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The impact of the Australian Torrens system on the land transfer debate in the United Kingdom, 1858-1914

Edmund Rogers

By the 1850s many English legal reformers had become deeply critical of the slowness and expense of private conveyancing, whereby solicitors re-examined the title deeds to a landed property upon every transaction in order to assess the validity of the owner's title. The idea of title registration gained currency because by being able to convey legal ownership through entry on a public register this repetitive process could be abandoned.[1] This was still an untested assumption, at least under English land law, when the Royal Commission on Registration of Title reported in 1857 and expressed its approval in principle.

Then, in 1858, the South Australian legislature passed the Real Property Act. Its author was Robert Torrens, a customs officer turned colonial politician, and son of the political economist and colonisation commissioner for South Australia, Colonel Robert Torrens. The 'Torrens system' of title registration, which developed through several amendments over the next three years, promised quicker and cheaper land transfer by removing retrospection. Registered titles were indefeasible, and title holders received a title certificate, a duplicate of one held in the registry. An insurance fund paid for through

[1] For a clear explanation on the principles behind conveyancing through deeds and through registration, see Greg Taylor, *'A Great and Glorious Revolution': Six Early South Australian Legal Innovations* (Kent Town, 2005), pp. 15-22.

contributions from new registrants compensated anyone losing out on an interest through the award of indefeasibility. All land newly alienated from the Crown was automatically registered, and once titles were placed on the register they could not be removed.[2] By 1862, Torrens had helped to export this model to the other Australian colonies.

The Torrens system had a considerable impact on the land transfer debate in the United Kingdom in this period, pervading Parliamentary debates and inquiries, legal literature, and the national press. As a working example of title registration under English land law, it was tremendously relevant and instructive to conveyancing reformers, inspiring their cause and acting as the benchmark to which they aspired and by which British legislation was judged. Paradoxically however, the Torrens system also held back title registration in the United Kingdom. In explaining its failure to take hold in England in this period, historians have concentrated on the legal profession's opposition – for Avner Offer it was defending a lucrative conveyancing monopoly; for J. Stuart Anderson, it was defending professional status and criticising the working of title registration itself. Neither author, however, fully appreciated the importance of the Australian Torrens system to that professional critique.[3] It shall be argued here that many legal thinkers had serious and genuine misgivings about the suitability for the Old World of a system established in the New World.

[2] Between the original January 1858 Act and the Real Property Act 1860 the nature of the legislation shifted from registration vesting title to the registered proprietor holding the title free from unregistered interests, while the 1861 Real Property Act introduced the idea that the certificate of title provided conclusive evidence of title. W. N. Harrison, 'The transformation of Torrens's system into the Torrens system', *University of Queensland Law Journal*, 4 (1961), 125-32.

[3] Avner Offer, *Property and Politics 1870-1914: Landownership, Law, Ideology and Urban Development in England* (Cambridge, 1981), part I; idem., 'Lawyers and land law revisited', *Oxford Journal of Legal Studies*, 14, 2 (1994), pp. 269-78; J. Stuart Anderson, *Lawyers and the Making of English Land Law 1832-1940* (Oxford, 1992).

There was a common theoretical distinction in this period between 'old countries' and 'new countries', which permeated debates in Britain on any economic topic in which English-speaking societies in the New World were ploughing their own furrow, such as land values taxation and old age pensions. New countries sharing British culture and institutions, but with weaker vested interests and traditions, were often regarded as ideal testing grounds for adventurous policies and ideas. However, opponents of those policies and ideas used the distinction between old and new economies to legitimate their opposition, and to reinforce genuine intellectual objections.[4] This distinction helped bolster the case against title registration for the Mother Country.

Torrens himself fought against the significance of this distinction to the registration question. From his arrival in the United Kingdom in 1863 to his death in 1884 he was a tireless campaigner for title registration; yet historians have described him as a failed reformer in the old country, 'a pathetic figure'.[5] However, Torrens was instrumental in publicising the changes he had wrought to colonial land law. Although his efforts did not result in a successful registration system within his lifetime, they must not be dismissed. Torrens was a towering figure in the land transfer debate, giving the reformist cause vitality, intellectual backing, and practical knowledge, intervening in the debate even before he left Australia. From 1863 to 1865 he was central to much-overlooked efforts to introduce title registration to Ireland, and which in this paper

[4] Edmund Rogers, 'The New World economies and economic debates in Britain from the late nineteenth century to the First World War', (Cambridge, PhD thesis, forthcoming).

[5] Craufurd D. W. Goodwin, *The Image of Australia: British Perception of the Australian Economy from the Eighteenth to the Twentieth Century* (Durham, N. C., 1974), pp. 91-2; Douglas Whalan, 'Immediate success of registration of title to land in Australasia and early failures in England', *New Zealand Universities Law Review*, 2, 4 (1967), pp. 416-38, at pp. 426-7; Anderson, *Lawyers*, pp. 170-1. See also the unpublished work of Jeremy Finn, '"Should we not profit from such experience when we could?": appeals to and use of Australasian legislative precedents in debates in the British Parliament 1860-1940', draft article, unpublished (2000).

extends historical analysis of the land transfer question beyond the central arena of England. From 1868 to 1874 he was the Liberal MP for Cambridge, taking his cause to Westminster itself; and alongside other Australians Torrens gave critical evidence to several official inquiries: the 1868-70 Royal Commission examining Lord Westbury's Land Registry Act 1862, a piece of legislation deemed then and now to have been an utter failure, which created the Land Registry for England and Wales and established an awkward fusion of deeds registration and title registration;[6] and the 1878-9 Select Committee following Lord Cairns' 1875 Land Transfer Act, which tinkered with the kinds of titles one could register.

.The Torrens system arrived at an opportune time, shortly after the 1857 Royal Commission, although the idea of title registration had been present in English legal reform circles since at least the 1830s.[7] By removing the need for repetitive re-examination of title by expensive skilled legal professionals, it promised quicker, cheaper, easier conveyancing. South Australia, said property magazine the *Estates Gazette* in 1859, was the 'glorious realisation' of 'law-emancipated land.'[8]

However, English legal minds objected to title registration on the grounds that it required much simpler titles than were generally dealt with in England. Registration protected the registered proprietor from unregistered interests, and the system's whole *raison d'etre* required that the clutter of lesser legal and equitable interests go unregistered. Many English titles were considered too old and complicated by encumbrances to register as indefeasible in this way, hence the attempt in this period's

[6] On the differences between these two systems, see Taylor, *'A Great and Glorious Revolution'*, pp. 17-18.
[7] Anderson, *Lawyers*, pp. 63-73.
[8] *Estates Gazette*, 15 October 1859, p. 314.

conveyancing legislation to differentiate between absolute and possessory titles. Opponents of Torrens' approach assumed English feudal traditions of creating complex estates through settlements and trusts to be incompatible with registration of a single, indivisible title. This is why the machinery created in the Land Registry Act 1862 had separate registers for the various types of interests, so creating an unworkable amalgamation of deeds and title registration in which, crucially, retrospection was retained.

The establishment of title registration in Australia was a gift to these objections. Opponents could now argue against registration on the grounds that it was intended for 'new countries', where titles were far simpler than in 'old countries' like England. The perception was that whereas English titles were complicated by settlements, trusts, encumbrances, and other feudal interests, in the colonies settlements were much rarer, and most titles fresh Crown grants, so the fee simple dominated. Many members of the legal profession reiterated time and again that a system designed for those conditions would not therefore suit England. There were genuine misgivings about the practicability of combining complex old titles and settlements with a system designed for a country with new titles and where land was more commonly traded and mortgaged than preserved in one family.

A strong cultural distinction between the way land was dealt with at home and in the colonies underpinned these attitudes. Giving evidence to the 1878-9 Select Committee, the renowned conveyancing specialist and anti-registrationist Joshua Williams, whose son had been New Zealand's registrar, distinguished between the colonies, where land was a commodity for speculation, and England, where 'when a man

buys land, it very often is at the end of a successful mercantile career; and he buys a large estate with the intention of making a family.'[9]

Another cultural line drawn was between liberal Britain and her state-dependent colonies. Lawyers drew on the caricature of Australia as a breeding ground of heretical political economy and state socialism. In 1861, *The Law Times* compared the fragmented authority of private conveyancing with the registrar-general in Australian legislation, a 'state conveyancing monarch' with a 'sweeping monopoly'. As it reminded its readers, in 'the old country men prefer trusting the sagacity and vigilance of their own solicitors and counsel.'[10] The very idea of a fallible 'mere registrar', rather than a judge, ruling on one's title was another example of colonial reliance on the bureaucratic state. Although the 'officialism' of the colonies was blatantly exaggerated, distrust of bureaucracy was part of a genuine critique of registering titles as indefeasible. Many lawyers thought that indefeasibility and the displacement of retrospection would forever set in stone the mistakes of registry officials and lead to fraud.[11] 'That might do, or the compensations allowed in case of mistake might do, in a new country like Australia', said one objector, 'but would it ever be submitted to in an old country like Great Britain?'[12] Several Australian court cases in the early 1860s demonstrated the problems of state-guaranteed titles.[13] However, colonial statistics were on the registrationists' side, revealing just how little fraud had taken place and how little compensation had been paid out.[14]

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[9] *Report from the Select Committee on Land Titles and Transfer*, xv (1878), pp. 20, 40.
[10] 'The Australian state conveyancing model', *Law Times*, 2 February 1861, p. 164.
[11] *Report of the Royal Commissioners Appointed to Inquire into the Operation of the Land Transfer Act*, xviii (1870), p. 32.
[12] Discussion on land transfer in *Transactions of the National Association for the Promotion of Social Science*, 1863 (1864), p. 253.
[13] For instance, the South Australian case, *Payne* v. *Dench*, represented for both Mr Justice Gwynne of the Adelaide court and *The Law Times* the pitfalls of using a precise form leaving off past transactions, for an

Australia also exacerbated concerns that the indefeasibility granted under title registration would ignite boundary disputes amongst neighbours, and require more detailed national cartographic resources than were available.[15] Opponents of registration said the 'geometrical boundaries' of Australian parcels were more easily registered than Old World properties with complicated boundaries.[16]

The Australian example therefore crystallised the dilemmas of title registration in England. Would it be possible to register as indefeasible ancient and complex titles involving multiple interests under a system designed for freeholds and fresh Crown grants? Would it be possible to continue traditional English practices of making settlements? And could parcel-based registration work in England?

Torrens and fellow registrationists sought to convince doubters that the system could indeed work in an old country. They often argued that colonial titles could be more complicated than was assumed. Torrens frequently explained that although settlements and entails were less common in Australia, frequent transfer of land in the colonies and the 'inferior skill' of their conveyancers had quickly resulted in an accumulation of 'complications and uncertainties no less grievous than those with which the English Landowner is oppressed'.[17]

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absence of encumbrances on a certificate of title could be due to omission by a clerk. 'The Australian mechanism at work', *Law Times*, 30 March 1861, pp. 259-60.

[14] *Select Committee*, (1878), pp. 146, 154; *General and Detailed Reports of the Assistant Registrar of the Land Registry on the Systems of Registration of Title Now in Operation in Germany and Austria-Hungary*, lxxxiv (1896), p. 17 (109); *Report of the Royal Commission on the Land Law (Ireland) Act, 1881, and the Purchase of Land (Ireland) Act, 1885*, xxvi (1887), p. 1005 (1035).

[15] *Estates Gazette*, 15 October 1859, p. 314.

[16] *Select Committee*, (1878), p. 165.

[17] *Report of the Royal Commissioners* (1870), p. 32; Robert R. Torrens, *Transfer of Land by "Registration of Title," as Now in Operation in Australia Under the "Torrens System."* (Dublin, 1863), p. 6; Robert R. Torrens, *An Essay on the Transfer of Land by Registration* (London, 1882), p. 30.

The really significant attempt on Torrens' part to prove that title registration could work in the Old World was Ireland, seemingly the most fertile ground for erecting the Torrens system in an old country. In 1849 the Incumbered Estates Commission was established to facilitate sale of bankrupt, indebted estates following the potato famine. It investigated the titles to those estates, before issuing clean, fresh ones. This was replaced by the Landed Estates Court in 1858, which also covered unencumbered estates.[18] The 1857 Royal Commission, and Torrens himself, believed that alongside an existing deeds registry, and an excellent Ordnance Survey map, the Court made Ireland a better prospect for title registration than England.[19] Torrens likened the Estates Court process to the granting of indefeasible titles in Australia under his system. The only thing missing in Ireland was registration of those titles once issued, for they quickly became re-encumbered. The Estates Court was incredibly useful to Torrens' case that title registration was possible in England, because it demonstrated how an old country's titles could be simplified for registration.

Torrens was heavily involved with the Dublin-based Registration of Title Association, which applied much of the political pressure leading to the 1865 Record of Title (Ireland) Act.[20] The original Bill, co-drafted by Torrens, declared that titles given out by the Estates Court would be automatically registered as indefeasible.[21] However, to win the support of Lord Westbury and his fellow peers, the legislation was watered down so that it mimicked Westbury's voluntary registration model, a move Torrens deeply

[18] J. A. Dowling, 'The Landed Estates Court, Ireland', *Journal of Legal History*, 26, 2 (2005), pp. 143-82.
[19] *Report of the Royal Commission on Registration of Title*, xxi (1857), pp. 47-8.
[20] Dowling, 'Landed Estates Court', pp. 364-6.
[21] 'Bill to provide more certain and economic Means for transferring and otherwise dealing with certain Lands in Ireland', iv (1864), pp. 489-524.

detested.[22] He later admitted that because it made registration optional and deregistration possible, thus allowing Irish solicitors to persuade clients to withdraw from the register, the Act had been a total failure.[23]

Successive Irish Attorneys-General were highly unsupportive of the Title Association's vision, and the Old World-New World distinction stands out in their thinking. James Lawson, who as Attorney-General for Ireland from 1865 took control of the Bill, had never been convinced that an Australian system designed for 'land-jobbers and money-lenders' would suit Ireland.[24] His predecessor Thomas O'Hagan counselled caution over bringing the system to Ireland due to the 'great difference between the simple relations of property in a new country and the complicated relations of an old country.'[25]

Registration was facilitated in Australia by fresh Crown grants, and in Ireland by Estates Court titles – these were simply taken for granted as insurmountable differences with England. Torrens told the 1868-70 Royal Commission that Ireland was a 'better analogy' than Australia, but the Commissioners dismissed it because of the absence of an Estates Court from England.[26] Why therefore not just establish an Estates Court for England? The 1857 Royal Commission had ruled this out because it did not think a system intended to facilitate 'absolute changes of ownership' would suit a country where family settlements were the most important dealings in land. For that Commission and

[22] *Select Committee* (1878), p. 148, 151-2; Torrens, *Essay*, pp. 42-3.
[23] *Select Committee* (1878), p. 148.
[24] Discussion on land transfer, *TNAPSS* 1863 (1864), p. 253.
[25] *Parliamentary Debates*, CLXXV, 27 May 1864, cols. 739, 742.
[26] *Report of the Royal Commissioners* (1870), p. 31.

many legal reformers after, the aim was simply to remove retrospection, not to obliterate settlements, hence the muddle of the 1862 Act.[27]

The failure of the Irish Act led the 1878-9 Select Committee to conclude that although the Estates Court might make an Australian-style system more feasible, Ireland and England, unlike Australia, were both old countries where land was more likely to be settled than sold or mortgaged.[28] Even if there was an English Estates Court, the nature of land use in old countries would still prove an obstacle.

The supposed uniqueness of English practice also saw the rejection of Central Europe's example, where title registration had existed in an Old World environment for centuries. Torrens himself had been heavily influenced by title registration in the Hanseatic towns, and in the early 1860s adduced their example of how the system worked in old countries.[29] However, when the Royal Commission reported in 1870 it ruled out Europe's experience because there were fewer 'long settlements'.[30] In 1896, the chief registrar Charles Fortescue Brickdale published his comprehensive official report on German and Austro-Hungarian registration systems, which received much press attention and hardened the case for compulsory registration in the Land Transfer Act

[27] *Royal Commission* (1857), pp. 16-17, 25; Anderson, *Lawyers*, p. 91.
[28] *Report from the Select Committee on Land Titles and Transfer,* xi (1878-9), p. vi.
[29] R. R. Torrens, 'The Torrens System of conveyancing by registration of titles, as in operation in Australia, and applicable to Ireland', *Transactions of the National Association for the Promotion of Social Science*, 1863 (1864), pp. 180-8, at p. 188. There has recently been vigorous debate about the extent to which Torrens deserves credit for the 'Torrens system', given the mighty influence of the Hamburg registration system. For the argument that Torrens simply translated the Hamburg system to South Australia, see Antonio Esposito, 'A comparison of the Australian ('Torrens') system of land registration of 1858 and the law of Hamburg in the 1850s', *Australian Journal of Legal History*, 13 (2003). It has also been argued that the Germanic origins of Torrens' system were obscured in order to avoid anti-German sentiment. See Murray Raff, 'Torrens title land registration - the influence of German law' (paper presented at 'The German presence in South Australia', University of Adelaide, 30 September and 1 October 2005). For the opposite view, that Torrens deserves supreme credit for synthesising several influences and guiding the legislation into being, see Taylor, *'A Great and Glorious Revolution'*, pp. 30-43.
[30] *Report of the Royal Commissioners* (1870), pp. xxv-xxvi.

1897.[31] He was convinced that the best way of persuading people to erect a 'New World' system in the Old was to show how it in fact already existed and functioned well in the latter.

It was understood that once a title was registered, no new legal estates less than the fee simple could be derived from that title. Entails were out of the question. But Torrens and his supporters continually made the case in print, Parliament, and before the public inquiries, that under his system it was perfectly possible to protect equitable interests arising from settlements and trusts. To make a settlement, a landowner could go to the registrar, reduce his fee simple to a life estate, and arrange the line of succession. Upon death, the next person in line would then obtain their own certificate for a life estate, denoting the powers available, basically a 'limited power of sale'. Although trusts could not be entered on the register, trustees could register as absolute owners and be issued their own declaration of title. Caveats and 'no survivorship' clauses, requiring any deceased trustee to be replaced before further dealings could take place, would protect beneficial interests.[32] Torrens was essentially reinforcing the view of the 1857 Royal Commission, which had also decided on the practicability of caveats.

Torrens also scoffed at what he saw as a distorted British view of Australian habits, as if when emigrants reached Australia they left 'behind them all sense of duty as regards making provision for their families.' They might keep property free of encumbrances at first in order to make it better security for credit, said Torrens, but once

[31] Anderson, *Lawyers*, pp. 199-201.
[32] Robert R. Torrens, *The South Australian System of Conveyancing by Registration of Title* (Adelaide, 1859), pp. 39-41; Torrens, 'Torrens System', p. 184. *Select Committee* (1878), p. 147 (621); Torrens, *Essay*, pp. 33-4.

on their feet 'the old-country instinct to make provision for their families' prevailed.[33] Even the Bar Committee admitted that settlements were possible in Australia, they were just less frequent.[34] But this was precisely the problem for Torrens' critics – title registration suited Australia where land was mostly transferred, but not England where settlements and trusts were the norm, not the exception.

The English land reform movement was interested in the Torrens system as part the wider project to establish 'free trade in land' through abolishing feudal estates. By removing the legal obstacles to the sale and purchase of land, Liberals hoped that land tied up in the ownership of a small number of families would be put to market and allow the creation of small-holdings.[35] However, some did see title registration as a distraction from the core matter of diminishing the distinction between real and personal property by abolishing primogeniture and entails, which they believed would really make land a commodity as in new countries.[36]

As for the land parcel question, Torrens said that there was much more difficulty in identifying parcels in Australia, let down by poor past surveys, than in England, with her 'ancient hedgerows, permanent land marks, and actual occupation'.[37] As early as 1860 he claimed that Tithe Commission maps and the Ordnance Survey afforded greater potential for registration that even Australia.[38] However, the 1:2500 scale Ordnance

[33] Torrens, *Essay*, pp. 31-2.
[34] Bar Committee, *Land Transfer* (London, 1886), p. 88.
[35] Joseph Kay, *Free Trade in Land* (London, 1879), letter V; Havelock Fisher, *The English Land Question* (London, 1883), p. 16.
[36] Anderson, *Lawyers*, p. 121; *Parliamentary Debates*, 4 June 1875, ccxxiv, cols. 1424-5.
[37] *Select Committee* (1878), p. 148.
[38] 'South Australia – Real Property Act', *Estates Gazette*, 15 March 1860, p. 89.

Survey was not completed until 1893,[39] and so until then Torrens' words may have seemed unrealistic.

Although the Torrens system received much praise in England, it became obvious by the failure of voluntary registration that English landowners were simply not attracted to the system.[40] Australia demonstrated the importance of compulsion in certain circumstances for encouraging others to voluntarily register. In the colonies, fresh grants flowed directly onto the register and Torrens title quickly became the norm, inducing other landowners to register their titles. Yet without new alienations, or an equivalent to Ireland's Estates Court, compulsion actually had to be more daring in England, and apply to registration on sale, something not done in most of the colonies until after the First World War.[41] With Australia as a benchmark, Torrens advocated compulsion, but his opponents saw only the system's incompatibility with English titles.

During the Parliamentary struggle over the 1875 Land Transfer Bill, Lord Selborne tried to insert a compulsion clause, justifying it by referring to the role of compulsion in registration's success in Australia. But Lord Chancellor Cairns retorted that compulsion in the colonies only applied to fresh alienation of perfectly marked out portions of Crown land, and so did not involve forcing imperfect titles onto the register.[42] Cairns' legislation left registration to choice, but enabled registration of 'possessory' titles and less than perfect, or 'qualified', titles.

Compulsion was finally, albeit cautiously, introduced under the 1897 Land Transfer Act, with it initially being confined to possessory titles in London only. The

[39] C. J. Sweeney and J. A. Simpson, 'The Ordnance Survey and land registration', *Geographical Journal*, 133, 1 (1967), pp. 10-18, at p. 11.
[40] Whalan, 'Immediate success'.
[41] Ibid., p. 418.
[42] *Parliamentary Debates*, 15 March 1875, ccxxii, cols. 1776-8, 1781, 1788-9.

existence of the Torrens system in Australia provided the performance benchmark which persuaded policymakers and legislators of the necessity of compulsory registration on transfer. Even after registration began to make real progress with the introduction of compulsion, the Australian Torrens system continued to influence legal discourse in Britain. Indeed, the conveyancing expert, James Edward Hogg, believed that with title registration properly in place colonial experience would provide invaluable lessons for making the system work.[43]

In order to truly make this a paper on the land transfer debate in the United Kingdom, it is necessary to explain that for much of this period the Scots were comparatively disinterested in the Torrens system. They already had great nationalistic pride in the relative cheapness, ease, and efficiency of their register of sasines system, similar to deeds registration, when compared to English conveyancing. When the Royal Commission on Registration of Title in Scotland inquired into the matter in 1910, some witnesses objected to title registration because the current system was not considered to have the English system's deficiencies. However, the Commission recommended the establishment of a trial area for registration, and drew heavily on Australian examples in making that conclusion.[44]

The English property law legislation of the 1920s simplified land tenure so that the great barrier of English feudal titles was finally demolished, and gradually over the twentieth century title registration progressed. With England and Wales now in the vanguard of

[43] James Edward Hogg, *The Australian Torrens System* (London, 1905), p. vii.
[44] *Report of the Royal Commission on Registration of Title in Scotland*, lviii (1910), pp. 5-15, 19-23, 172-3.

land transfer, pushing ahead with e-conveyancing, it is fascinating to look back at a time when many were convinced of their country's inability to change.

There are, however, several broader lessons that must also be conveyed. First, it is imperative to recognise the extent to which British colonisation of the New World had created a 'British world', which fed back into domestic debates on all kinds of matters as Britons sought inspiration and ideas from their kith and kin not only in the Australian colonies, but also New Zealand, Canada, and, beyond the Empire, in the United States. In the context of legal debates, the expansion of the English legal model to new environments stimulated innovation and the exchange of ideas, as across the lands of the British 'diaspora' similar debates and struggles for and against change took place. Secondly, the case of the Torrens system perfectly illustrates how the economic idea of 'old' and 'new' countries, so tied up with the nature of that British world, shaped a number of the contentious debates of the day.