under the pseudonym 'A Conveyancer'.[77] The discussion may be divided into two sub-discussions: first, the basic concept; secondly, that relating to the possible external sources of legal ideas. I shall deal with each of these in turn.

First, Forster's basic concept was initially attacked in principle because of its character as a reform. It was argued that a thorough-going reform of real property law was too difficult and made no sense having regard to the imminence of reforms in England. Only later did arguments against Forster deal with the actual content of his proposals and his idea of a register office armed with wide powers.

Given that South Australia was a British colony, some correspondents doubted whether it should alone attempt a reform. 'A Conveyancer' objected that the law of real property was too complicated a subject for a successful reform by the South Australian parliament, which lacked the necessary skills.[78] 'A Conveyancer' pointed to a series of multi-volume works on real property law (including the two volumes of *Blackstone's Commentaries*),[79] which every real property lawyer needed to have mastered as a basic requirement for knowing how to deal with the subject-matter. He also pointed out that much better qualified people had dealt with the material in the past and had come to grief on the highly complicated and ancient law.[80] It was, he said, not possible to develop a simple and also inexpensive procedure in this area.

Forster had, however, already dismissed the argument from the difficulty of the material. In his view, lawyers had an interest in keeping the law complicated in order to justify their high fees.[81] That was denied by various correspondents, among

74. The correspondence on the reform can be found chiefly in the *South Australian Register* and the *Adelaide Observer* (State Archives of South Australia, Adelaide).
75. *South Australian Register*, 4 Jul 1856.
76. Ibid, 15 Jul 1856.
77. Ibid, 8, 22 & 29 Jul 1856
78. Ibid, 22 Jul 1856.
79. W Blackstone, *Commentaries on the Laws of England* (London, 1765–1770) vol 2, 'The Rights of Things'.
80. Probably this referred to the reform commissions of 1829-1830 and 1850.
81. *South Australian Register*, 3 Jul 1856.

them non-lawyers. Thus, 'A Layman' wrote on 19 July 1856 that lawyers' objections could not be based on this ground, as Forster's proposals, so far from reducing costs, would require additional litigation.[82] The real reason for lawyers' opposition, however, was, 'A Layman' wrote, that the lawyers were so wedded to legal tradition. The editor of the *Adelaide Observer* provided a similar reason for the lack of reforms suggested by lawyers.[83] It was not self-interest but the insistence on following outdated legal rules and blind adherence to antiquated forms that were the reasons for their opposition to reform of real property law. The cudgels should therefore be taken up by non-lawyers.

In relation to the allegedly imminent British law reforms, the *Adelaide Observer* pointed out that many lawyers put forward the view that it was senseless to attempt a reform in South Australia given that in England recognised leaders of the profession were working on a similar subject at the same time.[84] It would thus be better to await their report. This was a reference to the deliberations of the Royal Commission on Real Property Law, which had begun work in England in 1854 and was to complete its deliberations in 1857.[85]

Forster dealt with this very argument, which aimed at continuing South Australia's orientation towards English law and awaiting developments in Great Britain, in one of his articles.[86] He said that the situation in England was different and not comparable to that in South Australia. South Australia had a different societal structure and greater pressure for reform.[87] Moreover, the work of the Royal Commission of 1829-1830 showed[88] that an orientation towards the English sources was not compulsory – for that Commission had itself considered continental codifications with much benefit in the form of many new ideas.[89] There was thus no reason simply to receive English law as it came along. Furthermore, a South Australian innovation would not be without precedent.[90] In the area of inheritance law, South Australia had already gone its own way. Finally, the Royal Commission reports of 1829-1830 had produced no result, despite the Commission's view that reform was very urgent.[91] The Commission had referred to the need for a reform from the ground up, as partial reforms had proved insufficient.

Secondly, Forster's principal suggestion – the creation of a central office for the examination of titles to declare conclusively what interests existed in parcels of

82. Ibid, 19 Jul 1856.
83. *Adelaide Observer*, 5 Jul 1856.
84. Ibid.
85. JE Hogg, *The Australian Torrens System* (London: Clowes & Sons, 1905) 17.
86. *South Australian Register*, 17 Jul 1856.
87. Ibid, 5 Jul 1856.
88. First Report of 1829, above n 10.
89. *South Australian Register*, 5 Jul 1856.
90. Ibid, 15 Jul 1856.
91. Ibid, 5 Jul 1856.

land – was questioned. This aspect of the debate dealt with three questions: the cost-benefit of a central office; the difficulty of introducing such an office; and finally the structure of the office itself.

In relation to the cost-benefit analysis, 'A Conveyancer' again provided a critique which addressed the main points. In his estimation the number of parcels of land in private ownership in South Australia was about 40 000.[92] It was, therefore, impracticable to create a central office to examine them: it could never cope. Any such office would have neither sufficient time nor staff to deal with its task.[93]

Forster responded by saying that in other countries (eg, the USA and on the continent) such register offices already existed and were successfully functioning.[94] He illustrated this using extracts from the report of the British Royal Commission of 1830, which had referred to such systems.[95] The same point was also made by reference to the proposed reform of real property law in Fisher's South Australian proposal of 1836,[95] which involved the introduction of a central register and showed that such a system was feasible in South Australia.[97] Moreover, the benefits of such a register office greatly exceeded the costs of its administration.[98] Forster also pointed to the high costs and inconvenient procedures for establishing a chain of title that were unavoidable under the existing system. It was difficult to rebut this argument: as Forster pointed out, a central office would need to examine titles only once for each parcel of land,[99] on its becoming the subject of an entry in the register. Afterwards, the register itself would be legally conclusive. Interests in land would be established not by showing a chain of title but by registration itself. In addition, the increased degree of legal certainty produced by a central register would be of value.[100] This would rapidly lead to a reduction in litigation and an overall reduction in costs.

As far as the difficulty of introducing a register office was concerned, it was suggested that there were particular and perhaps insuperable difficulties in South Australia. Thus, 'A Conveyancer' maintained that such a register would be feasible only if it had been introduced from the foundation of the colony and the first sales of land.[101] The opportunity had therefore been missed. He found support in Forster's own quotations from the reports of the Royal Commission of 1830 in which the Lord

92. Ibid, 8 Jul 1856.
93. *Adelaide Observer*, 12 Jul 1856.
94. *South Australian Register*, 17 Jul 1856.
95. Ibid.
96. JH Fisher, *A Sketch of Three Colonial Acts, Suggested for Adoption in the New Province of South Australia* (London: Clowes & Sons, 1836).
97. *South Australian Register*, 23 Jul 1856.
98. Ibid, 12 Jul 1856; *Adelaide Observer*, 19 Jul 1856.
99. Ibid, 23 Jul 1856.
100. Ibid, 12 Jul 1856.
101. *Adelaide Observer*, 12 Jul 1856.

Chancellor was quoted as saying that the success of some American systems was attributable to their having been introduced from the start.[102]

Forster countered these objections with the argument that the system would not be introduced on a compulsory basis.[103] In an opt-in system, it would not be necessary to examine all titles at once. The transition to title by registration would occur in stages. The effort involved would therefore be justifiable. However, 'A Conveyancer' was not wholly convinced. He thought that Forster's system would necessarily lead to additional and unnecessary costs.[104] In order for the register to be conclusive evidence of title, all interests in each parcel of land would have to be subjected to examination, a procedure from which to date parcels had been excluded if no doubts existed in relation to their legal titles. However, the *Adelaide Observer* thought that an examination of such undisputed parcels prior to registration would be superfluous.[105] Forster, on the other hand, took the objection more seriously and suggested that different levels of examination might exist for parcels of land depending on the extent to which doubt existed in relation to them.[106] Obviously indubitable titles to land could be the subject of summary and thus inexpensive examination. Complicated cases could be subjected to a more thorough procedure depending on whether competing interests were asserted. Forster also indicated that in simple cases an examination would still be of value as it would need to be conducted only once, and legal certainty would then ensue.[107] This permanent advantage would outweigh the initial costs.

Finally, a discussion took place, even while the principles of Forster's system were still being discussed, about what institution or person would have the task of examination on the first entry of a parcel of land in the register. While Forster, as mentioned, was originally in favour of confiding this task to a court,[108] the *Adelaide Observer* thought that it should be given to lawyers with a commission from the Crown.[109] 'A Conveyancer' stated, on the other hand, that such jurists could suffer from conflicts of interests with their private clients.[110] He thought that a permanent commission would need to be established.[111] It would consist of two experts in real property law and one lay-person.

These various suggestions remained on an equal footing in the debate. No one view became dominant. Rather, each correspondent hardly referred to contradictory views, so that the discussion remained somewhat inconclusive.

---

102. *South Australian Register*, 17 Jul 1856.
103. Ibid, 23 Jul 1856.
104. *Adelaide Observer*, 12 Jul 1856; *South Australian Register*, 22 Jul 1856.
105. Ibid, 5 Jul 1856.
106. *South Australian Register*, 4 Jul 1856.
107. Ibid, 23 Jul 1856.
108. *Adelaide Observer*, 19 Jul 1856.
109. Ibid, 5 Jul 1856.
110. Ibid, 12 Jul 1856.
111. Ibid.

I mentioned above that the second portion of the discussion of Forster's proposals referred to possible external sources of ideas for reform. I now turn to this aspect of it. In the foreground were, first, the shipping law, as mentioned by Forster himself, and secondly the German models of registration of interests in land as favoured by German settlers.

Once Forster had suggested the use of the shipping register as a template for the realisation of his plans,[112] a discussion began about whether the Merchant Shipping Act 1854 was suitable for this purpose. It was questioned whether the law of shipping could be applied at all to land. It was also doubted whether the schedules to the Act containing forms to bring about changes in ownership, create mortgages, etc,[113] on which Forster had placed emphasis, could usefully be adapted to the purpose at hand.

The general adaptability of the shipping law was questioned in a letter to the *South Australian Register* on the basis that it was itself very complicated and that dispositions of interests under it would therefore also be correspondingly expensive.[114] Adapting this law to the purposes of real property would thus not bring the desired relief. Forster's response was that this was indeed true before the law was codified in 1854.[115] The new Merchant Shipping Act 1854 had, however, ended this and dealt with all questions relating to ships in a coherent codification. Forster reprinted the most important provisions of the Act in order to enable his readers to form their own views of the matter.[117]

The opponents of reform must also have argued that the shipping law could not be adapted because ships and land are not similar. At any rate, Forster dealt with this argument, referring to correspondence received, in one of his articles.[118] He admitted that the moveability and destructibility of ships were significant and relevant differences. But this was not an argument against the adaptability of the system. Rather, the immovability and permanence of land would make it easier to adapt the shipping rules. Forster also emphasised that he saw the shipping legislation as a guide only. Its basic principles could easily be adapted with special reference to the unique qualities of land.

Forster also pointed out that the idea of codifying the law which had animated the drafters of the shipping legislation could also be adopted in real property law.[118] In the end, real property law was a prime example of unnecessary legal complexity. Even the lawyers admitted that only a few of their number were masters of it. A codification would largely eliminate this defect.

112. *South Australian Register*, 9 Jul 1856.
113. Merchant Shipping Act 1854, Appendix.
114. *South Australian Register*, 14 Jul 1856.
115. Ibid, 14 Jul 1856.
116. Ibid, 4 & 5 Aug 1856.
117. Ibid, 31 Jul 1856.
118. *Adelaide Observer*, 19 Jul 1856.

Forster's suggestion of using the schedules of the shipping legislation[119] was also the subject of attack. It had been objected that dispositions of land were associated with particularly long covenants, so that a handy short form could hardly be used. Forster dealt with this objection.[120] While admitting that it would be necessary to restrict the amount of text in any one form, it would, he said, not be necessary to deal with all possible legal problems that might arise in the form itself. As in the shipping legislation, the forms would contain only the most important covenants in an abridged form. This would cover most transactions in land in South Australia. For particularly complicated cases, it would also be possible for individual covenants to be drafted.

Forster also rejected the objection by 'A Conveyancer'[121] that the parties to land transactions would make mistakes in filling in such forms and would therefore cause litigation. Forster thought that, if this did not happen with ships, it would not happen with land. It needed also to be remembered that the texts of the forms would be drafted by recognised experts in real property law.[122] This would ensure that legally correct formulations were used for each transaction and make the extended drafting of covenants a thing of the past.[123] Forster was supported on this by a reader writing under the pseudonym 'A Layman'.[124] 'A Layman' maintained that a majority of transactions were currently conducted by young, inexperienced lawyers. Without precedents they would assuredly make numerous mistakes in the drafting of covenants and would render numerous titles dubious. This would no longer be a danger if forms for the purpose of conducting such transactions were introduced in the legislation.

Forster put forward a further argument on the basis of a comparison with the existing state of the law.[125] He referred to the cost savings that would accompany the introduction of legislative forms. The forms were, moreover, to be associated with the idea that registration itself would be the source of title, which would render the establishment of a chain of title unnecessary. The parties to transactions would, therefore, incur fewer costs, as their expenses would be confined to the purchase of the forms and the registration fee.

While the English settlers were used to the English system of transferring land by deed, their German neighbours[126] who had also settled in South Australia had been

119. *South Australian Register*, 9, 11, 12 & 23 Jul 1856.
120. Ibid, 31 Jul 1856.
121. Ibid, 22 Jul 1856.
122. Ibid, 12 Jul 1856.
123. Ibid, 11 Jul 1856.
124. Ibid, 19 Jul 1856.
125. Ibid, 11 & 12 Jul 1856.
126. German Immigration was promoted by George Fife Angas who collaborated from 1838 with the German Pastor August Ludwig C Kavel. They had chosen in particular the Barossa Valley, north-east of Adelaide, for a predominantly German settlement: A Brauer, *Under the Southern Cross: History of Evangelical Lutheran Church in Australia* (Adelaide: Lutheran Publishing House, 1956), 15 ff, 33 ff.

astonished and outraged by it.[127] They could not understand why the legal status of land that had already been surveyed should be uncertain. They had repeatedly suggested the introduction of a reliable register of land holdings similar to that which existed in the German states.[128] When Forster began to present the idea of a secure register of land holdings to the public in mid-1856, the German settlers brought their own systems into the debate.[129] In particular, the registration systems of Hamburg, Prussia and Austria-Hungary were repeatedly mentioned in this connection as worthy of adoption.[130]

The first letter to Forster's newspaper that mentioned German law appeared on 16 August 1856.[131] In it, a reader defended Forster's proposals under the name of 'Vitis'. Vitis maintained that a virtually identical system existed in Prussia. As it had proved itself of value there, it could not be said that it was not practicable in South Australia.

It is to be assumed that Forster's proposals led to more extensive contributions on German real property law that were published in German-language newspapers in South Australia. Since 1851 two such newspapers had existed, namely the *Südaustralische Zeitung* and the *Adelaider Deutsche Zeitung*.[132] The *Tanunda Australische Zeitung* also appeared in the earlier years.[133] Unfortunately only issues from the 1860s are extant. This means that a considerable part of the discussion of German registration systems in the course of the South Australian reform movement of 1856–1857 may have been lost.

In the contemporary discussions, the scholarly contributions of the German lawyer Dr Ulrich Hübbe on the Hamburg law of land titles registration must have been particularly prominent.[134] At all events he came to the attention of George Fife Angas, among others, who had had contact with German purchasers of his land.[135]

127. Stein & Stone, above n 8, 21.
128. Ibid.
129. PA Howell, 'Constitutional and Political Development: 1857–1890' in D Jaensch (ed.), *Flinders History of South Australia: Political History* (Adelaide: Wakefield Press, 1986) 159.
130. Robinson, above n 8, 9; Stein & Stone, above n 8, 21.
131. *South Australian Register*, 16. Aug 1856.
132. For detailed background information, see the introduction to the microfiche edition in the State Archives of South Australia (Adelaide).
133. The *Tanunda Australische Zeitung* (*Tanunda Australian Newspaper*) was founded in 1864 by MP Basedow. Tanunda itself started as a South-Australian settlement with predominantly German population. In 1875, Basedow bought also the *Süd-Australische Zeitung* which he merged with the *Australischen Deutschen Zeitung* into the *Australischen Zeitung:* IA Harmstorf, 'Germans in the South Australian Parliament: 1857–1901' (BA (Hons) Thesis, University of Adelaide, 1959) 27.
134. In Germany, Hübbe had organised the emigration of Lutherans from Hamburg to South Australia. In 1842, he migrated himself with the support of GF Angas. For further information, see the *Australian Dictionary of Biography* (Melbourne: MUP, 2005) vol 4, 292.
135. Pike, above n 8, 178 ff.

Both he[136] and later Torrens[137] commissioned Hübbe to present his ideas in an accessible form. Once Torrens had made the public discussion a parliamentary one by the introduction of his first Bill, Angas financed the publication of Hübbe's book, *The Voice of Reason*.[138] He provided a free copy to each member of the South Australian parliament in order to bring its influence to bear.[139] Hübbe's discussion of German law, which owed its origin to the debate prompted by Forster, was soon to be closely associated with Torrens' first working drafts.[140] I have dealt with this aspect elsewhere.[141]

Summary

My analysis of Forster's series of articles has shown that, as early as mid-1856 and thus a year before the legislative process began,[142] he had already developed the principal features of what became the Torrens system. These features were the introduction of a register of land holdings based on parcels, registration as the basis for the transfer of interests, the use of scheduled forms by the parties to transactions and also the association of the register with an official system of maps.

Forster's series of articles, and the debate he encouraged in his newspaper, gave the reform movement direction. The shipping legislation of 1854 was presented for the first time as an already existing system of title by registration that was suitable for adaptation. Thereafter, Forster's ideas began to develop independently. The search for a basic concept came to be associated with discussions of possible external sources of legal principles and provisions. The law of the German states was soon at the centre of attention alongside British shipping law.

It cannot be concluded on the basis of the evidence presented here that the Torrens system was a direct result of Forster's suggestions, or that they were translated directly into provisions of the Torrens system as it emerged in early 1858. But it is possible to conclude that the essential principles of the Torrens system were first formulated by Anthony Forster. It is especially impressive that he did not merely present some important individual aspects of the system, but an entire coherent concept, even if one which was not entirely without loose ends.

---

136. Ibid.
137. M Geyer, *Robert Richard Torrens and the Real Property Act: The Creation of a Myth* (BA (Hons) Thesis, University of Adelaide, 1991) 32.
138. The full title is: *The voice of reason and history brought to bear against the present absurd and expensive method of transferring and encumbering immovable property*. (A copy of the book can be found in the law library of the University of Adelaide.)
139. Geyer, above n 137, 33.
140. Esposito, above n 4, 97 ff.
141. A Esposito, 'Ulrich Hübbe's Role in the Creation of the "Torrens" System of Land Registration in South Australia' (2004) 24 Adel L Rev 263; Esposito, ibid, 135 ff .
142. Torrens introduced his draft bill into Parliament on 4 June 1856: South Australia, *Parliamentary Debates*, House of Assembly, 1857/58, 201 ff.

THE ROYAL COMMISSION REPORTS

Preliminary

In this section I propose to consider the sources from which Forster might have drawn his inspiration. After all, he was not a lawyer but a journalist and newspaper publisher.[143] His reform proposals in his newspaper were limited to descriptive accounts; he did not attempt to draft a Bill.[144] It cannot be assumed that Forster gave expression to his own original ideas in the coherent package in which he presented and defended them vehemently against the criticisms of South Australian lawyers. If a non-lawyer presents a largely coherent and comprehensive set of legal proposals rather than just isolated suggestions, it is possible – some might even think it more than likely – that the proposals have been taken from some other source.

Pursuing this line of inquiry, I have discovered that Forster's proposals of mid-1856 were based primarily on old reports of British Royal Commissions. This fact, which scholars have previously overlooked, is shown in what follows.

The reports of these Royal Commissions were divided into three parts. First came the report proper, then recommendations or propositions, and finally the appendix. The appendix included dissenting reports.

In the years 1829,[145] 1830,[146] 1850[147] and 1857,[148] British Royal Commissions presented reports relating to real property law. In connection with the origin of the Torrens system, only the report of 1857 has so far been the subject of analysis, chiefly owing to the large degree of similarity between its recommendations and features of the Torrens system.[149] It was very early on identified as a possible source of the ideas for Torrens's Bill.[150] But this theory is difficult to defend. First, the analysis above shows that the essential ideas of the Torrens system were being discussed as early as mid-1856, in other words long before publication of the report in 1857. Secondly,

143. Pike, above n 135.
144. Only regarding the equal treatment of legal and equitable property rights in respect of the indefeasibility of registered rights did Forster formulate an actual draft clause, as he thought it crucial to deal with this in the future Bill: *South Australian Register*, 31 Jul 1856.
145. First Report of 1829, above n 10: 'The Report' 5-63, 'Propositions' 63-83, 'Appendix' 83-671.
146. Second Report of 1830, above n 10: 'The Report' 3-66, 'Subjoined Papers and Table' 67-81, 'Appendix' 1-544.
147. Report of 1850, above n 10: 'Report' 3-38, 'Supplementary Paper' 39-41, 'Appendix' 1-604.
148. Report of 1857, above n 10.
149. PM Fox, 'The Story Behind the Torrens System' (1950) 23 ALJ 489, 491; Hogg, above n 85, 17 f; GA Jessup, *Torrens of the Torrens System* (unpublished essay, 1950) 12 ff; Robinson, above n 8, 9; Stein & Stone, above n 8, 24; Whalan, above n 36, 7 f.

as the supporters of this theory themselves admit, the report of 1857 could not easily have had any influence even on the Bills of that year. This was for practical reasons: it is beyond doubt that the ship carrying the report of 1857 reached South Australia only as Torrens' Bill was at the Second Reading stage, and more precisely on the eve of the Second Reading.[151]

It is all the more puzzling, therefore, that the reports of Royal Commissions in 1829–30 and 1850 have thus far not been seriously considered.[152] This appears to be because they, unlike the report of 1857, did not contain any recommendation for the introduction of a register of land holdings like the Torrens system. Indeed, the commission of 1850 expressly rejected such a system.[153] Moreover, the reports of these Commissions, unlike that of 1857, are not mentioned in the debates of the South Australian Parliament.[154] These circumstances made it appear unlikely that the reports of 1829-1830 and 1850 could have provided inspiration for the Torrens system. However, such a conclusion is unjustified, as I shall now show, as it ignores the content of the appendices to the reports of 1829-1830[155] and 1850.[156]

A new source: the appendices to the 1829–30 reports

Forster's series of articles shows that he had at least the reports of 1829-1830 to hand. In his series, Forster did not just repeatedly refer to them;[157] on 5 July 1856, he cited whole paragraphs from them ('In their first report the commissioners say: [...]').[158] Surprisingly, these references have not been followed up before now, so that the connection between the two sources has been overlooked. The reports of the old British Royal Commissions have been treated separately from the history of the Torrens system proper.[159] This failure to appreciate the historical connection is

150. In 1873, Gwynne J asserted that Torrens had drafted his bill on the lines of the 1857 report: *Report of Commission Appointed to Inquire into the Intestacy, Real Property, and Testamentary Causes Acts* (Adelaide: South Australian Parliamentary Papers No. 30, 1873) XIII.
151. Stein & Stone, above n 8, 24.
152. References to the reports occur rather incidentally, when the British history of reform is laid out comparatively: E Cushman, 'Torrens Title and Title Insurance' (1937) 85 Uni Pennsylvania L Rev 589; Hogg, above n 85, 15 ff; W Niblack, *An Analysis of the Torrens System of Conveying Land* (Chicago: Callaghan, 1912) 7, Stein & Stone, ibid 12 ff.; Whalan, above n 36, 2; D Whalan, *The Torrens System in Australia* (Sydney: Law Book Co, 1982) 4.
153. Report of 1850, above n 10: 'Report', 3 ff.
154. South Australia, *Parliamentary Debates*, House of Assembly, 1857/58, 647 ff.
155. First Report of 1829, above n 10, Appendix, 83-671; above n 147, Appendix, 1-544.
156. Report of 1850, above n 10, 'Appendix', 1-604.
157. *South Australian Register*, 3, 4 & 17 Jul 1856.
158. Ibid, 5 Jul 1856, 3rd column.
159. Wherever the similiarities between the contents of the reports and the Torrens System were noted, this happened incidentally in the course of the description of overall developments, but no historical explanation was furnished for possible coherence: see eg,

not only due to the fact that insufficient attention has been paid to Forster's series of articles. In addition, Forster's citations from the 1829–30 reports do not at first sight justify the conclusion that the reports could have played a role in the formulation of his proposals. Forster used his quotations from the reports merely to show that the law was in need of reform and that the reform did not need to come from an English source.[160] He did not, however, support his conception in his first two articles by quoting the reports, but confined himself to an indirect indication of their content:

> In 1829 a commission was appointed.... An immense mass of valuable evidence was taken, not only in reference to English law, but also in reference to Continental codes.[161]

With these words Forster gave an oblique reference to the true source of his ideas, which can now be seen to be the reports of the Commission of 1829–30. In their appendices one finds not only the 'immense mass of valuable evidence'[162] and a description of continental codes,[163] but also, as I shall now demonstrate, the very proposals which Forster proffered at the commencement of the South Australian reform process.[164]

The Commission to which Forster referred in the above quotation was set up in 1829 in England and produced a total of four reports from 1829 to 1833. The full title of the first report was *First Report made to His Majesty by the Commissioners Appointed to Inquire into the Law of England respecting Real Property* (1829). The second report appeared under the title *Second Report made to His Majesty by the Commissioners Appointed to Inquire into the Laws of England respecting Real Property* (1830). The third (1832) and fourth (1833) reports appeared under similar titles. These latter two reports dealt with particular aspects of land ownership (1832) and testamentary dispositions of land (1833) and were thus confined to specific aspects of real property law. Only the first two reports dealt with the possible introduction of a lands titles register. I therefore consider these two reports (1829-1830) in what follows.

The fact that the reports of 1829 and 1830 did not deal with the introduction of a lands titles register in their 'official' sections (the report proper and the propositions)

Cushman, above n 152; Hogg, above n 85, 15; Niblack, above n 152, 7; Stein & Stone, above n 8, 12; Whalan. above n 36, 2; Whalan, above n 152, 4.

160. *South Australian Register*, 3, 4, 5 & 17 Jul 1856.
161. Ibid, 5 Jul 1856.
162. Since the appendices to the reports occupy most of the space within them, the author suggests that Forster's remarks refer to the appendices.
163. First Report of 1829, above n 10, 'Appendix', 440 ff.
164. Legal opinions which deviated from the suggestions of the commission were usually incorporated in the appendices to the reports.

should not blind us to the significance and extent of the consideration of a register in their appendices. The length of the appendices greatly exceeds that of the 'official' sections. The report proper of 1829 contained 58[165] and that of 1830, 63[166] pages, and the propositions 20[167] and 14[168] pages respectively, while the appendix to each was swollen by the very detail of the information about lands titles registers to over 500 pages.[169] Caution must therefore be exercised when historians of the Torrens system refer to the report somewhat inexactly and make statements about it as a whole.[170] Such a procedure is, as I shall now show, not possible owing to the great difference in content between the appendices and the 'official' sections.

While the report proper of 1829[171] did not concern itself with a register of lands titles and thus in its propositions[172] did not suggest the introduction of such a register,[173] the appendix to the first report[174] drew its net much more widely. In a treasury of individual assessments of land law and its reform, no fewer than 19 persons gave their views on the question of a possible introduction of a lands titles register.[175] While many authors considered merely the registration of transfers as a means of securing priority of interests,[176] three of them contained suggestions which are very similar to those put forward by Forster in South Australia. These are the contributions of TB Addison,[177] J Pemberton[178] and J Tyrrell.[179] The last-mentioned shows the greatest similarity to Forster's proposals.

Like Forster,[180] TB Addison suggested introducing a register which would have a function well beyond that of a register of deeds.[181] The register should, said Addison, have a greater degree of effectiveness as a means of legal proof. It should not merely be proof that a procedure for the disposition of an interest had been carried out (that is, that the appropriate deeds had been completed), but also be used to

165. First Report of 1829, above n 10, 'Report', 5-63.
166. Report of 1850, above n 10, 'Report', 3 - 66.
167. First Report of 1829, above n 10, 'Propositions', 63-83.
168. Second Report of 1830, above n 10, 'Propositions', 67-81.
169. First Report of 1829, above n 10, 'Appendix', 83-671; Second Report of 1830, above n 10, 'Appendix', 1-544.
170. Stein & Stone, above n 8, 12.
171. First Report of 1829, above n 10, 'Report', 5 ff.
172. Ibid, 'Propositions', 63 ff.
173. The commissioners for the first report had rejected a public register because they feared a negative influence on commercial credits due to the 'disclosure of private affairs': First Report of 1829, above n 10, 'Report', 60.
174. First Report of 1829, ibid, 'Appendix', 83-671.
175. See, in particular, First Report of 1829, above n 10, 'Appendix', 441 ff.
176. The system of deeds registration had been introduced in South Australia in 1842: Borrow, above n 22, 55 ff.
177. First Report of 1829, above n 10, 'Appendix,' 455-467.
178. Ibid 468–70.
179. Ibid 471–584.
180. *South Australian Register*, 3 Jul 1856.
181. First Report of 1829, above n 10, 'Appendix', 468 ff.

prove the disposition itself.[182] Forster, however, was to suggest that the entry of a disposition in the register should have the effect of a declaration of the validity of the disposition.[183] However, this was merely a theoretical difference, for Addison thought that the entry in the register should not just be one of many possible methods of proving a disposition, but the only permissible method.[184] Thus Addison's proposal amounted to the same thing. Addison therefore stated that his proposal would in practice lead to the ineffectiveness of deeds disposing of an interest until they were registered. The passing of property would therefore occur, logically enough, at the time of entry on the register.[185]

It is unclear whether Addison wished to make the effectiveness of the entry independent of the effectiveness of the deeds which preceded registration so that the mere entry itself would be conclusive evidence. This was to become Forster's plan. But certainly Addison dealt separately with the consequences of making the entry final, that is with the consequences of making it irrebuttable proof.[186] And as Forster later did, he discussed what institution should have the task of examining titles on their first being brought on to the register.[187] He was in favour of giving this task to a court. He thought that the register office itself and any other similar authority would lack the legal knowledge needed to make such far-reaching legal determinations. Like Forster, he suggested that the examination should have various degrees of rigour. If there was a dispute about interests in the land concerned, the court would be able to use different procedures.[188] As entry on the register would fix the legal position for all time, Addison also thought it necessary to take particular care to guard against fraud and forgery.[189] He thought that the possibility of rectifying the register might be needed in extreme cases, but only if the rights of third parties who had meanwhile relied on the register were preserved.

Despite all these similarities, it remains the case that the legal nature of the register was seen differently by Addison and Forster. While Forster thought that registration should transfer title, Addison referred to registration as a means of proof, albeit one that was strengthened to such an extent that it was de facto the transfer itself.

Finally, Addison made suggestions about the procedure to be followed which were similar to those of Forster. Just like Forster,[190] Addison suggested setting out the register in the form of a book with original foliums, of which official copies (certificates)

182. Ibid 468.
183. *South Australian Register*, 3 Jul 1856.
184. First Report of 1829, above n 10, 'Appendix', 468.
185. Ibid 469.
186. Ibid.
187. Ibid.
188. Ibid.
189. Ibid.
190. *South Australian Register*, 4 Jul 1856.

should be made.[191] Addison suggested that the certificates should have the same status as proof of the interests noted on them as the register book itself.

It also appears likely that Forster's perusal of the report of 1829 led him also to the contribution of J Pemberton[192] and that he took some ideas from him as well. Pemberton also made suggestions that differ from Forster's only slightly. Pemberton suggested that the entry on the register should confer legal rights.[193] Only registered proprietors should, in his view, be able to dispose of interests in land. Although Pemberton did not say so in as many words, his view led to the position that the entry would have the effect of conferring title. Pemberton highlighted his proposal to make entry also a determination of the validity of a title by stating that the register office should be equipped with quasi-judicial powers.[194] In this he departed from Addison.

In view of Forster's later proposals, it seems that Pemberton's views were particularly useful in relation to the shape of the instruments of transfer.[195] Pemberton suggested that the text of the instruments should be fixed by law in a uniform format. Complicated forms should be replaced by simple ones. This obviously was similar to Forster's proposal to introduce forms for disposing of interests in land using uniform formulae.[196] Pemberton did not, it is true, speak of forms. But this is not a question of principle but merely one of the practical shape of what is essentially the same thing.

The third contribution in the appendix to the report of 1829 which appears to have been used by Forster in the development of his plan is that of John Tyrrell.[197] Its length alone – 113 pages – gave it some prominence among the other contributions. Tyrrell provided a very systematic and scholarly analysis of a possible register of lands titles, to which he even added for ease of reference a table of contents and an index.[198] Tyrrell, like Addison and Pemberton, supported a register as a superior means of dealing with lands titles only if the entry in the register had a wide-ranging legal effect.[199] Like Addison, he based his proposal in essence on the finality of the register, against which no contrary proof could be admitted.

The legal consequences which Tyrrell drew from this premise went a step further than Addison had. The status of the register as not admitting of any contrary

191. First Report of 1829, above n 10, 'Appendix', 469.
192. Ibid 455 ff.
193. Ibid 455.
194. Ibid: 'The registrar should be a barrister of not less than ten years standing at the bar, and should be a judge of all matters touching the registering of alienations of real property.'
195. Ibid 456.
196. *South Australian Register*, 9, 11, 23 & 31 Jul 1856.
197. First Report of 1829, above n 10, 'Appendix,' 471–584.
198. Ibid 471 ff.
199. Ibid 518.

assertion led in his view to the conclusion that registration should be a constitutive part of the transfer of interests.[200] Registration would thus become a requirement for validity above and beyond the deeds of transfer, and would be seen as a part of the effective completion of the deeds. Tyrrell attempted to indicate what consequences this state of the law would have. In a chapter entitled 'Of the Evidence of Title According to the Present Laws',[201] he dealt with questions of proof of title under the current law. He contrasted this with the position he himself favoured, the exclusiveness of the register, in a chapter entitled 'Of the Evidence of Title with a Register'.[202]

Tyrrell's equation of registration with a constituent element of the transfer of interests by means of the attribution of enhanced probative value to registration means that he stood very close to Forster's own ideas. Forster himself did not appear to distinguish clearly between the two conceptions. While he, on the one hand, spoke of 'indisputable titles'[203] and would have refused to allow the leading of evidence to contradict the register,[204] he also, on the other hand, stated that registration should be seen as a state-authorised declaration of validity.[205] This ambivalence may be seen as a further piece of circumstantial evidence that he had based his proposals on Tyrrell's.

As well as this proposal about the legal effect of registration, Tyrrell made further important observations which might have been picked up by Forster. These were, first, Tyrrell's analysis of the defects of the existing English lands titles registers in Middlesex and Yorkshire[206] and, secondly, his observation that registers functioned satisfactorily in countries which had been subjected to the influence of the Napoleonic Code.[207]

Tyrrell's view was that the defects of the registers in the two English counties were not able to be used as arguments against his proposals, as those registers were not conclusive evidence of their contents.[208] But the experiences in those counties were valuable because it was possible to learn from them that the traditional principles of equity could impair the operation of a register.[209] Tyrrell's criticism applied especially to the doctrine of notice coupled with the rules of priority at law and in equity. The

200. Ibid 527.
201. Ibid 515 ff.
202. Ibid 520 ff.
203. *South Australian Register*, 4 Jul 1856.
204. Ibid, 3 Jul 1856.
205. First Report of 1829, above n 10, 'Appendix', 526.
206. Ibid 529.
207. Ibid 526. At the time of the report of 1829, the French Code Civil was still regarded as the most successful codification of private law.
208. Ibid.
209. Ibid 529.

equitable rules carried with them the danger that unregistered interests could exist.[210] That would undermine the value of a register. Continental legal orders did not have systems of equity and thus did not suffer from such problems.[211] Tyrrell thus thought it necessary to protect a register from the unpredictable effects of the rules of equity. This could be done through an express provision in the law stating that registered interests would prevail in equity as well.[212]

Forster appears to have taken this passage in Tyrrell's contribution most seriously. There is thus a significant degree of agreement between them. The only point at which Forster made a specific proposal for a legislative provision in his series of articles referred to this very problem:

> Supposing some such clause as the following were included in the general Act, the question of validity would, we think, be at rest: 'Every title issuing out of the Registry Office shall be held to be valid and indisputable, at law and in equity'.[213]

In addition to this noticeable concordance between Tyrrell's report and Forster's proposals, two further points made by Tyrrell can also be found in Forster. First, both Tyrrell[214] and Forster[215] suggested that the register would need to refer to state-authorised maps so that the parcels concerned and the interests recorded in them could be precisely identified. Secondly, both in Tyrrell's report[216]and in Forster's articles[217] we find the suggestion that the new rules should not be introduced compulsorily for all parcels of land. Both authors give the same reason for this: the register would prevail without compulsion as proprietors would voluntarily choose the more secure and also less expensive system.[218]

In summary, then, Forster had found in the contributions of Addison,[219] Pemberton[220] and Tyrrell[221] in the appendix to the report of 1829 a series of expositions which he could make use of in his proposals for reform of South Australian real property law. The remarkable parallels between the contents of the three reports and Forster's

---

210. An important aspect of rights in equity was that they could be called into existence without complying with rules of form, of which the requirement of registration was one: B Edgeworth, CJ Rossiter & MA Stone, *Sackville and Neave Property Law: Cases and Materials* (Sydney: LexisNexis, 2004) ch 5.
211. First Report of 1829, above n 10, 'Appendix', 529 f.
212. Ibid 529: 'It appears to me to be of essential importance that the interference of Equity on the grounds of notice should be prevented by an express enactment'.
213. *South Australian Register*, 31 Jul 1856.
214. First Report of 1829, above n 10, 'Appendix', 542.
215. *South Australian Register*, 4 & 5 Jul 1856.
216. First Report of 1829, above n 10, 'Appendix', 524 ff.
217. *South Australian Register*, 4 & 23 Jul 1856.
218. Tyrrell in First Report of 1829, above n 10, 'Appendix', 531; *South Australian Register*, 23 Jul 1856.
219. First Report of 1829, above n 10, 'Appendix', 455–67.
220. Ibid 468–70.
221. Ibid 471–584.

concept[222] make it clear that this was Forster's most important source of legal ideas. True, the named authors in the report of 1829 did base their proposals largely on the evidentiary effect of the register, while Forster thought that registration should be the source of rights. But the three English authors adopt the view ultimately taken by Forster, as they proposed making the register conclusive and indisputable. Tyrrell clearly speaks, therefore, of the effect of registration as creating rights. There are further startling parallels, such as the simplification and standardisation of legal texts relating to the disposition of interests in property[223] and the suggestion by Forster about the manner in which interests in equity should be dealt with.[224]

Furthermore it cannot be doubted that Forster had access to the second report of the Commission set up in 1829, which was published in 1830. Only in the report of 1830 is there any information about the Continental codifications to which Forster referred.[225]

Unlike the first report of 1829, the Commission's second report of 1830 also dealt in its 'official' report[226] with the advantages and disadvantages of a lands titles register. However, the Commissioners restricted themselves to a discussion of the possibility of registering assurances.[227] As with the old registration-of-deeds system, this would mean that the effectiveness or otherwise of a disposition would be independent of its being registered, so that the effect of the register would be necessarily confined to indicating priorities among valid interests.

The appendix to the report of 1830,[228] however, also contained individual contributions dealing with lands titles registers and the possibility of introducing title by registration. In these reports there are further points which, it seems, Forster used in the development of his ideas and his proposal to make the existence of an interest in land depend exclusively on its registration, in other words, to detach the effectiveness of entries on the register from the validity of the prior transactions giving rise to them.[229] Again, we find that it is the appendix to the report rather than the 'official' report which contains the relevant information.

In the report of 1830, the appendix was divided into five parts.[230] The first four contained sophisticated discussions of what interests could be registered; how

222. Esposito, above n 4, 37 ff, 41 ff.
223. See, in particular, the legal opinion of Pemberton: First Report of 1829, above n 10, 'Appendix', 456; and Forster's suggestions in the *South Australian Register*, 9, 11, 23 & 31 Jul 1856
224. See *South Australian Register*, 31 Jul 1856; First Report of 1829, ibid 526, 529.
225. *South Australian Register*, 5 Jul 1856.
226. First Report of 1829, above n 10, 'The Report', 3–66.
227. Antiquated term for conveyance.
228. Second Report of 1830, above n 10, 'Appendix', 1–544.
229. See in particular, ibid 11 ff, 96 ff, 440 ff.
230. Second Report of 1830, above n 10, 'Appendix', Part the First: 5–35; Part the Second: 36–134; Part the Third: 134–298; Part the Fourth: 298–439; Part the Fifth: 440–544.

registration should take place; and in particular what effect registration would have. The first part contained expressions of opinion about the general desirability of introducing a lands titles register.[231] The second part concerned itself with four issues relating to important questions of detail in such a system:[232]

a. The benefits of a register
b. The practicability of a register
c. The available types of registration
d. The legal effect of registration.

The third[233] and fourth[234] of the report's five parts can be taken as a unit. The former contained the information which the Commissioners had provided to selected persons, mostly lawyers, who had been asked to express a view. This material consisted of a list of questions[235] and an outline for a lands titles register.[236] The fourth part contained the opinions of lawyers regarding this material.[237]

The fifth and final part of the appendix is different in content from the first to the fourth.[238] It contained assessments of land law in other countries. In the 1829 report, the Commissioners had referred to the need for comparative material which had now been provided at their request.[239] Hence the title of the fifth part: *Communications, Statements and Returns, principally with respect to the different Registers in His Majesty's Dominions, and in Foreign Countries*. This contained discussions of the law of Bavaria,[240] Austria,[241] Prussia,[242] Norway,[243] Sweden,[244] Italy,[245] New York[246] and Nova Scotia.[247] To this were added opinions by English registration authorities, London banks and merchants.[248]

The contribution of TG Fonnereau stands out in any assessment of the source of Forster's proposals for a South Australian lands titles register.[249] Fonnereau took as

231. Ibid 5–35.
232. Ibid 36–134.
233. Ibid 134–298.
234. Ibid 298–449.
235. Ibid 134 ff.
236. Ibid 285 ff.
237. Ibid 298–449.
238. Ibid 440–544.
239. First Report of 1829, above n 10, 'Report', 60.
240. Second Report of 1830, above n 10, 'Appendix', 440 ff, 461 ff.
241. Ibid 457 ff.
242. Ibid 459 ff.
243. Ibid 464 ff.
244. Ibid 466 ff.
245. Ibid 473 ff.
246. Ibid 476 ff.
247. Ibid 480 ff.
248. Ibid 484 ff.
249. Ibid 11 ff.

his starting-point the contributions in the appendix to the report of 1829 and developed them further. His proposal was for a register which should not be restricted to the proof of dispositions conducted independently of it. Rather, the register should be proof of the existence of the rights themselves.[250] If this were done, unknown circumstances and proceedings outside the register would lose their legal effect. Only through registration could legal effect be given to any disposition of land.[251]

Fonnereau made his proposal more detailed in a description of the resulting procedures for registration. Registration rather than the deeds preceding it would effect the change in title.[252] His view, therefore, was different from those in the report of 1829, which still saw the register principally as a means of proof. Thus, Fonnereau's suggestions were a significant development of the principles suggested in 1829. Fonnereau thought that registration should not be seen as merely a further constitutive step in the completion of the deeds.[253] He went a step beyond that and detached the effectiveness of registration from the effectiveness of the steps that had preceded it. Thus, registration was the sole source of the validity of registration not just as a matter of evidence, but in substance as well. While some of the contributions in the 1829 report earlier described would have produced this result de facto owing to the irrebuttability of the register, Fonnereau thought that this should be made into an independent principle of law.

Thus, Fonnereau is very close to Forster's central idea relating to the legal effect of registration.[254] Although sometimes Forster does not express himself with complete precision,[255] his basic concept was aimed at making registration the source of title, and also that its effect should be independent of all steps that had preceded it.[256] It is, therefore, likely that Fonnereau's contribution was the basis for Forster's ideas on this important point.

A further important source of ideas for Forster's conception of a South Australian lands titles register was contained in the country-by-country reports in the fifth part of the appendix to the report of 1830.[257] In his articles, Forster had referred vaguely to 'Continental codifications' in order to show that the Commissioners had not confined themselves to the law of England in their search for a conceptual framework.[258] It may, however, be assumed that Forster also drew inspiration from

250. Ibid 56.
251. Ibid 11, 52, 96, 164.
252. Ibid 11, 96.
253. This was how Tyrrell's envisaged the steps of transfer: First Report of 1829, above n 10, 'Appendix', 527.
254. *South Australian Register*, 4 & 5 Jul 1856.
255. Ibid, 3 & 4 Jul 1856.
256. See the analysis of Forster's concept; Esposito, above n 4, 36 ff.
257. Second Report of 1830, above n 10, 'Appendix', 440 ff.
258. *South Australian Register*, 5 Jul 1856.

the comparative part of the report. The hostility of the South Australian legal profession may explain why Forster did not, 25 years later, refer in his series of articles in 1856 to what was by then an old and out-of-date series of what would nowadays be called country reports. This omission gave his opponents less opportunity for attack.

Looking at the country reports in the appendix to the report of 1830, it is noticeable that the majority are about the law of the German states. The descriptions of the registration systems of Bavaria,[259] Austria[260] and Prussia[261] by CP Cooper take up over 23 pages, while the other countries' systems are described briefly in two to seven pages.[262] It may be that Forster, having access to these English-language descriptions of German systems of registration, developed an interest in contemporary accounts of German law available to him through German settlers in South Australia.

At any rate, two aspects of German registration law, which were referred to in the country reports in the report of 1830, were taken up by him in his proposals: first, the use of the land parcel as the basic unit of the register,[263] and secondly the use of standardised forms for dispositions of interests in land.[264] Cooper thought that it was much better to use the land parcel rather than the identity of the owner as the basic structural unit of the register, as the latter made the register less easy to use and had been found to cause problems in France.

> The registry of France, kept according to the names of the proprietors, was admitted to be grossly defective by the most enlightened jurists of that country.[265]

And in connection with a detailed description of the Austrian system, he says:

> The *Hauptbuch* [register] is kept according to the names of the immovables, and not according to the names of the proprietors, and each immoveable held under a separate title has a particular number and a particular leaf assigned to it.[266]

Cooper thought that, after a sensible structure for the register, the greatest benefit would be obtained from standardised forms, as had been developed in Bavaria[267]

---

259. Second Report of 1830, above n 10, 'Appendix', 440 ff, 461 ff.
260. Ibid 457 ff.
261. Ibid 459 ff.
262. Italy (3 pages); New York (4 pages), Norway (2 pages), Nova Scotia (4 pages); Sweden (7 pages).
263. See the descriptions proper: Second Report of 1830, above n 10, 'Appendix', 449 (Bavaria); 458 (Prussia); 462 (Austria).
264. Ibid 440 (Bavaria); 459 (Prussia).
265. Ibid 462.
266. Ibid.
267. Ibid 440.

and Prussia[268] in contrast to Austria.[269] In Austria, the preparation of individual and legally effective deeds for each transaction had been proved to be very inconvenient and expensive.[270] In relation to the Prussian mortgage legislation of 1783, Cooper writes, 'and in general the instrument must be executed in a prescribed form before certain public authorities'.[271]

As one of the main defects of South Australian law was the high cost associated with the preparation of convoluted deeds,[272] Forster must have found this suggestion particularly valuable. He will also have seen in other places in the reports of 1829[273] and 1830[274] that it had proved feasible in the law of Prussia and Bavaria and was not just a good idea still to be tested in practice. Forster's suggestion to use standardised forms may therefore have had a further basis in the comparative work of Cooper.[275] The English Merchant Shipping Act 1854 had introduced a similar concept in English shipping law.[276] This must have further strengthened Forster's view and given him an additional reason to propose the adoption of this feature of English shipping law.

The general effect of the comparative survey in the report of 1830 was that Forster did, in fact, as he advocated,[277] think outside the square of English law. On the other hand, the country reports of 1830 did not contain much in the way of suggestions of principle which had not already been made in the theoretical discussions in the reports of 1829 and in the 'official' report of 1830. Cooper also critically analysed each of the German systems he described and attempted to outline the advantages and disadvantages of each system instead of declaring one system as worthy of adoption.[278]

The report of 1850

There is no historical source which suggests that the report of 1850 was actually available to the South Australian reformers. However, it cannot be ignored: its content shows significant parallels to the later South Australian draft bill and a few authors

268. Ibid 459.
269. Ibid 457.
270. Ibid 457 f.
271. Ibid 459.
272. *South Australian Register*, 11 Jul 1856. In this article Forster compares the costs of a transfer of land according to the old law with the costs according to the system of registration proposed by him.
273. First Report of 1829, above n 10, 'Appendix', 456.
274. Second Report of 1830, above n 10, 'Appendix,' 440, 459.
275. *South Australian Register*, 9, 11, 23 & 31 Jul 1856.
276. Merchant Shipping Act 1854, Appendix (Schedules).
277. *South Australian Register*, 9 Jul 1856.
278. Cooper explicitly rejected the adoption of the Prussian law (First Report of 1829, above n 10, 'Appendix', 460), even though he held it to be superior to the Code Napoleon (at 461). He critisised the Bavarian law (at 461 ff), but thought that it was an improvement of the Austrian and Prussian law (at 462).

refer to it, even placing the report in the foreground of their investigations to the exclusion of those of 1829–30.[279] On the other hand, I ignore the report of 1857, even though it has been the subject of much attention by some authors.[280] It arrived only on the eve of the Second Reading of the South Australian Bill, long after the reform had been set in gear and the most significant features of the draft bill were elaborated.[281]

The report of 1850[282] was also divided into three parts: the report proper,[283] a supplementary paper[284] and an appendix.[285] This report, however, arose from a commission of 1847 directing the commissioners not to look at real property law in general, but rather to consider the possibility of introducing a register.[286] The official report and recommendations advocated the adoption of a land titles register, but again put forward the view that such a register should be limited in its legal effect.[287] Foreign law could not simply be copied as it was inconsistent with basic principles of English law.[288]

The reforms proposed in the report of 1850 were, therefore, quite narrowly drawn. That is the reason why the principal parts of the report of 1850 have little in common with the later Torrens system. On the other hand, the contributions in the appendix to the report again showed significant parallels with the later South Australian law.[289] This applies in particular to the opinion of Thomas Wilson.[290] As a vehement proponent of the introduction of a lands titles register, he presented his ideas in detail and included concrete suggestions for reform.[291] His suggestions were based in this respect on an idea he had written about in 1844 to adapt the system of transfer of public funds to land.[292] He also attempted to adapt the principles relating

279. Hogg, above n 85, 14 ff; Whalan, above n 36, 1 ff; Robinson, above n 8, 1 ff; Stein & Stone, above n 8, 17 ff.
280. For a more detailed evaluation of the possible influence of the report of 1857, see Esposito, above n 4, 71 ff.
281. The report was published in England on 15 May 1857 and arrived in South Australia on 10 November 1857. Torrens' first draft was published in October 1856; the second draft appeared in April 1857. The first reading took place in the beginning of June 1857. The second reading coincided with the arrival of the report from England.
282. Report of 1850, above n 10.
283. Ibid, 'Report', 3-38.
284. Ibid, 'Supplementary Paper', 39–41.
285. Ibid, 'Appendix', 1-604.
286. Hogg, above n 85, 16.
287. Nevertheless, the commission was opposed to the participation of courts in the transfers of land as it was practised in some continental states: Report of 1850, above n 10, 'Report', 35. See also Hogg, ibid 16.
288. Report of 1850, ibid, 'Report', 4.
289. Hogg, above n 85, 16.
290. Report of 1850, above n 10, 'Appendix', 244–435; 483–94.
291. Ibid 232 ff.
292. T Wilson, *Outline of a Plan for Adapting the Machinery of Public Funds to the Transfer of Real Property* (London, 1844).

to the transfer of railway shares, for which a special register existed.[293] Working on these ideas, he came to the view that the problem with English real property law as it existed was that the existence of rights could be proved only by proving past events, namely, previous transactions with the land.[294] Wilson was of the view that the principle of 'retrospective deduction of title' could be dropped without loss if legal interests themselves rather than the prior transactions giving rise to them were registered.[295] For this to occur, the register would have to be associated with officially produced maps.[296]

As well as Wilson's suggestions, one notices in the appendix to the report of 1850 a series of country reports relating to non-English registration systems. There were extensive discussions of the registration laws of Belgium[297]and Scotland.[298] The law of France, Germany and Italy, on the other hand, was only summarised in a comparative fashion by JM Ludlow.[299]

Without going further into the detail of the report of 1850, it can be said – on the assumption that they had access to it – that the reformers in South Australia would doubtless have seen in its compendium of legal information, both of a theoretical and a comparative nature, a considerably more up-to-date basis for their work than the 1829-1830 reports.

Seven years passed between the appearance of the report of 1850 and the introduction of the South Australian reform into Parliament. There was, therefore, enough time for this report to reach South Australia. Forster himself, as publisher of the *South Australian Register*, had good connections in England through which he could have obtained a copy. The particular function of newspapers in 19th century South Australia must also be recalled. They were a form of bridge between 'home' (England, or Germany for the German settlers) and the colony. A look at the South Australian newspapers published from 1856 to 1882 indicates, in fact, that the greater part of their news was not about Australia, but rather about England or Europe. As part of this, articles from English newspapers were sometimes simply reprinted word-for-word, including a citation of the original place and date of their appearance. Furthermore, newspapers were in the colonies at this stage often the only source of information and opinion on all sorts of topics of general interest; many gladly took on the role of learned journals educating a grateful public not merely on transient items of daily news, but on topics of more permanent and scholarly significance. This could not be done, of course, without at least some basic research in sources such as Parliamentary reports.

293. Report of 1850, above n 10, 'Appendix', 214.
294. Ibid 244 ff.
295. Hogg, above n 85, 17.
296. Ibid.
297. Report of 1850, above n 10, 'Appendix', 6–37.
298. Ibid 166–206.
299. Ibid 206–32.

Even if it was not already available in South Australia by 1856, there can be little doubt that Forster possessed sources of information in England which he could have used to supply himself with materials such as those of which he made use in his series of articles in 1856. Forster would also have had enough time to have a copy of the report of 1850, or relevant extracts, sent to him before the reform started to gather momentum in the first few months of 1857. In this period, a ship took about three months to sail from England to South Australia, provided that there were no breaks in the voyage.[300] This three-month rhythm of sea transport would have provided Forster with at least two opportunities to have the report sent to him in the period before the first reading of the Bill in Parliament at the start of June 1857.

Given that the appendix to the report of 1850 contained further suggestions similar to what became the Torrens system, it would have provided the reformers with a useful supplement to the material in the report of 1829–30. In particular, the description of European land registration systems and Robert Wilson's explanation[301] of two existing English systems of registration (for public funds and railway shares) should have been of considerable importance to the reformers. It would have provided them with further weighty arguments. In fact, non-land registers of title were considered in the South Australian debates about the introduction of the Torrens system.[302] However, there is no indication that these sources of law played any additional role in the creation of the Torrens system, beyond being occasionally discussed.[303]

CONCLUSION

While previous investigations of the history of South Australian real property law have identified no connection between the series of articles written by Forster in 1856 and the reports of the Royal Commission appointed in 1829, Forster's use of these reports, his obvious access to their content and the considerable degree of similarity of his proposals and those mentioned in the reports of 1829–30 indicate that Forster must have had copies of the reports of these British commissions and used them in developing his proposals.

This answers the obvious question: how could Forster, a newspaper publisher without any legal education or the help of friendly lawyers, have developed a coherent and influential concept for the reform of South Australian real property law? My comparative analysis has shown that Forster's proposals in this regard were taken

300. *South Australian Register*, 7 Aug 1856: In this article different shipping routes were compared with each other.
301. Report of 1850, above n 10, 'Appendix', 244 ff, 483 ff.
302. RR Torrens, *The South Australian System of Conveyancing by Registration of Title* (Adelaide, 1859) 10.
303. Stein & Stone, above n 8, 23; Hogg, above n 85, 15.

to a large extent from the appendices to the older British Royal Commission reports.[304] These appendices contained what were extensive legal discussions in the dissenting reports, which were therefore not published in the report proper or its propositions (recommendations).

It is easy to understand why Forster was inclined to direct his attention principally to the dissenting reports. After all, the Royal Commission in its majority report of 1830 supported the deeds-registration system and thus suggested confining the register to indicating priorities among interests.[305] It was this very form of register which had existed in South Australia since 1842 and which had not ensured legal certainty.[306] Forster must therefore have seen the majority's recommendations as condemned by experience. The dissenting, more radical suggestions in the appendices must have seemed even more convincing to him, as they proceeded from the premise that an entry in the register should have a more extensive legal effect in order to provide the hoped-for degree of legal certainty.

It appears that Forster adopted the central suggestions of the appendix to the 1829 report, as further developed in the appendix to the report of 1830, according to which a land titles register would not merely indicate priorities but would also be a source of the very existence of rights in land. This also explains why Forster did not indicate with precision whether his proposal was that the register should be merely a special means of proof or rather should be a legal requirement for the effectiveness of a disposition.[307] The discussions in the appendices had been unclear about this too. Forster's series of articles and the associated correspondence from his readers show, however, that he had tended to favour the latter concept and developed his ideas accordingly.[308]

As well as this central question, the appendices to the reports of 1829–30 also dealt with other important issues which Forster used to round out his proposal. Thus, the association of a register of lands titles with state-authorised maps,[309] the use of the land parcel as the basic unit of registration in the form of certificates of title[310] and the provision of duplicate certificates of title to the registered proprietor[311] are also to be found there. Also worthy of notice are the proposals in the appendices and in Forster's plan for the use of standardised forms for the disposition of interests and the rejection of the doctrine of notice in relation to registered land. In order for these

304. Esposito, above n 4, 54 ff.
305. Second Report of 1830, above n 10, 'Report', 3 ff.
306. South Australia, *Parliamentary Debates*, House of Assembly, 1857/58, 209 ff.
307. Esposito, above n 4, 39 ff.
308. The idea pops up for the first time in the *South Australian Register*, 3 Jul 1856: 'conveyances being issued out of the Registry office'; and was elaborated further in the *South Australian Register*, 12 & 15 Jul 1856.
309. First Report of 1829, above n 10, 'Appendix', 542.
310. Ibid 468 ff.
311. Ibid 468 ff.

ideas to be translated into practical reality, Forster also found numerous useful ideas in the descriptions of existing systems of registration in the German states, which were the main focus of the country reports in the appendix to the report of 1830.

My analysis also explains the precise form which Forster's series of articles took. In the first place, it explains why Forster's articles began with the presentation of a complete concept in only two articles.[312] The following articles were confined to explaining what had been proposed and illustrating the superiority of a land titles register with constitutive effect. This procedure is explained by the fact that Forster did not himself develop the basic theories behind his system, but merely relied on the ideas of others.

It is also clear why Forster's next step was not to proceed to the drafting of a Bill, but rather to ask his readers for their assistance and to look for a model for the proposed legislation in the shipping legislation. Forster did not have enough knowledge to draft a Bill himself. The apparently deep knowledge of the area which he possessed was really taken from the expert discussions in the English reports and was not his own achievement. Indeed, the reports of the commissions of 1829–30 and 1850 must have indicated to him that caution was necessary: they indicated that a translation of the proposals set out in the appendices for a system of registration into legislative form would be a difficult task indeed. Forster had at first no assistance available to help him in the task of turning theories into a workable Bill.

Forster's repeated calls for lawyers to take up his suggestions and develop them can now also be understood. He must have realised that he could do little more than present others' ideas and would need expert assistance to convert them into reality. If Forster had developed the concepts himself, it would surely have been the case that he would have been willing to undertake a preliminary draft of a Bill. Forster's access to the British expert reports also explains, on the other hand, why he, a non-lawyer, was able to argue with the legal profession of the day with such astonishing self-confidence and was not afraid of discussion. However, as it became clear that professional help would be denied to him, he adopted the view in some of the dissenting reports in the appendices and suggested the use of an existing system of registration in another area of law as a template for a Bill. The most modern legislation of this type that suggested itself was of course the Merchant Shipping Act 1854.

The recognition that Forster had access to the early reports of the British Royal Commissions allows a further important aspect of the reform to be understood. Given that Forster was generous in his assistance to all who joined the ranks of the reformers and gave them access to the columns of his newspaper, it may be assumed that he provided all interested with copies of the English Royal Commission reports.

---

312. *South Australian Register*, 3 & 4 Jul 1856.

It may therefore be assumed that Torrens and his assistants also had access to these reports. The importance of this conclusion for the final shape of the Torrens system cannot be underestimated. It may be concluded, more specifically, that the circle of reformers had access to extensive material which dealt at length with a proposal to introduce a register in English law and was also based on a variety of comparative discussions of other countries' systems. This material was thus of double importance for the direction of the reforms. On the one hand, it was the source of the basic principles; on the other, its descriptions of other areas of law (such as the register of railway shares) and continental codifications indicated possible sources from which detailed provisions could be taken.

The conclusion is that the similarities between Forster's suggestions and the putative source of them leave no room for doubt: in the absence of lawyers willing to assist, Forster used ideas taken from the appendices to the Royal Commission's report. Those appendices are the legal source of Forster's ideas with which he largely set in motion and considerably influenced the South Australian reforms. Even if the presentation of these ideas did not involve the drafting of a Bill, it was an important first step in that direction. Forster's letter, quoted at the start of this article,[313] in which he claims credit for initiating the reform but gives most of the credit to the German jurist Ulrich Hübbe,[314] seems to be a rather modest assessment of his true contribution. It might be suggested, however, that Forster was not driven by the same modesty when he referred to the draft bill as 'Torrens' bill'. But the use of this moniker was nothing more than a device to indicate the political responsibility for the Bill, which was introduced into Parliament by Torrens as a private member's Bill.[315]

The lack of clear reference to the reports by Forster and the other reformers led to the unawareness of their importance until today. However, the taciturnity of the reformers in this respect can be explained by the political context of the debate, and in particular, the fundamental opposition of the legal profession and its constant search for arguments with which to oppose the Torrens system.[316] Under these circumstances the introduction of the reports of 1829-1830 and 1850 into the debate would only have provided further ammunition to the opponents of reform. After all, the English commissions had come to the conclusion that a register of lands titles as a constitutive step in the disposition of interests in land should not be introduced and had accordingly relegated the presentations of such systems to the appendices.[317] A public canvassing of these sources in South Australia would,

313. See above n 7.
314. Ibid.
315. It seems that this difference is often not given the proper importance when some authors conclude that calling the bill by Torrens' name implied the acknowledgement of his authorship: see for instance Taylor, above n 2, 34.
316. For the opposition of the legal profession, see Esposito, above n 4, 26 ff.
317. Only in the report of 1857 did the commissioners favour a system of registration that corresponded with the chief elements of Torrens' draft bill.

therefore, not have promoted the cause of reform. Had reformers like Forster referred to these reports expressly, they would have been faced with the accusation that they were presuming to draw different conclusions than those of the expert commissions that drew up the reports.