German Real Property Law

And

The Conclusive Land Title Register

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Volume 1: Thesis

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Declaration of Word Length

I declare that this thesis is less than 114,389 words in length excluding appendices.

...........................................
Murray J. Raff
This work is dedicated to my parents, Jean and Iain to my sisters, Lee-Anne and Neroli and to my son Julian, my niece Melanie, and my nephews Tim and Dominic
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CONCLUSION

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The primary objective of this study is to make a significant contribution to our understanding of the origins and background of those principles of the Australian Torrens land title registration system which were originally adopted in 1858 from the German land title registration system developed in the Hanseatic cities of Northern Europe. The substantial derivation of the contemporary German land title registration system, which implements the principles in Book Three of the German Civil Code, from the same system invites analysis of it as well, not least to see how it has adapted to the challenges to real property law posed by immense social and technological changes later in the nineteenth century and across the twentieth.

The second motivation for this work is the unique opportunity which this inquiry affords us to observe the practical operation of a European Civil Law system in fine detail. By selecting specific doctrines of the German land law system, such as those underlying the conclusive land title register and the principle of public faith in it, a deep vertical study is possible through which a central view of all property principles is afforded while reaching the level of detail at which individual court judgments may be studied as illustrations of the doctrines and demonstrations of their interrelationships in practice. In this way, the

1 Bürgerliches Gesetzbuch or GGB, the centenary of the implementation of which will be celebrated on 1 January 2000. Some centenary essays which have already appeared include, M Schmoeckel "100 Jahre BGB: Erbe und Aufgabe" (1996) 49 NJW 1697 and H Schulte-Nölke "Die schwere Geburt des Bürgerlichen Gesetzbuchs" (1996) 49 NJW 1705.

2 In this work "Civil Law" refers to the Roman law civilian tradition of Continental Europe in contrast to other legal families of the world, such as the Common Law. When referring to the body of law within a system which governs the private legal relations of citizens inter se, lower case "civil law" is used. The same distinction has been adopted for "Common Law", which in upper case represents the legal family employed in the former British Empire. In lower case, "common law" represents that source of law for which substantive legal norms are developed through curial discussion of previous applications of the norm in earlier court cases and scholarly commentary, and redefinition or reformulation in light of the case at hand. The term "common law" is thus also used to refer also to the German common law (das Gemeine Recht) in the period before the Bürgerlichen Gesetzbuch. On the structural characteristics of English common law and their history, see M Raff "Matthew Hale's Other Contribution - Science as a Metaphor in the Development of Common Law Method" (1997) 13 Australian Journal of Law and Society 73.
legal-cultural relativity of concepts such as unregistered proprietary interest may be explored in a concrete way which is not possible simply by reading a translation of the provisions\(^3\) or a more abstract summary of the system in a horizontal study.\(^4\) By analysing the principles in the light of decided cases I am not seeking to understand a Civil Law system by using Common Law method. As Rabel put it, "Without the judicial interpretations to which it has given rise a piece of legislation is like a skeleton without muscles."\(^5\) The advantage of understanding the principles in the light of practical problems presented for adjudication helps us to see the principles in a functional light and to understand their interconnections. This method also illuminates the Civil Law judicial style. We can consider the tones in which the relevant principles are discussed and understood, how material claims for justice and the need for innovation are dealt with in the face of an apparently, or reputedly, unyielding positive law text. It is hoped that this study can thus help to inform discussion surrounding further integration of the European legal systems by providing material for testing Common Law world preconceptions about the Civil Law world.

Naturally, it is not possible in a work of this size to make an exhaustive study of all German real property law at that level of detail. It is therefore necessary to adopt a specific issue as the vehicle for this study. Because the principles of the conclusive land title register, or indefeasibility of registered title, are the clearest and most important of the many adopted from the Hanseatic system, these and the meaning of registered ownership have been chosen as the particular focus of the study. The wider issues surrounding these principles have intense contemporary importance, not least in

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Germany and in Australia, because of their implications for the powers of a land owner to transform environmental characteristics of that land which constitutes the object of ownership. In 1999 it is virtually a platitude to write that all human activity on our planet is dependent upon relationships with land, and that these relationships must thus be organised in ways which permit the sustainability of both human society and the land itself. It follows nevertheless that the viability of all human activity, including its economic organisation, is ultimately a question of ecology. In the ever-spreading urbanisation\(^6\) of the planet's land resources property law plays a major role in recognising and ordering rights to the benefits of urbanised resource exploitation, and the rights to carry urbanisation further. The question of whether these legal property rights, in isolation from public regulation, carry an inherent power to pursue whatever activities the holder of the right might wish, even to the extent of disrupting the sustainability of the resource itself, or whether they are pervaded by social and environmental responsibilities, is thus in the first rank of the vital ecological and legal issues with which humanity must grapple on the threshold of a new century.

The need to do so was made very clear by the World Commission on Environment and Development in its report *Our Common Future*.\(^7\) The Commission discussed the need to integrate ecology into all forms of decision making -

The common theme throughout this strategy for sustainable development is the need to integrate economic and ecological considerations in decision making...

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\(^6\) I am using "urbanisation" in the most general possible sense to denote the process of converting customary, traditional or indigenous land use and administration methods to rationalised or scientised western industrial methods, whether involving the spread of built metropolitan landscapes or the adoption of western primary industry (farming, mining and forestry) technologies, as well as the technocratised administrative methods which accompany it. It is therefore a substitute for "development" or "progress" which denies inevitability and thus preserves the possibility of choice. By rationalisation I mean the expanded Weberian concept: see J Habermas, "Technology and Science as "ideology"" in J Habermas, Toward a Rational Society (trans & ed J Shapiro) Heinemann, London, 1971, 81, 98 and T McCarthy, The Critical Theory of Jürgen Habermas, MIT Press, Massachusetts, 1978, 37-8.

making. They are, after all, integrated in the workings of the real world. This will require a change in attitudes and objectives and in institutional arrangements at every level.8

And in a legal context -

Sustainability requires the enforcement of wider responsibilities for the impact of decisions. This requires changes in the legal and institutional frameworks that will enforce the common interest. Some necessary changes in the legal framework start from the proposition that an environment adequate for health and well-being is essential for all human beings - including future generations. Such a view places the right to use public and private resources in its proper social context and provides a goal for more specific measures.9

These concerns were manifested as expressions of international will in Principle 4 of the Rio Declaration on Environment and Development and in Chapter 8 of Agenda 21, entitled "Integrating Environment and Development in Decision-Making".10 The integration of ecological considerations into the decision-making of those who hold private proprietary rights remains a great challenge.

In Australia, the Torrens system of land title registration is the property law system through which society recognises and orders private rights to urbanised land. The legal framework of this system was modelled in South Australia in the 1850s after the Hamburg-Hanseatic system, and is now employed in every State and Territory in Australia. The Torrens system has also been adopted in many other countries, such as New Zealand and most of Canada.11 A similar system has been initiated in England, inspired by a number of sources such as the Torrens and Prussian models12 and the

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8 Ibid 106.
9 Ibid 107.
11 For an extensive list of jurisdictions which have adopted the Torrens system, see S R Simpson, Land Law and Registration, Cambridge University Press, 1978, 77.
12 C Fortescue-Brickdale, "Registration of Title in Prussia" (1885) 4 Law Quarterly Review 63. See also C Fortescue-Brickdale, Methods of Land Transfer – Eight Lectures, Slevers & Sons, London, 1914, 126-130: "The population affected by the system [in Germany and Austria-Hungary] amounts to 86 millions, whereas
findings of extensive 19th century inquiries.\textsuperscript{13} In most of these jurisdictions the land title registration system is progressively supplanting the English general law deeds conveyancing system received upon first colonisation. In many post-colonial places indigenous relationships to land are in basic legal principle recognised with respect to land resources which have not been urbanised,\textsuperscript{14} and to some which in part have been.\textsuperscript{15} In England it has been projected that all private land will be the object of registered title by 2007.\textsuperscript{16}

Land title registration systems are employed with respect to urbanised land resources also in many other parts of the world and many of these systems are derived directly, as in Japan, or indirectly, as in South Korea, from German models. Other land title registration systems also closely resemble German models in principle. For example, the Dutch system resembles the German system, and it was adopted with respect to urbanised land resources in Indonesia. In that former Dutch colony there are also indigenous Adat land based relationships in non-urbanised and semi-urbanised areas.\textsuperscript{17} These considerations lead us to the observation that, in the not too distant future among the urbanised areas of the world, only the United States and two provinces of Canada will significantly retain a conception of real property which is not fashioned after a German model of land title registration. In these jurisdictions the question of whether real

\textsuperscript{13} For an overview of these inquiries see Simpson, above n 11. See also text below in Part I, following n 143.

\textsuperscript{14} Mabo v State of Queensland [No. 2] (1992) 175 CLR 1.

\textsuperscript{15} Wik & Thayorre Peoples v State of Queensland (1999) 187 CLR 1.


\textsuperscript{17} R Haverfield, "Adat Traditional Land Title" in T Lindsey (ed) Law and Society in Indonesia, Federation Press, Sydney, 1999. Interestingly, Australian experts in geomatics and land title registration are now extending the urban registered land title system.
property rights are subject to inherent obligations is governed by traditional Anglo-
American common law.\footnote{I have answered this question affirmatively with respect to immanent environmental constraints in M Raff, "Environmental Obligations and the Western liberal Property Concept" (1998) 22 Melbourne University Law Review 657.} There is some irony in the observation that North American jurisprudence is not in this respect the apparent globalising and urbanising movement. The explanation of this might lie in the rationalising aptitude of land title registration with respect to public administration of land resources\footnote{On my use of the concept of "rationalisation" see generally E B Pashukanis, Law and Marxism - A General Theory [trans B Einhorn, ed C Arthur] Ink Links, London, 1978.} and for the commodification of private relationships to land.\footnote{On the concept of "commodification" see generally E Pashukanis, Law and Marxism - A General Theory [trans B Einhorn, ed C Arthur] Ink Links, London, 1978.} In this connection it is interesting that a recent critique of the globalisation process has identified the recognition of obligations in ownership as critical in addressing many of its undesirable repercussions.\footnote{H P Martin & H Schumann, The Global Trap: Globalization and the assault on prosperity and democracy [trans P Camiller], Zed Books, London, 1997, 128.}

The recognition of social and environmental obligations \textit{immanent} in property in the contemporary German system,\footnote{At a general level, \textit{immanent} means pervasive, inherent or intrinsic. The German adjective \textit{immanent} and noun \textit{die Immanenz} are used in discussions of inherent social and environmental legal responsibilities, and so the corresponding English term is also used widely in this work. The idea of \textit{immanent} principles is closely connected to a Natural Law tradition in which the universe is pervaded by principles of justice with "immanent and teleological qualities"; M Weber, Max Weber on Law and Economy in Society [trans & ed M Rheinstein & E Shils] Simon & Schuster, New York, 1954, 288. They are immanent in the sense that they follow naturally from the facts of human existence and are discoverable through human reason. They are teleological in that an unjust result of their application indicates an error in deriving the principle in the first place. In this sense the words in which a statement of positive law is expressed merely clothe the essential principle which they express.} and the substantial derivation of that system and the Torrens system from a common source, thus raise a string of questions. What does this obligation mean? How long has it been present in the German or Hanseatic systems? What is its jurisprudential essence and how was it manifested? Was it carried to South Australia and adopted into the Torrens system in some way which has so far remained unnoticed? The answers to these questions have implications for the meaning of private registered land ownership in most of the world.
This thesis is, therefore, as much an international comparative legal study as a work on property law. The relative unity of registered land title systems affords us the opportunity of using comparative legal method to achieve a harmonisation of those principles with respect to which unity is desirable.\textsuperscript{23} The use of land is fundamentally connected to cultural tradition, and there are certain to be many principles which it is not desirable to harmonise. The internationally acknowledged necessity for land use to be administered in ecologically sustainable ways is, however, plainly a principle which should be harmonised and the various national and local systems interpreted so far as possible in accordance with it.\textsuperscript{24} A major object of this work is thus to understand the basic and common principles of two of the world's great real property systems, the German system and the Torrens system, particularly with respect to immanent obligations and limitations of the power of the proprietor of a registered right with respect to the relevant land. This investigation comprises three principal inquiries -

1. the reception of Hamburg-Hanseatic land title registration concepts into South Australia in the 1850s,
2. the real property jurisprudence of the Hamburg-Hanseatic land title registration system, and
3. contemporary German real property law.

Without doubt, the most popular model of comparative legal research is the functional method, through which the execution of a specific legal transaction, or an identified practical legal problem, is examined in at least two legal families with a view to harmonising them or at least drawing out the common and contrasting principles.\textsuperscript{25} In the comparison of private law this method has many advantages, not the least of which


\textsuperscript{24} Ibid 19.

\textsuperscript{25} One model example of this method in a related field is B von Hoffmann, Das Recht des Grundstückskaufs - Eine rechtsvergleichende Untersuchung, J C B Mohr (Paul Siebeck), Tübingen, 1982.
is the emphasis of what in customs and legal norms lies in common between the civil societies of the world rather than their differences. On a macro scale, therefore, it has the potential to transcend the nation state and dwell in a realm of "peace through trade" which, with the more corrosive aspects of globalisation in the post-Cold War period in mind, might better be wound back further to a concept of "peace through global human intercourse".

Unfortunately, the more utopian ideal of a functional comparison cannot be pursued as the primary method of this work.\textsuperscript{26} As the first comparative work on the jurisprudential background of Torrens land title registration,\textsuperscript{27} explicit and detailed treatment of the contemporary Torrens system has not been pursued, in favour of making a more intimate acquaintance with the Hamburg-Hanseatic and the contemporary German system, with the hope that a foundation will be laid for more extensive functional comparisons in the future.

Consequently, I have adopted with modification a comparative legal method appropriate to \textit{Rezeptionsproblemen} or \textit{legal transplants}.\textsuperscript{28} Rabel provided a clear depiction of the connection between the roles of comparative and historical analysis—

I distinguish three sub-areas: doctrinal or systematic comparison asks how they relate with respect to \textit{content}. The \textit{evaluation} is no longer a part of the legal

\textsuperscript{26} For an earlier attempt at this see K Rudolph, \textit{Die Bindungen des Eigentums - Eine rechtsvergleichende Studie}, J C B Mohr (Paul Siebeck), Tübingen, 1960.

\textsuperscript{27} The pioneering work of Robinson must be acknowledged; see S Robinson, \textit{Equity And Systems Of Title To Land By Registration}, Ph D Thesis submitted at Monash University, Melbourne, on 30 August 1973; and S Robinson, \textit{Transfer Of Land In Victoria}, Law Book Co, Sydney, 1978, especially Ch 1, "The Origins Of The Real Property Act 1858 Of South Australia".

comparison, but of the legal critique which it has made possible. Closely connected to that, certainly within a practically necessary division of work, is that which we call historical legal comparison: the investigation of the historical relationships of the legal systems, through which the established similarities are to be traced back to either a common origin or a reception or independent factors with parallel effects. Legal historical comparison has an extraordinary power to stimulate the reconstruction of past laws out of fragmentary records. 29

When Watson addressed this aspect of the discipline he proposed that Comparative Law is -

... the study of the relationship of one legal system and its rules with another. The nature of any such relationship, the reasons for the similarities and the differences, is discoverable only by a study of the history of the systems or of the rules. Comparative Law is Legal History concerned with the relationship between systems. 30

The application of historical method within the comparative discipline extends it as an important tool of Jurisprudence. Zweigert and Kötz consider comparative law to be pervaded by legal history to such an extent that distinct roles could hardly be systematised. 31 Through this more expansive concept of Comparative Law -

... we should be able to isolate the factors which actually have led to a real innovation in a particular society. We should also learn whether a legal rule which is transported to another system is likely to exist unchanged in its new setting. 32

Concerning legal transplants, particular methodological problems occur relating to the transplanted rule or system operating within its new social context, and the tendency of the "source legal habitat" to continue to develop along its own developmental trend and in the face of its own challenges.

[...] rule transplanted from one country to another ... may equally operate to different effect in the two societies, even though it is expressed in apparently

29 E Rabel, above n 5, 88-7.
30 Watson, above n 28, 6.
32 Watson, above n 28, 16.
similar terms in the two countries. But our first concern will be with the existence of the rule, not how it operates within the society as a result of academic or judicial interpretation. When a rule is transplanted ... it will interest us whether it can be moved unaltered, or whether, and to what extent, it undergoes changes in its formulation.\textsuperscript{33}

Kahn-Freund emphasises the importance of considering the social and legal environment as well as political relationships when evaluating a legal transplant.\textsuperscript{34} This difference has been seen as a dispute, reconciled with the observation that the historian, Watson, was interested in mega-movements over large time spans, while the contemporary legal scholar, Kahn-Freund, could not overlook the interconnections between law, politics and society. If this were a dispute it would pose a problem for this work, which is in a large part historical and also concerned with some relatively subtle issues of law, politics and society in the past. This issue has been dealt with by conducting a defined vertical study and by introducing relevant considerations to the concept of legal transplantation. These are explored below.

Watson demonstrates that transplantation can take place in an infinite number of ways, leading one to question whether transplantation is actually being confused with simple human inter-cultural exchange of ideas in the socio-legal realm. Perhaps the idea of transplantation has been considered appropriate because imperial or neo-imperial source cultures have assumed that there was nothing of value\textsuperscript{35} to receive in return—

The reception of English law in New Zealand is another instance of an immigrant population taking its law with it to an area where there was no comparable civilization.\textsuperscript{36}

When analysing a transplant it seems naive to overlook factors of imperialism and neo-

\textsuperscript{33} Watson, above n 28, 20.

\textsuperscript{34} O Kahn-Freund, above n 28.

\textsuperscript{35} For example, on the valuable contributions which indigenous peoples make to environmental management see M Tehan "Indigenous Peoples, Access to Land and Negotiated Agreements: Experiences and Post-Mabo Possibilities for Environmental Management" (1997) \textit{Environmental and Planning Law Journal} 114.

\textsuperscript{36} Watson, above n 28, 73, see also 29-30.
imperialism. As Stein remarked with respect to "massive transplants" such as the reception of Roman law in the rest of Europe and adoption of the draft German Bürgerlichen Gesetzbuch in Japan -

"Most, if not all of these transplants involve en bloc receptions of sophisticated systems by less developed societies pursuant to a basic modernization decision made by an authoritarian elite."37

This issue also arises in perception of the "success" of a transplant, which has been rarely discussed by European and North American commentators. Legislative repeal of transplanted concepts must be the ultimate signal of their "rejection".38 So far as Watson considers the issue -

"A successful legal transplant - like that of a human organ - will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system. Subsequent development in the host system should not be confused with rejection."39

Why, in order to be a "successful transplant", the received legal organism must grow in the same way in its new habitat is far from obvious, and these observations, are plainly made from a strongly euro-centric perspective, as though the legal transplant will retain no authenticity if it joins a new dynamic with the "receiving legal habitat". Intentions behind the attempted transplant are clearly most relevant to declaring it successful or not. If for example, an Asian country had adopted the French Civil Code deliberately to avoid colonisation, and colonisation had thus been avoided, then plainly the transplant was successful even if, and especially if, a century later it still had little bearing on the adjudication of commercial disputes - both sovereignty and the traditional normative structures were retained and France would have fulfilled her civilising zeal without actually doing any harm.


38 See Stein's example of American concepts transplanted in the unsuccessful British Industrial Relations Act 1971: Stein, above n 37, 209. See also Kahn-Freund, above n 28, 25.
Subsequent experience in the donor legal system with the transplanted material will of course remain of great interest to the recipient legal system in order to monitor new ideas for the system's further improvement. Long after attaining legislative and judicial independence, Australian legal scholars keenly observe further development in other countries of both Common Law principles and new interpretations of the legislation which was originally transplanted without Imperial constitutional compulsion in the colonial era and later. If "... there is no need for the primary instrument of the reception to be the law of the donor state in its official form ..." then the transplantation of law from other parts of the English speaking world is still, as it has always been, an on-going process.

Adoption of the Australian system of land title registration illustrates many of these observations. In Australia, the indigenous legal habitat had already been felled and cleared and supplanted by the most earnest attempt to create an English legal landscape in the Antipodes. Into this landscape a very useful species of land law was transplanted from the Free and Hanseatic City of Hamburg. It has been so successful in the Australian climate that it must now be accepted as an integral part of the legal landscape. There are however some problems with its continued growth, and particularly with respect to its interaction with other English legal species.

With a view to addressing these problems, the jurisprudence of legal transplants will be adapted in the course of this study to seek an understanding of the Hamburg species in its own indigenous habitat at the time of its transplantation. Records of the thoughts and motives of the original legal botanists will be examined to assess their understanding of the new species, and particularly their awareness of other companion legal plants and animals in the indigenous Hamburg environment with which the land law system enjoyed

39 Watson, above n 28, 27.
40 Watson, above n 28, 93.
a symbiotic relationship. As one would expect, the Hamburg land law species continued to grow and further evolve in its native soil. It has faced its own challenges, but many similar challenges were also experienced in Australia. A comparative study of the Hamburg-Hanseatic land law system in its own environment, among its companion legal principles, can thus reveal to us latent capacities of the species which, with the application of arboreal skill, and the introduction of companion principles, will assist the continued sustainability of the Torrens system in its Australian environment, with respect to its Australian legal habitat and with respect to its "integrated workings [with] the workings of the real world."

41 I expand and illustrate what I mean by "companion legal principles", or Juratypen [from Biotypen], below in Part II, following n 307.

42 Our Common Future, above n 7, 106.
PART I

HANSEATIC INSPIRATION

OF THE

AUSTRALIAN LAND TITLE REGISTRATION SYSTEM

A Introduction - Who Really Developed the Australian

Land Title Registration System?

The Australian land title registration system was called the Torrens system after its apparent initiator, Robert Torrens, who was a politician in South Australia at the time when it was developed in Adelaide in the late 1850s. Although in the following understatement Torrens referred to some help in carrying through "his scheme",

I therefore submitted my scheme in the form of a draft Bill to ...[Mr Forster]... and to several other gentlemen on whose judgment I placed reliance. From these gentlemen I received some valuable suggestions, which are embodied in the measure as it now stands. To them I am further indebted for powerful and unwavering support throughout the struggle now so successfully terminated ...¹

it was known that a group had participated in actual development of the reform proposal.

A persistent opponent of the reform, Mr Baker, remarked in the closing stages of the debate -

The Bill was the production of a clique, who sought to pass this measure for popularity sake, without knowing what effect it would have upon the property in the colony.²

¹ R R Torrens, The South Australian System Of Conveyancing By Registration Of Title, Register/Observer, Adelaide, 1859, vi.
² South Australia, Parliamentary Debates, Legislative Council, 22 January 1858, 779 (Mr Baker).
It is difficult to assess the contributions of the respective members of the Torrens clique, or even confidently to identify them. For one thing, it is clear from records of the debates that Mr Forster had a far more protracted struggle in carrying the Bill through the Upper House than Torrens did in the Lower House.

Research by Professor David Kelly and Dr Stanley Robinson has shown that Torrens was at the very least guided, and in the final shape of "his scheme" largely inspired by the general principles of the land title registration system then operating in the Hanseatic cities of Northern Europe, and, in detailed respects, by that operating in Hamburg. Torrens was generously informed about the principles of that system by one extraordinarily talented and loyal member of the Torrens clique, Dr juris Ulrich Hubbe who had immigrated to South Australia from Hamburg. Torrens never publicly acknowledged Dr Hubbe's assistance and claimed largely for himself the glory of having developed a system of land title registration which was to prove so workable and thus successful throughout the British Empire. One of the aims of this work is to assess the significance of Hubbe's contribution, partly by examining the land title registration system which operated in Hanseatic Hamburg at the time when he immigrated and thus deducing common aspects of the systems.

Torrens championed politically, inside the first South Australian Parliament and in wider society, the need for a new conveyancing system to replace English general law deeds conveyancing, the transaction costs of which were sometimes more than the value of the

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4 S Robinson, Equity And Systems Of Title To Land By Registration, Ph D Thesis submitted at Monash University, Melbourne, on 30 August 1973. Most of Chapter 1 of this thesis, "The Origins Of The Real Property Act 1856 Of South Australia", was published as Ch 1 of S Robinson, Transfer Of Land In Victoria, Law Book Co, Sydney, 1978. References below are to Dr Robinson's thesis.
land concerned\textsuperscript{5} and which was plagued by fraud. Torrens' ideas for a system of registered land title were nevertheless relatively amorphous, and as Robinson has shown,\textsuperscript{6} these ideas changed in the course of the campaign for its adoption largely through Hübbe's influence. When Torrens introduced his Bill, in the preparation of which he had already received some assistance from Hübbe, he described the central principle in this way -

\ldots Registration \textit{per se} and alone shall give validity to transactions affecting land \ldots This method is designed to give confidence and security to purchasers and mortgagees through the certainty that nothing affecting the title can have existence beyond the transactions of which they have notice in the memoranda endorsed on the grant.\textsuperscript{7}

Each registered transfer was to take effect as the fresh issue of a new Crown Grant of the land. In Torrens' mind registration would comprise these steps - deposit of a duplicate title, endorsement in a book of registration and endorsement on the relevant Crown Grant. At the beginning of his Second Reading speech Torrens acknowledged that he had collected materials which induced him to make alterations to the Bill, to make it more complete, but in his view the essence remained the same -

\textit{The two great principles of the measure were that not merely the instrument, but the entry in the book shall form the title; and that the certificate, for the future, shall always be deemed evidence of title in a court of law.}\textsuperscript{8}

He added quickly that he had entertained the idea for nearly ten years. Torrens was not a lawyer, although he had plainly devoted great effort to gaining familiarity with many legal concepts. His speeches nevertheless convey the distinct impression that he was never more articulate and confident than when rousing his fellow parliamentarians to

\textsuperscript{5} Parliamentary Debates, Legislative Assembly, 4 June 1857 [First Reading Debate], 206-7 (Captain Hart); and J Brown & B Mullins, \textit{Town Life in Pioneer South Australia}, Rigby, Adelaide, 1980, 177.

\textsuperscript{6} Robinson, above n 4.

\textsuperscript{7} Parliamentary Debates, 4 June 1857, Legislative Assembly, 204 (Mr Torrens).

\textsuperscript{8} Parliamentary Debates, Legislative Assembly, 11 November 1857, 647 (Mr Torrens).
confront the expense of deeds conveyancing, the monopoly of the legal profession and the uncertainty of general law title, and pointing out that these posed a great obstacle to the intended prosperity of the South Australian colony. Torrens did that very well.

However, Torrens' apparent failure to appreciate the significance of the changes made to his proposal through Hübbe's influence between June and November 1857, mirrors an aspect of his leadership of the reform group which is also reflected by his claim to have devised "his scheme" through the innovative application to land of the provisions for ship registration in the British Merchant Shipping Act,9 and his claim that the system proposed in the report of the English Commissioners10 was virtually identical.11 These aspects of his rhetoric demonstrate that Torrens painted with a very broad brush - he discussed land title registration in such broad terms that in his mind all of the new registration schemes imagined in this period in the English speaking world were more or less one and the same, whether inspired by the method of issuing railway stock employed by the Bank of England,12 systems used on the continent,13 or the registration of ships.14

Torrens was the consummate politician and for that vital contribution he should not be forgotten. However, his role in bringing together the legal elements of the reform has long been exaggerated. If Torrens was the consummate politician, then Dr Hübbe was

9 The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) (Imperial).


11 Torrens, above n 1, iii.

12 Mr W S Cookson, Great Britain, Report from the Select Committee on the Registration of Assurances Bill (House of Commons, 5 August 1853) British Sessional Papers, House of Commons, 1852-53, Vol XXXVI, 397, Minutes of Evidence, 3, Question 16.


14 Ibid 207.
the consummate jurist in the clique. One need only consider the "cut and paste job" which Torrens prepared to publicise his triumph around the Empire, beside the remarkable legal publication by Hübbe to conclude that Hübbe provided the juristic framework and many of the detailed provisions for the system adopted in Adelaide. While Torrens was concerned with such pragmatic matters as the cost of a transfer, Hübbe equated escape from English real property law with escape from the legacies of feudalism and the complicated devices developed to evade it. Hübbe penned a very competent analysis of the legal foundations of deed conveyancing before the United Kingdom reforms of 1925, a description of the French post-revolutionary system, an analysis of the Hanseatic system and a stirring argument for achievement through the Torrens reforms of social and democratic liberalism among the Saxon descendant peoples of England, Germany and South Australia. It might be that Torrens' failure to appreciate his dependence on the other participants in the group, and especially Dr Hübbe, is the reason for the relative failure of the later project which he undertook alone - drafting the Record of Title (Ireland) Act 1865.

When considering why Torrens acknowledged so minimally Hübbe's assistance, Robinson took the view simply that Torrens was a charlatan, and indeed, with allegations of false imprisonment and an assault over which he resigned as a Justice of the Peace against him, Torrens' character is open to question. Nevertheless, there is no doubt that Torrens worked tirelessly against great odds in the political realm. His virtual silence concerning Hübbe's contribution could also be accounted for by the political

15 Torrens, above n 1.
16 U Hübbe, The Voice of History and Reason brought to bear against the present Absurd and Expensive Method of Transferring and Encumbering Immoveable Property, David Gall, Adelaide, 1857.
17 28 & 29 Vict c 88.
18 Brown & Mullins, above n 5, 175.
19 Ibid 177-8.
disadvantage which the reform could have suffered if it had been linked too directly with the German immigrants, against whom there was considerable latent, if not open, belligerence.

B Who was Robert Torrens?

Torrens was born in 1814, the son of Colonel Robert Torrens, and educated at Trinity College, Dublin, where he graduated Bachelor of Arts in 1835. Two aspects of Torrens' past frequently recur in his speeches and writing as socio-legal assumptions about his world or his motivations for reform.

The first was the ruin of a close relative in the Court of Chancery:

Twenty-two years have now elapsed since my attention was painfully drawn to the grievous injury and injustice inflicted under the English Law of Real Property by the misery and ruin which fell upon a relation and dear friend who was drawn into the maelstrom of the Court of Chancery, and I then resolved to some day to strike a blow at that iniquitous institution.

The second concerns the ideals of his father, Colonel Torrens, who was chairman of the Colonization Commission for South Australia, and in the founding of which the Colonel appears to have been instrumental. It seems that Colonel Torrens provided his son a head start in the new colony. In any case, if the Colonel believed his own rhetoric about the colony's prospects, there was no other place in the world for a young man to be.

20 Professor Kelly, see above n 3, has recounted in personal communication that a petition by the German settlers to the South Australian Governor complaining of ill-treatment was rejected on the ground that the settlers were not British subjects. See text below following n 49.


22 Torrens, above n 1, v-vi. The details remain a mystery.
In his monograph *Colonization of South Australia* Colonel Torrens sought to locate in the *science of wealth* the reasons for raising the existing settlement in South Australia to the status of a province. Torrens senior argued that industry in the mother country could be stimulated, lifting her economy into a phase of high rates of both wealth accumulation and wages, in the way that settlement of the western United States had stimulated unprecedented prosperity in the eastern states. Unemployed agricultural workers would be assisted to travel to South Australia, and through industrious work could acquire their own land. The wealth raised through sale of Crown lands would in turn be used to assist the passage of more agricultural labour.

... the principles which should guide the commissioners in determining that price [of Crown land], may be laid down with sufficient distinctness and confidence. The public lands in the New Province, should be sold at a price sufficient to secure the accomplishment of the three following purposes. The price should be sufficient to convey to the colony the number of agricultural labourers requisite to cultivate all the land purchased, in such a manner as to raise the greatest quantity of produce, in proportion to the number of hands employed; it should be sufficient to convey to the colony the number of artisans requisite to allow a division of employment, and to apply combined labour exclusively to the soil; and it should be sufficient to prevent the labourers, who received a free passage to the colony, from becoming landed proprietors, until after they had remained, as hired labourers, for such time as might be requisite to allow other labourers to be brought out to supply their place.

The colonization formula was calculated with tight margins. Apart from a brief consideration of the cost of survey, transaction costs barely entered the Colonel's projections. Powerful things were expected of the immigration land fund, underpinning a liberal southern utopia for small proprietors.

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24 Ibid ix.

25 Ibid 1-52.

This theme surfaces from time to time in the speeches in support of Torrens' Bill. Torrens junior noted that South Australia had the highest proportion of landholders to population, apart from France perhaps, with her widespread peasant holdings. He drew attention to the uncertainty of English general law title and the anguish experienced by those involved in litigation about it. He then turned these factors into an argument which drew strength from the high ideals behind founding the province, and which proved powerful in the very early days of the first session of its first democratically elected parliament -

The principle of encouraging a yeoman proprietary has been the distinguishing feature in our policy from the first foundation of the colony. To it we all acknowledge that we are indebted for our rapid advancement - for our stability, and for the vigorous elasticity with which the colony has again and again arisen after circumstances of depression ...\(^{26}\)

He went on to ask what could be more unfavourable to this principle than the cost of conveying land under the English system.

Torrens left no doubt that he was not intent on merely tinkering with the land title system, but, indeed, effecting basic change -

I propose to abolish a system irremediably wrong in principle, and to substitute a method which I believe will, when explained, commend itself to the House as consistent with common sense, perfectly feasible, and effectual for all purposes required.\(^{28}\)

Thus, Torrens the politician could have quite consistently held in mind as his goal a system of land title which was, when considered in juristic terms, so very much generalised that any of the models debated would answer what he held in his mind as "his scheme". It would assist the success of his father's scientific model colony by

\(^{27}\) Ibid 103-4.

\(^{28}\) *Parliamentary Debates*, Legislative Assembly, 4 June 1857, 202-3 (Mr Torrens).

\(^{29}\) *Parliamentary Debates*, Legislative Assembly, 4 June 1857, 203 (Mr Torrens).
slashing transaction costs, and it would do away with the appalling state of the Court of Chancery and its since-abolished weird range of equitable estates and interests, such as shifting and springing uses. This could be done with a system of registration like that employed for ships. As Torrens saw it, this was his great idea. At this level of generality there is little difference between the version of 4 June 1857 and that of 11 November and he could own them both. The personal stake of the Torrens family helps to explain his great energy for the reforms. His position as "virtual prince" of the colony goes a long way to explaining his success there and his famously enormous arrogance.

C Who was Dr juris Ulrich Hübbe?

Dr Hübbe was born in Hamburg on 1 June 1805. He read law at Kiel, Jena and Berlin before being appointed to a junior position in the Prussian Civil Service. He obtained his Doctorate from the University of Kiel on 10 March 1837 and later practised in Hamburg. He was the third son of Heinrich Hübbe who was a notary and registrar of the Hamburg Admiralty. Dr Ulrich Hübbe arrived in South Australia in 1842. Aside from efforts for reform of real property law, in South Australia Dr Hübbe was also a teacher, a

33 1826-1837.
34 E H Tilbrook, "The Hubbe Memorial At Clare" Royal Geographical Society of Australasia, South Australian Branch, Proceedings for the Session 1939-40, Vol XLI, November 1940, 39: Kiel, in "... the lovely and cultured province of Schleswig Holstein (not then under the Prussian heel, Hohenzollern rule or Nazi regime)" was then a province of Denmark.
35 Robinson, above n 4, 52.
land agent, interpreter and translator, editor of the Neue Deutsche Zeitung, poet and Lector of the Lutheran Church. Dr Hübbe also contributed to the formulation of the Public Trustee Bill. His agitation for reform of the Law of Succession probably contributed to the abolition of primogeniture in South Australia in 1867. In 1872 Dr Hübbe published a booklet, Letters to a Countryman on Intestate Estates, Acts, Judges, and Things in General, celebrating and explaining the abolition of primogeniture, and proposing further reforms.

Some time before 1851 he married Martha, who was born in Glasgow in 1806, the daughter of John Gray of Glasgow, and who was already the widow of Colonel Finselli of Switzerland. Her contribution, particularly as an active campaigner for state education, has also been underrated. Their daughter Isabel Hübbe opened the first South Australian Education Department School at White Hut (Clare) on 1 September 1880, not far from the ruins of the first White Hut School at which Dr Ulrich and Mrs Martha Hübbe lived and taught. Martha died and was buried at White Hut in 1885, aged 79 years. In September 1940 the marble Hübbe Memorial was erected on her grave. Ulrich Hübbe died in February 1892, aged 87 years, and lies in the Hahndorf Cemetery. On his grave there are memorials to his son Samuel, who was killed in action while commanding the 3rd South Australian Bushmen's Contingent to the Boer War in 1899, and to a grandson who died while serving with the Australian Imperial Forces in the First World

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37 Hübbe was reputedly fluent in eleven languages.

38 Martur, "A Worthy Colonist" The Adelaide Observer, Saturday, 11 October, 1884, 41, 42.

39 Act no. 29 of 1867. See Hübbe, above n 16, 76-7.

40 Dr Ulrich Hübbe, Letters to a Countryman on Intestate Estates, Acts, Judges, and Things in General, David Gall, Adelaide, 1872.

41 Martur, above n 38.

D Why did Germans immigrate to South Australia?

The reasons why the Germans immigrated form an important background to understanding why a person of Hübbe's calibre was in Adelaide in the 1850s, and the ideals which he held and sought to realise through participation in law reform. The German experience in South Australia helps to explain why his contribution was not publicised at the time and was later minimised, if not obliterated.

Fischer has pointed out that German participation in the founding of Australia commenced at a very early point. In addition to the arrival of individuals, German immigration to Australia in the 19th century was characterised by distinct waves. The first wave of organised large-scale immigration began in 1838 with the arrival of Lutherans in South Australia, and their settlements at Klemzig and Hahndorf became destinations for later immigrants. The second wave left Germany in the wake of the apparent failure of the German revolution of 1848 and comprised middle class professionals and intellectuals, who were often radical democrats and liberals, dissatisfied with the slow pace of political reform in Germany. Their destinations were generally Adelaide, Melbourne and Sydney. There were later waves to Queensland, participating in an agricultural settlement scheme, to Victoria for the gold rush among other reasons, and to New South Wales to assist the establishment of the Hunter Valley wine industry. There was substantial internal migration, usually in groups. By the outbreak of World War 1, almost 7% of South Australians were German-Australians.44

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43 Both Governor Phillip, who commanded the First Fleet, and Surveyor-General Alt, who laid out Sydney Cove, had at least one German parent: G Fischer, Enemy Aliens - Internment and the Homefront Experience in Australia, University of Queensland Press, St Lucia, 1989, 16.

44 Ibid 16-19. While a small proportion in overall terms, one might also approximate this at 1:20 families.
1861 they comprised 4.32% of the total Australian population, or the largest non-British immigrant ethnic group, and as large as all other immigrant groups combined.

Dr Hübbe's presence in South Australia stemmed from the first wave following 1838. A detailed explanation of what motivated this wave was published in 1929. While living in Hamburg Dr Hübbe had assisted Lutheran groups to immigrate to South Australia, including one led by Pastor Gothard Daniel Fritzche, escaping Prussian attempts to create a state religion through a forced union of the Calvinist Reformed Churches with the Lutheran Church. Although the ideal of church union is traced back to 1614, it was adopted as state policy by Friedrich Wilhelm, The Great Elector, in the period 1640-88. The policy was not implemented by Friedrich II, The Great, but was taken up with enthusiasm by Friedrich Wilhelm III, who proclaimed The Union, and in 1808 dissolved Lutheran Church Councils. The state then took over government of the church with the King of Prussia as the highest bishop. In 1817 a Cabinet order was issued which formed one church under the administration of a state ministry and a new order of service was implemented. From then until 1840, when the King died, the union was enforced through increasingly repressive measures. Lutheran Confessions were annulled and replaced with Union Church Confessions. The term Lutheran was no longer to be used. Opposition was raised and suspensions from office followed. The opposition spread and prosecutions were initiated. After 1834 a new wave of repression commenced against private religious meetings, against performance of ministerial acts by people not ordained by the state, against parents refusing to let their children attend state sponsored religious instruction, and against ministers not using the state order of service. Ministers were dismissed, homes and goods were seized to exact payment of fines and some Lutherans were imprisoned. Lutheran ministers operating underground were pursued by the police.

45 This account is largely informed by Rev A Brauer, "Another Page From The Life Of The Fathers". The Australian Lutheran Almanac, 1929, 40ff, and greatly abbreviated.
and one could be imprisoned for not informing on them. The idea of congregations immigrating then gained currency.

Hamburg was not subject to the repressions and became a centre for the organisation of ships. Dr Hübbe travelled with Pastor Fritzche to England to obtain the assistance of Quakers there. When Friedrich Wilhelm III died, his son Friedrich Wilhelm IV took the throne, immediately releasing all interned Lutheran pastors and permitting the Lutheran Church to organise itself free of state interference. Despite this new tolerance, immigration plans were implemented. On 6 April 1841 a contract was signed with Slomen & Co to carry Pastor Fritzche's Lutherans to South Australia for 12,000 Thalers or £1800. With their passage arranged, the Lutherans travelled to Hamburg from Posen, Grünberg and Schiebers-Züllichau on boats down the River Oder, arriving on 22 May 1841. On 14 June 1841 they embarked on the Skiold, sailing on the 11th July. In South Australia this group of immigrants formed a settlement which they named Lobethal, later renamed Tweedvale. Following the Great Fire of Hamburg, Dr Hübbe decided to follow the immigrants he had assisted, and landed at Port Adelaide on 15 October 1842 from the barque Taglione. In this way Australia received her first wave of immigrants who were primarily refugees for reasons of free conscience.

Other highly educated Germans also immigrated to Australia individually. The famous botanist Dr Müller, also a postgraduate of Kiel University and later Baron von Müller, arrived at Port Adelaide on the Hermann von Beckerath on 15 December 1847.

46 Martur, above n 38, 42.


48 R W Home "Science as a German Export to Nineteenth Century Australia" Dept of History and Philosophy of Science, University of Melbourne, unpublished paper (copy on file with author). See also R W Home, "Ferdinand Müller: Migration and the Sense of Self" (1997) 11 Historical Records of Australia 311.
Schedlich recalled that Dr Hübber [sic] travelled over almost impassable streets to meet the ship. He also recorded his deep, and not slightly arrogant disappointment with Adelaide, where there was "... not a sign of intellect or refinement ..." except among the German community in the Rundle Street Coffee House.49

1 Anti-German Chauvinism

Anti-German agitation was a constant and growing aspect of 19th century immigrant life - always latent, a "... continuing and constant element of friction ..."50, and at best an "... attitude of paternalistic condescension ..." toward "'our' Germans".51 The latent chauvinism of 'the Britishers'52 exploded into a xenophobic, jingoistic and ferocious repression with the outbreak of World War 1, which, as intended, broke up the once obvious and cohesive German community and eradicated German influence from Australia and the Pacific region.53 The mistake of the German-Australians was that they had generally perceived themselves as Australian at a time when the British colonists had barely begun to think of an Australian nation and instead emphasised their connection to Empire. Despite the second rate nature of their naturalised citizenship, which was not valid outside the colony, the German-Australians persuaded themselves that they were engaged in a cooperative venture -

... with the aim of developing Australia into a prosperous independent country with its own cultural identity in which the best influences that could be imported from Europe were to be creatively integrated and allowed to

49 C G Schedlich, Memoirs of Carl Gustav Schedlich, Mortlock Library, Adelaide, No DA302(L) [c 1900], 23.

50 G Fischer, above n 43, 27.

51 Ibid 6.

52 This expression, which I have adopted from Fischer, is intended primarily to characterise extreme allegiance to the British Empire rather than nationality simpliciter. Ibid.

53 Ibid 9 and Ch 16.
progress into something which could be seen as uniquely Australian.\textsuperscript{54}

In fact nothing was more likely to create friction with -

... 'Britishers' who felt alienated in their new environment and who overcompensated their colonial experience of isolation and inadequacy by developing an exaggerated, aggressively pro-Imperial ideology.\textsuperscript{55}

Nothing was more likely to puncture the fantasy and raise the ire of colonists who saw the British as the mightiest of empires with an historic mission to civilise the world, and a paternalistic duty toward lesser countries and races, than an ethnic minority which held out "... Berlin, Munich, Hamburg and Frankfurt as competing sources for the input of ideas, as well as methods and technologies of research and production ..." on the premise that "... a choice of the best that was available might provide a more promising platform from which an original productivity could emerge ..."\textsuperscript{56}

Signs of the aggravation emerged recurrently in South Australia. In 1856 there was objection to the German immigrants participating in responsible government, which was ultimately overcome. The right of Germans to suggest alterations and improvements in the public life of South Australia was, however, frequently challenged. They were expected to be grateful, keep quiet and "... cease to be Germans."\textsuperscript{57}

These perceptions and tensions were also reflected in the same session of the Legislative Assembly in which Torrens advocated a system of land title registration. On 5 June 1857 the Assembly considered the question of German immigration, and

\textsuperscript{54} Ibid 36.

\textsuperscript{55} Ibid 38.

\textsuperscript{56} Ibid 35-6.

\textsuperscript{57} Contemporary letter to The Adelaide Observer, quoted from Fischer, above n 43, 27.
particularly whether German migrants could take advantage of the immigration Land Fund.\(^5\) Opinions ranged from complete closure of the colony to German migration - it was a British colony - through concern about the "introduction of discontented politicians from the continent of Europe" to proposals of a 1:10 quota for Germans in proportion to the British immigrants. From the tone of discussion one might imagine that Mr Krichauff, the elected representative of Mount Barker, was not in the chamber, but he added that there were advantages for everyone in taking hard-working Germans, and naively that "[w]hen a man became naturalized he ceased to be a foreigner, for he became a South Australian."\(^6\) Torrens supported immigration by the Germans and their access to the Immigration Land Fund. Bad characters could be screened out because they had to be in South Australia for two years before naturalisation.\(^7\)

E Evidence of Hübbe's Contribution

In 1856 and early 1857 a series of letters appeared in the South Australian newspaper The Register under the names of Vitis and Sincerus. Vitis wrote that reforms to the land title system which had been suggested along the lines of the new Shipping Act were already in practice in Prussia.\(^8\) Hübbe later recounted that Torrens drove in his trap to the Hübbe family home and inquired after the author of letters in the newspaper. Hübbe acknowledged their authorship and Torrens took him immediately to his home at Torrens Park, Mitcham, in Adelaide. This was probably in early 1857.

\(^5\) See text above following n 27.

\(^6\) South Australia, Parliamentary Debates, Legislative Assembly, 5 June 1857, 213-14.

\(^7\) Ibid 219.

\(^8\) The Register, 16 August 1856, from Robinson, above n 4, 11.
On 10 February 1857 Torrens articulated a principle of title by registration in *The Register*:

The principle of my bill, is, "That no instrument purporting to convey, mortgage, or encumber real estate, or to release or transfer any mortgage or encumbrance shall have validity until a memorandum of such instrument shall be endorsed on such grant."  

Robinson concluded that the principle did not derive from the *Merchant Shipping Act*, and was "... the plinth of the system found in Hamburg, which Hübbe urged Torrens to adopt."  

When on 4 June 1857 Torrens introduced his Bill to amend the law relating to the Transfer of Real Property, he referred in his speech to the extreme difficulties experienced in applying the English deeds conveyancing system in the colony and then articulated the basic principles of the system which he envisaged, that:

- each transfer of the fee simple would be equivalent to a fresh grant from the Crown
- registration alone would afford validity to land transactions.

In support of this initiative he stated that,

In the Hanse Towns a system of transfer by registration has been in force for over 600 years. I have had communications from legal practitioners there, and I hold in my hand a letter from a gentleman who for many years conducted an extensive agency business in Hamburg; and from these communications I am assured that the cost of a transfer or mortgage in that city seldom exceeds 7s6d, and that suits about titles to land are almost unknown. No one in this House will assert that this which is accomplished by

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62 From Robinson, above n 4, 54. Today, a Crown Grant remains equivalent to a Certificate of Title with respect to land recently alienated by the Crown.

63 Ibid.


65 See text following above n 5.
Germans in Hamburg cannot be accomplished by German and English colonists in South Australia.\(^6^6\)

Speaking in reply at conclusion of the first reading debate, Torrens reaffirmed -

It was not an untried measure, for although he was not at first aware of it, it had been in operation for 600 years in the Hanse Towns.\(^6^7\)

Torrens also referred to the Hanseatic cities of Northern Europe in his book, when addressing -

"... our titles would have been preserved clear and susceptible of being transferred with certainty, facility, and economy, as those of the Hanse Towns have, under a similar institution, been preserved for centuries\(^6^8\) and real securities\(^6^9\) -

"The South Australian system analogous to that adopted in the Hanseatic States. The South Australian method of mortgaging resembles that of the Hanse Towns referred to. The cost of mortgage is 10s,..."\(^7^0\)

Over 1857, such explanations of the legal details of land title registration as Torrens attempted grew to reflect his new knowledge of the system which operated in the Hanseatic cities of Germany, and specifically Hamburg, obtained from Hübbe, or from German sources which Hübbe translated. Hübbe waited outside the Chamber awaiting consultation while Torrens debated the Bill inside.\(^7^1\) In his first reading speech Torrens drew attention to systems of registration for shares and ships. Robinson points out that Torrens' use of the concept of *immovable property*, in demonstrating that there are no

\(^{6^6}\) *Parliamentary Debates*, 4 June 1857, 205 (Mr Torrens).

\(^{6^7}\) Ibid 210.

\(^{6^8}\) Torrens, above n 1, 22.

\(^{6^9}\) Torrens, above n 1, 37.

\(^{7^0}\) Torrens, above n 1, 38.

\(^{7^1}\) Royal Geographical Society Proceedings (South Australia) Vol XXXII, 110, quoted from Robinson, above n 4, 23.
relevant differences between the registration of land and that of shares and ships, suggests influence of the Civil Law system.\textsuperscript{72}

As noted,\textsuperscript{73} the reform was guided through the Upper House by Mr Forster, who on 15 May 1892 wrote to his niece Miss Ridley stating that -

\ldots it never could have been brought to a final consummation but for the efficient help of a German Lawyer, Dr Hübbe, who has unfortunately had too little recognition in connection with it.

The provisions of the Bill were settled by Mr Torrens and a few friends and put into proper form by Dr Hübbe and passed triumphantly through the local legislature notwithstanding the fierce and uncompromising opposition of the lawyers. Mr Torrens took charge of it in the House of Assembly and I in the Legislative Council. We had the whole Colony at our back.\textsuperscript{74}

By 11 November 1857, when the Bill entered its second reading, the principles had been reorganised, and were articulated with more sophistication. The vital elements were -

\begin{itemize}
  \item estates and interests in land should pass by registration of the transaction
  \item registered titles should be absolutely indefeasible, unless procured by fraud
  \item lesser interests granted by the registered proprietor should derive from his indefeasible title as encumbrances or limitations.\textsuperscript{75}
\end{itemize}

Torrens went on to state that, unless registered, leases and mortgages would not be binding, \ldots except as personal contracts between the individuals.\textsuperscript{76} In conclusion he stated that -

\begin{quote}
It would be necessary for the opponents of the Bill to show that the inhabitants of South Australia could not do that which was done by the inhabitants of the Hanse Towns, the Prussians, and the Americans. They
\end{quote}

\textsuperscript{72} South Australia, \textit{Parliamentary Debates}, Legislative Assembly, 4 June 1857, 205 (Mr Torrens). See Hübbe, above n 16, 6. Robinson, above n 4, 23.

\textsuperscript{73} See text above following n 2.

\textsuperscript{74} South Australian Archives, quoted from Robinson, above n 4, 44-45.

\textsuperscript{75} Torrens' Printed Speeches, 13-14, from Robinson, above n 4, 19.

\textsuperscript{76} Ibid 15; in Robinson, above n 4, 20.
would have to show that there was something in the nature of land which
prevented the application to it of all the law that applied to shipping.77

Only two days after the Third Reading of the Bill in the Lower House, Torrens wrote to
the Governor requesting that a copy of his speeches be forwarded in support of his
application for promotion. Governor MacDonnell appears to have supported Torrens, but
MacDonnell's successor Daly later wrote,

... speak of him more as an unscrupulous Charlatan than as the real author
of a beneficial measure of Law reform to the orientation of which he is well
known to have no pretension whatever. His absence is so beneficially felt in
this community that even those most friendly to him consider that such a
pension as would prevent his return to this colony would be well bestowed.78

Torrens' record in public office was not exactly gleaming. In 1841 he had been rebuked
on three counts and censured on another; including action without authority,
carelessness and absence from office. In 1842 he was involved in disputes and
censured twice. He was rebuked again in 1846. In 1851 he sought promotion by
irregular means. In 1852 he was charged with irregularity in the administration of his
department, and again censured, criticised and even prosecuted for criminal assault.79

In 1880 a Bill was introduced to award Torrens an additional pension of £500 per annum.
Some speakers reminded the House that Dr Hübbe had made significant contributions.80

According to Benning,

... it was perfectly well known at the time that Sir R R Torrens bought in the
Real Property Act Dr Hübbe provided the ideas, the brains, and the work of
the measure, and that Sir R R Torrens merely fought the battle of the Bill.81

77 Ibid 18, in Robinson, above n 4, 20.

78 South Australian Archives, Confidential Dispatch to the Duke of Newcastle, 24 November 1863, in
Robinson at n 4, 47-8.

79 Robinson, above n 4, 47.

80 See Ross, 1880 Parliamentary Debates 422, in Robinson, above n 4, 50 n 2.

81 1880 Parliamentary Debates 427, in Robinson, above n 4, 50.
Brown and Mullins report that chaos broke out in the House when the proposal of a pension for Torrens was proposed.\textsuperscript{82}

Hübbe later petitioned for a pension\textsuperscript{83} and obtained £250. In the course of that debate Hardy, a lawyer, stated that,

\begin{quote}
The late Sir R R Torrens was staying with him at the time he started the idea of the Real Property Act and he knew that the information which Dr Hübbe had obtained from the continent was of great service. Dr Hübbe was always a strong supporter of the measure, and the country was almost as much indebted to him in the matter as it was to Sir R R Torrens.\textsuperscript{84}
\end{quote}

The Honourable J Cotton expressed similar views.\textsuperscript{85}

While Torrens was rewarded with the position of Commissioner for Land Titles, a pension, and later a grant, Hübbe received nothing but odd work as a court interpreter.\textsuperscript{86}

It had been suggested that he would receive some appointment in the public administration of land titles under the new system. This did not eventuate, and that was the reason for his application for financial assistance. In his petition Hübbe wrote,

\begin{quote}
... Mr Torrens asked me to go through the Draft Bill with him in order to its final settlement. I suggested that I could not afford to do so without payment, when he said he would do what he could for my future advancement, when the Bill became law, but would not pay a penny out of his own pocket. Seeing that my help ought not to be withdrawn at this stage of a most important measure, I consented to work gratuitously but in the hope of a future reward, in the shape of a position in which I could be officially useful to the working of the Act. I may at once say that such a position was never
\end{quote}

\textsuperscript{82} J Brown & B Mullins, above n 5, 178. Their account of Torrens' participation in Adelaide society in this text is probably the most damning in print: 174-8.


\textsuperscript{84} 1884 Parliamentary Debates 1024, in Robinson, above n 4, 51.

\textsuperscript{85} Ibid. Robinson paraphrases the views of many in support of the view that Hübbe was a considerable influence: see above n 4, 52 n 1. Among them is Hague, History of South Australia, stating that "He [Torrens] had assistance all the way through - he could not have succeeded without it, nor did he ever attempt to conceal it. Dr Hübbe sat just outside the bar of the House during the consideration of the Bill and was frequently consulted by Torrens."

\textsuperscript{86} Hübbe's position as Supreme Court interpreter was apparently abolished in 1867 in the legal profession backlash against the system he had helped so much to develop: Martur, above n 38, 43.
In his application for financial assistance Hübbe explained the part that he played. Hübbe claimed to have worked with Torrens on a highly influential committee which was assisted by the editors of the daily newspapers. Hübbe demonstrated to Torrens the superiority of the Hanseatic and Prussian systems, with the assistance of translations which he and Martha Hübbe made, by explaining the principles and methods underlying their simplicity and indefeasibility of title.

Four great principles were adopted from the German system, and, by my advice, incorporated by Mr Torrens into his measure.

1st Publicity, which secures fair dealings in land.

2nd Specialty, which secures accuracy and certainty of titles and interests.

3rd Inscription. The practice of inscribing sums of money on Real Property, with priorities, according to order of presentation, is common to all the German systems; it never interferes with the proprietor's title. This principle forms one of the most distinctive and useful features of the Real Property Act.

4th Registration. In Germany registration of title or interest is paramount. The indefeasibility of titles or interest flows from this; except where actual fraud can be proved.88

Through a systematic analysis of the provisions of the Bill at different stages of drafting, Robinson produces convincing evidence that the addition of Hübbe's work was the dominant influence on the jurisprudence and legal detail of the Torrens reform measure, establishing substantial links between the system which emerged in South Australia and the Hanseatic system of land title registration of which Dr Hübbe had so much

87 South Australian Archives, from Robinson, above n 4, 80.
88 South Australian Archives, from Robinson, above n 4, 56-7.
knowledge. Many of these ideas were advocated by Hübbe in his extensive pamphlet, *The Voice of Reason and the History brought to bear against the Absurd and Expensive Method of Encumbering Immoveable Property*,[89] which he wrote in 1855 and had published while the original Bill was before Parliament. Hübbe distributed a copy to each member of Parliament, among whom it caused a sensation.[90] Some of the significant examples of changes made to accord with Hübbe's proposals, deduced by Robinson, include:

- the original Bill was to be cited as the Real Property Act, but the second Bill was, apparently, to be the Immoveable Property Act
- the repeal clause in the original Bill repealed only legislation, but in the second Bill it extended to rules and practice "... whatsoever relating to freehold and other interests in land" - suggesting extension to rules of equity
- identification of land in a title by mapping, which was also advocated by the Attorney-General[91]
- comprehensive and stringent penalties for forgery
- moving provisions in the Bill concerning title by registration together in order to overcome disassociation by distance
- a mortgagee should not hold the legal estate subject to the equity of redemption held by the mortgagor, as with an English general law mortgage, but rather the mortgage should take the form of a legal charge on the mortgagor's registered estate - the so-called "Torrens mortgage"[92]
- abolition of the doctrine of notice for registered interests in land, and erection of the conclusiveness of the register and title by registration in its place
- that it be mandatory for lesser interests in land held under shifting, springing and executory uses[93] to also be registered and transferred under the Act. Trusts should at least be notified by caveat, or not affect a third party

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89 See above n 16.

90 See Tilbrook, above n 34, 41, and Robinson, above n 4, 59 n 1.

91 Torrens acknowledged this while scornful of any other contribution made by the Attorney-General: Torrens' edited speeches, 20, in Robinson, n 4, 46 n 1.

92 Torrens seems to have considered the registration of English mortgages at first: see Hübbe, above n 16, 86-91.

93 These equitable estates and interests were obviated, or converted to plain equitable interests, by Settled Land legislation later in the 19th century; see above n 31.
a new indefeasible title should be created on registration of a transfer, so that the title to an interest need not be examined back beyond its registration. A title obtained by fraud is an exception to this, but even so the fraud should not affect third parties.

The pamphlet placed Dr Hübbe squarely in the debate and Torrens relied upon him heavily, at least from the time of its publication. Dr Hübbe was still contributing into the 1860s, especially on the question of obviating the effects of actual and constructive notice on a registered title.94

1 The Voice of Reason and History

Any doubts about Dr Hübbe's ability to grasp the larger historical and jurisprudential picture, in addition to his work in translating German legal material and carrying over technical aspects of the Hamburg system into Torrens' Second Reading Bill, are dispelled through a consideration of his monograph, The Voice of Reason and the History brought to bear against the Absurd and Expensive Method of Encumbering Immoveable Property.95 The underlying argument advances a fundamental principle of publicity under which a transaction gains validity with respect to third parties through conduct in a public forum or registration in a public register, drawing upon various land title systems, including deed registration, of the American colonies, France, schemes aired in the British inquiries, and ultimately the Hanseatic systems, in order to gain for the principle currency and transcendence of particular legal families. The Hamburg system is treated with modesty in six pages, probably reflecting Hübbe's sensitivity to the aggravation provoked in 'the Britishers' by reference to German technical input.96 It seems that Hübbe will draw on any other source to establish a point in preference to a

94 Section 104 of the Act of 1860, in Robinson, above n 4, 81.

95 See above n 16.

96 See above in text before n 56.
German example - use of the Nova Scotia deed enrolment system to support the desirability of publicity, for example, when German and especially Hanseatic examples would have been much closer to the point.\textsuperscript{97} The modest six pages devoted to the Hamburg system nevertheless cap all of the themes developed in the paper, leaving only an analysis to be completed of the Torrens proposal and its appropriateness to implement the principles identified.

Hübbe's significant themes are: first, the unity of German and English Saxon real property law with respect to the publicity of transactions\textsuperscript{98} which existed before the English experience of feudalism commenced in 1066; second, repressive Norman feudalism and the development of trusts and deeds conveyancing to avoid it; third, the incomplete nature of the French mortgage registration system and its inappropriateness for South Australia; fourth, the principle of publicity in other deed registration or enrolment and title registration systems around the world; and fifth, how the Hamburg registration system is the modern day expression of the formerly unified German and English Saxon land transfer method without detraction from the remnants of Norman feudal law and engines of equity developed to evade it. The South Australian situation and the Torrens proposal are then dealt with in detail.\textsuperscript{99}

The values which Hübbe brought to analysis of title registration are not mechanistic and asocial. Throughout the work he refers to feudalism as an oppressive social system, drawing attention to the ability of Saxon women to own and transact with land and the

\textsuperscript{97} Hübbe, above n 16, 58.

\textsuperscript{98} Delivering a turf or a twig from the land before the regional popular assembly \textsuperscript{[folk-gemo\textsuperscript{\textdagger}]}, ibid 10-12. Hübbe later explained the deviation of feoffment with \textquoteleft livery of seisin under the Norman system from this Anglo Saxon ceremony, ibid 26-7.

\textsuperscript{99} Ibid 69ff.
absence of primogeniture,\textsuperscript{103} in contrast to the feudal principle of primogeniture and the tenurial incident of wardship, under which the lords right to select a spouse for his ward was transactable as an incorporeal hereditament.\textsuperscript{104} Rather than seeing title by registration as a ruthless cleaver, severing the unregistered interests of the meek, Hübbe is at many points concerned with the position of those in any of the studied systems unable to transact for themselves -

- marital real securities in the French system,\textsuperscript{102}
- the protection afforded to them by the principle of publicity which in contrast to deeds conveyancing requires transparent transactions recorded in public,\textsuperscript{103}
- the embodiment of this protection in the Torrens proposal,\textsuperscript{104} and,
- use of an example of a young couple of limited means to illustrate transactionally the advantages and savings in interest and legal costs which flowed from the Hamburg system for registration of title and second and subsequent real securities in contrast to the contemporary situation in South Australia with deeds conveyancing.\textsuperscript{105}

Dr Hübbe also considered approvingly the relevance of public interest in Saxon property law -

In such ...[national council meetings]... the Saxons had their first shares in their commonwealth adjusted, in point of property as well as of possession, of dignity, and of burden. The sturdy Saxons, though very far from holding communistic views were a people eminently given to meet together and devise anything and everything, under some point of view or other, as a matter of public interest.\textsuperscript{106}

This democratic participation and social responsibility were for Hübbe, whether or not an
accurate historical account, the overarching custom under which the most distinguishing feature was

... and always has been, wherever Saxons had it their own way, that transactions affecting lands must be public and notorious, and attested to at the people's ordinary meeting, in order to be valid.107

This was the case although the words signifying transfer of all of the rights of the transferor were "... that as well thou as thy posterity may hold, possess, and have free power to do with the land whatsoever thou wilt."108

In this valuable work, which built on what could unify the British and German communities, there is no mention of the community of people from whom the South Australian land was being taken in the first place, just as there is none in the parliamentary debates on the Torrens Bill nor in Torrens' book.109

2 The Real Property Law Commission of 1861

Dr Hübbe was not called as a witness before the Real Property Law Commission of 1861 into the operation of the new legislation. Gawler gave evidence that Hübbe had a desk in a public office in an unofficial capacity, but he did not know why.110

Are you aware whether any difficulty has been experienced by the Germans in bringing their property under the Act, since the removal of Dr Hübbe's desk? - I am not aware of any complaint on that score.111

Torrens questioned Mr Schumacher in an effort to extract a favourable comparison

107 Ibid 11.
108 Ibid 15 (Hübbe's emphasis).
109 Torrens, above n 1.
110 1861 Parliamentary Paper No 192, questions 789-792, in Robinson, above n 4, 81-2. Martur suggested that a "financial crisis produced by the actions of Colonel Gawler" some time prior to 1851 forced Hübbe to give up a farm (above n 38, 43), so one might assume that they were not on friendly terms.
111 From Robinson, above n 4, 82 (my emphasis).
between his own system and the Hanseatic system. Mr Schumacher was a land broker and most of the questions were directed to showing that the expense of transactions through land brokers in Hamburg was comparable with the expense under the Torrens system. The tone of Torrens' questioning, or perhaps intense "cross-examination", seems to have been clear from the outset:

You, Mr Schumacher, are a German? - Yes.

Robinson concludes that Torrens was at pains to show that:

1. the Hamburg system and the new South Australian system were similar,
2. the Hamburg system worked well,
3. while the general law system produced litigation constantly, the registered system produced none,

and therefore, Torrens' system would work well and produce minimal litigation. This line of questioning seems a clear acknowledgment by Torrens of his efforts to emulate the Hanseatic system.

3 Information from Germany

Four texts were obtained from Hamburg and Hübbe translated and commented upon them. Hübbe's consequent paper *Title by Registration in the Hanse Towns* was ordered to be printed by the Legislative Council on 27 November 1861. Another text, a translation of rules compiled by Dr Luhrs of Hamburg entitled *The Book of the City of Hamburg, of Hereditaments and Rents; or, the order of transcribing land and Hypothecks*

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112 Ibid 82-3.
113 Ibid 84.
114 South Australia, *Title by Registration in the Hanse Towns*, Parliamentary Paper No 212 (1861).
is reproduced by Robinson. It was first published in 1860 when the original Real Property Act was two years old. Robinson saw this as an effort by Torrens to justify the basic principles of the Act in the face of opposition. It might also have been that Torrens and Hübbe were formulating rules for implementation of the system in practice, which would also account for Hübbe having a desk in the Registry Office.

Hübbe referred to the German civil law concept of trusteeship. It follows that the accommodation of trusts in the new system did not necessarily signify a fundamental compromise of the Hanseatic principles of title by registration in favour of transactions off the register. The Hanseatic trust relationship was protected by a specific type of caveat called a Clausula. Clausulae could be amended to reflect changes in the circumstances of a trust. A buyer from a trustee was concerned only to see that the restrictions noted in the Clausula were observed. Other lesser interests too, such as life interests, vested and contingent remainders, executory interests and terms of years, were protected by annotations on the record. However, only heritable forms of property formed the basis of the register, and an entry on the register was conclusive evidence against all the world. A transaction could not affect third parties until registered, because until then it did not create an interest in land. Notice of another interest did not detract from entitlement to rely upon the register. Priority was accorded by the order of registration. A mortgage was registered as a charge on the registered legal title, unlike the English general law method of assigning the legal title to the mortgagee while the

115 Robinson, above n 4, 135-47.
116 Ibid 84-5.
117 Treuhand, or “trusted hand”. See South Australia, above n 114, 9. See Robinson, above n 4, 86.
118 Robinson, above n 4, 93.
119 Ibid 97.
120 South Australia, above n 114, 8.
mortgagor retained an equity to redeem it upon satisfaction of the advance of money outstanding.

Robinson argues that the system in Hamburg operated through the parties settling the transaction at the Registry, and for this reason a vendor's lien did not arise - the vendor would not absolutely part with land without receiving payment. In any case, a form of caveat, a Protest, could be lodged while contractual remedies were being enforced.

The indefeasibility of a Hamburg title was also addressed. Title by registration could only be defeated if the person who became registered had been privy to the fraud by which registration was obtained - title by public registration was not permitted to become a cloak for fraud.

The system of caveats in the Hanseatic system was more complex than that which emerged in the Torrens system. Clausulae were noted on the Register by consent. Inhibitoria were explained as another type of caveat, noted as a protest to maintain the status quo while a question was resolved. With that qualification, Robinson concluded that the original draft of the second Bill for the Real Property Act was consistent with the Hanseatic system, and the presence of trusts did not detract from that.

In 1873 Hübbe explained his view of the incompatibility of title by registration with the existence of equitable titles off the register in his evidence before the Commission to

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121 Ibid 87, and 90.

122 South Australia, above n 114, 24.

123 Robinson, above n 4, 94-5.

124 It will be recalled that at this time a range of equitable estates and interests existed, such as shifting
Enquire into the Workings of the Intestacy, Real Property, and Testamentary Causes Acts.\textsuperscript{125} In doing so he pointed out the circularity of an equitable interest in land subsisting \textit{in rem} only in the circumstances which a Court of Equity will recognise in an action between parties. This circularity is to some extent broken jurisprudentially in that Equity permits a property interest \textit{in rem} to arise only where the circumstances in which Courts of Equity have previously recognised an interest in land are repeated. In this regard the conceptions of equity would not be regarded as closed. At the same time, the doctrine of binding precedent was not securely in place until the House of Lords decided in 1898 that it was bound by its own decisions.\textsuperscript{126} It is not surprising that in the 1850s Hübbe was extremely uncomfortable with the position of proprietary interests recognised by Equity.

While agreeing that there should be remedies \textit{inter partes}, such as specific performance,\textsuperscript{127} Hübbe explained in 1873 that -

\begin{itemize}
  \item What I desire to expunge is the part recognizing estates in equity. There might be remedies for all dealings which people have before they are registered. Suppose a man takes money for land and does not sign the memorandum of transfer, there ought to be some remedy. The evil, to my mind, arises from this: that the court of equity is bound to go by certain doctrines on equitable estates with which the principle of the Real Property Act does not agree - and they will have neck or nothing if they have not such an estate in equity; that being subject to the Court, the Court will not give a remedy unless there is an equitable estate on which to have the remedy. My impression is, that remedies of a simple nature ought to be connected with the Act for the protection of any dealing that may take place in land under the
\end{itemize}

and springing uses, which were abolished or converted in the English reforms leading up to 1925: see above n 31. These were to the fore in Hübbe's mind when he discussed the existence of equitable estates and interests: see Hübbe above n 16, 91-5.

\textsuperscript{125} South Australia, Report of the Commission to Enquire into the Workings of the Intestacy, Real Property, and Testamentary Causes Acts, Parliamentary Paper No 30 (1873).

\textsuperscript{126} London Street Tramways v LCC [1898] AC 735.

\textsuperscript{127} An equitable remedy which, if available, would give rise to an equitable interest in the land subject to the agreement or instrument of which specific performance was sought. There might be circumstances peculiar to the parties, or the agreement or instrument which could preclude specific performance.
Robinson identified two themes in Hübbe's later evidence:

1. the principle of publicity and the necessity for a conclusive register, and
2. equitable remedies and the extent to which they should be available.

4 Principle of Publicity

Hübbe reiterated the principle that third parties could be bound by a transaction with property only if the relevant interest were made public through registration. In this he made no distinction at all between legal and equitable estates. All rights, once registered should have full indefeasible effect.\(^\text{129}\)

5 Equitable Remedies

Hübbe was not opposed to the existence of equitable principles, only to equitable estates subsisting off the Register, and where there was no competition between proprietary interests there would be no reason to deny an equitable interest, such as one arising from a right to specific performance. Hübbe disagreed with a recent case of the South Australian Supreme Court\(^\text{130}\) in which the Chief Justice had concluded that the only evidence of title was that appearing on the certificate of title, and no other rights were to

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\(^{128}\) South Australia, above n 125, Question 6. Quoted from Robinson, above n 4, 88.

\(^{129}\) South Australia, above n 125, Questions 7-9, in Robinson, above n 4, 99.

\(^{130}\) *Lange v Rudwolt* (1872) 6 SALR 75. At the other extreme Judge Boothby had sought to declare the Real Property Act ultra vires on the ground that it was repugnant to the Laws of England: Martur, above n 38, 43. See also the appointment of Select Committee to investigate recent judicial decisions, opinions and conduct of Judge Boothby: South Australia, *Parliamentary Debates*, Legislative Assembly, 2 August 1861. See also Anon, *Observations on the Report of the Committee of the House of Assembly, South Australia, on Judge Boothby's Case* by a Member of the Irish Bar, David Galt, Adelalde, 1862.
be recognised. Hübbe agreed so far as title "against the whole world"\textsuperscript{131} was concerned, but disagreed in relation to unregistered "rights of an inchoate or imperfect nature", which he thought should be protected. His concern was, again, that third parties should not be prejudiced by the unregistered status of the interest. The registered proprietor should still have to answer a claim, and as the Act did not provide a system of remedies, a separate system of remedies should be provided. It follows that he approved of equitable remedies to fulfil this function. Ideally he saw local courts as the proper venue, perhaps with the litigation initiated by a caveat procedure.

When considering the issue of caveats, Hübbe referred to the insecurity of lending money on security of a deposit of the duplicate certificate of title, when not protected by a caveat. His point was that another party could lodge their own caveat and defeat the equitable mortgage by gaining registered priority.\textsuperscript{132} He later stressed that "matters would be greatly simplified if there were no duplicate certificate at all", drawing on the experience of the Hanseatic system where equities had a personal obligatory status.\textsuperscript{133}

In Hübbe's view there was a clear choice between a system of title by registration and a system under which titles could be registered. The former gave distinct advantages of security which were immediately compromised by any recognition of equities off the register as rights in rem. The range of possible equities should be set out in the Act and those which are perfect or perfectible should be capable of protection on the register\textsuperscript{134}. Articulating these principles, Hübbe, having already interposed that he could not address the issue offhand and would prefer to respond in writing, outlined three classes of rights.

\textsuperscript{131} South Australia, above n 125, Question 34, in Robinson, above n 4, 100.
\textsuperscript{132} South Australia, above n 125, Question 88, in Robinson, above n 4, 102.
\textsuperscript{133} South Australia, above n 125, Questions 164 and 165, in Robinson, above n 4, 102 n 1.
\textsuperscript{134} Questions 96-101, in Robinson, above n 4, 103.
which should be kept distinct under the Act:

1. the fee, or "registered entire ownership"

2. a registered estate or interest which a person has in land belonging ultimately to another person, such as for life, a term of years or for a specified pecuniary charge

3. a bare right to obtain the fee or a lesser interest, or in some cases to restrain the owner from doing certain acts.

Bare rights should not be treated as rights, estates or interests subsisting in the land, in order to maintain the principle that registered dealings should be paramount according to the priority and content of their public registration. The division between law and equity should not be perpetuated into dealings with land by confining the relevance of title by registration to legal interests and estates, and leaving equity to govern the rest. The right, whether at law or at equity, to obtain registration should be protected not by formulating the right as an equitable estate or interest, but by providing recourse under the Act which does not interfere with registered indefeasible title.

6. *Das Stadtbuch hat den höchsten Glauben, darüber geht kein Zeugniss*

Hübbe frequently repeated the fundamental principle that "The City Book has the highest credit, above which there is no evidence." The induction of a similar principle into the second Bill for the Real Property Act marks the acceptance of the principle of publicity into the Torrens system. While it should not be assumed that Hübbe insisted upon complete unmediated acceptance of the Hanseatic system, in the form which he had experienced, into the newly appropriated colony of South Australia without adaptation to local conditions or to the dominantly English system that prevailed, it does seem that his own real property jurisprudence was largely accepted. Hübbe's jurisprudence of land title

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135 *Title by Registration in the Hanse Towns*, above n 114, 6. See also Robinson, above n 4, 86 and 105.
registration has been described above. In summary it was that the dealings between parties should be enforceable, until third parties became involved, at which time principles of priority by registration should apply. In this way, private transactions could not create rights over land *in rem* until registered or noted by caveat. Proprietary rights would follow the register and other parties would find there opportunities in rights *in personam*. A transaction incapable of affording a right to registration could create only a right *in personam*. Inchoate rights would be capable of protection. Priority between interests should follow the order of registration.\(^{136}\)

G The Torrens Camelot

It is clear that even if Torrens drew the original Bill for the South Australian Real Property Act from the inspiration of the British Merchant Shipping Act, concerning registration of ownership of ships, it was not long before a body of people subject to other influences was assisting him to draw the second. The second Bill displays foreign influences - the information about the Hanseatic system operating in Hamburg related, or obtained and translated, by Dr Ulrich Hübbe. The influence of German principles of title by registration was plainly considerable, even if other influences were also at play. Robinson concluded that this principle was essential to alleviate the severe problems then experienced in South Australia.\(^{137}\) It was not contemplated that entries on the register were to be made only as a result of instruments purported to be executed by the registered proprietor.\(^{138}\) Hübbe contemplated court orders and other ways of authenticating rights which could be registered. Hübbe's central concern was that registration should prevail in the competition between registered and unregistered rights, between rights *in rem* and rights

\(^{136}\) Robinson, above n 4, 105-9.

\(^{137}\) Ibid, 110.

\(^{138}\) Ibid.
in personam. This did not necessarily exclude rights created other than by execution of a document.

Hübbe was no more an astronaut in his new South Australian environment than were the English immigrants, and if his perceptions of how a new system should operate in the colony were a little different from their Hanseatic inspiration this can only highlight his cosmopolitan jurisprudential skills. Nevertheless, the evidence is convincing that Hübbe had a very significant influence and consequently the Real Property Act was originally enacted with basic principles bearing a very strong resemblance to the Hanseatic land title registration system operating in Hamburg at that time. Certainly, considering the influential submissions of Hübbe at every point of the early development of the system, we can agree with Robinson that "... the contribution of Hübbe to the principles of the Original Act must be valued as to content, far greater than that of Torrens"\textsuperscript{139} even if Torrens' political skills did realise their final enactment into the so-called Torrens system.

H What about the Alternative Explanations?

1 Merchant Shipping Act 1854 (Imp)

Interestingly, section 19 of the Merchant Shipping Act did not provide that registration of a ship pursuant to the Act is conclusive of ownership, but related only to recognition of her as a British ship. The provision against notation of trusts in the register in section 43, could arguably have the effect that registration was to be conclusive of ownership as well as nationality.

\textsuperscript{139} Robinson, above n 4, 113.
Hubbe, the son of a registrar of the Hamburg Admiralty, acknowledged in his pamphlet the value of the British Shipping Act for British shipping, and as an example of how property registers might operate. This can hardly be surprising when the very existence, and great wealth, of the Hanseatic cities had been built on shipping. Indeed, one of the prerequisites for a city to join the Hanseatic League was to adopt the Shipping Laws of the City of Lübeck. Some cities, such as Kiel, adopted them without even becoming a Hanseatic city. Later these laws became the foundation of international shipping law and it is interesting to speculate on the chicken and egg question of whether the Hanseatic shipping law inspired the good merchants to develop the Hanseatic land title system, which is probably the case in view of the early requirement that ownership of ships be passed in the same way as real property. Whether we accept Hubbe or the Shipping Act as the dominant influence on the development of the Torrens system, the heritage of its fundamental principles from either source is most probably Hanseatic.

In any case, Robinson's systematic comparison of the Real Property Bills before and after the involvement of Hubbe shows that the key planks of the Torrens system emerged during his most earnestly sought involvement. Taking a Bill initially inspired by the shipping legislation as his starting point does not appear to have hindered Hubbe because, "... it appears that the ability to mould the Shipping Act provisions into a cohesive statute giving a workable system of title to land by registration belonged to Dr Ulrich Hubbe."
2 Reports of English Inquiries

In the Preface to his book, *The South Australian System Of Conveyancing By Registration Of Title*, Torrens wrote-

The second reading was carried without division on the 11th of November [1857], the cause being much strengthened by the report on Registration of Titles presented to the House of Commons on the 15th May, which reached my hands most opportune on the eve of the day appointed for the second reading.\(^{145}\)

As the fastest voyage of the fastest clipper ship *Cutty Sark* between London and Australia was in the order of 130 days, one might say that Torrens was extremely fortunate to receive the report in less than six months. Nevertheless, this source has been referred to as the favoured inspiration\(^{146}\) for improvements made in the Bill which he substituted on 18 November 1857 - again a very fast turn-around if this were the case.

The Report\(^{147}\) was the sixth official report concerning real property in the period 1826-1857. Until 1853 the general concern was to establish a system for the registration of deeds. The Report of 1830 recommended the establishment of a General Registry of Deeds.\(^{148}\) The Commissioners considered registers operating successfully in other countries, including Germany.\(^{149}\) Indeed, one Mr C P Cooper provided an extensive

\(^{144}\) Torrens, above n 1.


\(^{147}\) See above n 145.


\(^{149}\) Ibid 19 and 33.
examination of the situation in Bavaria, Prussia, Norway, Italy and Sweden, with translations of Bavarian provisions.\textsuperscript{150} The Report of 1832\textsuperscript{151} was mainly concerned with the rationalisation of tenures and estates, with considerable attention to future estates and contingent remainders.\textsuperscript{152} Communications were nevertheless received with respect to deed registries in Ireland and Yorkshire, and even from Jeremy Bentham.\textsuperscript{153} The Report of 1833\textsuperscript{154} was entirely devoted to the Law of Wills. In 1846 a select committee of the House of Lords reported on the burdens on real property and impediments to agricultural transactions caused by the system of poor laws and taxation.\textsuperscript{155}

The First Report of the Registration and Conveyancing Commission of 1850\textsuperscript{156} again recommended establishment of a General Register of Deeds,\textsuperscript{157} setting out detailed recommendations for its structure, including provision for caveats or restraining orders.\textsuperscript{158} Although an extensive analysis was made by one Mr J M Ludlow of registration systems in other countries,\textsuperscript{159} the Commission concluded that these should not be imitated.\textsuperscript{160}

\textsuperscript{150} Ibid, Appendix V, 440-75.

\textsuperscript{151} Great Britain, Third Report to His Majesty by the Commissioners appointed to Inquire Into the Law of England respecting Real Property (House of Commons, 24 May 1832) British Sessional Papers, House of Commons, 1832, Vol XXIII.

\textsuperscript{152} Ibid 23-44.

\textsuperscript{153} Ibid, Appendix III, 26-56.

\textsuperscript{154} Great Britain, Fourth Report to His Majesty by the Commissioners appointed to Inquire Into the Law of England respecting Real Property (House of Commons, 19 April 1833) British Sessional Papers, House of Commons, 1833, Vol XXII.

\textsuperscript{155} Great Britain, Report from the Select Committee of the House of Lords on the Burdens Affecting Real Property (House of Lords, 19 June 1845) British Sessional Papers, 1846, Vol VI Pt I, 1.


\textsuperscript{157} Ibid 5.

\textsuperscript{158} Ibid 32.

\textsuperscript{159} Ibid, Appendix V, pp 206-31, "Registration of Deeds in Foreign Countries".

\textsuperscript{160} Ibid 4.
The interesting aspect of this report is that a recognition had been reached of a system of land title registration beyond mere registration of deeds. Although Mr Ludlow considered the register established under the Prussian system, founded by the Hypothekenordnung of 1783, to be an example of narrow and inflexible Prussian despotism, with some other factors such as French rationalism, he went on to analyse it in great detail, intelligently equating the concept of good faith acquisition with the equitable doctrine of notice. Provisions in the General Prussian Code concerning indefeasibility were, he considered with less insight, probably adapted from the French Code, yet-

The exception of notice is still more broadly laid down, and is several times repeated. "If a party contracting with the registered possessor should know that he is not the true owner, such party can acquire thereby no right to the latter's prejudice." He concluded that the Prussian system led to voluminous records, but noted that one general feature of the "teutonic systems" was focus on the estate in land itself rather than the identity of the owner, which was a feature of the Romanist systems. Another feature was that land registry operations were conducted judicially in conjunction with a local tribunal which adjudicated disputes. Ludlow's attempt to come to grips theoretically with the idea of title by registration is indeed an interesting curiosity of Victorian England with its very subtle distinctions between holographic, substantive and referential registration. One Mr Wilson wrote a letter maintaining that land transfer should be as simple as transferring railway shares. The form of certificate of title might nevertheless

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161 Ludlow, above n 159, 224.
162 Ibid 225.
164 Ibid 231.
165 Ibid 206.
166 Ibid, Appendix VII, 244.
The proposal for a Deed Registry was progressed to the point where a Registration of Assurances Bill reached a Second Reading in the House of Commons. On 27 May 1853 it was referred to a Select Committee which reported on 5 August 1853. The Committee recommended against continuation with the Bill in view of the submissions from eminent professionals who recommended ‘... a scheme for the registration of "Title," or of "Legal Ownership," ...’ and suggested further pursuit of this idea through the appointment of another inquiry. The scheme proposed by Mr W S Cookson later proved to be the most influential. It proposed a record simply of legal title. A mortgagee would become the registered legal title holder but the mortgagor could lodge a caveat. This system adhered as closely as possible to that adopted by the Bank of England for dealing with stock. Rights in Equity would not be recorded but could be protected by caveat, and otherwise notice of an unregistered prior transaction would not affect a subsequent purchaser. This was already provided for in the Bill before the Select Committee, Mr Cookson observed. Acts of registration were to be purely ministerial. He contemplated nevertheless a system of deferred indefeasibility, under...

169 Ibid iii - iv.
170 Ibid, Minutes of Evidence (21 June 1853), 1, Question 6.
171 Ibid 2, Question 9, and 11, Question 118.
172 Ibid 3, Question 16.
173 Ibid 3, Question 14.
174 Ibid 6, Question 50.
175 Ibid, Question 57.
176 Ibid, Questions 71 and 78.
which a defect in the title of a transferor would not be cured until the first transferee conveyed on to a second transferee.\footnote{177 \textit{Ibid} 8-9, Questions 86-106.}

Mr Field, who had experience of a West Indies system while arranging payment of compensation to British slave traders there, was attracted to Mr Cookson's scheme, but wished to suggest a scheme of compensation for losses occasioned through registration and an idea of "warranted title" which would reduce title searching. Mr Cookson's scheme, thus modified, would alleviate the expense and defects experienced with deed registration schemes.\footnote{178 \textit{Ibid} 18-27.} Mr Williams, a London solicitor, also approved Mr Cookson's plan as the kind of thing he had had in mind since Mr Wilson's proposal to the Real Property Commissioners.\footnote{179 \textit{Ibid} 27, Question 287. Regarding Mr Wilson, see above n 166.} Ultimately a Land Book\footnote{180 Perhaps his literal translation of \textit{das Grundbuch}.} would do away with the complex system of estates and interests, and transfer of legal or registered ownership would "constitute a perfect indefeasible title."\footnote{181 \textit{Ibid} 389 and 420.} Mr Bullar, a barrister with some 20 years' experience, had his own scheme based on the registration of railway stocks, right down to the use of \textit{distringas} to protect unregistered interests, but would have preferred Mr Cookson's scheme to a deed registration system.\footnote{182 \textit{Ibid} 61-75.} He considered registration the critical factor, which, however bad regarding former ownership should be absolute for all claiming under it.\footnote{183 \textit{Ibid} 71, Question 792.} This idea of absolute title was fleshed out in Mr Bullar's suggested provisions to implement his scheme -

\begin{quote}
Except with respect to the iniquitable Acts of the registered owner … the registered owner is to be deemed, in equity, a \textit{bona fide} purchaser for full
valuable consideration of the property of which he is the registered owner, without notice of any claim except only the estates and interests to which, according to the Act, the registered ownership of the property is to be subject. 184

One should not take subject to pre-existing unregistered rights, even if one had notice of them, unless a *distringas* had been lodged, as with railway stock. 185 Problems created by registration could be cured by a fund, and personal remedies would be retained in any case. 185

Mr Coulson, who had been a member of the earlier Commission 187 did not like Mr Bullar’s scheme, but suggested that a majority of the Commission, unrestrained by its terms of reference, would have been attracted to something similar if the records were entered by a judicial officer, which had been a feature of “teutonic systems”. 188

“Witnesses of high professional reputation” 189 were not the only subjects with qualms about a deeds registration system. Petitions were received from six building societies generally against the scheme in the Bill. That of the Wolverhampton Freeholders Permanent Benefit Building Society 190 seems a representative example, explaining that its object was to encourage frugality and assist the working class to save in order to own their own house or cottage, and expressing concern about new impediments which might be presented by the Bill through additional complexity and expense in creating duplicate documents, transmitting them to a central registry in London, and so forth.

184 Ibid, Appendix III, 145, cl 68.
185 Ibid 69, Questions 770-76.
186 Ibid 71-2, Questions 792-805.
187 See above n 156, 157.
188 See above n 164.
189 See above n 169.
This was the context of debate in which a new inquiry was commissioned on 18 January 1854 to investigate the idea of registration of title raised by the professional witnesses at the 1853 inquiry. The report was received on 15 May 1857. By way of introduction to its endorsement of a very simple proposal for registered title, the Commission found in the English history of real property law a latent principle of publicity which its proposal could restore:

In the earlier period of our history publicity was considered essential in almost all dealings with landed property. The transfer of the immediate freehold in possession was made notorious by livery of seisin; ...

The account of the rediscovered English publicity principle went on to recount its fall through "subtle construction and contrivance" in the courts' interpretation of the Statute of Uses which instead of facilitating publicity had made "... legal conveyances, what they never were before, secret." Thus the Commission embarked on the time-honoured common law world method of reform through rediscovery of the past and correction of present errors. The scheme proposed by the Commission was intended to restore the lost English principle of publicity. It is interesting to note that on the verge of plagiarising the central theoretical plank of the German title registration systems all efforts at international comparative analysis in the field had been abandoned since Ludlow castigated narrow and inflexible Prussian despotism. Meanwhile, apart from the nostalgia of Coulson, an idea of a conclusive register still dependent upon equitable

191 See above n 169.


193 Ibid 2.

194 Ibid 3.

195 See text above n 161.

196 See above n 188.
principle for its points of reference\textsuperscript{197} had been developed through reflection upon robust London commercial trade in railway stocks, reinforced by a compensation fund inspired by the method of paying out the slave trade. Having swiped the principle of publicity, the Commission went on to transcend two other protections already identified by Ludlow in the Prussian system, a "doctrine of actual notice" [good faith acquisition] and judicial scrutiny of registration processes at a local level. After the failure of attempts to implement the Commission's recommendations,\textsuperscript{198} international comparative analysis was resumed, even if with some imperialistic disdain of the Torrens system.\textsuperscript{199}

The problem which the Commission posed was how to implement a system which would allow owners of land to deal with it as simply as moveable chattels or stock.\textsuperscript{200} The objects of a land title register would be "... that the retrospective inquiry into the former dealings and transactions, which on a transfer is now necessary may be avoided ..."\textsuperscript{201} and to simplify title and the forms of conveyancing, while preserving the existing system of landed settlements. Thus, the register should manifest only "... the actual and existing ownership of the land for the time being, without laying open the history or past deduction of it."\textsuperscript{202} Beneficial interests were not to be mixed up with it - they should perhaps be registered separately, and certainly amount to a claim on the proceeds of sale, but not complicate or impede sale of the fee simple.\textsuperscript{203} The Commission saw as erroneous the suggestion that there was a dilemma between ensuring the security of settlements and

\textsuperscript{197} See above n 184.

\textsuperscript{198} A W B Simpson, above n 146, 282.

\textsuperscript{199} C Fortescue-Brickdale, "Registration of Title in Prussia" (1888) 4 Law Quarterly Review 63.

\textsuperscript{200} See above n 145, at 23 [XL].

\textsuperscript{201} Ibid 25.

\textsuperscript{202} Ibid [XLIII].

\textsuperscript{203} Ibid [XLV].
protecting the interests of purchasers, and thus, between the interests of the family and
marketable title. It rallied critics to the Imperial flag -

Were we to allow, however, that such a difficulty does in fact present itself, we
should be able to rely ... on our ancient law as affording for the present
purpose a wise and useful precedent; for just as the feudal law required that
the freehold should always be filled by one capable of contributing to the
national defence, and performing the duties of a feudal follower, so the spirit
of commerce now demands that for its purposes also the fee simple in land
shall always be represented and be in the possession of persons capable of
fulfilling those new duties and offices which the ownership of land in the
present state of society entails or involves.204

It followed, apparently, that the purchaser had to be able to dispense with inquiry into the
equitable title. An inhibition or caveat could be entered to protect equitable claims, and it
could refer inquirers to the second register of equitable interests.205 The Commission
contemplated that when the register was fully operating, a system of "warranted
ownership" would be the equivalent of a registered fee simple estate, subject only to
other registered rights, and exempt from latent claims and interests -

The registered owner will therefore have, forthwith, for the purposes of
transfer, a simple, complete, and indefeasible title.206

And thus "... land will be as clear from all rights, other than those which are actually
registered, as stock which is purchased in open market."207 The inhibition or caveat was
also contemplated to act only against the power to transfer title,208 a power now to be
guaranteed expressly.209 Volunteers would gain no greater protection from
registration.210 Fraud on the part of the person acquiring registered title would disentitle
that person to protection, and notice of an unregistered right would not be regarded as

204 Ibid 29. [L].
205 Ibid 282.
206 Ibid [LXXII].
207 Ibid 36.
208 Ibid [LXIV].
209 Ibid [LX].
210 Ibid [LXXII].
fraud.\textsuperscript{211} The Commission also proposed a system of registered encumbrances, under which charges would be registered on the title with the legal ownership staying with the registered owner.\textsuperscript{212} The report went on to discuss the "machinery" of the registry, within which the registrar would be a purely executive or ministerial official, without the necessity for approvals or sanctions for the completion of transactions, and thus without discretionary power to prevent them.\textsuperscript{213} The Commission endorsed a sketch of a Bill, for The General Register Act, which had been prepared by a Commission member, Mr Lewis.\textsuperscript{214} One major advantage which it saw with the scheme was facilitating the subdivision and sale of large estates in lots - it considered that wider ranging reforms should accompany establishment of the register.\textsuperscript{215}

Mr Lewis' sketch of a Bill was appended to the Report.\textsuperscript{216} There is no clear common basis for comparison with the final version of Torrens' \textit{Real Property Act} 1858.\textsuperscript{217} Torrens would have been very pleased with his own proposal after reading the limited concepts of the Report and its suggested Bill on the eve of his Second Reading speech\textsuperscript{218} - he certainly saw no need to incorporate provisions drafted for the Report of 1857 into his substitute Bill which Hübbe had developed. Compare for example of the main indefeasibility provision of Mr Lewis' proposed Bill -

\begin{quote}
Notwithstanding the existence of any trust affecting the registered ownership in respect of any unregistered ownership as aforesaid, the absolute right or
\end{quote}

\begin{footnotes}
\textsuperscript{211} Ibid [LXXXIII].
\textsuperscript{212} Ibid [LXXVI].
\textsuperscript{213} Ibid 294-5, [LXXXI], [LXXXII].
\textsuperscript{214} Ibid [LXXXIII].
\textsuperscript{215} Ibid [LXXXIX].
\textsuperscript{216} Ibid, Appendix 2, Part B.
\textsuperscript{217} Appendix to Torrens, above n 1.
\textsuperscript{218} See above n 145.
\end{footnotes}
Torrens' Real Property Act provided -

Notwithstanding any error or omission in the observance of any formality herein prescribed to be observed in bringing land under the operation of this Act, and excepting in the case of frauds ... every certificate of title or entry in the register book shall absolutely vest the estate or interest in the land therein mentioned, in the manner and to the effect expressed in such certificate of title or entry, and the registered proprietor of such estate or interest in the said land shall be secure from eviction or disturbance or adverse claim, in respect of any estate, right, or interest in the said land, which is not declared in such certificate of title, or entry on the register book, or in the instrument referred to in such entry.\(^2\)

Any similarity between the provisions of Mr Lewis' sketch for a Bill and Torrens' second Bill is most superficial. Considering the generality with which Torrens viewed models of systems of title by registration, it is doubtful that Torrens did more than find reassurance in the English Report. Rather than it being a source of grand ideas on the eve of Torrens' Second Reading speech, in later debates the sketchy and ultimately unsuccessful\(^2\) English proposal was to be drawn upon in place of the Hanseatic system to bolster the reasonableness and, ironically, the feasibility of the Torrens measure.

The English Report was tabled and ordered to be printed in the Legislative Council on 7 January 1858, and in the Assembly on 12 January. Debate in the Council was deferred on 12 January because the republished Report was not available. After the Council received the Report, Mr Baker claimed that he had read it and, contrary to what had

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219 Mr Lewis' Bill, above n 145, 166, cl XL. Clauses XLIII and XLIV would have provided that registered title would not be lost if obtained with notice of a pre-existing unregistered interest.

220 See s 39 Real Property Act 1858 (SA). Concerning the obviation of notice with respect to prior mortgages and trusts, see ss 53 and 76 respectively.

been said, the Torrens proposal was not identical. He considered some of the clauses and stated they were "... a convincing proof that the measure had not been, as was said, framed after its model."222

I Conclusion

It is clear that Dr Ulrich Hübbe played a very significant role in development of the Australian land title registration system which is generally attributed to Torrens, and that the system reflected his adaptation of the Hanseatic system then operating in Hamburg. Hübbe's contribution appears to have been played down at the time. Robinson concluded that this was consistent with Torrens' famous arrogance and allegations that he was a charlatan. Whether that is the case or not, we can see that in view of the friction between the British and German immigrant communities it would not have been good politics to assert the scheme as German. The fact that title by registration had operated successfully in Hamburg for centuries was drawn upon to demonstrate its feasibility in practice, at least until a sketchy experimental English model happened along which ultimately failed, and which a Member of Parliament said was plainly different at the time. Hübbe's own monograph223 appears at first glance to draw minimally on the Hamburg system because of his sensitivity to hostility to the introduction of German ideas and methods into the British colony. Torrens himself does not appear to have shared these views and supported assistance for German immigrants from the public immigration Land Fund which his father had proposed. That factor would have assisted his relationship with Hübbe.

222 South Australia, Parliamentary Debates, Legislative Council, 19 January 1858, 763 (Mr Baker).

223 Hübbe, above n 16.
The surprising aspect is not that the system has been named the Torrens System rather than the Hübbe System, but rather that by the end of the 19th century the strong influence of German real property jurisprudence had been virtually forgotten, that the German influence was minimised in favour of plainly spurious explanations based upon the Merchant Shipping Act and the English Report of 1857, and that the Australian courts drew exclusively upon English general law and equitable principles in the interpretation of it, rather than seriously contemplating the nature of the legal transplant which it had received and evaluating the companion principles [the Juratypen] in the Hamburg legal system, and later the German legal system, when dealing with the problems which arose following its implementation.

On one hand the explanation could be as simple as the linguistic difficulties involved in assessing the applicability of German legal solutions to problems found in the implementation of the Torrens system. On the other hand, the legal profession was also influenced by the outbreak of ruthless anti-German jingoism during the First World War. The Australian High Court attempted no legal creativity in defence of human rights when it reversed a decision of the Victoria Supreme Court and decided that habeas corpus was not available for Franz Wallach and thus all other German-Australian civilians interned without trial or other judicial inquiry, and indeed that the Minister for Defence could not be required even to give reasons.

The prisoner said he was in fact not disaffected or disloyal. That was nothing to the point, ...

In his Honours Thesis, which was subsequently published as a pamphlet, and for which

224 See for example, the judgment of Kitto J in IAC (Finance) Pty Ltd v Courtenay (1963) 110 CLR 550.
225 See Fischer, above n 43, 303-4.
226 R v Lloyd; Ex parte Franz Wallach (1915) 20 CLR 299; see Isaacs J, 303-8.
227 ibid 309.
he was awarded the Bowen Prize in the School of Laws at University of Melbourne, Robert G Menzies concluded that denial of *habeas corpus* was a valid action of the state in protecting itself against aggression and, Kafkaesque, a sign of the modern age. Far from outrageous, or even surprising:

"[In a war like the present one, in which racial animosities are so keen, and in which some nations at least have not hesitated to abandon law for convenience, it would not have been altogether unexpected to find some disregard of the usual rights of aliens, particularly alien enemies.]"

In fact Franz Wallach was an Australian citizen and naturalised British subject. The tones of regret which one might detect in places in the essay are grief for the *Magna Charta* and the principles for control of executive government which emerged with liberalism in the 17th century.

The geographical dislocation apparent in references to "... an enemy knocking at the gates ..." is matched by absolute identification with the English legal system and "... the part played by our Courts ..." when referring to decisions of the English Prize Court. In his Foreword Professor W Harrison Moore applauded his student's work and noted that the growth of civil rights was conditional upon "... the comparative security of our country against the gravest external dangers ..." on the other side of the globe in Europe. Because of wartime censorship of the issue until 1919, with which Menzies agreed to

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228 Menzies went on to become the Prime Minister of Australia (1939-1940) as leader of the United Australia Party. He was a key figure involved in founding the Liberal Party in 1944, as the leader of which he again became Prime Minister (1949-1966).


230 ibid 15-16.

231 ibid 23.

232 ibid 30.

233 ibid 4.

234 Fischer, above n 43, 197.
prevent distraction "of the public mind", the essay, which was completed in February 1917, demonstrates no awareness of conditions in the internment camps. The Torrens Camp in South Australia, for example, had already been closed in 1915 following a scandal about the inhumane treatment of the 400 prisoners there, one of whom claimed to be Swedish and another American. Its infamy even reached Europe and was the subject of a protest communicated by Germany to Britain through the United States.

Certainly, naively with respect to the fate suffered by Australians and others merely because they had German names might be explained by ignorance about what was happening in the camps. The point is that, in view of such preparedness to suspend the civil rights of the German-Australian community, the legal system and perhaps a generation of professionals working in it, were hardly likely to treat the German heritage of its land title registration system with credibility, let alone honour it. The failure of the Australian legal system to deal with plural legal sources in this respect underscores the failure of Australia's first experiment with multi-culturalism - it was always retractable.

Another less belligerent but equally effective effort to exclude German real property law as a source when interpreting the Torrens system, which is nevertheless an aspect of the same rejection of plural legal sources, is the range of assumptions about the German real property system which are voiced when attention is drawn to it. Echoing cultural stereotypes projected on to Germans, Germany, and her tragic history, is the view that the German land title registration system is highly mechanistic and masculinist.

235 Menzies, above n 229, 14.

236 Fischer, above n 43, 194-8.

237 See for example the letters concerning the fourth generation Australian sisters Daisy Schoeffel and Mena Kendle (nee Pearse) who had married German cousins and lived in Fiji before deportation back to Australia for internment: Fischer, above n 43, Appendix 1.
In fact careful analysis suggests that mechanistic intentions were actually operating behind the English Reports. To some extent even Robinson, when championing Hübbe's contribution, draws upon a similar image of the German inspiration of the Torrens system when building a starting point for the argument that no unregistered rights should enjoy legal existence, and no right which cannot ultimately be registered should be capable of protection by caveat. These views go far beyond anything which Hübbe recommended, and contradict the concern for the holders of equitable rights, in the absence of protections [the companion principles] which the Hamburg system offered, which he frequently expressed.

Equally difficult is the view that the Torrens system is essentially masculinist because it makes no provision for the holders of those kinds of rights which women are thought conventionally to hold - a matter of a blind spot with respect to the interests of women rather than an open misogyny -

Effectively, a person holding such ... an equitable interest may be in a worse position than if he or she held such an interest under the general law system. Although social patterns have changed during the latter part of the 20th century, it is still the case that women rather than men are more likely to hold equitable interests arising out of informal transactions. The Torrens system with its emphasis on the recording of interests may thus be viewed as a form of gender bias.

Consideration of Hübbe's monograph shows that he was alive to these issues and an active campaigner against the paradigm of patriarchy - primogeniture. His idealisations of a Saxon tradition in which the British and the German immigrants could share stated

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238 See for example the preference for the "machinery" of a ministerial land title registry above the "teutonic" judicial model in the 1857 Report: above n 145, 42, [LXXXI ff].

239 S Robinson, *Transfer Of Land In Victoria*, Law Book Co, Sydney, 1978, especially Ch 1, "The Origins Of The Real Property Act 1858 Of South Australia".


241 Hübbe, above n 16.
strongly that the institution of property is shaped by its social context. Hübbe's work exudes his conviction that a system of public registration has advantages, through its transparency and the facility of caveats, for just such groups when holding unregistered claims to land. If an assumption is operating in his work in this respect, it is that women would hold registered title to land and enjoy the benefits of indefeasibility.242

Ultimately, it is indisputable that the introduction of the Torrens system was intended to, and did, introduce a new system for defining, allocating and ordering ownership of and limited proprietary interests in urbanised land. Essential to this system is a concept of legal entitlement with respect to land which is subject to at least one very clear obligation - to register the creation or assignment of the legal entitlement - and this for the wider social benefit of ensuring certainty in transactions with real estate. It is thus completely false after introduction of the Torrens system to speak of a concept of property in Australia which is not subject to at least one obligation for the wider social good. Hübbe was certainly well aware of this, and he made it plain in his monograph243 which was distributed to the elected members of, and thus informed acceptance by, the first South Australian Parliament of his limited modification of the Hamburg land title system. Hübbe's monograph also made plain his expectation that the system, particularly through its transparency and reliability, would advance the interests of more vulnerable members of the community. In this respect we may certainly conclude that the system's concepts and operations were expected to take root in their new social context and grow dynamically with it, and not as some perfect imported machine to grind away everything at all cost. We cannot know with certainty which of Hübbe's brain cells were excited when he heard the word "property" or "ownership", but we can establish through

242 With respect to married women, in the context of these times in South Australia, s 83 of the 1858 Act can indeed be seen as protective of their powers of alienation.

243 Hübbe, above n 16.
historical research legal concepts which in 1840\textsuperscript{244} were inherent to the legal transplant, or so closely related to its proper functioning as a system that they might be identified as companion principles. The next question is therefore to establish the immanent attributes of the concept of property in the Hanseatic system of land title registration and the companion principles of the system in related fields of law which maintained it in its correct social orbit.

In this sense it is not vital that the minds of Hübbe, Torrens and the members of the first South Australian Parliament were specifically attuned to each point. If principles may be found latent within a constitutional structure fashioned with home-grown intelligence from a range of transplants obtained from such various sources as the United States and Switzerland,\textsuperscript{245} then certainly a land title registration system, governing the fundamental wealth of a nation, and fashioned in the same way from just one source can also hold them. The object of the next part is thus to find both the clear and the latent sources of the principles which were embedded in the Torrens system, and then carried to virtually every corner of the former British Empire.

\textsuperscript{244} Hübbe left Hamburg in 1842 on the Taglione (see above at n 47), so 1840 seems a reasonable date for the source of the legal transplant.

\textsuperscript{245} Australian Constitution 1901.
PART II

TITLE BY REGISTRATION IN THE HANSEATIC CITIES

A Introduction

In this section the emergence of the Hanseatic League, the common administrative structure of the Hanseatic cities and the further development of the Hamburg land title registration system is examined with two objectives. Following from Hübbe’s observation in 1861 that-

[...] in the sea towns of German origin, all round the Baltic shores, the same principles as in Hamburg, Lubeck, and Bremen, have prevailed of old

one objective is to establish what Hübbe had in mind, while working in Adelaide with the Torrens group, when reference was made to "a system of transfer by registration" in "the Hanse Towns". Resemblance between the Hamburg-Hanseatic and Torrens systems can thus be further illuminated and, particularly, background "companion legal principles" may be identified which were important for the correct functioning of the Hamburg system, but which were not present in the English general law jurisprudence into which the Hanseatic real property system was introduced. Another objective is to examine the role of the Hanseatic system as a general model in preparation for analysis of the contemporary German land title registration system.

1 H L Vosz, C D Anderson & G Luhrsen "Title by Registration in the Hanse Towns" (trans & ed U Hübbe) in South Australia, Parliamentary Paper No 212 (1861), 5.

2 Parliamentary Debates, 4 June 1857, 205 (Mr Torrens); set out above, in Part I, above n 66.
The Hanseatic League pre-existed the creation of anything we would today describe as a German nation state, and indeed the modern idea of the nation state itself. The Hanseatic cities, generally, demanded or were granted freedom to transact free of the constraints endured under the feudal systems which surrounded them, in the way that a number of early-capitalist European cities were. 3 The Hanseatic League was first established as a trading association with reciprocal trading rights amongst its member cities, the influence of which spread around northern Europe and especially the Baltic region.

The League grew into a union of the cities numbering at various times between 50 and 200. They adopted similar laws and civic institutions, with more in common between themselves than with the feudal areas from which they were excised. Relatively free from feudal constraints, the style of administration which the cities adopted was very much before its time, described by Ebel as the "greenhouse of the modern administrative state." 4 From a very early time these public institutions relied upon written records in the books and files of the city for the maintenance and publication of many kinds of civil rights. The rights of the citizens of the Hanseatic cities were more liberal than those which generally existed in feudal society. The cities were administrated by merchant City Councils with wide-ranging executive organs.

Land within the city was, generally, freely transactable. Transfers of ownership of land and encumbrances [burdens] were recorded in special books of the City. In Hamburg, whence Hanseatic inspiration of the Torrens system came, a public system of recording


land ownership which held superiority in proof of title was instituted certainly by 1270.

The legislative basis of this system was the subject of major revisions in 1497 and 1603 to accommodate stages of the reception of Roman law, and in the early 19th century under the French occupation, and again after its departure. Administrative reforms accompanied these legal revisions.

In 1868 the system was again consolidated and reformed; this time preliminary to the unification of Germany under Bismarck. For these historical reasons, in order to understand the system which in 1857 inspired South Australia the history of the Hanseatic League will be briefly reviewed, and then a "snapshot" analysis will be made of the Hamburg land title registration system at 1840 with some backward glances at its evolution from its earlier foundations. For the purposes of our comparative study, across such great stretches of time, culture and space, it can be said that the system which emerged with the unification of Germany in the 19th century, and which endures in Germany today, is in essence modelled around fundamental land title principles which had emerged in Hamburg by the middle of the 17th century.

Generally it is accepted that formation of the modern German land title system, in the wake of German unification under Bismarck and composition of the Bürgerlichen Gesetzbuch was also strongly influenced by the Prussian civil law system, the initial codification of which is attributed to Friedrich the Great. The strength of Hanseatic influence on the system which emerged with the Bürgerlichen Gesetzbuch is supported

5 E Schalk, Einführung in die Geschichte des Liegenschaftsrechtes der Freien und Hansestadt Hamburg - Eine Darstellung des hamburgischen Grundstücksrechtes bis zur rechtsrechtlichen Vereinheitlichung, A Deichertische Verlagsbuchhandlung Dr Werner Scholl, 1931.

6 Höbbe arrived in Adelaide in 1842. As related in Part I above, following n 114, communication with Hamburg on the topic continued into the 1860s.

from two directions. First, there is a strong case that the essential principles of the
Prussian land title system itself, which emerged as a Mortgage Book system\(^8\) during the
defeudalisation of agrarian Prussia, was inspired by ideas with a Hanseatic history.
Many of the major Prussian cities were at some time in their histories Hanseatic cities,
including Danzig, Königsberg, Thorn, Krakau, Breslau, Magdeburg and even
Brandenburg and Berlin. Cities which were seats of the Prussian Court, such as Memel,\(^9\)
were unlikely to be privileged as free cities ruled by its citizens and excised from the
feudal hinterland. The Prussian land title system applying in rural areas retained clear
feudal characteristics well into the 19th century\(^10\) and the land title registration system
appears to have been something new when the English agitator for land title registration,
Fortescue-Brickdale, visited.\(^11\) It is thus quite probable that when the Prussian Mortgage
Book system was conceived, the Hanseatic model, which had been passed down in the
major commercial cities of Prussia, retained influence. In any case, the Hanseatic
system retained its veneration in the 19th century and was no doubt considered when
Prussian legal reformers undertook their work. Buchholz points out that the Hamburg
mortgage form was specifically adopted into the new Prussian agricultural system.\(^12\) The
second, and related, historical influence of the Hanseatic model on the emergent
contemporary German system might be traced through the influence of the Hanseatic
City States in the North German Federation, welded under Bismarck in 1867, and the
power of its representatives in the discussions leading to Unification and the drafting of

\(^8\) das Hypothekenbuch.

\(^9\) Now Klaipeda in Lithuania. It was the seat of Friedrich Wilhelm III in October 1807.

\(^10\) The liberal German revolutionary movement of 1848 led to a final Edict for discharge and alteration of
feudal relations on 2 March 1850, in fulfilment of Art 42 of the new Prussian Constitution of 31 January 1850
promulgated under Friedrich Wilhelm IV (reign - 1840-1861). See generally H Welkoborsky, "Die
Herausbildung des Bürgerlichen Eigentumsbegiffs" in Daubler and Sieling-Wendeling, Eigentum und Recht,

\(^11\) C Fortescue-Brickdale "Registration of Title in Prussia" (1888) 4 Law Quarterly Review 63.

\(^12\) See generally, S Buchholz, "Die Quellen des deutschen Immobilieerrechts im 19. Jahrhundert" (1978)
7 Ius Commune 250, 257-61, especially 253.
the Bürgerlichen Gesetzbuch. Indeed, the concessions to the southern states in this regard are generally discussed as deviations grudgingly agreed to. As Buchholz put it,

[cf]ertain specific institutions of the [Hanseatic] City Law were authentically maintained in the Hanseatic areas - if also with some time-specific modifications - into the 19th Century and have, at the very least, contributed to the unique character of German real property law in detailed respects.13

1. A Brief History of the Hansa from 1159

The history of the Hanseatic trading empire is usually taken from the founding of Lübeck in 1159,14 and from the earliest times the City of Lübeck was the centre of the Hanseatic League - the Queen of the Hansa. Other cities were already engaged in distant trade. The City of Bremen, for example, was already a centre for the projection of trade missions into distant lands by 965 when Otto the Great granted Bremen market privileges.15 In any case, the history of the Hanseatic League is usually broken into two periods:

1 1160 - 1356/58 - The Merchants' Association; and,
2 1356/58 - 1669 - The Association of Cities.

The foundation of a free trading city was a complicated affair, usually involving intrigue, and each city has its own interesting history. Lübeck was conceded by the Graf of Holstein, Adolf II of Schauenburg, as a mercantile centre on the Baltic coast at the protected confluence of the Trave and Wakenitz Rivers. A merchant settlement had

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13 Buchholz, above n 12, 265. Between the Hanseatic cities themselves, by the 19th Century, the esteem of Hamburg's system had developed to the point that Lübeck was adopting many significant points of the Hamburg system: 268-7.

14 B Fischer, Hanse-Städte - Geschichte und Kultur, Du Mont, Köln, 1981. A timeline is provided at Appendix I in order to abbreviate this fascinating topic. Readers are referred generally to J Bracker (ed), above n 4, and a visit to the Museum für Hamburgische Geschichte and the World Heritage City of Lübeck are strongly recommended.

15 Bremen Landesmuseum für Kunst- und Kulturgeschichte (Focke-Museum).
been there since at least 1143. The Saxon Herzog Heinrich the Lion formally gave possession of the place in 1159, with the right for the merchants collectively to exercise the Herzog right to make laws for cities under their control, and to carry their wares through the land without excises.\footnote{The sealed instrument still exists. See E Hoffmann, "Lübeck und die Erschließung des Ostseeraums" in J Bracker (ed), above n 4, Vol 1, 35.} The creation of sealed durable written legal records became vital in the process of exacting and maintaining freedoms from the feudal nobility.\footnote{G Theuerkauf, "Recht, Rechtsaufzeichnung, Gerichtsbarkeit", in J Bracker (ed), above n 4, Vol 1, 381.} There are many examples of privileges being counterfeited.\footnote{The content of a privilege granted by Kaiser Friedrich Barbarossa in 1188/89 to Neustadt in Hamburg was apparently counterfeited in 1224/25.} A series of true privileges from the Grafen of Holstein was instituted in 1212. Kaiser Friedrich II again privileged Lübeck in 1226 and Hamburg in 1232. Continuing prosperity of the free cities depended on privileges and exemptions from the burdens, dues and services which would have been due to the feudal nobles of various rank otherwise entitled to them, in relation to the area occupied by the economically buoyant trade centres. There was a clear need for reliable written records in order to maintain the concessions exacted from the nobles and their heirs, who appear regularly to have had second thoughts.

Lübeck's great trade opportunity arose when relations between the island of Gotland\footnote{Between Sweden and Latvia in the Baltic Sea.} and the German countries were reconciled. Heinrich the Lion allowed trade concessions for traders visiting from Gotland. To take advantage of these concessions, the merchants of Lübeck effectively moved "offshore" by forming a society with their counterparts in other Westphalian and Saxon cities to trade with Gotland.\footnote{It was called the Genossenschat der Gotland besuchenden deutschen Kauflute, or Universi mercatoris Imperii Romanii Gotlandiam frequentes.} This society grew into the Hanseatic League. The word "Hansa" is an old German word meaning a
co-operative society or assembly.

By 1189 the Hansa merchants had on their own behalves made a treaty with Prince Jaroslav to secure their trade in Novgorod. The merchants projected their trade into Scandinavia, and soon had Visby, Riga, Dorpat, Reval, Stockholm and Bergen as well. The economic affluence and civic rights enjoyed in Hanseatic cities were envied, and many of the best surviving examples of Hanseatic architecture, art and craft remain in these more distant cities. Navigation to these places was then no small feat. It was later assisted by development of the Hansa “Sea Book” with charts of the North European coast from Cardiff to Riga, including the south of England. The construction method of their unique cargo vessels, the Kogge, developed from the 7th century on the North German coast. These were later replaced by Caravels, which resembled the ships sailed by Columbus to the Americas.

After establishing their distant trade offices, the merchants concentrated on ports closer to home and obtained trade concessions and the rights of the laws of Lübeck for the former slave trading centre at Rostock. Wismar, Stralsund, Danzig and Elbing.

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21 On a lake south of where St Petersburg now stands.
22 The main city on Gotland.
23 In Latvia.
24 Tartu in Estonia.
25 Tallin in Estonia.
27 C Hirte and T Wolf, "Das Kraweel und die weitere Entwicklung der Seeschiffe" in J Bracker (ed), above n 4, Vol 1, 575.
28 Now Gdansk in Poland.
29 Now Elblag in Poland.
became Hanseatic cities over time. Merchants also struck out toward England and the Netherlands, and in the course of this adventure brisk trade relations were established with Köln, Bremen and Westphalia.

In the 13th century the merchants of Lübeck sent a mission to Hamburg overland and from there by ship to England and Flanders. Henry II of England\(^{39}\) had already granted the wine merchants of Köln concurrent trade rights with the French wine merchants. From 1175 they had freedom of trade throughout the entire kingdom. Richard the Lion Heart permitted trade in London from the Guildhall with freedom from tax. In 1237 protection of trade was secured from Henry III. Thirty years later the merchants of Hamburg and Lübeck settled the same rights, also operating from the Guildhall in London.

By 1281 the traders of the three German ports had relegated their rivalries and cemented their relationships to become known as the Hansen, and united as the Deutsche Hanse. A trade in cloth was established with Brugge in competition with merchants from England, Spain, France and Holland. In this competition, without the concessions to which they had become accustomed, the merchants of the German ports found it politic to unite. Soon the merchants of the various German ports were trading in foreign places generally under the name of the Hansa. By the middle of the 14th century the name widely signified the society of North German merchants. Particularly in north-eastern Europe it had become clear between 1150 and 1250 that the power of the city merchants was bound up with a particular social, cultural and economic structure which was projected through trade. Lübeck published her first City Code in 1224 in Latin and again in middle lower German in 1255. Magdeburg first published her laws in 1261, and

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30 Reigned from 1154 to 1189.
Hamburg at the latest in 1270.

Theuerkauf contends that it was vital for the City Councils of newly founded Hanseatic cities to exercise as soon as possible the powers which they had acquired in the excision of their cities from the feudal domain and law-making was a clear exercise of authority. Many cities were happy to acquire the basis of their City Laws from the written laws of other cities. The Laws of Lübeck spread along the Baltic coast. The Laws of Magdeburg spread into the interior on both sides of the Elbe, on the lower Oder, and to the east. The Laws of Hamburg, always developed with strong respect for the Laws of Lübeck, were even exported to Riga in Latvia.

The structural transition of the Hansa from a trade association to a confederation of free cities with a similar merchant culture and a unique structure of city institutions occurred more slowly, catalysed by a series of external threats to trade. In Flanders in 1280, and in Norway in 1284, the local sovereigns and merchants sought to cut off the trade privileges of foreign traders. The united Hanseatic cities responded by cutting off trade and blockading. Early in the 14th century the Fürsten of Mecklenburg, Wismar and Rostock, and the Graf of Holstein, wished to bring the now thriving independent cities of North Germany back under their sway and engaged troops of the Danish King to reinforce their claim. Lübeck successfully approached the Danish King, who emerged as the protector of the cities for ten years at a fee of 750 Marks per annum.

31 See above n 17, in J Bracker (ed), above n 4, Vol 1, 361.
Hanseatic Cities in The 15th Century

Map copied from B. Fischer, Hanse-Städte - Geschichte und Kultur, DuMont, Köln, 1981.
With the risk of such conflicts with local overlords and with Denmark still present, a new conflict with Flanders emerged. In 1356 Lübeck recalled her agents to advise solutions. All the city groups sent their agents, and this meeting became the first Hansetag, an annual meeting of all member cities in Lübeck, the heart of the League's structure. They decided that for the next two decades the trading offices in Novgorod, Bergen, London and Brugge would be brought under the collective administration of the League. In 1358 they met again in Lübeck, successfully ending their blockade of Flanders, and readmitting Bremen to the League after some 70 years' exclusion for trading with Norway during an economic blockade.

From these and other struggles the Hansa grew to a League of about 180 cities enjoying varying status. For the greater period Lübeck retained the leading voice. Nevertheless, the League divided into three groups: Lübeck-Saxony, Westphalia-Prussia, and Gotland-Livland. These groups were not composed of like-minded cities or around geographical, political or economic interests, but emerged simply to balance the power of the Lübeck-Saxony group. At the meeting in 1494 this broke into a four-sided group when Braunschweig [formerly Brunswieck] joined and took leadership of a Prussia-Livland group. This underlines the importance of the individual cities within the framework of the League. Lübeck remained at the head leading the organisation and steering its policy.

Through this organisation the League developed methods of confronting external threats, first by imposing harsh trade conditions, second with an economic blockade, and finally through war in extreme situations, depending upon the solidarity of the member cities at each point. With each century the League developed as a unique economic power in Northern Europe. The expansion of foreign trade through offices in Novgorod, Bergen, London and Brugge was mirrored by the internal trade developed along rivers into the

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32 Hansa Day.
German hinterland.

In 1557 the assembled city representatives gave the imprimatur of the League to collected chapters of the rules and regulations which underpinned it. Lübeck had republished her Law of the Sea in 1537 and again in 1575. The Law of the Sea annexed to the Book of the Laws of Hamburg in 1301 became an expanded and systematised edition in the Hanseatic Sea Law of 1614. The exchange of laws between Lübeck and Hamburg commenced at a very early point. Nevertheless in the face of discontent, especially in Hamburg, about the strength of Lübeck's leadership of the League, a unique opportunity to renovate further the structure of the League into a tighter syndicate or federation was passed over. For the next century the individual cities were united as high trade conjunctures, with Hamburg and Danzig foremost.

As an effective power, the League ended with the Thirty Years War (1618-48) and its consequences. In 1629 it was decided that Hamburg, Lübeck and Bremen would deal on behalf of the League during the war. Perspectives on the later history of the Hansa are almost irrevocably tied up with the cross-currents of ever moving cultural and ideological positions in German society. Perhaps most credibly, the Thirty Years War was the crucible of the idea of a nation state with firm borders and this inhibited the pan-continental trade organisation. The League also failed, it is said, in the competition with mercantile interests in other countries, particularly in Holland, which were projecting their interests around the world, and also the new trade form, the joint stock company, such as the East India Company (1600), which had superseded and surpassed the medieval trading city as a vehicle for uniting investment and spreading the risks of overseas trade. Further, its earlier advantages in tax concessions and, particularly, the freedom of its member cities from feudal burdens was no longer relevant as feudal constraints on other

33 Theuerkauf, above n 17.
cities were progressively relaxed or removed.\textsuperscript{34} Fischer\textsuperscript{35} on the other hand laments growing dissipation of solidarity, and loss of an old dynamism, as the final closure of the League's pre-eminence, sublimating the policy of the old confederation into a maxim, attributed to the League without citation, "Common use before individual use", but not even the history he relates supports his nostalgic and utopian conclusion, as the history of the Hanseatic cities following the apparent demise of the League suggests.

In 1669 a Hansa Day was called in Lübeck, but only nine cities were represented: Lübeck, Hamburg, Bremen, Danzig, Rostock, Braunschweig, Hildesheim, Osnabrück and Köln. Without positive results the meeting closed, and that was the last Hansa Day in the history of the League. At a Peace Congress in 1678-79, the deputies of Hamburg, Lübeck and Bremen undertook to represent the interests of the League in the future.\textsuperscript{36} These cities continued as independent city states, and certainly as successors to the property of the League in foreign places such as the trading offices in Bergen, London and Antwerp, which were dissolved and sold in 1774, 1853 and 1862 respectively.\textsuperscript{37} Lübeck, Hamburg and Bremen retained their independent status at the Vienna Congress after the Napoleonic Wars mainly through the efforts of the Bremen representative.\textsuperscript{38} Frankfurt an der Oder (in the East) retained the title of a Hanseatic City until 1866. After some discussion of unifying Lübeck with Hamburg in the early 1930s, Hamburg subsumed the former leading city with legislation in 1937.\textsuperscript{39} It is said that Hitler wished to break the independence of this city, with "Peace Without - Peace Within" inscribed above

\textsuperscript{34} M North "Wandel der europäischen Handels- und Wirtschaftsformen" in J Bracker (ed), above n 4, Vol 1, 142.

\textsuperscript{35} Fischer, above n 14, 29.

\textsuperscript{36} Rezeß des letzten Hansatages von 1669, Lübeck Archive: see J Bracker (ed), above n 4, Vol 2, 601.

\textsuperscript{37} R Postel, "Der Niedergang der Hanse" in J Bracker (ed), above n 4, Vol 1, 141.

\textsuperscript{38} Ibid Vol 1, 673.

\textsuperscript{39} Ibid Vol 1, 674.
her ancient Holstentor city gate dating from 1466, because he was refused entry to make a speech there in his earlier career. Today only Hamburg and Bremen describe themselves as free Hanseatic cities and, as separate states within the German federal republic, retain relative autonomy.

The Hansa did not have a Constitution and had no common seal after that of the Gotland Co-operative was dispensed with. The documentation of a transaction between the League and an external entity was sealed individually by each city wishing to become a party to it. At least until the middle of the 16th century, it had no fleet, no personnel, no regular sources of money and no army. Of all the aspects of its 500 year dominance of Northern European commerce, the structure of the League itself is perhaps its greatest mystery, and especially so because in other spheres there was great dedication to the creation and maintenance of records. Puhle40 concludes that from the beginning the lack of a formal internal concord between the cities was in their common and individual interests, particularly in their day-to-day dealings with neighbouring feudal overlords and with foreign powers.

From an Australian perspective it is difficult to see that the idea of the Hansa has actually ended, even if it is not imaginable that Hamburg, Lübeck, Bremen and Gdansk could unite to blockade Norway. It does remain imaginable, for example, that in the post Cold War period the shipbuilding Hanseatic cities of the West might have reached an influential accommodation about closure of that industry in former East Germany's only shipbuilding port of Rostock. In other words, the Hansa simply changed form and moved on. Nevertheless, as the League's European agencies were being closed, new Hanseatic consulates were being opened around the world - between 1844 and 1860 in Adelaide, Melbourne, Geelong, Hobart, Sydney and Brisbane, and between 1861-67 in

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40 M. Puhle "Organisationsmerkmale der Hanse" in J. Bracker (ed), above n 4, Vol 1, 146.
King George Sound (WA) and Newcastle (NSW). Especially in the smaller Hanseatic cities one might find an entrepreneur in almost any trade, from tow-trucks to insurance, using Hanseatic nostalgia in public relations. Until recently the German airline *Luft Hansa* serviced Australia, but now corporatised and largely privatised, it has entered global accommodations with other airlines which operate "feeder routes". The real point is, one might speculate, that at least from 1558 when she founded her own stock exchange, Hamburg had overtaken Lübeck and the League itself to become Germany's most important commercial centre. Hamburg did this by projecting her trade westward, and through investment in foreign ventures which were not so obvious as a Hansa fleet arriving in the harbour with offers of unimaginable wealth in exchange for a tax-free port and access to primary resources. Even if the joint stock company and lucrative trade with more distant countries spelled the end of the Hanseatic League as a confederation of trading cities, Hamburg was close to the cutting edge in bringing these innovations to perfection. From fitting out ships of the Spanish Armada in 1588, to providing ships for the Dutch East India trade in the 1720s, Hamburg very comfortably transcended her status as a medieval trading city to become one of the world's major global investment and trading capitals, and all the more respectably when one considers that Germany took colonies for token reasons. Certainly in legal terms, one might suggest that the continued maintenance of a Hanseatic tradition by Hamburg and Bremen has until very recently been centrally concerned with a civic tradition based on a conjuncture of free trade and a deep seated republican social and democratic responsibility.

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41 These were later taken over by the North German Federation, and then by the German Reich.


43 See for example the tones of pride expressed when contrasting the Hamburg tradition with those regions of Germany subject to monarchical interference in A Noldeke, *Hamburgisches Landesprivatrecht*, Halle, 1907, 39.
In 1375 a list was compiled of Hamburg's 8000 citizens. Class divisions in the medieval Hanseatic city have been gauged from it.\textsuperscript{44} The list reveals that the upper stratum of the population of City Councillors, import-export merchants and export brewers comprised 20%. The middle class of skilled craftspeople, coopers, local brewers, city officials, shopkeepers and street traders comprised 40% of the population. The lowest stratum of apprentices, less skilled craftspeople, handworkers, merchant's assistants, domestic servants, porters, transport workers, ship crews, casual and seasonal workers, prostitutes, the disabled and beggars comprised only 40% of the population. Even remembering that the port city had a sizeable immigrant population which could not, or could not immediately obtain citizenship and thus might not have been counted, the relative population strata do not resemble a feudal city, which in other places could be expected to have a lower class twice this size, and a much smaller middle class.

The administrative organisation of the entire city was largely geared to trade and maintaining the infra-structure which it required. The Councils of the cities played a very important role. Positions on the Councils were filled mainly by merchants in any case, but still they addressed issues of internal city administration and maintenance of links with the Hansa and other external interests.

\textsuperscript{44} Museum für Hamburgische Geschichte, 1988.
Even from the 13th and 14th centuries, the larger Hanseatic cities had extensive city administrations providing services and infrastructure which in other places would not have been the function of corporate city administrators, but rather of the church or of charitable bodies established by feudal overlords. The collection of customs duties, immigration procedures, loading and unloading of goods, testing of goods, registration of ship crews and payment of harbour dues were all dealt with by different departments of the city administration. Events at the market were also strictly ordered, with regulations against discriminatory practices by both sellers and bidders, and concerning the manner and form of offers, the conduct of negotiations, the price, the weight, quantities and market times, the currency and coinage, and crimes of selling spoiled or underweight goods. Citizens of the city were taxed and obliged to participate in the nightwatch and weapons duties. Trade was conducted by trading corporations. Many citizens worked as members of an office for manual labour. There was provision for proof of legitimate birth and orderly lifestyle.

House construction, the establishment of an unruly or dangerous occupation, acquisition of a house through purchase, inheritance or consent, and all relevant questions of ownership had procedures through an office of the administration. Inheritance required proof of relationship by making a binding declaration. On this basis a certificate of the City Kanzlei could be obtained. It was recognised in the other Hanseatic cities to permit administration of the deceased estates of the mobile Hanseatic traders. There were regulations to police conduct, such as disturbances at night, and use of the streets for

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45 A Grassmann, "Die Städtische Verwaltung" in J Bracker (ed), above n 4, Vol 1, 359. Dr Grassmann presents the Lübeck administration as an example of a broader Hanseatic style at the height of the League in the late Middle Age and Renaissance. There is no reason to doubt this in relation to the larger central member cities. Common issues in administration were discussed at regional meetings of the member cities, and probably at Hansa Day meetings as well, leading to general adoption and refinement of similar administrative methods: M Puhle, "Organisationsmerkmale der Hanse" in J Bracker (ed), above n 4, Vol 1, 146, 148.
transporting goods, for cleaning the streets and there were general public health regulations. Social and welfare questions were addressed by the church and by the city, which assumed responsibilities in relation to the poor and beggars on the streets. The city administration was responsible for the construction and maintenance of public buildings, and also for church buildings, as well as defence positions such as the city wall and towers, gates and bridges, and harbour structures. It was also responsible for security of the wider area of land belonging to the city. Administration of the personnel who carried out these tasks also required extensive officialdom.

The city administration had policies for dealing with neighbouring territories. It was also involved in domestic issues such as economic and political developments in the wider sphere.

(a) The City Council and Council Offices

There was no formal separation of powers within the City Council. It combined legislative, executive and judicial functions until the 19th century. Wealth and privilege were no doubt connected with the appointment of a Councillor. Relationships with the general populace were not always smooth. In Hamburg there was considerable discontent in the 15th century, which reached a high point over food shortages following a bad harvest, and to top it off the mayor was selling grain to Iceland in his private mercantile capacity. A procedure was developed for dealing with such discontent. A Committee of Councillors and Citizens [die Bürgerschaft] met to discuss the issues. When agreement was reached, it was expressed in a written protocol called a *Recess*\(^\text{46}\) and these supplemented the written law. In this qualified sense, in Hamburg the Council

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\(^{46}\) The first Recess [Rezeß] was settled in 1410 and is often referred to as the *Magna Charta* of Hamburg's citizens: J Bolland, *Die Hamburgische Bürgerschaft in Alter und Neuer Zeit*, Hamburg, 1939, 14. The status of the Recess as a source of law is discussed below at n 91.
and the citizens did exercise together the legislative functions of government from the 15th century. For some centuries all citizens who satisfied the electoral franchise of owning land had a right of direct participation, but a collegial system emerged between 1712 and 1859. The first sitting of a popular chamber with elected members who did not own land or capital was on 6 December 1859. Certainly by the time of the new Constitution of 1860 a two chamber parliament had emerged, comprising the Council [now the Senate] forming the upper house and the popular chamber being called the Bürgerschaft. Complete abolition of multiple class and gender biased electoral systems had to await the Weimar Constitution of 1919.

At the centre of a Hanseatic city administration was the Administrative Office of the Council. In Lübeck and many other cities this office had been established in the first half of the 13th century. The authority it held relative to the Council members on one hand, and the more distant feudal overseer of the city on the other is still in question. Nevertheless, in some cities, at various times, this office developed functions which overlapped with those of other officials and of the Council itself. Foremost was the development of legal judgments and opinions. A distinction developed between the Council members who sat in court and the other officials in other fields who exercised judicial discretions. The Mayor published the resolutions of the Council and was concerned for their implementation.

The first recorded distribution of defined functions within the Administrative Office was made in Lübeck in 1298. Chancellor Albert Bardewik designated two Mayors, two

47 A Noldeke, above n 43.

chamber members, two members for the wine cellar,\(^{49}\) two overseers of the city for the court, two defence members to ensure security of the city area, two members to oversee collection of fines for breach of the peace, one member for the city strong room, one member for the book in which the laws of the city were written, and two members for the stables and the crossbows and shots.

(i) \textit{Kammerei - The City Treasury}

Generally the Kammer had been the office of a Fürst\(^{50}\) for the exercise of his judicial and administrative powers, and to manage his treasure. After the 12th century the Kammer denoted financial administration only. The Council members responsible for the Kammerei were the most important officials of the Council. They were first mentioned in Lübeck in 1227. At that time they did not constitute an independent office in their own right, but were charged with solving routine questions of the Council for final decision by the plenary meeting of the Council. Eventually they were responsible for all the monetary transactions and the assets of the city. This gradual centralisation facilitated economic planning in the modern sense. City accounts were substantiated by the Kammerei members. The method of accounting was also promulgated, to the standard that a merchant would maintain. The growing wealth of the cities enabled innovation in taxation. The cities found that through financial policy they could exercise considerable economic power over the territory outside that conceded to them.

\(^{49}\) The City Wine Cellar itself employed a Cellar Master and four cellar workers.

\(^{50}\) The position of \textit{der Fürst} was equivalent to a Prince in the English feudal hierarchy; see Appendix IV Glossary.
(ii)  

**Kanzlei - The Chancery**

A Kanzlei was generally the office of a Fürst, or of a city, for the preparation of documents and the discharge of written business. In Lübeck the Kanzlei was first placed as an executory organ under the direct supervision of the Council in around 1300. It mirrored the general development of the administration in its function, influence and particularly its production of writing. The influence of its literacy was important for the development of other fields of administration. A Secretary of the Council was first appointed in 1227 in Lübeck and became its most importantly invested official.

The highest non-elected official of the Kanzlei was the Protonotar, who emerged not so much as its head but as the head of the Land Title Registry. From around the 14th century the Protonotar tended to have a scholarly education. From 1416 the title denoted a secure position. With the rapid expansion of writing methods through the administration in the 14th and 15th centuries they received the title of Secretary. The Kanzlei head was responsible for the collected writing and record keeping methods. There were three secretaries for particular registration areas of the City Books, a copyist and an accounts clerk, all of whom were minimally qualified literate workers. From the 14th century there were also lower office writers outside the Kanzlei, and an office of Registrar was established in 1565.

In Lübeck a corporate lawyer was first permanently engaged in 1310-1320, and exercised great influence on the Kanzlei. While not belonging to it, specific tasks were performed originally as occasion arose; for example, travel with legations. Gradually the corporate lawyer assumed a separate role as the legal representative of the city. From the 15th century the possession of legal qualifications was a precondition of appointment.
(iii)   Die Wette - The Police Members

These members\textsuperscript{51} were concerned with police and regulatory duties, particularly the regulation of occupations. They administrated compensation for breach of the peace to victims and their families, and also had regulatory functions concerning land and water. In these fields they had judicial functions. Their administrative tasks included regulation of the market, and especially the market for foodstuffs.\textsuperscript{52} They assumed responsibility for fire fighting and for the harbour, including ship accidents. This led further to the supervision of trading organisations in Bremen and of ship building in Lübeck. In some places their responsibilities extended to the establishment and inspection of schools, probably deriving from their central task of regulating occupations. They were responsible for the streets and public places - policing and cleaning. The Wette were also concerned with health regulation ranging from barber shops to chemists, from wine to disease control measures, and not least the city musicians.

A police court was established in Lübeck by 1400, with the next resort for appeal before the collected City Council itself.

(iv) Other Functions

Further regulatory tasks of the Council included sewerage and the supply of drinking water. In Lübeck from the end of the 13th century delivery of water through pipes had already been instituted through private initiatives.

\textsuperscript{51} die Wetteherren; Wette derives from a North German concept of a fine for a breach of the peace under law.

\textsuperscript{52} For an extensive account see Grassmann, in Bracker (ed), above n 4, Vol 1, 357.
Further offices of the Council included bodies for the regulation of building, including private building, mills, water works, and bridges. The city employed a large number of lower officials to perform these tasks. The Council was also responsible for the prisons in the towers of the city wall, forests, and, at least in a regulatory capacity, almost every other field of human activity imaginable for those times.

The cities also had social welfare responsibilities, usually in conjunction with the church and, at other times, the offices for manual labourers concerned. This extended to hospitals and homes for the disabled. Guilds were also involved in care of the aged. Homes for the poor were often run by private bodies. Poor foreigners were accommodated by the city, and by the church. Toward the end of the 15th century the mentally ill came under the supervision of a city officer. Poor and uncared for children also went under city supervision. In Lübeck ten distinguished citizens were appointed for provision of the general poor. These institutions continued for over two centuries through initiatives of the citizens through the institutions of their cities.

3 Conclusion

Early in the medieval period the major Hanseatic Cities had been freed from the feudal realm and its characteristic real property law, featuring burdens and services. This is the meaning of a Free City. The cities confederated in the Hanseatic League in order to advance their mutual trading interests, and in doing so developed advanced methods of exercising economic power to meet external threats. Perhaps through the wealth generated by their trade and industries, the cities, and certainly Hamburg, emerged in relatively balanced social structures without despotic characteristics, and indeed with notable democratic processes beside their feudal counterparts, if less than ideal from a contemporary perspective.
The confederate structure of the Hansa also lent itself common development of advanced public institutions for the domestic governance of their autonomy. The roles of these institutions exhibited a high level of social responsibility, in the regulation of trade and domestic markets and in the care of the aged and disabled. Sophisticated methods of record keeping were also developed in comparatively early times. The initial impetus for the development of these methods appears to have been the preservation of the cities' autonomy from feudal overlords and their heirs, and the methods then extended throughout the administrative organs of the cities. Similarly, the enactment of early Codes of City Laws appears to have been prompted by the need for the autonomous cities to exercise their authority so soon and as clearly as possible after excision from the feudal realm.

These early innovations in public administration, and the ethic of social responsibility which pervaded them, also led to pioneering developments in the administration of the private title to land, which in Hamburg initially drew upon and reorganised existing Saxon conceptions and principles, later was influenced by the reception of Roman law, and in the early modern era was further rationalised. Many conceptions of the real property law, such as the real securities, appear to have developed through "trial and error". Nevertheless, by 1840 the Hamburg land title registration system was highly sophisticated and rationally integrated, reflecting the centuries of experience which had contributed to its development. No doubt this is a significant reason for both the enthusiasm of the Torrens group to draw upon it in the development of the Australian Torrens system under Hübbe's guidance and its pivotal influence in the establishment of the contemporary German system.
B. The 1840 "Snap Shot" of Hamburg Real Property Law

1. Overview

In 1840, just before the Unification of Germany under Bismarck, and before the integrating initiative of creating a federal Civil Code, the BGB, the sovereign German provinces retained a variety of legal systems. The Hamburg civil law system provides an interesting example of the operation of German legal sources in this period, and the place of Roman law within them. Property Law is particularly interesting because of the strong and proud persistence of German legal principles from the Hanseatic era. As with the history of the Hansa itself,\(^53\) the tension between nationalist and plural interpretations frequently emerges. As an example of the former, Schalk\(^54\) hardly overlooked an opportunity to point out the disadvantages brought to the system by Roman law.

Baumeister\(^55\) is an excellent example of the latter, keen to solve problems by adapting Roman law principles where possible. Consideration of a spectrum of sources points very clearly to the central role of registration of ownership and abstract interests in land, confirming Hübbe's explanations in Adelaide and his history of the Hanseatic system.

Aspects of Hamburg private law also point very clearly to a concept of land title with

\(^53\) See above in text before n 35.

\(^54\) See above n 5. It should be noted that Schalk's book, published in 1931, demonstrates no more extreme nationalism than the writing of Savigny. Clear evidence of the work's distance from more extreme National Socialism of that time lies most obviously in the fact that it was printed in Times Roman rather than the Gothic typeface: contrast the last issue of Die Justiz (Vol 8, April, 1933) with Deutsche Justiz (Vol 95, 1933) or Juristische Wochenschrift (1930) for a clear demonstration of the diverging printing styles of the time. See also Bauhaus printing styles: J Willett, The Weimar Years - A Culture Cut Short, Thames and Hudson, 1994, 78-9. It must be added urgently that publication in Gothic typeface is not a sign of connection to National Socialism (see for example, G Anschütz, above n 48), but in the 1930s, publication in a modern typeface was positive evidence to the contrary. For a brief summation of National Socialist legal ideology see "Die Aufgabe de Rechtswahrers" (1938) 65 JW 1633.

immanent limitations, consciously developed to facilitate land use planning, and to other companion principles which facilitated efficient operation of the system, such as a principle of unjust enrichment and the ability to protect claims on a defendant's assets in general through a compulsory charge over specific land parcels.

2 Sources of Law

(a) Legislation

In 1840 the following legislative sources bore on Hamburg private law.

City Laws were made under the Hamburg Constitution as a decree of the two chambers of the Hamburg Parliament. There was also limited authority for the Council to produce delegated legislative instruments for approval by a committee of either chamber - the so-called Mandata.

As a member of the 1848 German Federation [Deutscher Bund], after 1849 its orders were important to Hamburg. They were binding on member states according to the Constitution of the Federation and applied to citizens when published as legislation by member state administrations.

We are concerned mainly with City Laws made by the Hamburg Council. In 1840 the most recent official consolidation and revision dated from 1603. A number of private

56 Especially concerning earliest history, see G Theuerkauf, "Recht, Rechtsaufzeichnung, Gerichtsbarkeit" in J Bracker (ed), above n 4, Vol 1, 361.

57 Baumeister, above n 55, Vol 1, 10-11.

58 See text above before n 48.


60 Stadtrecht von 1603.
collections of intervening amendments and Recessse were available. Before 1603, the landmark revisions were in 1270, 1292 and 1497. With respect to the real property provisions, a distinct textual lineage is discernible throughout these centuries of legislation. The production of these legal milestones in their milieu of expanding commerce and growing Roman law influence thus explains the City Law of 1603. In 1840 the earlier Codes were still being drawn upon in legal debate, providing a rich source of interpretative material. No doubt the complications of this situation prompted Baumeister to make the otherwise straightforward observation that although in the implementation of legislation the general rule applies that newer legislation overtakes older, but the extent of amendment is always in issue - how much did City Law of 1603 consolidate, and how much did it reform preceding legislation, Recessse and Bursprake? In addition, the status of provisions which had lost practical meaning over the centuries remained a problem. The text of many of the provisions relevant to real property remained relatively unchanged over almost 700 years, if reorganised and adapted linguistically. The sources drawn into the Hamburg statutes included Saxon custom and the Laws of Lübeck, supplemented by provisions of the Sachsenspiegel.

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61 The most famous of these was C D Anderson, Hamburgisches Privatrecht, Hamburg, 1782/87. See also Klefeker (attrib. editor), Sammlung der Hamburgischen Gesetze und Verfassungen, Piscator, Hochdeutschen & Hochdeutschen Rathshuchdrucker, Hamburg, 1785 and Verein für Hamburgische Geschichte, Der Stadt Hamburgs Gerichts Ordnung und Statuta, Perthes-Besser & Mauke, Hamburg, 1842.

62 The most important provisions are set out in Appendix II.

63 On the Recess [Recész] as a source of law see text below at n 91.

64 On Bursprake as a source of law see text below at n 90.

65 Baumeister, above n 55, Vol 1, 13.

66 The most important provisions are reproduced in Appendix II.

67 After the Law of Magdeburg, Lübeck Law was the most frequently adopted Hanseatic mother law. Ebel, above at n 4, 24.

68 Baumeister, above n 55, Vol 1, 3. The Sachsenspiegel (Mirror of the Saxons) was compiled around 1220 and expanded sometime before 1270, purporting to contain the norms of the Saxon people. It is attributed to the Ritter (knight) Eike von Repgau and was written in lower German. Most editions, including those for Dresden, Heidelberg and Oldenburg, derive from an edition by the Brandenburg judge Johann von Buch. Its legal weight is uncertain, appearing to describe the good Saxon life. It was damned as heretical in
The older written City Laws did not strive to be codifications, in the sense of a systematic and complete statement of law in the way that many post-Enlightenment codifications strove to be. In Hamburg the influence of Roman law on the legislation grew with each revision from 1292.

The City Law of 1270 (Ordeelbuch)

The author of this Codification of the City Laws was the Notary to the City Council, Magister Johann von Boizenburg. The real property law provisions are in Part I, from Article 5 onward, in Part II and Part VII Art 12. Part I contains procedural and substantive provisions concerning the transfer and ownership of land through sale and inheritance, the law concerning the pledging of property, restricted building law and tenancy law. Part II concerns rentcharges. Schalk found the Ordeelbuch reminiscent of the Sachsenspiegel in its method of reorganising the legal provisions. He sought to make no further substantive comparison, and given his enthusiasm for Saxon law we may conclude that there was no deeper similarity, or Schalk would have drawn attention to it.

The Hanseatic City Laws, in contrast to Land Laws applying to the rural hinterland, generally departed from the Sachsenspiegel. Indeed, Schalk added an alternative conclusion that the Ordeelbuch was in the context of its times a deliberately ordered compilation. Schalk confirmed Lappenberg’s conclusion that the Ordeelbuch 1374 by Pope Gregori XI, possibly because it was acquiring the power of national law. In its description of good life and proper station it expresses the unwritten common law of feudal life, particularly emphasised by the feudal relationships of patronage and deference which leap from its illuminations. In any case it is linked to feudal provincial life rather than to life in the free Hanseatic cities. See generally E Koolman, E Gäßler and F Scheele, Der Sassen Speyghel - Sachsenspiegel - Recht - Alltag, 2nd ed, Isensee Verlag, Oldenburg, 1995.

89 Before development of the Grundschuld (land debt) and the Hypothek (mortgage), with its Roman law similarities, transactions are best described as pledging (die Pfändung), without implication of retention of possession by the creditor unless expressly mentioned; see generally S Buchholz, Abstraktionsprinzip und Immobiliarecht - Zur Geschichte der Auffassung und der Grundschuld, V Kostermann, Frankfurt aM, 1978 - special edition (1978) 8 Ius Commune.

70 Rente and Erbzins were forms of annuity secured over land. The development of forms of mortgage from them is very significant, and will be dealt with below.
distinguished the oldest Law of the City of Hamburg as "...pre-eminent before all other old City Laws". The law of 1270 was revised in 1292 and followed the contents of the City Law of 1270, Chapter C being devoted to Estates and Chapter D to Rentcharges.

The City Law of 1497

While the written text of the Code of 1497 affords portrayal as a mere amendment and reorganisation of the pre-existing law, and thus the Reception of Roman law might be minimised, Binder's research of its medieval context and remarkable illuminations emphasises the importance of the legislation for the status of Hamburg at that time as an international city, which, considering the time devoted to preparation of the code, was clearly open to Roman legal ideas well in advance of the official German reception in 1495. In Binder's view, the impetus for the great project to create the City Law of 1497 lay in a dispute at the level of the Reich about the status of Hamburg law made under the privileges granted by the Grafen of Holstein, following excision of the free city from the feudal domain. The dispute centred on the extent of the new judicial power of the City Council vis-à-vis the judicial power of the Grafen of Holstein and the courts of the Reich.

The City Law of 1497 was advanced in the dispute as a new legal constitution for the

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72 The revision appears to have first taken effect in 1306 and was used in a decision of the City Council in 1330. Anderson referred dismissively to a dispute about whether the Law was ever made at all: C D Anderson, *Hamburgisches Privatrecht*, C W Meyn, E. Hochelder & Raths Buchdrucker, Hamburg, 1787, Vol 1, 227.

73 Erben.

74 Erbzins.

75 Schalk, above n 5, 10.


77 See below n 99.
City. This is one reason why great resources were devoted to its legal and artistic production. The illuminations stand beside those of the Sachsenspiegel as the most remarkable illustrations of legal writing produced in the Middle Ages. These were combined with legal reworking by Dr Dr Hermann Langenbeck,78 within a sophisticated principle of integrated legal and artistic interpretation.79 The resulting legislation no doubt advanced the status of Hamburg as a jurisdiction deserving the independence which was indeed achieved. This City Law also deserves great historical prominence as a contemporaneous legislative reaction in Hamburg to the Reception of Roman law. Although reforms were made of the laws of other cities around that time under the same influence, in Hamburg the reform produced a new arrangement and division of the existing legal material according to Roman law concepts. Nevertheless, as Schalk points out, the content of substantive real property law was barely touched. Significant changes did occur in title registration practice in 1497 and again in 1603 when there was further reconciliation of German and Roman concepts and laws in a second stage of reception.

The City Law of 160380

The reforms of 1603 brought important change to the collected private law of Hamburg. The legislative reforms were followed by administrative reform of the City Books, creating a Land Title Register ordered in much the same way that the present German registers are, and the Torrens paper title registers were organised in Australia. The reforms had been called for81 at least since the Recesse82 of 152983 and 1548,84 and by the reform

78 Mayor of Hamburg 1481-1517.

79 Binder, above n 76, Vol 1, 368.

80 In effect from 1619 - reproduced in Verein für Hamburgische Geschichte, Der Stadt Hamburg Gerichts Ordnung und Statuta, Perthes-Besser & Mauke, Hamburg, 1842.

81 Baumeister, above n 55, Vol 1, 5.

82 See below at n 91.
The new City Law was written in High German, whereas the earlier City Laws were written in Plattdeutsch. The entire material is a fundamentally altered arrangement made to accord with new perspectives, including the Nürnberger Reformation of 1564.\textsuperscript{86}

According to the decree of the Hamburg Council for publication of the law, the main aim was "to bring such old statutes, provisions and court rules into an intelligible policy". A Commission of 12 delegates was appointed by the Council and although it was passed on 10 October 1603 without dispute it later encountered controversy. The mayor, Möller, was appointed to revise it, and his edition was published in 1605. Its objectives were to:

- set out the existing written law in High German and organised in a more contemporary way, and
- enhance it through consideration of the German common law [adapted Roman law] and bring Hamburg legislation into harmony.

Its real property provisions are, nevertheless, a compilation of the law of 1497 supplemented by Court rules, Recesse and Burspracke from the intervening time. Many other sources were drawn upon and often these can be traced as literal translation of:

- Roman law
- Nürnberg Reformation of 1564
- Lübeck law
- Kursächsisch Constitutions
- Imperial statutes
- Hanseatic Sea Law of 1591

\textsuperscript{83} Art 50.
\textsuperscript{84} Art 9.
\textsuperscript{85} Postulate der Vierzig Bürger of 1557, Art 3.
\textsuperscript{86} Schalk, above n 5, 11.
The Möller edition was still considered to have problems. Apart from some more fine-tuning which concluded with the Recess of 1618, by 1840 the only later substantive amendments concerning private law, were the Bankruptcy Law of 1753 and the Advocacy Law of 1844.

The City Law of 1603 was arranged with the procedural provisions in the first part of the Code and the criminal law in the fourth. Private law was contained in the second and third parts, and the provisions concerning immovable property are distributed through those parts. While generally the City Law of 1603 was strongly influenced by the Reception of Roman law, with respect to real property law the Reception actually had the smallest influence - indeed the evidentiary credibility to be accorded to the land title register was bolstered in accordance with longer term trends since 1270. The same trends could, according to Baumeister, also be seen as a unique adaptation of two vital Roman law principles -

1. that a younger right must give way to an older, *qui prior tempore est quia potior*: a principle already present with the first Hamburg register, and

2. the principle of good faith, that rights are taken subject to those of which one has knowledge, resolved by reinforcement of the credibility of the existing public transparency procedures - public symbolic transactions and registration, or in other words, procedures in which the public could have faith because their validity would be upheld against all of the world, and which thus invested rights *in rem*.

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87 Baumeister, above n 55, Vol 1, 7.
88 Baumeister, above n 55, Vol 1, 9.
89 Falliten-Ordnung.
90 Vormundschafts-Ordnung. *Vormundschaft* equates very generally with Guardianship; see text below following n 321.
The elements were present in the existing law. The received Roman law principles were read so far as possible, and requiring little effort, to accord with them.

Recesse and Bursprake

These were regarded as further sources of law. The Recesse were conceived of as agreements between the Council and the citizenry or in later times the popular assembly. The City Seal was applied to them and a copy was displayed in every Parish. The operation of a Recess is illustrated by that of 1618. When the City Law of 1603 was being further perfected, it was noted that the exception to the non-contestability of registered land title in favour of persons absent from the City was so general that it did not represent contemporary custom, although it faithfully replicated the corresponding provision of the City Law of 1497. A Recess was thus negotiated and it was accorded the status of a binding gloss on the provision tantamount to an amendment.

The Bursprake were collections of regulations which, in Hamburg until 1810, were consolidated twice each year, published and read in public. In Lübeck different Burspraken were read from the Town Hall balcony, and displayed nearby, four times in the year and they tended to reflect the issues of the season. For example, early in the year when the merchants were about to set out on their travels there were directions to put the house in order, to equip it with food and measures for its security, and to remind the citizen about the crime of supporting pirates. At the beginning of the market season there were always directions about the coinage. For the Jakobi reading (22 July) there were entreaties to the unemployed to help with the harvest. In November there were

91 Baumeister, above n 55, Vol 1, 4. See above n 46.

92 City Law of 1603, I, 30, 3 (see Appendix II). See text following n 264.

reminders to stock the house for winter and to go out on watch punctually. In Kiel the Burspraken also contained provisions about the conclusion of sales, about harbour questions and shipwreck regulations.

(b) Customary Law

In this category Baumeister included the practice of the courts when, providing general principles with application in private law, as a legal source of similar validity and effectiveness as the legislature. Customary law encompassed express rules, and filled in where there was an absence of law. It could also be used to modify the effect of a law which has fallen into disuse. If its content were disputed, it was to be proven as a custom or trade usage. To this end Baumeister catalogued the existing collections of court decisions.

In this connection one might raise Baumeister’s reference to the private law position of Jewish citizens in significantly Lutheran but also cosmopolitan Hamburg. Jewish citizens were acknowledged to have their own law applied in fields such as matrimony and inheritance, the content of which was to be proven in the way that foreign laws were proved. Baumeister went on to describe significant provisions of the Laws Of Moses and The Talmud in these areas.

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94 das Gewohnheitsrecht.
95 Baumeister, above n 55, Vol 1, 14.
96 Ibid 23.
97 Ibid 57-60.
98 The Jewish population of Hamburg increased significantly in 1585-89 when Sephardic Jewish refugees sought refuge there from persecution in Portugal, as they did in Amsterdam and other cities of Northern Europe. With strong connections between the dispersed communities the wealthier of them were able to make important contributions to the success of the city’s international trade. Not all sections of Hamburg society welcomed the new arrivals. In 1603 there was popular demand for their expulsion. This was rejected by the Council, but from 1612 their status was officiated and subjected to strong restrictions. Wealthy
This source may also be referred to as Imperial common law, Pandekten law, das Gemeine Recht, usus modernus pandectarum, or ius commune. This refers to the legal principles of the Holy Roman Empire officially received into Germany in 1495. Baumeister explained that failing native legal norms, the want was to be supplied from this source, thus forming a subsidiary common law beneath particular local law, and he alleged against Klefeker an error in placing neighbouring anglo-saxon and Lübeck law as the subsidiary source.

merchants in the Jewish community nevertheless joined in founding the Hamburg Bank in 1619. Although subject to periodic friction, and many moved to neighbouring Danish areas (Glockstadt and Altona) whence they could still enter Hamburg, and remote cities such as Ctzensen and Amsterdam, most important members of the community remained. Great insight into this era may be gained from the 1691 memoirs of the female merchant, banker and mother of 12 children, Glückel of Hameln: The Memoirs of Glückel of Hameln [trans & ed M Lowenthal] Schocken Books, New York, 1977. 18th century Enlightenment in Hamburg brought greater admission to society and civic rights. During the French Occupation of 1806-1813 they gained equal civic rights, but controls were again applied although they helped to expel the French. The Frankfurt settlement of 1848 led in 1849 to separation of religion from political life. One long standing formality of control was the need to obtain a certificate of a City Council Commissioner before real estate transactions between Jewish and non-Jewish residents could be completed: C D Anderson, Anleitung für diejenigen, welche Sich oder Anden in Hamburg oder in dem hamburgischen Gebiete Grundstücke oder darin versicherte Geide zuschreiben lassen wollen, Friedrich H Restler, Hamburg, 1810, 73. The difficulty which this presented in practice would be difficult to ascertain, but prominent Jewish citizens certainly owned land in Hamburg at the time of the Great Fire (1842) and probably always had. Baumeister made a very strong public speech demanding equal rights for Jewish citizens, on the common principle of justice "equal duties - equal rights": Vortrag des Herrn Dr Baumeister gehalten am 19 Mai in der "freien Zusammenkunft" der "Gesellschaft für sociale und politische Interessen der Juden", J J Halberstadt, Hamburg, 1847, 4. In it he referred to Jewish colleagues at university and in the legal profession. Despite complete repeal of legal restrictions, difficulties still remained in wider social acceptance - in obtaining employment, etc. Difficulties posed by Guilds when setting up business were actually one factor in some members of the Jewish community gaining great prosperity in the 19th century through investment in new technologies and industries which were not subject to Guild control. Commercially prominent contributions before the 1930s included directorship of HAPAG shipping and also banking.


(d) Legal Literature

Baumeister discussed$^{101}$ the value of various texts and commentaries not so much as a source of law, but as essential tools in attaining understanding of such a difficult but rich constellation of legal sources.

3 Securing Title and Claims to Landed Assets

Although the real property provisions of Hamburg Law were largely repeated in the revisions across the centuries, the development of the personal obligatory rights of the Demand$^{102}$ and the Claim$^{103}$ had considerable impact on them. In Hamburg in 1840, as in preceding centuries, registration in the land title register, the City Books,$^{104}$ was the primary and virtually absolute method of securing ownership and limited proprietary interests with respect to land. However, a problem which both the Australian and German land title registration systems still experience is the discernment of claims which relate to a particular land parcel from those which are conceived as general and personal to the obligor. This problem is thrown into sharpest contrast when insolvency of the obligor requires a decision as to whether the claimant may seek privileged satisfaction from a particular real asset or rank equally with other unsecured creditors for a share of whatever is recovered from the insolvent estate. In Hamburg the subjection of all landed assets to general obligations was a source of debate from enactment of the City Law of 1603 until abolition of the general form of caveat, the Impugnation, in 1802 - the repercussions of which were still being discussed into the 1850s. Because the concept

$^{101}$ Baumeister, above n 55, 16-23.
$^{102}$ die Forderung.
$^{103}$ der Anspruch.
$^{104}$ The City Books are detailed below in text following n 124.
of a Claim also encompasses an enforceable claim to performance of the obligation, superficially the issue vaguely resembles the availability of English equitable remedies, but this comparison actually obscures the point that in 1840 a wide range of, so classified, unregistered general personal obligations could in principle be attached to land. Before 1802 this could be done quite easily with an impugnation, but following its abolition there was confusion about the appropriate procedure to do so. This issue requires, before embarking on the fascinating evolution of the Hamburg land title register, some consideration of symbolic transactions freely entered and the assertion of claims to landed assets through compulsion.

(a) Free Will and the Juristic Act

The juristic act\textsuperscript{106} of German law might be seen as the simplest form of security available in the German system, in the way that an English deed under seal is. However, the juristic act is also much more than that. Historically the divergence of the real property law systems of the German Lower Saxons of the Hanseatic cities of Hamburg and Lübeck and the English Angle-Saxons can be explained as diverging developmental directions from a common starting point with respect to symbolic transactions, largely following from the impact of Norman-French feudalism on the latter, just as Hübbe astutely pointed out in Adelaide.\textsuperscript{107} Baumeister\textsuperscript{108} explained the importance of the juristic

\textsuperscript{105}Zweigert & Kötz adopt a similar position on the equivalent point in contemporary German law, pointing out that a party to a contract is entitled to demand performance (§ 241 BGB) and thus may obtain an order for performance in all but exceptional circumstances: K Zweigert & H Kötz, Introduction to Comparative Law 2nd ed (trans & ed T Weir) Clarendon Press, Oxford, 1987, Vol II, 158 ff and especially 173.

\textsuperscript{106}das Rechtsgeschäft. Although it is very tempting to translate the term simply as "legal transaction" and treat its unique aspects as requirements of formal validity, as one might the application of seals to an English deed, this does not capture the essence of the ceremony, and thus I have adopted juristic act informed by Zweigert & Kötz, above n 105, Vol II, 1 ff, and Chung Hui Wang, The German Civil Code - Translated and Annotated with an Historical Introduction and Appendices, Stevens & Sons, London, 1907.

\textsuperscript{107}U Hübbe, The Voice of History and Reason brought to bear against the present Absurd and Expensive Method of Transferring and Encumbering Immoveable Property, David Gall, Adelaide, 1857.
act, stressing its origin as a symbolic transaction and its connection to the Auflassung.  

He noted that many symbolic transactions had disappeared, such as the giving of a ring when taking possession of a house, but many still survived, such as giving a ring at engagement for marriage, the fall of the hammer at public auction, a handshake on a promise. While in 1840 these were no longer essential for the validity of the transaction, they confirmed it and marked the moment of being bound to it. In the past, as many witnesses as possible were assembled for a legal transaction, and of the highest possible rank, but with writing and the reception of Roman rules of evidence, this was no longer important. Some examples of acts which still attracted a multitude were making a will, acquiring citizenship and marriage. Private written documents were first mentioned as taking precedence over a completed juristic act at the end of the 15th century. With respect to a land transaction however, Baumeister advised, writing was truly necessary only to facilitate its later registration. However, the use of a notary became necessary for transactions with documents and instruments which would attain public faith. The idea was to entrust to a notary the creation and execution of documents which must have the highest standards of correctness, completeness and credibility, such as minutes, instruments, powers, verification of the correctness of signatures, and so forth. So, the notary had be satisfied about the presence of the requisite elements of the transaction, such as certainty over identity of parties, their power of disposition, specificity and clarity of the declaration of intention, and the veracity of the facts attested. In the rule, every notarial act had to take place before the notary, and two witnesses or another notary. An


109 die Auflassung, or Verlassung in older Hamburg texts, is the legal procedure or ceremony in which a transferor personally declares his or her intention [die Willenserkärun] to assign or create the relevant interest in the land in the presence of the other party and, formerly in Hamburg, before the Council, then later a court and now a notary or an official of the Land Title Registry [§ 873 II BGB]. It thus corresponds functionally closest to the settlement in the Torrens system, where the parties meet to exchange money for completed registrable documents in completion of the transaction.

110 Baumeister, above n 55, 64-5.

111 Reichsnatatatsordnung of 1512, and later the Hamburg Notariatatordnung of 1815.
act which in form breached the Act could still take effect as a written private document, but not if it lacked a substantive requisite.

In some transactions, judicial completion was required. The Auflassung ceremony was one of these, taking place before a court in order to secure the evidence, because of the transaction's importance, to provide publicity of the transaction, and because its legal consequences occurred virtually straightaway. However, for Baumeister, the publicity of the transaction was already a shadow of its historical significance, having lost its meaning when the documentation of the minutes of the ceremony "... R. hat verlassen" ["... R. has quit (the property)"] in the act of registration was separated from the Verlassung ceremony itself.

(i) The Auflassung

As noted, the Auflassung, or Verlassung, was such a symbolic ceremony from the earliest time. The transferor of the land made a clear declaration of intention to quit custody of it. The details of the symbolic aspects are not clear. Schalk mentions the symbolic raising of a sword, and Baumeister refers vaguely to handing over twigs. Gries described the Hübbe-contemporary Verlassung ceremony [or, Auflassung, vestitura, or investitura] as a public declaration by the present proprietor, before the City Council in one of its weekly audiences, of his intention to transfer his estate to a nominated person. The ceremony afforded an opportunity for others claiming interests in

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112 Baumeister, above n 56, Vol 1, 67.
113 Of the vendor's title for example.
114 Baumeister, above n 55, Vol 1, 67.
115 Schalk, above n 5, 18.
116 Baumeister, above n 55, Vol 1, 67.
the property to express them, and to challenge the transaction. The transaction was then judicially declared valid. Over time the importance of registration had grown to the point that certainly by 1840 the ceremony had no effect unless registration followed, while, on the other hand, the ceremony was also a pre-condition for valid registration.\textsuperscript{117} The function of the City Council in this procedure would today be described as judicial.\textsuperscript{118} The early provisions refer to the ceremony taking place before the whole Council, but certainly by 1603 only two members had to be present.\textsuperscript{119} The ceremony was an opportunity to raise objections. Naturally the vital aspects of the ceremony were recorded in written minutes which were entered into the City Books. The City Books were accorded superior evidentiary status.

4  \textit{Registration in the City Books}

The development of writing was a major contribution to the emergence of a Hanseatic form of administration.\textsuperscript{120} The City Book\textsuperscript{121} differed from other forms of city record in that it held in legal transactions a special evidentiary status claimed by private citizens in their own interests, and was not simply serving the internal business of a public office.\textsuperscript{122} Although in principle there was to be one City Book the spread of literacy in the administration and the ever more complex demands of city administration led to division of record keeping into several "City Books". Such observations, set out in great detail by


\textsuperscript{118} See City Law provisions in Appendix II.

\textsuperscript{119} Schalk, above n 5, 19.

\textsuperscript{120} A Grassmann "Die städtische Verwaltung", in J Bracker (ed), above n 4, Vol 1, 355-6.

\textsuperscript{121} das Stadtbuch - über civitatis - der stat bok.

\textsuperscript{122} W Ebel, cited in A Grassmann "Die städtische Verwaltung", in J Bracker (ed), above n 4, Vol 1, 350.
Grassmann,\textsuperscript{123} about the development of record keeping in Hanseatic cities, are borne out by study of the early development of land title registration in the City of Hamburg.

The system of land title registration current in Hamburg in 1840 can be traced back to the 13th century. In the 19th century, Baumeister\textsuperscript{124} described the following four books as relevant to land title -

\begin{itemize}
  \item \textit{das Verlassungsprotocol} [Minutes of Real Transactions] - recorded the minutes of Verlassung ceremonies concluded before the Council with respect to virtually all imaginable real property transactions with Estates [\textit{Erbe}] and interests in land [such as \textit{Rente}]. The minutes were then entered in the \textit{Erbe Book} or the \textit{Rente Book}, as the relevant City Books, in the order of ceremony, and were then bound and archived.
  \item \textit{das Erbebuch} - this City Book developed from the \textit{liber actorum coram consulis in resignatione horeditatum} (1248-1274), which was a comprehensive chronological register of a variety of transactions effected before the City Council with respect to ownership and non-fiscal interests in land. It was compiled from the minutes of Verlassung ceremonies. The registration entry took the form of a statement of the parties and the transaction - "A. quits ownership in favour of B."\textsuperscript{125} The land was then described according to the street and neighbouring land - plans of the land were used only for new subdivisions, re-subdivisions, consolidations and some other transactions. Further explanations of the transaction were added if necessary, followed by a statement of the resulting situation - "so that this Estate now belongs to B, the new owner."\textsuperscript{126} Any limitations of the transactions, and how such conditions were to be satisfied, were then added. References to preceding and successive transactions with the land were made in the margin. It was called the \textit{Grundbuch} [Land Title Register] from 1868 until 1900.
  \item \textit{das Rentebuch} - this book also developed from the \textit{liber actorum} (1274) to register chronologically transactions effected before the City Council concerning fiscal securities. From 1868 until 1900 it was called the \textit{Hypothekenbuch} [Mortgage Book].
  \item \textit{das Hauptbuch} (1659- ) - this index was developed to consolidate the information recorded in the \textit{Erbe} and \textit{Rente} Books and present it in a more accessible form. Each land parcel was accorded a separate sheet (Folium)
\end{itemize}

\textsuperscript{123} A Grassmann, ibid 355-6.

\textsuperscript{124} Baumeister, above n 55, 198. Historical observations added from Schalk, above n 5, 41-61.

\textsuperscript{125} "A hat verlassen an B."

\textsuperscript{126} "... so daß dieses Erbe dem B (dem neuen Eigentümer) eigentümlich zugehört."
located in a volume (Band). The location of the land was identified by reference to the neighbouring land. There was a list of the successive owners and interest holders, with further reference to the relevant transactions recorded in the appropriate City Book. It did not hold independent validity, but rather, was dependant upon the City Books which it indexed. Nevertheless, its practical reliability was such that in 1900 it became the modern German Grundbuch [Land Title Register] for Hamburg. It was strikingly similar to the modern Torrens paper register book.

Historically there were also other City Books. Of most interest was the Schuldbuch (~1270-1782) which recorded acknowledgments of debt and promises to pay within a specified period. It also recorded securities offered for the debt. These could be over movable or immovable property or over all the assets of the debtor. A Kontraktbuch was also maintained at least between 1300 and 1599, recording executory contracts concerning movable and immovable property and noting securities for performance.

The rationalisation of the City Book system which commenced in 1659 and the laying out of the Hauptbuch is the point when the inspiration source for the Torrens system crystallised in its most formal manifestation. Continued strengthening of the status of registration of land title in the City Books challenged practical administrative capacity to provide information about interests in land. The entries in the Books had been accumulating in straight chronological order over almost two centuries and only with great effort could an accurate picture of the ownership of and burdens over a particular parcel of land be obtained. Gerhard Kelpe worked in the office of the Council with responsibility for the Books between 1657 and 1693. He proposed establishment of the Hauptbuch in Volumes with a separate Folium page for each land parcel. All transactions concerning the parcel were to be abstracted on to the single Folium. The

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127 Such systems are described as real folien systems to distinguish them from the personal folien systems in which the information is recorded according to personal identity, as was attempted during the French occupation of Hamburg (1811-1814).

128 Schaik, above n 5, 47.

129 Baumeister, above n 55, Vol 1, 201 n 11.
Hauptbuch Volumes for St Petri Parish were laid out from 1659 and the other Volumes followed. The state of title to each parcel was traced back to the middle of the 15th century to ensure accuracy. At the commencement of each Volume there was a directory of streets, the abutting parcels of which were contained in the Volume. The Folium numbers were assigned to each land parcel according to its position in the street. The nature of the title was stated at the top of the Folium, for example whether it was a brewery title, an open space, or some other form of Estate.\footnote{130} Initially there were concerns that parcels might be left out of the Hauptbuch. There do not appear to have been any major problems on that score and these fears dissolved with time. Dealings with a land parcel were entered in the Hauptbuch immediately.\footnote{131} A reference to the full record of the transaction in the other books was added to permit investigation of the details of each transaction. The Hauptbuch was prepared in German, while the other books were compiled in Latin. The state of the Hauptbuch did not technically attract the protection of the doctrine of public faith in the register, and so resort still had to be made to the chronological Erbe- and Rentebücher, but their reliability was confirmed when in 1900 the Hamburg system was converted to the new federal German system, under the \textit{BGB} and \textit{Grundbuchordnung}, solely on the basis of the Hauptbuch.\footnote{132} An official abstract in German of the state of a title could be obtained inexpensively and, with respect to the time when it was made, it carried the protection of public faith.\footnote{133} In contrast to the Prussian system, a person was not required to show a legitimate interest in the land parcel to be permitted to conduct a search of its title in the City Books.\footnote{134}

\footnote{130}{See text below following n 143.}
\footnote{131}{Baumeister, above n 55, Vol 1, 205.}
\footnote{132}{Schalk, above n 5, 65.}
\footnote{133}{Baumeister, above n 55, Vol 1, 204.}
\footnote{134}{Schalk, above n 5, 68 n 36.}
(a) The Nature of Estates and Interests

(i) Seisin - die Rechte Gewere

The concept of die rechte Gewere still required discussion by Baumeister. In medieval times the Hamburg concept seems reasonably clearly to have approximated the English concept of seisin, as the best right to possession, and was obtained after holding the object for a year and a day. For Schalk the concept was the source of the relativity of the German concept of property, of which traces remained in the idea of social context. This stemmed from relationships with others holding proprietary interests in the same thing, and the right of self-help as both a right and an obligation to protect the object, and certainly land. In this sense the public recognition of Gewere was an entrusting of the appointed "owner". Although the reception of Roman law appeared to have led to an amalgamated total concept of ownership it was not a right to make use of the thing beyond its relative capability. Writing in the 19th century, Baumeister concluded that in contrast simply to possession, Gewere or Were meant the right of peaceful possession. This right was protected by criminal law, for example, by punishing those who disturb the peace of a house even if the people in occupation of it did not own it. Related to this was the second concept of Were - the factual power over a thing. The same concept applied to one's relationship to children who are in der Were

135 Baumeister, above n 55, 103-5.
136 Also the case with Sachsenspiegel, Book II Art 44.
137 Schalk, above n 5, unpublished manuscript, 187-195.
138 Ibid, unpublished manuscript, 187 n 9, and see § 153 Weimar Constitution of 1919, discussed below Part III, n 229.
139 Schalk, Ibid 190.
- that is, in one's care and custody.\textsuperscript{141} Baumeister thus explained that by his day Gewere was essentially the concept of possession, and the Roman law concerned with acquisition of possession applied to it,\textsuperscript{142} in contrast to former times when it had to be assigned in public ceremony [Auflassung]. Baumeister's view that the "care and custody" related to possession does not exclude Schalk's view that the implicit responsibilities also pervaded ownership, one of the rights of which is possession.

(b) \textit{Classification of Estates and Interests in Land}

As with contemporary German property law, the Hamburg system maintained the distinction between movable and immovable property, following the natural movability of corporeal objects. The status of ships remained in doubt because under the earlier law [1270, 1292, 1497] securities over ships had to be granted before the Council just as with many other similar transactions with rights in immovable property.\textsuperscript{143}

(i) \textit{Estates}

In the Hamburg system in the earlier 19th century ownership of land remained classified according to Estates.\textsuperscript{144} The concept of \textit{das Erbe},\textsuperscript{145} as in Saxon law, meant not only a deceased estate as today, but also the object of ownership in land, and also the object of

\textsuperscript{141} Modern: \textit{der/das Gewahrsam} - safe keeping, care, control, custody.

\textsuperscript{142} above n 55, 106.

\textsuperscript{143} Baumeister did not regard this as a pressing practical problem because ships were then generally held in common ownership by a society of ship owners: above n 55, 99. Although transactions with ships were recorded in the \textit{fiber actorum}, Schalk maintained that there were none in the Erbe- and Rente Books, and the ceremony had already passed from use by 1603: above, n 5, 88 n 3.

\textsuperscript{144} Baumeister, above n 55, Vol 1, 100-2; Schalk, above n 5, 87-93.

\textsuperscript{145} In Mittelhochdeutsch the noun was feminine - \textit{die Erbe}. 
limited proprietary rights over land, and the juristically analogous interests such as "entitlements" and "public proprietary permissions". In Hamburg the different types of Estate were distinguished according to permissible use of the relevant land, such as Brauerben [brewery land], Backerben [bakery land], Wohnenben [residential land], Buden [market stalls], Ställe [stables], Mühlen [mills], Schmiede [smith's shops], Speicher [warehouses] and so forth. The allocation of these was made very definitely with what today would be called "planning intentions". This was certainly the case with public proprietary permissions such as for goldsmiths, the Barbierämter, and the abattoirs which were deliberately located together in different parts of the city. It was also the case with the Estates. Of particular concern in the then largely timber-built port city were industries which used fire - such as baking, brewing and blacksmithing. In practice these were organised on a community basis or a street basis to ensure not only that each area had the convenience of one such facilities, but also that it was placed so as to minimise the danger posed by escape of fire.

... the [older] provisions dealt most importantly with dangers arising from urban relationships - harm to health and harm caused by fire ...

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146 According to Baumeister, the true meaning of Erb und Eigen ["estate and interest"] in City Law of 1270, IX, 11, Art 5, S. 1, 17: above n 55, Vol 1, 101 n 11.

147 Gerechtigkeiten and Ämter.

148 M. Schlüter, Von denen Eben in Hamburg, allen fremden und einheimischen Eigentümern, Hamburg, 1698, 1.1.12.5; C D Anderson, Anleitung für diejenigen, welche sich oder Andern in Hamburg oder in dem hamburgischen Gebiete Grundstücke oder darin versicherte Geldte zuschreiben lassen wollen, Friedrich H Restler, Hamburg, 1810, 25ff; Baumeister, above n 55, Vol 1, 100-1; Schalk, above n 5, 89-93.

149 Ämter - "nicht radicirte Realgewerke".

150 Viertelorganisation.

151 Straßeorganisation.

152 Interview with Professor Dr Landwehr, Seminar für Deutsches und Nordisches Recht, Faculty of Law, University of Hamburg, 23 October 1998 (record on file with author).

153 Schalk, above n 5, unpublished manuscript, 263.
Anderson explained that it was very uncommon and difficult to move the designation of an Estate from one land parcel to another, and referred to a case in 1805 when it was attempted to move a fish bakery from Nicolistraße to Lilienstraße.\(^{154}\) The Hamburg form of consensual caveat, the *Clauses*,\(^{155}\) could also be used to protect planning and environmental interests concerning land.\(^{156}\)

It is difficult to imagine a more graphic example of the concept of registered ownership itself being pervaded by public planning and environmental responsibilities. This view is supported by the restrictions on powers of the owner in a neighbourhood context with respect to environmental interference. Conceived as "neighbour rights,"\(^ {157}\) the topic was in Hamburg, as in the contemporary German system, conceptually an issue of Property Law limiting the powers of the owner over the object of dominion,\(^ {158}\) in contrast to the English conceptualisation of the issue as one of personal obligation in the Law of Tort. The restrictions existed for the benefit of private neighbours and for the public interest.\(^ {159}\) Naturally there were issues such as the need to achieve a common neighbourly approach to the replacement of building materials which overlapped land parcels, and to place outdoor toilets not closer than two feet [zwey Fuss] from the boundary.\(^ {160}\) On privacy grounds, a window was not to be placed in a building which overlooked a neighbour without his or her permission, unless it was opaque. The land owner had no arbitrary power to cause disadvantage to the neighbour through such things as misuse of

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\(^{154}\) Anderson, above n 148, 74.

\(^{155}\) See text below, around n 215.

\(^{156}\) Anderson, above n 148, 104-5.

\(^{157}\) *das Nachbarrecht*.

\(^{158}\) "Gesetzliche Beschränkungen des Eigenthums" in Baumeister, above n 55, Vol 1, 138.

\(^{159}\) Ibid.

\(^{160}\) Baumeister drew the second principle from "old Saxon law" in II, 51 of the *Sachsenspiegel* in view of the ambiguity of the City Law of 1603, Part II, Title 20, Art 13 on the point: above n 55, Vol 1, 139 n 8.
water,\textsuperscript{161} and especially when there was no advantage in it for the owner. The power of the owner in deciding what to do with the land in any particular situation was thus a discretion and not an arbitrary pleasure. When Baumeister discussed servitudes he described the "character of ownership" as "unlimited and exclusive dominion\textsuperscript{162} but this was expressly in contrast with the defined and shared powers of the owner of the dominant tenement over the servient. Baumeister raised directly the issue of presumed freedoms implicit in property ownership in connection with the rights of a neighbour to restrain nuisances such smoke or dust in unusual proportions, and even here the presumed freedom of the proprietor is not one to create nuisances but indeed to be free of them -

The concession of an extensive right of neighbours to restrain nuisances, namely against facilities which through fire risk, noises, offensive odours etc annoy the surrounding residents, must necessarily be underpinned by a legal or customary foundation, and not alone on account of a freedom of property which is to be presumed, because such a vague limitation in itself has absolutely no conceptual significance.\textsuperscript{163}

Baumeister could not, however, acknowledge a right of neighbours to enforce through litigation the designation of land use in a title, or the limitations on real entitlements to conduct a particular business in the premises. Only one case could be referred to after 1815.\textsuperscript{164} The impermissibility of establishing a blacksmith shop on land not so designated, against the wishes of the neighbours, was acknowledged by the courts at each level, but insufficient evidence was produced to establish, in the absence of statute, a customary law right for the neighbours to challenge the blacksmith in the civil courts.\textsuperscript{165}

\textsuperscript{161} Baumeister, above n 55, 141 n 17.
\textsuperscript{162} Baumeister, above n 55, Vol 1, 148.
\textsuperscript{163} Ibid 146.
\textsuperscript{164} Nöhring v. Kömer in 1828.
\textsuperscript{165} Baumeister, above n 55, Vol 1, 147 n 43. Gries reproduced extensive passages from the judgments at various court levels: above n 117, Vol 2, 90-4.
In the lower court the adjudged lack of evidence seems more related to a failure to prove that operation of the blacksmith shop sufficiently interfered with the interests of neighbours, particularly as the correct designation of the land was for a bakery or brewery and thus the more general designation *fabris* was still applicable, particularly if fire danger was the common concern. In an earlier case, the permissible use of land to stable animals also lent itself to the operation of a blacksmith workshop. Although the court cast some doubt on the continued effectiveness of land use designation through private title, honoured apparently more in breach than observance, there can be no doubt that relevant regulatory officers of the Council would have had authority to intervene in this case.

In 1840 these issues were considered to be well within the field of property law and the social and environmental constraints were conceived as limitations of the civil law concept of property itself. This approach was, in addition, moved strongly into the sphere of public regulation after the Great Fire of 1842. A Senate decision of 1845 was the foundation for public planning in general, and specifically oriented to reconstruction after the conflagration. The regulatory material was moved from the City Code and into the General Building Statute of 1845 and other specialised legislation. The Building Regulation Statutes of 1872 and 1882 extended this coverage of the environmental and planning issues in the public sphere with no requirement that land use controls be registered. However, no end was brought expressly to the basic principle which had existed in civil law, that the freedom of the property owner had inherent social and environmental obligations.

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166 Schalk, above n 5, unpublished manuscript, 263.

167 Baupolizeigesetz vom 31. 1. 1872, revised by the Baupolizeigesetz vom 23. 6. 1882. The public provision of water (Statute of 23. 6. 1882) and the reorganisation of sewerage and canals (Statutes of 1854 and 1875) were part of this trend toward public regulation.

168 Schalk, above n 5, unpublished manuscript, 264.
Other forms of property in land included -

*Plätze*; which Baumeister described as a right of possession of land according to a contractual relationship which was nevertheless inheritable and assignable. It was perpetual, but could be terminated under precise circumstances, and could be used as a security.\(^{169}\) Schalk on the other hand distinguished between types of *Plätze*, such as *areae* and *curiae*, and described them as smaller building sites.\(^{170}\)

*Gerechtigkeiten or Ämter*, the first were public proprietary permissions such as those held by the goldsmiths, Barbierämter and the abattoirs. When these were *radizierten* they were inseparable from the land. Both Schalk and Baumeister refer to these as real rights in the nature of "accessories" [*Zubehör*] of the land parcels. Therefore there was no special procedure to transfer them apart from the land. Ämter were permissions which did not attach to the land parcel. In order to assign or mortgage them a *Verfassung* ceremony before the Council was required, as for recording entries and changes with respect to all dealings with land. Registration appears to have been in the Mortgage Book of the relevant City department rather than the *Erbebuch*.\(^{171}\)

*Zubehörungen and Pertinenzen*; these resembled fixtures and appurtenances. Zubehörungen were movable things attached to buildings which passed upon assignment or pledge without special mention. Pertinenzen were immovable things connected to land, such as buildings, places and rights of way which belonged to an Estate.\(^{172}\)

(ii)  *Fiscal Securities Over Land - Rentcharges and Mortgages*

The development of fiscal securities in the Hamburg system is interesting for two reasons. First, the introduction of the "Torrens mortgage" in South Australia is the clearest evidence of a legal transplant from Hamburg to Adelaide, and thus the history of the Hamburg Hypothek is also the history of the Torrens mortgage. Second, the development of real securities is strongly connected to, and perhaps a precondition for the emergence of mercantile capitalism. The emergence of the real securities in Hamburg followed an interconnection between the annuity or rentcharge and the

\(^{169}\) Baumeister, above n 55, Vol 1, 101.

\(^{170}\) Schalk, above n 5, 88-9.

\(^{171}\) Baumeister, above n 55, Vol 1, 102; Schalk, above n 5, 101.

\(^{172}\) Baumeister, above n 55, Vol 1, 102-3.
mortgage as methods for raising capital. The early Hamburg mortgages were a form of pledge of the land\textsuperscript{173} which developed from forms of annuity which already existed. The mortgage appears to have involved, at first, conveyance of all of the mortgagor's estate and interest in the land to the mortgagee subject to a right of redemption upon repayment, as with the English general law mortgage. The later mortgage,\textsuperscript{174} in the form of a registered charge on the legal title to the land which is retained by the mortgagor, appears to have developed independently in North Germany and been confirmed in the reception of Roman law into the Hamburg system - the Roman law and Hanseatic mortgages were considered distinct concepts in 1840.

Annuities and Rentcharges - Grundzins and Erbzins

The Grundzins, or Erbzins, were the first registrable fiscal real securities to become objects of proceedings before the City Council. They combined two of the earliest methods of burdening real property already known to Hamburg law - the Wurtzins and the purchased Annuity.\textsuperscript{175}

The Wurtzins, also often called Grundzins, was created by delivery up of a land parcel, \textit{der Wurt},\textsuperscript{176} to secure one of these methods of paying interest -

\textit{Worttyns},\textsuperscript{177} which was probably a predetermined amount of interest included

\textsuperscript{173} \textit{das Pfandrecht}.

\textsuperscript{174} \textit{die Hypothek}.

\textsuperscript{175} \textit{gekaufte Rente}.

\textsuperscript{176} The \textit{Wurt} was, in North Germany, a raised building area. In the southern and eastern marsh areas of the North Sea and on the Halligen drained areas the farmers and other settlers raised hillocks on which to live. These were known as \textit{Hauswurt} for a home, and \textit{Dorfwurt} for a village. This construction of Wurten began around the birth of Christ as the consequence of rising sea floods. Settlement on Wurten continued until the dyking of the marshes, which began in the 11th century.

"\textit{Der Zins}" was a recurrent payment, later taking the form of interest.

\textsuperscript{177} So called in the \textit{Liber actorum}. 
in the amount initially secured,\textsuperscript{178} which probably required recurrent payments of interest at a relevant rate calculated on the principal, or in an agreed amount.

The resulting proprietary interest held in the land by the lender [Leiherrn] appears to have been the most distinguished of all interests, the dominus area, as it was called in the Latin dissertations. This is supported by the wide dissemination of the interest throughout the oldest land title registration (Erbe) books. The Hamburg Statutes referred to the lender variously as "den de worde uth deyt",\textsuperscript{180} "de den tins up boret", and "de den tins het". In contrast, the borrower [Beiiehenen] was variously referred to as "de den ervetyns koft hevet unde in synen weren hevet",\textsuperscript{181} "de uppe ervetyns sitt",\textsuperscript{182} "de den ervetyns uthgeven schal",\textsuperscript{183} and "des de wort syn sey".\textsuperscript{184}

These expressions support the conclusion that the dominus held by the lender became acknowledged as the superior form of ownership. A shift emerged over time in favour of the borrower, at the conclusion of which the actual economic relationship between the borrower’s actual occupation of the Wurt and the lender’s interest in recovery of interest was acknowledged and the legal title relationships transformed into an estate burdened with the payment of interest. A transferee of the land [Wurt] would then require satisfaction of the resulting annuity [Rente] in favour of the lender, as it was then conceived, when accepting transfer, or accept the title subject to it.\textsuperscript{185} At the time of the

\textsuperscript{178} This is the nature of the modern German Grundschuld [Land Debt]: BGB § 1191.

\textsuperscript{179} Later also called reditus.

\textsuperscript{180} City Law of 1270, II, 2.

\textsuperscript{181} City Law of 1270, II, 1.

\textsuperscript{182} City Law of 1270, II, 3 & 5.

\textsuperscript{183} City Law of 1270, II, 1.

\textsuperscript{184} City Law of 1270, II, 2; City Law of 1292, D, 2; City Law of 1497, H, 2.

\textsuperscript{185} Schalk, above n 5, 94.
codification of the City Laws in 1270 the Erbzins was already current. Consequently only the Erbzins was mentioned in the statutes.

The annuity form of real security succeeded in a period of wider legal and social transition in Hamburg. Growth in trade and in the importance of the registration of land transactions under the new City Laws of 1270 and 1290 probably combined to require and enable the use of fiscal securities in the finance of trade ventures as well as building construction. This view is supported by the growth at that time of trade in the annuity securities themselves between investors.\textsuperscript{166} The registered reserved annuity was flexible and appropriate as a security over any title. This ensured its success as a preferred security above other more complex and inflexible alternatives, such as the Erbleihe which was not self-evidently conceived as a hereditament, and consequently, parallel transactions were required when constituting one to prevent the debt becoming separated from the interest in land and one or the other falling into the estate of the deceased instead of passing to the assignee. Clearly this complexity would have militated against growing mercantile interests in the burgeoning trade city, which had formally joined the Hanseatic League around 1281.

The reserved annuity security\textsuperscript{187} was created and assigned by formal Auflassung. While Schalk found in the early statutes no positive provision for the necessity of Auflassung, a requirement for Auflassung emerged as the annuity became regarded as a form of immovable property. Auflassung was not a necessary precondition for the formation of the rights underlying the annuity, a naked contract sufficed. Annuities not secured through Auflassung and registration were not infrequent at the earlier, and even in later, times and could be validly asserted against the annuity debtor and his or her estate.

\textsuperscript{166} der Rentenkauf, ibid 96-7.

\textsuperscript{187} vorbehaltene Rente beim Austun einer Wurt.
The reserved annuity security became the model for the later transactable annuity which emerged as the later Grundrente or rentcharge. It served above all to circumvent the canonical prohibition against interest while permitting interest bearing investment of capital. In contrast to the reserved annuity, the rentcharge debtor remained the owner of the land parcel offered to the financier, the rentcharge creditor, as security. The entire procedure was the object of public Verlassung and registration in the Erbe and later Rente Books, obtaining the highest security for the rentcharge creditor. The Rente became regarded as an incorporeal interest in the land parcel, equated as an interest in immovable property with the land parcel itself.

The rentcharge superseded the reserved annuity entirely from the end of the 13th century. A further superficial change was made when rentcharges were registered in their own books, although they continued to be mixed with other entries in the Liber actorum. Schalk dismissed as error the view, which had been expressed in the literature, that the rentcharge had temporarily moved aside in the course of the 14th century. In his conclusion this view resulted from ignorance of the existence of the oldest Rente Books for the period 1291 to 1400.

The Pledge and the Mortgage

The necessity for Auflassung in order to pledge land and the consequent rise of the mortgage of registered title, the independent Hypothek, was closely connected to

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188 der Rentenkauf.
189 Schalk, above n 5, 98.
190 das Pfandrecht.
191 die Hypothek.
development of the pledge security from the rentcharge. The requirement for Auflassung developed in the course of the 15th and 16th centuries.

The City Law of 1270\textsuperscript{192} referred to a transaction "to Weddeschat setzen" which Schalk concluded was a pledge by ceding possession of property against later redemption, which he thought concurred with the older statute.\textsuperscript{193} This City Law also prescribed\textsuperscript{194} that pledge of land parcels had to be made before the entire Council. A form of registration of the pledge was allowed through the security of an executed "Bannung". These were recorded in the Schuldbuch [Debt Book].\textsuperscript{195} As noted above,\textsuperscript{196} the Schuldbuch listed securities offered for a debt and in the case of land a further transaction was required. Six sporadic entries in the Liber actorum concerning independent pledges were, in Schalk's view, certainly only fortuitously recorded. Pledges were at that time very frequent and many more would have been recorded if that had been the practice. These entries did not contain a remark about Auflassung and thus probably did not occur, corresponding to legal conceptions of the times. According to the nature of the pledge, it was not suitable for Auflassung because it was neither an assignment of an estate or interest, nor a right to a share of the profits of the land parcel, as with the reserved annuity and rentcharge. At that time the pledge was security only for the eventual satisfaction of a specified or unspecified debt.\textsuperscript{197} This early type of

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\textsuperscript{192} I. 7, with correspondence to the City Law of 1292 C. IX. and the City Law of 1497 H. VIII.

\textsuperscript{193} Schalk, above n 5, 99.

\textsuperscript{194} I. 13, corresponding to the City Law of 1292 C. IX. and the City Law of 1497 H. VIII.

\textsuperscript{195} The Liber pignorum et actorum until some time after the 1270s when the City Book was divided. It was later entitled Liber memorandum until 1399, and was also referred to as the Liber debitorum or depositorum. The series was designated "stad schultbock" (Stadt Schuldbuch or City Debtbook) in the City Law of 1270 VII 3.

\textsuperscript{196} In text above, after n 127.

\textsuperscript{197} Schalk, above n 5, 99.
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Verpfändung, or pledge, later became known as Verfallspfand or Verkaufspfand - a security for a debt the satisfaction of which could be required only in the course of another transaction. Auflassung was required only if this right of satisfaction was to be further assigned. Schalk found multitudinous entries of this type in the Schuldbuch.\textsuperscript{198}

Later development brought an assimilation of the right to satisfaction of a pledge with that of a rentcharge which could be released by the debtor through payment, and by the creditor by demand. In the course of the 16th century it became frequent to register in the Rente Book the capital amount (the so-called Hauptstuhl) beside the registration entry of the rentcharge, and for such registrations Auflassung became by practice an indispensable requirement. The earlier legislation\textsuperscript{199} also provided that a general demand which could be established in litigation could be registered as a reserved annuity or, later, a rentcharge. The City Law of 1603 retained this rule, and the debt was secured over the land as capital [Hauptstuhl] through entry in the City Books. The debtor was obliged to pay 6 per cent interest for a year and then to discharge the entire debt. The necessity of Auflassung for the creation and assignment of the security, the later independent Hypothek, was expressly required in the City Law of 1603\textsuperscript{200} and was retained subsequently. Schalk concluded that this development followed from the influence of Roman law itself. His further comment that it led to "an obscuration of the legal position and to an 'extremely doubtful' legal insecurity"\textsuperscript{201} is intriguingly ambiguous, and if taken at face value would be surprising in view of his earlier analysis.

\textsuperscript{198} Schalk, above n 5, 100.

\textsuperscript{199} City Law of 1292 C. 27, and City Law of 1497 H 6.

\textsuperscript{200} City Law of 1603 II. 4. 5.

\textsuperscript{201} Schalk, above n 5, 100.
(c) Compulsory Security

In addition to fiscal securities over land voluntarily granted, Hamburg law also provided for a compulsory form of mortgage which could be registered, or protected by other methods, in order to secure a personal demand.\(^2\) If the obligor had neither money nor personal property with which to satisfy the personal obligation, on application by the creditor, the obligor could be required to allow the capital of the debt, with 6% interest, to be registered as a burden over land. If the obligation was not satisfied within a year the land could be sold.\(^3\) Schalk briefly discusses a procedure by which the creditor obtained registration of the demand in the City Schuldbuch, which then enjoyed the superior evidentiary weight of the Book in relation to third parties, but which could still be the subject of substantive dispute between the creditor and debtor.\(^4\) The existence of this procedure emphasises the greater significance of a personal claim in the system. The general availability of an order for performance of an obligation, not just when damages were inadequate, reinforces this. It is very feasible that the easier availability and registration of effective methods of "execution against land" reduced the functional need for the equitable securities which emerged in the English system.

(d) Protection through Caveat - Inhibitorium, Impugnation, Clause

Hamburg law offered a range of instruments to secure rights.\(^5\) The Proteste were orders for which one could apply to a judicial or police officer in order to protect an existing legal situation, with the aim of maintaining the status quo against an anticipated

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\(^2\) See Forderung. Baumeister, above n 55, Vol 1, 170-1. See also text above around nn 104 and 199.

\(^3\) See also ibid Vol 1, 84-8.

\(^4\) Schalk, above n 5, unpublished manuscript, 253ff.

\(^5\) Baumeister, above n 55, Vol 1, 82ff.
disturbance. They are distinguishable from executory remedies, such as injunctions, the application for which required initiation of a court procedure. For example, in older law, a *Protestation* could be lodged against a neighbour's illegal building works. It later took the form of a petition for a *Prohibition* to be issued by parish administrators\textsuperscript{206} who had local authority over building activities. If the activity was not then halted, a court procedure could be initiated in order to preserve the status quo. The orders could also be turned to some commercial transactions - they had been available, for example, to deal with bills of exchange since the earliest Hamburg Bills of Exchange legislation.

The *Warnung* [Warning] was also issued by a magistrate or police chief against anticipated breach of the peace.\textsuperscript{207} The *Caution* had a similar background. However, upon application for a Caution the parties could dispute whether it should issue, and there could be a requirement for security of costs, rather than, presumably, application being made for it to be lifted. In some wider situations a landowner had a duty to tolerate the issue of a Caution if the applicant had a claim the value of which could not be satisfied from available property.

A range of similarly conceived instruments and orders could also be used to protect interests through land title registration processes, and some of these could be registered or noted on the Land Title Register. The range of interests which could be protected extended beyond unregistered proprietary interests as conceived in the common law system.

The *Inhibitorium* was the closest equivalent to an injunction as conceived in English derivative systems - granted by court order and capable of both negative and mandatory

\textsuperscript{206} die Kirkspielherren.

\textsuperscript{207} ibid Vol 1, 83.
applications. It was feasible to have an Inhibitorium directed to the Land Title Registry to restrain registration of a transaction which had already passed through the public Verlassung ceremony. Baumeister saw this as the only possibility for assertion of unregistered interests after abolition of the Impugnation. The Hamburg Obergericht [Supreme Court] was the forum for such applications, and it applied the principles applicable to arrest of assets, so an injunction could be awarded to protect only -

1. unregistered proprietary rights which would not be effective against the transferee, because no other protection was possible,

2. claims on the owner, where the possibility of fulfilment would be destroyed through the intended alienation of the land, and

3. claims on the owner with respect to provable demands, for the satisfaction of which, after alienation of the land, there would be no other equivalent or sufficient surrogate in the assets of the debtor.\(^{208}\)

The Impugnation had been available to assert claims [Ansprühe] contrary to, and contradictions\(^{209}\) of the state of the Land Title Register through a challenge to the transaction.\(^{210}\) On the basis of public faith in the register, contrary claims were dissolved if they had not been raised by the time of registration of the new transaction, whether the grantee of the new interest knew of the contrary claim or not. Claims and Impugnationen thus had to be cleared up within the three day period between Verlassung and when registration could take place. As mentioned,\(^{211}\) in 1802 the Impugnation had been abolished, and still in the 1850s its role, the roles of the other instruments, and related issues were still being debated.\(^{212}\) The justification given for abolition was that, because of the ease of making an Impugnation, the instrument was frequently misused, in order to

\(^{208}\) Baumeister, above n 55, Vol 1, 134-5.

\(^{209}\) Widersprüche.

\(^{210}\) Baumeister, above n 55, Vol 1, 110.

\(^{211}\) See above before n 105.

\(^{212}\) Baumeister, above n 55, Vol 1, 112-14.
claim pure money sums and to support contradictions which had no substance. Abolition in 1802 left the Inhibitorium as the only feasible protection method. Baumeister considered that some impatience with the exaggerated misuses might have been understandable but, on the other hand, the land title system had lost an important security which had been available to creditors and to protect other rights, and this regret at the loss of the instrument from the system was widely expressed in the texts.\(^{213}\) The significance of the Verlassung ceremony itself declined, and the importance of registration commensurately increased, when there was no possibility of initiating an Impugnation before the public audience.

Clausein\(^{214}\) were remarks noted in the Land Title Register and are closest to the concept of the "caveat as bookmark" in the Torrens system. They could be made at the time the relevant registration entry was made, or later, but could not displace the need for a transaction to proceed through the public Verlassung ceremony and on to registration if this was required for its formal validity. Notation of a Clausein could not replace a juristic act. Baumeister thus defined the Clausein as any entry which was not a Verlassung protocol and yet had a place in the City Books.\(^{215}\)

In view of this, rights notified by Clausein could not generally share fully in the advantages of registration - a purchaser of land who had paid the purchase price did not gain through the notation of a Clausein a claim to an estate superior to the claims of other unsecured creditors.\(^{216}\) The Clausein did however enjoy a measure of protection from the principle of publicity. It enjoyed the superior evidentiary status of a public document, and also it was

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\(^{213}\) see also Anderson, above n 148, 124.

\(^{214}\) die Clausein, die Clauseine.

\(^{215}\) Baumeister, above n 55, Vol 1, 210-11.

\(^{216}\) Warburg c. Cohn, 24 April 1840, explained in Baumeister, above n 55, Vol 1, 211, note 3(b).
impossible for anyone to deny notice of the existence and content of a notation which would be revealed through inspection of the City Books or an extract obtained from them. A Clausel notation could be made or erased only with the consent of the parties affected by it.

The uses of the Clausel, as determined by permissible content, generally fell into four fields -

- more specific delineation or description of a registered estate or interest,
- modification of a registered mortgage,
- limitation of use rights, or
- limitation of the power of disposition.

With respect to the latter two limitations, the Clausel did not prevent a contrary transaction, but the later party acquired its interest subject to the limitations notified. Although a Clausel could not advance the status of a claim following bankruptcy of the registered proprietor, it could affect a mortgagee's realisation of the security through sale.

The familiar principle of prior tempore potior jure applied, with the effect that a mortgagee's right which had been registered before the notation in question could be enforced regardless of it, but one registered after it could be exercised only subject to it. When a claim secured by Clausel evolved into a registrable right and was registered, the registered proprietary right absorbed the claim, with the effect that it enjoyed no less effectiveness than the notation of the claim had enjoyed through the principle of publicity, unless it was a purely personal claim.

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217 Baumeister, above n 55, Vol 1, 215.

218 Ibid Vol 1, 214. Anderson provides many practical examples, such as, protection of interests reserved for a vendor in a contract of sale, the necessity of consent for the commercial use of a building, protection of life interests: above n 148, 102-22.

219 Baumeister, above n 55, Vol 1, 219.
The distinctions between the Proteste, the Inhibitorium, the Impugnation and the Clausel are succinctly stated by Baumeister in the following terms - a Proteste could be noted upon *ex parte* application by a third party; an Inhibition through the order of a relevant official *inter partes* but in a preliminary way, and this was also the case with the Impugnation raised before the City Council in the course of Verlassung; while the Clausel was initiated by, or at least with the cooperation of, the land owner. The Clausel generally noted a relationship of longer duration, while the Proteste, the Inhibition and the Impugnation were used only as an interim postponement.  

(e) *The Significance of Registration and the Status of Unregistered Interests*

The significance of registration in the City Books was authoritatively reduced to two interlocking and hardly controversial principles by Gries -

1. property in an urban land parcel is acquired through registration in the City Erbe Book, and

2. registration is the only method by which ownership of an urban land parcel may be obtained.

In substantiation of the first principle, Gries drew attention to three provisions of the City Law of 1603, to the effect that a transaction with a proprietary estate or interest in land which had been through the Verlassung ceremony and registered in the relevant City Book was beyond challenge, except in very limited circumstances. Significantly, the first of these provisions is located among the provisions concerning the credibility to be accorded various forms of evidence, and in this case, the conclusiveness of transactions

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221 Gries, above n 117, Vol I, 246ff.

222 City Law of 1603 I. 30. 3; II. 8, 14; and II. 8. 7. The full German text of these provisions is set out in Appendix II.

223 Explored below in text, commencing before n 264.
with land registered in the City Books, just as today in the Torrens system the so-called indefeasibility of title rests upon the conclusive evidence of title in the Land Title Register. These provisions of 1603 were themselves clearly drafted in reflection upon provisions from the City Law of 1270, the City Law of 1292, and the City Law of 1497. The general principle underlying all of these provisions is that no one can dispute the proprietorship of an estate which is registered in the City Erbe Book. The strength of this evidence had to be observed also by the officials of the registry office. A person registered as owner had the power directly to transfer his ownership to another without more than the Verlassung ceremony. Therefore, asserted Gries, ownership is acquired through registration, and this is justified by the certainty which is brought to all transactions. Third parties which suffer loss through the incorrect registration of another would have claims to damages, but not to assert nullification of the registration, unless it could be brought back to a fraud by the present registered owner. Even for Gries, the irrefutability of the state of the register did not preclude the existence beside the registered de jure ownership of a de facto ownership off the register - the point was the impossibility of asserting it except within narrow and defined exceptions. The absoluteness of registered proprietary interests must be understood with this in mind.

224 See for example, s 41 Transfer of Land Act 1958 (Vic). Interestingly, City Law of 1497 G. 3. expressly places the evidentiary strength of registration "vor alle segele unde breve" [before all seals and letters - the equivalent of deeds], suggesting interesting connections to equivalent Torrens system provisions such as s 40 Transfer of Land Act 1958 (Vic).

225 City Law of 1270 I. 6. - see also VII. 2. The full German text of these provisions is set out in Appendix II.

226 City Law of 1292 C. II. The full German text of this provision is set out in Appendix II.

227 City Law of 1497 G. 2. - see also G. 3. The full text of these provisions is also set out in Appendix II.

228 Gries, above n 117, 248.

229 Ibid 248.

230 der Betrug.

231 Gries, above n 117, Vol 1, 251.
The second principle identified by Gries, that registration was the only method by which ownership of land in Hamburg could be acquired, followed from the first. In addition, Verlassung and registration were positively required by the City Law of 1603, and no other method of creating, assigning or altering a registered interest. Gries disputed that inheritance and prescription formed exceptions to this principle. Until the heir obtained registration of the title in his or her name, the land remained in the ownership of the deceased but in the person of the heir. With respect to prescription, evidence of long possession could not overwhelm the strength of evidence of registered title - a point agreed to by virtually all commentators of the time.

Beside the firm and hard edged views of Gries, the approach of Baumeister was somewhat subtle, especially in his seemingly solitary attempt to blend in Roman law principles through a "partial reception" to meet difficulties which he identified following abolition of the Impugnation. His eventual surrender in that discussion is some testimony to the strength of the principles underpinning the security of registered title. For Baumeister the status of registered and unregistered rights to land was so deeply connected with the meaning of property, and the essence of property law, that he dealt with the topic in the opening, more theoretical pages, of his work on property law. Property law, asserted Baumeister, is about proprietary rights, including ownership, their relativity to each other, their nature and extent, and the dominion over an individual object which they found. This is distinct from a duty to perform personal obligations.

232 In text above at n 221.
233 City Law of 1603 II, 8. 6. The full text of this provision is set out in Appendix II.
234 City Law of 1603 II, 1. 6 - derived from City Law of 1497 H. 4. The full text of these provisions is set out in Appendix II.
235 Gries, above n 117, Vol 1, 253-4.
236 Baumeister, above n 55, Zweites Buch - Sachenrecht, Vol 1, 107-25.
This distinction had greater meaning in the law of Hamburg than generally in German common law, Baumeister claimed, but even Roman law with its firm distinctions between personal and proprietary rights did not restrain the assessment of claims to things as being of a proprietary nature when they exhibited the fundamental characteristics of property. For example, he pointed out, Roman law also had to deal with the dilemma of the parallel rights of vendor and purchaser between sale and transfer. The issue of competition between different claims to the same thing should thus be dealt with as property law. Such competitions between claims to things, Baumeister advocated, were generally to be dealt with under two formal principles -

1. **the older right takes precedence over the younger right**, which is recognised in the City Law of 1270, the City Law of 1292, and the City Law of 1497, and it also follows from the Roman law principle that no one can give more than he has.

2. by founding a right through Auflassung (Verlassung ceremony), priority according to time is not only countered, but effectively replaced; yet, between rights founded through Auflassung, the competition is still determined by the age of the right (priority in time).

Limitation of the first principle by the second principle is justified by the need for certainty in transactions, and particularly, when granting credit a lender needs to know the risks, and thus the competing interests and claims.

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238 ibid.

239 Ibid Vol 1, 108.

240 **das ältere dem jüngeren vorgeht.**

241 City Law of 1270 I. 7. - see also I. 6. - set out in Appendix II.

242 City Law of 1292 C. 3. - see also C. 2. - set out in Appendix II.

243 City Law of 1497 G. 2. - set out in Appendix II.

244 **Keinand mehr weggeben können als er selbst hat.**

245 Citing City Law of 1497 C. 3, and contrasting City Law of 1270 I. 6. and VII. 2; and City Law of 1292 C. 2; and City Law of 1497 G. 2. [all are in Appendix II].
These considerations led to a further principle which enhanced both of the propositions -
that to remain a contender in the competition between rights to the thing, a person must
not have recognised competing claims; that is, rights of which he must have known. Such a situation would contravene the principle of good faith [guten Glaubens] - a person acquiring a right to a thing must accord legitimacy to claims of which he must have known; that is, either really known, or through only his own fault not known.

For Baumeister, these principles were actually unified and resolved through the system of title registration [Inscription] - a person acquiring rights over land cannot remain ignorant of existing rights over it because each such claim must also be registered in order to be effective against him. At the same time, through registration every claim to the land is completely secured against future rights to the same thing, because future claimants must have been aware of the prior acquisition of the registered right.

To Baumeister it thus appeared that there were only two classes of rights to land -

1 purely personal rights valid against the proprietor of a registered right, which before registration would be ineffective against third parties because registration was the only means of publicising them, and

2 absolute proprietary rights [absolut dingliche Rechte] valid against third parties which, regardless of their content, had acquired this character through registration.

Nevertheless, he reasoned, Hamburg law had room for unregistered jura ad rem, which would take priority according to age, because the order of registration followed the Auflassung [Verlassung ceremony], but these would have to be treated as relative proprietary rights [die relative Dinglichkeit]. Illustration of the existence of unregistered

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246 Thus, neither known of in actuality, nor through culpable neglect.


248 Possession would be an exception to this, but only with respect to goods.
real rights in the Hamburg system could be found in the period when the Impugnation remained available - from as late as 1618 until its abolition in 1802. As explored below,\textsuperscript{249} one exception to the protection of registration was the ancient rule, progressively restricted over time, that a year and a day had to pass after the Auflässung before seisin [rechte gewere] could pass. During this period a range of contrary claims to the land could emerge. To protect the registered estate of the transferee against complete defeat by these claims, the transferor had to provide interlocking guarantees of secured compensation. It was not clear whether rights emerging in this period had to be known to the transferee in order to succeed, but probably not. After a year and a day the unchallenged right to possession being acquired gained unconditional protection - all other claims were excluded by prescription except those of claimants out of the jurisdiction, for whom the time ran from first knowledge of the transaction.\textsuperscript{250} After 1618 aside from those absent from Hamburg, seisin [die rechte Gewähr] and security passed to the transferee upon registration of the transaction, which took place three days after the Verlassung ceremony. For the assertion of these contrary claims the Impugnation was available to challenge the transaction. Contrary claims not raised by the time of registration were dissolved, whether the transferee knew of them or not, and thus contrary claims and Impugnationen had to be cleared up within this three day period before registration could take place, just as had been the case earlier under the "year and a day rule".\textsuperscript{251} Abolition of the Impugnation in 1802 has been discussed above.\textsuperscript{252} With the loss of this interim form of security for credit and other rights, it seemed to Baumeister that unless the relevant right was registered it would dissolve with registration of the new right, just as it would have before 1618, when after the passage of a year and

\textsuperscript{249} See text below commencing before n 264.

\textsuperscript{250} Baumeister, above n 55, Vol 1, 110.

\textsuperscript{251} Ibid 111.

\textsuperscript{252} In text above n 212.
a day seisin was obtained.\textsuperscript{253}

For Baumeister this was an inadequate result, and he sought another solution in aid of rights of which the transferee had knowledge by attempting to incorporate the principle of good faith - a person acquiring an estate or interest in land should take it subject to existing rights of which he was aware, or of which he could have become aware, but would have remained unaffected by those which without his own fault remained unknown. Certainly, he noted, one would have to consider that the Auflassung displaced any stricter principle of priority according to time, but the holders of unregistered rights, who formerly would have entered Impugnationen, might at least have found some protection in the later grantee's knowledge of the prior existence of their unregistered rights.

The adoption of such a proposition would require juristic justification, Baumeister conceded. His argument ran as follows\textsuperscript{254} - if the owner of a thing, through the arbitrary alienation of it, can bring my independent right to an end, then he does me a wrong because dependence upon the arbitrariness of one under an obligation contradicts the concept of law. Those who cooperate in occasioning my loss are also touched by culpability so far as they knew of it. The maxim that one hand must protect the other [Hand muß Hand wahren] requires that the principle of good faith must be the same with respect to both goods and land. Between two purchasers of a thing, as in earlier law, the earlier takes precedence, regardless of whether either of them is in possession.\textsuperscript{255} The earlier purchaser takes lower priority than the later only when the later has obtained possession and title without fraud. However, additionally, the later cannot prevail over

\textsuperscript{253} Baumeister, above n 55, Vol 1, 113.

\textsuperscript{254} Baumeister, above n 55, Vol 1, 114 n 16.

\textsuperscript{255} Ibid Vol 1, 114 n 17.
the earlier if he or she was aware of the earlier purchaser's right because then the later would become a party to the wrong being perpetrated by the vendor, and would be obliged to assign the possession and title to the former. These principles for the resolution of priority competition would not be restricted to interests gained through a contract of sale. So, Baumeister concluded, there was no lack of principle in support of his proposal for resolving the difficulties caused by abolition of the impugnation. Even without the Impugnation, known rights at least could be protected. The principles would assist in view of the nullification which would otherwise take place without such an effective and accessible instrument to notify the existence of unregistered rights and claims.\textsuperscript{256}

Clearly, he conceded, his view diverged from that of a system delivering hard-edged concepts and instead introduced fluidity.\textsuperscript{257} Even if the proposal were adopted, the holder of an unregistered right would be dependent upon coincidental opportunities to notify the second in time and thus secure the interest. Perhaps at the public Verlassung the assignor and assignee could be obliged to state any unregistered interests of which they had knowledge, Baumeister contemplated. In comparison with the Impugnation, a judicial order was not so simple to obtain, and thus not so accessible. The acquisition of interests in land thus had an uncertainty, he claimed, which it had not had since the times of the "year and a day rule" before 1618.

If this "unsatisfactory theory" was to be avoided, Baumeister acknowledged, the only alternative seemed to be to drop the concept of a relative proprietary right.\textsuperscript{258} If such

\textsuperscript{256} Ibid Vol 1, 115.

\textsuperscript{257} Ibid Vol 1, 116.

\textsuperscript{258} Ibid Vol 1, 117.
rights are to be regarded as personal, then merely a casual attitude held by a later acquirer toward pre-existing claims would be insufficient to impugn the latter's registration and on the other hand, Baumeister added, it would be a very casual right holder who did not take advantage of the existing methods, such as registration, lodging a Clause, or obtaining an injunction to protect it. On this view, it could hardly be put to a person who later acquired the land - a person standing in no relationship to the earlier unregistered right holder - that he knew of the claim but proceeded regardless. This would be like a counterclaim of contributory fault, and evokes the principle that two parties touched by fraud [dolus] cannot sue each other in fraud. If, on the other hand, the second acquirer has done more than merely disregard the first acquirer's claim and has, for example, acknowledged it and agreed to respect it so that the other need not secure it, or when through some coincidental circumstance it was impossible to protect the interest by formal means, and the later grantee had consciously used that impossibility to cause damage, then this is not a relative proprietary claim, or even partly a proprietary claim, but one to which, by reason of the fraud the defendant in fraud must defer - it would be a fraud to continue to maintain the existence of his registered interest.

In conclusion, the basic principle for the recognition and enforcement of proprietary interests in and claims to land was that they had to be registered, or at least noted in the register by means of a caution, an injunction, a Clause, or, before 1802, an Impugnation. Even the most liberal of Hübbe's contemporary commentators, Baumeister, acknowledged the tenuousness of arguing for the recognition of unregistered rights as relative proprietary interests and the application of Roman law principles to priority competitions between them. At best, Baumeister was arguing for recognition of these principles supplementary to the central principle of the obligation to register. When he dealt with expropriation and the passage of risk, he acknowledged the moment of

259 ibid Vol 1, 118.
registration as that at which ownership passed.\textsuperscript{260} Naturally, there were exceptions to the obligation to register or notify in order to obtain recognition and enforcement of rights over land against third parties.\textsuperscript{261} In addition, fraudulent transactions, such as exploitation of the impossibility of protecting an unregistered right and acting against an assurance to protect one, bore upon the conscience through an action in fraud.\textsuperscript{262} Nevertheless, even Baumeister acknowledged that acquisition of a registered interest simply with knowledge of the existence of a pre-existing unregistered interest, the holder of which had not taken advantage of the public facility of the City Books to secure it - a facility which existed to ensure certainty in real estate transactions for the wider social interest, did not give rise to an obligation to defer to it.

It does not follow that the Hamburg system thus totally negated all other claims to assets. For one thing, a claim for an order for performance of a personal obligation was not dependent upon the inadequacy of monetary damages or compensation as English performative equitable remedies are. For another, compulsory real securities were available to a litigant concerned that the defendant had insufficient liquid assets to meet his or her claim, thus establishing a proprietary entitlement for otherwise personal claims.

In short, to this point we might observe that the nature of Hamburg estates [Erbe] in land were conceived, as a matter of civil property law, \textit{a priori} in consideration of the social and environmental context of the particular land parcel. The obligation to register an estate or interest was respected by commentators across the contemporary spectrum of opinion as one which served the wider social benefit and had existed at least since 1270.

\textsuperscript{260} Baumeister, above at n 55, Vol 1, 268.

\textsuperscript{261} These are explored in greater detail below, commencing before n 264.

\textsuperscript{262} Interestingly, the Australian High Court reached a similar view of the Torrens System in \textit{Bahr v Nicolay} (1988) 164 CLR 604.
These principles were doubted only in the 19th century, but even in the expression of these doubts Baumeister acknowledged the continued juristic validity of the principles, even if practical considerations, such as the impact of abolition of the Impugnation and the reported widespread breach of civil proprietary land use designations, sometimes prevented their effective application in practice.

It remains to be seen to what extent the exceptions to the security of registered title detracted from the existence of obligation as an inherent aspect of ownership.

(i) Exceptions to the Security of Registration in the City Books

At first glance, the exceptions to the security of Hamburg registered title appear to have been numerous. Examination reveals that each was progressively restricted until by 1840 most were of little practical importance.

Exception 1 - "Year and a Day Rule"

The rule that secure registered title was not obtained until a year and a day had passed after the Verlassung ceremony was repeated in the City Laws from the earliest times as a general exception to the unimpeachability of a registered estate or proprietary interest. Schalk sheeted the justification of the rule back to the period required in old German law for the acquisition of seisin [die rechte Gewere] by taking possession - after a year and a day it was considered that contrary claimants had lost their rights through

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263 In the terminology of the Torrens system interests in land which prevail although unregistered are variously referred to as "exceptions to the indefeasibility of registered title" and "paramount interests".

264 City Law of 1272 f. 6. - see Appendix II.
From the earliest time the possible grounds of opposition which could be asserted within the year and day were limited to the "paramount interests" set out below [Exceptions 2-9]. The transferor was obliged to provide a sufficient guarantee, generally secured by other land, against the possibility of a claim emerging during the period. However, by the end of the 17th century the restrictions on the right to make such a claim had grown to the point that for practical purposes they had virtually eliminated the purpose of the rule. This is illustrated by a dispute which took place in the course of promulgating the City Law of 1603. Clause I. 30, 3 had been formulated apparently with careful consideration of the equivalent provisions of earlier compilations of the City Laws, but on 13 February 1618 it was noted that the text apparently allowed anyone to impugn a registered title within the year and day. The general understanding of the earlier City Laws, and their wider policy in support of security of registration, as well as experience, was however that the extended right of appeal was limited to those absent from Hamburg at the time, and they had a year and a day from the date when they acquired knowledge to assert their interest. Any widening of the appeal right would abrogate the certainty with which money was advanced. Accordingly, the Recess of 1618 was made to express this position. The Impugnation procedure for objection was also founded in that year and the Verlassung ceremonies were hence to be held on seven specified Fridays in the year. By a further Recess of 29 June 1619 the transactions were not to be

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265 Schalk, above n 5, 113. See also Gries, above n 117, 255. This principle has been discussed above, after n 249.

266 Schalk, above n 5, 114-15.

267 Set out in Appendix II.

268 City Law of 1272 C. II; City Law of 1292 C. II; City Law of 1497 G. II. - see Appendix II.

registered until the following Monday. Absent citizens aside, the right to assert objection on the basis of one of the following "paramount interests", which, according to the text of the City Law of 1497 but not the custom, formerly had been available for a year and a day could then be asserted only within those opportunities. The result of all these changes was to confirm the importance of registration as the means by which title was changed and immediately. The practical likelihood of challenge by a citizen who had been absent from the city was so small that the necessity for a vendor to provide a secured guarantee to the purchaser was actually abolished in 1638, and Baumeister knew of no recent cases. Abolition of the Impugnation in 1802 rendered remaining grounds of objection practically meaningless, because the means by which they could be asserted was severely limited.

Exception 2 - Inherited Family Estates [Erbgut]

The richest source of claims which could overturn a registered interest is found in the field of inheritance, and the purpose of these was to enforce the obligation to provide for one's family after death. By the 18th century the claims had transformed from rights held by prospective inheritors in distinct land parcels to claims for a proportion of the total liquid value of the estate.

The exception applied in favour of Erbgut [inherited family estate] which embraced land which one had acquired through inheritance or marriage dowry. A rentcharge was also

\[\text{270 Schalk, above n 5, 129. Gries dated the legislation at 28 January 1619, above n 117, Vol 1, 246.}\]

\[\text{271 Schalk, above n 5, 130. Gries, above n 117, Vol 1, 259.}\]

\[\text{272 Baumeister, above n 55, Vol 1, 131 n 3.}\]

\[\text{273 Ibid Vol 1, 135-6 note 28. Baumeister went on to comment that it was arbitrary to allow to those absent such an exception when, in practice, those present in the city had even so little idea of what was happening in the Verlassung ceremonies - so low in importance had the Verlassung descended beside registration.}\]
characterised as Erbgut if held over land which could be so characterised, which is quite logical because sale subject to a reserved annuity\textsuperscript{274} was the most significant method for \textit{inter vivos} transfer of family wealth to the next generation, with income reserved to the aging parents.

The basic principle was that a person holding such land was obliged in turn to pass it on to one's own next of kin. This inter-generational obligation of the land owner translated into a range of absolute real proprietary rights for his or her statutory next of kin,\textsuperscript{275} including a spouse, to intervene in transactions with the land which might defeat their expectations. From the earliest time Hamburg law did not permit a person holding title to land as Erbgut to sell it, or to pledge it as a security, without the formal consent of the next of kin. At first their agreement to the transaction had to be express but eventually, if inquiry was made, the fact of which was to be proved by a Councillor, their silence sufficed. Consent was easily established when the next of kin stood as guarantors in the transaction or joined in the Auflassung.\textsuperscript{276} While originally their agreement was an essential precondition for a legally valid alienation or burdening of Erbgut land, and if it were refused the Auflassung could not take place, by 1603\textsuperscript{277} it was limited to a veto power over only dispositions taking effect on the event of death. Nevertheless, Schalk referred to a registration entry as late as 1542 as demonstrating persistence of the requirement for reversal of a transaction without the agreement of the next of kin.\textsuperscript{278}

\textsuperscript{274} See above following n 174.

\textsuperscript{275} \textit{die Erben}; "Next of kin" has been adopted, for want of a better word like "inheritors", to avoid the English terminological distinction between testate and intestate succession. "Heir" has been rejected because of its connections to primogeniture, which has not been detected in studies of Hamburg law from 1270.

\textsuperscript{276} Schalk, above n 5, 101-3.

\textsuperscript{277} City Law of 1603 Ill. 1. 5.

\textsuperscript{278} Schalk, above n 5, 110.
The characterisation of a particular landed asset as either Erbgut or as an independently acquired asset was therefore important. It does not appear to have been necessary to be able to characterise the land from information in the City Books in order to ground a claim by the next of kin. Schalk nevertheless pointed out the textual characteristics of relevant registration entries which would have made it relatively clear that a particular title was Erbgut. While the consent of the next of kin was seldom recorded in the registration entries, their participation in the Verlassung ceremony was, and it was also frequently the case for spouses to make a common Resignation from the property even when it was not expressly under marital co-ownership.

There were three principal exceptions to the requirement that the consent of the next of kin be obtained -

i. real distress of the vendor - which had to be proved by the vendor on his or her own oath and through witnesses who were property owning citizens.

ii. bankrupt deceased estates - the executor could transfer Erbgut land without consent when the estate assets did not meet its liabilities, thus establishing real distress.

iii. mobilis - the present holder of Erbgut obtained the competence freely to dispose of it if upon acquisition notation had been made that the title could be assigned or pledged as security without the approval of next of kin. A particular juristic act could also be used to free Erbgut already acquired. By 1603, when the veto was restricted to dispositions taking effect upon death, it was exceptional for acquisitions to be made without notation of the most free power to dispose of the asset.

Through expansion of these exceptions, in practicality, the claim of the next of kin shifted from particular assets to a proportion of the entire estate "... as a debt of the last class ..." for which the deceased was legally obliged to make provision. In the City of Hamburg,

\[\text{279} \text{ Schalk, above n 5, 104.}\]
\[\text{280} \text{ City Law of 1603, above at n 277.}\]
\[\text{281} \text{ Schalk, above n 5, 106-7.}\]
the real wealth of which was built on international trade, which had founded a stock market in 1558 and a commercial bank in 1619, freeing the claims of the next of kin from land and attaching them to general assets would not necessarily have been disadvantageous to them - land was no longer the most important source of wealth. After 1603 the textual indications in the City Books that land was Erbgut no longer played a role and fell away, as with recording assignments in real distress.\textsuperscript{282} At least with respect to specific landed assets, the veto right probably retained no practical significance when it was finally abolished by legislation in 1861.\textsuperscript{283}

Exception 3 - Pre-emption Right of Next of Kin

The next of kin\textsuperscript{284} had a real right of first refusal\textsuperscript{285} over all land of their forebears, in addition to their ever-dwindling real right of veto over transactions with Erbgut. This applied to land whether independently acquired or being sold in "real distress".\textsuperscript{286} This right was not effectuated by reversal of the transaction, but rather by a real right of the next of kin to step into the transaction in place of the assignee or mortgagee, in which case they had to assume any guarantees required of the vendor or mortgagor.\textsuperscript{287} Although the City Law of 1603 worked a severe limitation of other apparent juristic rights over Erbgut, which probably corresponded to the practice of the time,\textsuperscript{288} it did not restrict

\textsuperscript{282}Schalk, above n 5, 108.

\textsuperscript{283}Schalk, above n 5, 108. Gesetz vom 20. 2. 1861 "Betreffend die Aufhebung einiger Beschränkungen der freien Verfügungsmacht auf den Todesfall".

\textsuperscript{284}die Erben.

\textsuperscript{285}das Naherrecht - next right [to the thing]
dingliches Vorkaufsrecht - proprietary right of pre-emption.

\textsuperscript{286}Schalk, above n 5, 107.

\textsuperscript{287}Schalk, above n 5, 110, and see above in text at n 266.

\textsuperscript{288}City Law of 1603, above at n 277.
the right of pre-emption. Gries nevertheless commented in 1837 that in practice the provision was no longer utilised. In principle, however -

The power of disposition of every proprietor of an urban land parcel was therefore limited in favour of his next of kin through this right of pre-emption.

There appears to have been little concern on the part of the land title registry officials whether land had been offered to next of kin before it was assigned or burdened in favour of another. When the next of kin joined in the Verlassung ceremony, which was common, they nullified their rights in this respect also. The right of pre-emption, so far as it still held meaning, was finally abolished by legislation of 12 April 1871.

Exception 4 - Creditors and Residential Building Land

One very early method of financing residential construction in Hamburg involved the owner of the land retaining seisin [rechte Gewere] over the land, usually an estate known as an area, as well as the early form of security known as Erbzins. The person for whom the house was built acquired undivided ownership of buildings and other improvements constructed for him and could freely alienate them. However, this separation of title could not be maintained if there was to be an alienation, so the owner of the building could also alienate the land, but subject to the securities for the original landowner. In contrast to the law of Lübeck, there was no positive provision for this situation in the law of Hamburg, so the relationship between the original land owner, retaining a security analogous to the mortgage, which was not yet conceptually perfected, and the purchaser.

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289 City Law of 1603 II, 8, 3 & 4; Schalk, above n 5, also refers to a case from 1672 confirming this: 107 n 32.

290 Gries, above n 117, Vol 1, 318 and Vol 2, 141.

291 Schalk, above n 5, 107.

292 Schalk, above n 5, 108.
of the building was arranged through private transaction with the title to the land. Rather than the former landowner agreeing once and for all to further alienation of the land and building, agreement to each subsequent transaction also had to be obtained in the way that the agreement of the next of kin had to be obtained to alienation of Erbgut land, and often, similarly, this was satisfied by concurrence in the Auflassung as was seen above concerning the Näherrecht of the next of kin. With conceptual development of the annuity and rentcharge, the latter emerged as the security retained by the former land owner, with reservation of a right to disallow new transactions or to exercise a right of pre-emption. Schalk suggests that this latter rentcharge transaction was in practice registered, but it is likely, at least in the earlier Erbzins transactions that the reservation of the original landowner's real rights did not have to be registered in order to bind the subsequent purchasers.

Exception 5 - Pre-emption Right of a Purchaser Subject to Security

Pursuant to the older statutes in Hamburg a person who had acquired a Wurt, and with it the obligation to satisfy a security over it, had a real right of pre-emption if the holder of the security wished to sell and assign it. By exercising the right and acquiring the land, the title was freed of the security. With later transition in the concepts of securities, and particularly rentcharges, this was superfluous and was omitted from the City Law of 1603.

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293 See text above around n 275.
294 Schalk, above at n 5, 110-11.
295 see above n 176.
296 Schalk, above n 5, 111.
Exception 6 - Pre-emption Right of Rural Neighbours

In rural areas belonging to the City of Hamburg, pursuant to § 61 of the Hamburg provincial law (Landrecht), neighbours had a real right of pre-emption if one wished to sell one’s land. This would have assisted, perhaps, in maintaining economically viable agricultural units. Schalk states that there was no such right within the city.297

Exception 7 - Leases

In German law the lease relationship is not classified as a proprietary relationship, but rather as a personal obligatory relationship dealt with under the law of obligations. It is thus seldom discussed in property law texts. Although the transaction is classified as personal, it generally has the same incidents as a common law lease. Some insight into this issue can be gained from Baumeister’s argument that Hamburg law was capable of recognising relative unregistered proprietary rights,298 particularly because he went on to use the lease as an example of an unregistered right with respect to land which had clear proprietary characteristics.299 The rental contract could be recognised as a proprietary right, Baumeister argued, because by virtue of express statutory provision an alienation or burdening of the property did not affect the tenant of the house, at least for the duration of the rental contract, and securities over the land were not affected by that — indeed the lender has another form of security in the stable rental income.300

297 Schalk, above n 5, 111-12.
298 See text above at n 248.
299 Baumeister, above at n 55, Vol 1, 119.
300 A rental contract in fraud of a mortgagee would naturally be invalid: ibid, Vol 1, 119 n 5.
Exception 8 - Real Servitudes

Real servitudes could be protected by impugnation before abolition of that instrument in 1802. Baumeister notes that real servitudes were recognised as proprietary interests without registration, although it was usual practice to register them or at least obtain notation of them by Clausel. Upon sale of the servient tenement it was necessary to expressly inform the purchaser about an unregistered servitude unless it was evident upon inspection of the land parcel.

Exception 9 - Fraud

A claim in fraud was not conceived as a proprietary claim, but rather as a claim which bound the conscience of the person who had obtained registration through the deceit, and thus could be required to assign it to whoever was truly entitled to it.

Conclusion

By 1840 possible exceptions to the security of registration in the City of Hamburg were thus limited to -

- in a transaction with inherited family land [Erbgut] taking effect upon death it was still feasible in principle that the next of kin might decline their permission, if extremely remote in practice.
- in principle, the possibility that next of kin might exercise their right of pre-emption, step into the purchaser's shoes and acquire the land themselves.

301 Baumeister, above n 55, Vol 1, 119.
302 Baumeister, above n 55, Vol 1, 149-50.
303 Ibid Vol 1, 151-2.
304 Baumeister's view of the limit of the fraud claim vis à vis notice has been dealt with above n 259.
We have seen that in practice this possibility was also extremely remote.\textsuperscript{305} In principle, in favour of the original building site owner there could remain unregistered a real veto power over the new transaction and an unregistered security. We have seen that this form of transaction was overtaken by registered rentcharges and reservations of veto power.

Apart from these exceptions an estate or interest in land was secured by and upon registration. The first two exceptions in favour of next of kin had to be asserted within three days after the Verlassung ceremony, which always took place on a Friday, by obtaining an Inhibition in the Hamburg Supreme Court. It might be pointed out that registration in the Erbe- or Rente Book also closed off these possibilities of objection and thus they were not exceptions to the security of registration, unlikely as they were. Verlassung transactions were however recorded in minutes, and final registration was made in the same order. The bound volumes of these minutes have been classified as City Books,\textsuperscript{307} and for all other purposes the transaction was then considered complete. Further, the historical derivation of the "year and a day rule" was also as an exception to the security of final registration.

We may thus conclude that the exceptions to the security of registered title which actually operated in Hamburg in 1840 were very restricted, and plainly reflect those which emerged in the Torrens system. Far from undermining a general obligation to register

\textsuperscript{305} See above, text at n 290.

\textsuperscript{306} See text below following n 309.

\textsuperscript{307} See above in text following n 124.
estates and interests, the narrowness of the possible exceptions and the difficulty of
asserting many of them strongly reinforce the necessity to register transactions as a
precondition of their recognition and protection. The older exceptions in favour of the
rights of next of kin to Erbgut, reinforce the connections of the Hamburg concept of
property in land to social context - it is clearly a socially responsible principle that one
must provide for one's family upon death, or at least to pass on the heritage one has
received in no worse condition. That over time this principle of inter-generational equity
no longer grounded proprietary interests for the next of kin in particular land parcels but
applied to assets in general highlights the point that social and intergenerational
responsibility was not restricted to land but pervaded the fundamental civil law concept of
property itself.

5 Notable Companion Principles

A system of land title does not exist in cultural, spatial, environmental or conceptual
isolation.

Clearly it will have a cultural context. For example, it is difficult to imagine an English
deeds system existing outside a society with a strong local knowledge of the history of
the use of particular land which might be drawn upon to hedge risks of conflicting claims,
or some other system such as title insurance to deal with contrary claims which might
emerge. It is interesting to observe that in England the movement toward land title
registration followed the transition of village to industrial society. In South Australia the
widespread land frauds which motivated Torrens, and indeed contributed to the
groundswell of popular support which secured his election, would not have been possible
in a closer society with strong oral traditions. In this sense land title registration
represents a systematisation of social knowledge about land.

A land title system will also deal with the spatial context of the abstract concepts of ownership, possession, security and so forth, by providing a set of principles which may be drawn upon to fix the location of the claims and interests which it recognises and orders on the face of the Earth herself.

One would also expect a land title system to have principles which guide its relationship to the environmental context of the claims and interests which it recognises and orders, whether these principles are admirable or not. Even in a system of extensive public law regulation of environmental responsibilities, the system of private land title must take some position in relation to the powers of various interest holders, at least in their relationships inter se, to transform the object of property itself. One might speculate that in a closer society with strong oral traditions local knowledge of the land was also accompanied by a level of accountability.

Similarly, within the legal system itself there are principles which mediate the conceptual connections of the land title system with other parts of the legal system. Some of these are not regarded as important, and thus often neglected, sometimes leading to dual or disjointed sets of principles - such as the concepts of ownership and possession in criminal law beside those of civil law. Others are treated as vital and defining, such as the multi-faceted distinction between personal and proprietary rights - whether a lease is one or the other for example.

Some of these principles and doctrines which define or mediate the relationship of the land title system to society, the environment, spatial connections and other parts of the legal system will be vital to the identity of the system. Other principles and doctrine may
be regarded as companion principles because, in the operation of the land title system in context, it is inevitable that the operation of the doctrines in practice will impact significantly upon it. For example, it is almost inconceivable that any land title system could operate without processes for receiving and verifying a claim that someone is making unlawful use of land and then rectifying the situation. It is difficult to think of the English deeds conveyancing system without the doctrine of estoppel, or adverse possession, to deal with meritorious claims to land existing outside the private and mysterious formalities of the correct legal procedures. At the same time, it is virtually impossible to think of a land title registration system without a system of administrative appeal and judicial review which may be engaged when procedures and decisions within the registry are disputed. These principles, doctrines and rules of law, which are vital to the identity of the land title registration system, and which might well be placed conceptually in another part of the legal system outside the conventional property law realm, are what I mean in the context of a legal transplant by the expression companion principles.

(a) Damages, Unjust Enrichment and the Paulian Action

A system of land title by registration must have an effective system for dealing with the claims of proprietors of interests in land who lose their registered position and thus the enforceability of their rights, despite procedures to ensure the integrity of the system such as the completion of transactions in public or before a notary. Registration is established as the vital point because this ensures systematisation of knowledge about proprietary claims to the land, which in turn secures an infrastructure for all transactions with land by ensuring the easy and reliable identification of those who are entitled to the fruits of, and are responsible for any land in question. The raison d'être of the system is
that this dependability is so highly valued by wider society that, if one wants a proprietary claim to be recognised and enforceable by her public institutions, then one is obliged to register or ensure public notation of it. A key aspect of the civil law concept of a proprietary interest is thus the obligation to register it. Those who lose their registered position through a fraud actuated through the same registration system must therefore be provided with reliable recourse to compensation or damages on plain ideas of justice and the clear requirements for legitimacy of the registration system itself, not least in the eyes of those who would use it. The availability of claims for compensation can thus be seen as a companion principle of a land title registration system.

When title by registration was transplanted to South Australia there was no available practical principle for compensation in the English legal landscape, first because the English general law system has an elaborate doctrine of notice and remedial trusts which focus the dispute on regaining the lost title from the new acquirer of the land rather than pursuing the culprit and the value of the lost interest. These remedies were inappropriate in a system of registered title which did not recognise a doctrine of notice, which required that trust obligations be eradicated in the registration process in the absence of some other express formal arrangement, and which would reverse the transaction only if the person who acquired the title was at least complicit in a fraud, or some other exception or paramount interest was involved. To overcome this difficulty a public system of compensation was established as a part of the Torrens system, under which a small contribution was exacted from each transaction for use in a fund founded to compensate those very few who suffered losses through the operation of the system.

308 See compensation provisions in the Land Registration Act 1925 (UK).
In Hamburg, actions in damages were available if title could not be regained. The comparative ease of attaching the claim to other land through a compulsory mortgage ameliorated the otherwise apparent disadvantage of not having a proprietary claim against the subject land, and this was not restricted to tracing the value of the lost interest. If all of the unregistered claims against a registered proprietor could not be satisfied then bankruptcy was the natural result, and all obligees would take a proportion of all available assets - the available landed assets would have been greater because there would have been no other "equitable claims" taking priority as proprietary interests, which appears on one view fairer to all. An acquisition of a proprietary interest made in the knowledge of the likelihood that the grantor probably could not satisfy all claims could generally be undone as an enrichment of the grantee, on the basis that the grantee was complicit in the grantor's fraud on creditors, by means of the *actio Pauliana* which appears to have been an early version of the claim in unjust enrichment.

The Hamburg legal system thus provided remedies for compensation in the event that the extensive protection of the system failed and the proprietor of a registered estate or interest lost the security of registration through operation of the principle of public faith in the register. One might well conclude that the necessity of providing effective remedies in compensation, as a companion principle of title by registration, was satisfied in Adelaide as well as could be expected by the institution of a compensation fund in the

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309 Gries, above n 117, 250. Baumeister, above n 55, Vol 1, 137, seems to suggest that the Roman law action *rei vindicatio* was appropriate for the assertion of claims to unregistered proprietary interests. In classical Roman law this action was certainly available to claim damages at least in the alternative: M Kaser, *Römisches Privatrecht*, 16th ed, C H Beck, München, 1992, 125.

310 In text above n 202.

311 Baumeister, above n 55, Vol 1, 137.

312 Paulian action.

313 Baumeister, above n 55, Vol 2, 400-5.
absence of the Roman law principles which applied in Hamburg, and particularly in the absence of a developed concept of unjust enrichment.

Restrictions on Alienation by Spouses

The close proximity and trust of the marriage relationship has afforded dishonest spouses the special opportunity of using land title systems to defeat each other's interests in land, whether registered or not. In the development of common law and equitable principles in the English general law system these issues received particular attention early in the post-war period with the development of the deserted wife's equity\(^{314}\) and then later through extension of the constructive trust.\(^{315}\) In the evolving interpretation of the Torrens system, the landmark case of Frazer v Walker\(^{316}\) was the first of many in which the interest of a defrauded spouse gave way to the security acquired by registration for a later transaction in which the spouse had not participated. As noted above,\(^{317}\) the silence in this respect of the legislative text establishing the Torrens system has been pointed out as a source of discrimination against women who generally, as a matter of experience, have held the more vulnerable position in this respect. We have seen that in the initial development of the Torrens system Hübbe, at least, considered the vulnerability of this position within the prevailing English legal landscape of the time and concluded that the transparency of title registration afforded far better protection than did English general law conveyancing.\(^{318}\) This raises the question of how the Hamburg system protected spouses in their potential vulnerability to

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\(^{314}\) See National Provincial Bank Ltd v Ainsworth [1965] AC 1175.


\(^{316}\) [1967] 1 AC 569.

\(^{317}\) See above, Part I In 239.

\(^{318}\) See above, Part I In 103 and 242.
each other.

We have seen that spouses held real rights of veto and pre-emption with respect to inherited family land [Erbgut], at least until the real rights of next of kin transformed into a claim to a proportion of the value of the whole estate, and often joined with their marital partners in making resignation from the land in the Verlassung ceremony.

At no time in the history of the Hamburg land title registration system did women lack juristic personality or the capacity to own property. However, as in classical Roman law, it was necessary for women to have the assistance in many transactions of one variously referred to as a tutor, an adviser, a curator or guardian. For young single women this was primarily the father, for married women primarily the husband and for widows primarily the next male relative if the deceased husband had not appointed one by will. Litigation and court procedures were definitely transactions for which a tutor was required, and thus the resignation from land in the Verlassung ceremony was also embraced. Attention has been drawn to the records of many such procedures involving women's property without the participation of a tutor, but it has been argued that this was a failure in record making rather than evidence of women holding an independent right. On the other hand, Anderson pointed out that the law of the place where the land was situated governed this point and he had personal experience of transactions in five North German cities where women represented themselves without

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319 See above following n 273.
320 See above following n 279.
321 Kaser, above n 309, 294.
322 Schalk, above n 5, 31.
323 Schalk, above n 5, 32; Baumeister, above n 55, Vol 2, 200 note 3.
the requirement of a curator.\textsuperscript{324}

The role of the tutor seems never to have been clearly settled. With respect to transactions with land, minimally, the mere presence and consent of the tutor was required. Schalk maintains that from 1292 (interpretation disputed) until 1732 the express consent of a married woman was not required, suggesting that the tutor's role was more in the nature of a guardian or representative with independence of action.\textsuperscript{325} Anderson suggests that the express consent of the woman was always required to registration at least, even if her personal presence was not required.\textsuperscript{326} These variations could be explained by differences in the role with respect to wives, young women and widows, the last of whom enjoyed greater independent freedom of action.\textsuperscript{327} A breach of the requirement for participation by a tutor led to invalidity with respect to judicial matters and will making, but for other transactions it allowed the woman the choice of withdrawing from the transaction without proof of an enrichment of the other party.\textsuperscript{328} One exception to the principle was the situation of a business-woman in a transaction connected to her business, in which case she could also maintain litigation without a tutor's participation.\textsuperscript{329}

Clearly a curatorial relationship, and especially between husband and wife, was vulnerable to conflict of interest. There were principles intended to contain this, a clear

\textsuperscript{324}Bremen 1796, Lippe 1798, Moisburg 1800, Wilhelmsburg 1804 and Harburg (now a suburb of Hamburg) 1809: C D Anderson, above n 148, § 16, 43-4.

\textsuperscript{325}Schalk, above n 5, 30-2.

\textsuperscript{326}Anderson refers to the woman being able to give her consent to a registry official in her own home: above n 148, § 18, 46.

\textsuperscript{327}Baumeister, above n 55, Vol 2, 203.

\textsuperscript{328}Baumeister, above n 55, Vol 2, 212.

\textsuperscript{329}Baumeister, above n 55, Vol 2, 212-13.
example of which is the requirement that in a transaction between husband and wife a separate tutor had to be appointed for the wife for that transaction.\textsuperscript{330} There was, in addition, a widespread practice for women to have Clause\textsuperscript{n} noted on titles which required their personal consent in their presence to an alteration of registration.\textsuperscript{331}

The effect of this doctrine between spouses was thus, that a husband was required to obtain his wife's consent to assignment where the property was plainly a marital asset and where a Clause\textsuperscript{1} had been placed on the title requiring the wife's consent. It was also possible to place a Clause\textsuperscript{1} on a title freeing it from the necessity to obtain the wife's consent, which was another form of \textit{Mobilation}.\textsuperscript{332} On the other hand, the wife generally had to obtain the consent of her husband because he was her primary tutor, and in transactions between themselves when another tutor had to be appointed, he would have been well aware of it. The protection of spouses was thus a well established aspect of the Hamburg system. Although the method of protection does not match contemporary expectations, it was certainly a much more liberal approach than obtained in some other European models of the time. The ability of all women to hold and transact with real proprietary interests removed from the Hamburg system one impetus which motivated the development of the English trust to the dominant institution that it is today. However, the confinement of the trust institution in the Hamburg system clearly did not spell the simplistic conclusion that spouses had no rights - plainly the contrary was the case. Interestingly, in 1862 Baumeister published a paper in which he strongly advocated abolition of this restriction on the capacity of women before the courts and in public administration as an issue going to the roots of public law.\textsuperscript{333}

\textsuperscript{330} Anderson, above n 148, § 26. 73; Schalk, above n 5, 30-1; Baumeister, above n 55, Vol 2, 206-8.

\textsuperscript{331} Anderson, above at n 148, § 18, 47; Schalk, above n 5, 28-9 and 30-1.

\textsuperscript{332} Schalk, above n 5, 29-30. See also text above near n 275.

\textsuperscript{333} H Baumeister, \textit{Die Mündigkeit unserer Jungfrauen und Witwen - Gesetzentwurf mit Motiven}, Hoffman
(c) *The Position of Single Women and their Children*

The rights of married spouses within the Hamburg system should be set beside opportunities for single women to make claims on men with whom they had non-marital sexual relationships. In 1840 Hamburg had a highly organised set of principles for the "punishment of those who dishonour and seduce virgins, widows and maids" which were calculated as much to require that provision be made for the woman, according to the needs of her class, as to punish the wicked.

When the pair had a similar class standing the man was put to the option of marrying the woman or endowing her. So far as one alternative was not realistically available, the other became the object of the litigation. Marriage might not be an option for reasons emanating on the man's side, in which case the woman was entitled to litigate directly for an endowment. The man might have married or already been married, he might have been guilty of some social transgression which would form a valid ground of repudiation, presumably of an engagement, or he might have already declared that he would not marry the woman. Marriage was certainly precluded if the man had raped her. Similarly, marriage might not have been an option for reasons emanating from the woman's side, in which case the man was freed of obligation. She might have married, or through her own transgression or fornication afforded the man a ground to decline marriage. Litigation for a marriage was possible in principle when the copulation followed a binding promise of marriage, and was in rightful expectation of the marriage. If the man still refused to marry, in Hamburg the court would not judicially declare a marriage in order to

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334 City Law of 1603 IV. 28, quoted from Baumeister, above n 55, Vol 2, 414ff. Baumeister heads his chapter "Non-marital Sexual Affairs" [Unahelicher Geschlechtsungang] which is relatively value neutral for his times.
secure the civil advantages to the seduced\textsuperscript{335} and her child.\textsuperscript{336} Instead, the man became liable for an increased monetary payment.

If the seduced was a "plain girl"\textsuperscript{337} and the man was from a higher class then the man was not put to legal options to offer marriage or an endowment. Instead he was obliged to assist the woman by providing her with a dowry,\textsuperscript{338} which would have improved her marriage chances. That he was not put to the option was justified on one hand by not embarrassing the man with a compulsion to marry one below his station, but at the same time the woman could decline any offer of marriage which he might have made without losing her right to sue for the "compensation package", just as she did not lose it if there was some impediment to her marriage.\textsuperscript{339}

The situation in which a man of lower rank could find himself after intercourse with a woman of higher rank was decidedly grim. If the parents and relatives of the woman had doubts that the couple should marry, and he was unable to provide her with a dowry appropriate to her class,\textsuperscript{340} and he had led her astray with an element of deception, then he was to be flogged or suffer some other serious punishment.\textsuperscript{341}

\textsuperscript{335} \textit{die Geschwächte} - a general expression for the woman in this situation.

\textsuperscript{336} Baumeister, above n 55, Vol 2, 417. In other parts of Germany this might well have been the case - Baumeister refers to the Reichsgericht case of Clark c. Jackson, 14 November 1825, in which the court would have ordered a marriage if the plaintiff had been pregnant.

\textsuperscript{337} "unberühltigt Magd";

\textsuperscript{338} \textit{die Aussteuer}; objects for her personal or for common use which a bride of modest social standing took into the marriage - perhaps more equivalent to the "glory box" than a dowry.

\textsuperscript{339} Ibid Vol 2, 417-18.

\textsuperscript{340} \textit{der Brautschatz}; a sum of capital taken into a marriage by a bride of higher class.

\textsuperscript{341} Baumeister, above n 55, Vol 2, 416 n 17.
The litigation opportunities of the woman were a civil claim\textsuperscript{342} although based on the punitive provisions of the City Law. The object of the litigation could only be a monetary sum appropriate to the woman's standing\textsuperscript{343} and one might speculate that many factors bore on the negotiation of the appropriate figure. In view of the likely time span between the event, the litigation and anticipated marriage to another, the woman was entitled to a security for payment.\textsuperscript{344} Baumeister concluded that the woman's claim could be inherited if she had commenced litigation before her death. On the other hand, liability of the man to provide an endowment would fall as a liability to his estate upon his death so long as the claim had already passed the possibility of personal performance by marriage.\textsuperscript{345}

The related question of support for children born out of marriage was, naturally, also addressed by the law of Hamburg. While in earlier times the claim was maintained by the mother, by 1840 it was the child's claim against his or her father, waged in his or her name by the mother. If the child was not of full age a guardian had to be appointed. The guardian could not be the mother, but could be the maternal grandfather. In establishing paternity, if it were disputed, the child was assisted by a range of advantageous evidentiary presumptions. Calculation of the amount of support appears to have been guided only by the needs of the child and the means of the father. The support was to be paid quarterly in advance, but there was no entitlement to a security for payment.\textsuperscript{346}

\textsuperscript{342}"Das Object des Anspruches der Geschwachten...": ibid, Vol 2, 418.

\textsuperscript{343}Ibid Vol 2, 419.

\textsuperscript{344}Ibid Vol 2, 420.

\textsuperscript{345}Ibid Vol 2, 420-1.

\textsuperscript{346}Baumeister, above n 55, Vol 2, 429, citing, at n 9, Clark c. Jackson in the Hamburg Supreme Court on 9 July 1827, in which the court stated that there was no legal basis for the provision of a security for the support of children, and in any case, according to the court, it was not needed - perhaps because a single mother was entitled to a security in her own right.
C  Conclusion

Having gained freedom from feudal constraints at a very early stage the Hanseatic cities were able to develop over centuries experience of both pan-continental mercantile trade and relatively autonomous city administration. No doubt the success of these developments and the legal infra-structure which supported them was in a large part attributable to the sharing of information within the structure of the Hanseatic League.

The freedom of the cities also accounts for divergence of the English and Hanseatic land title systems as Hübbe so astutely pointed out.347 Starting from equivalent systems under Saxon law, based on public symbolic transactions with land, feudalism in England encouraged the development of extremely private transactions and the doctrine of the Use to execute them in order to avoid the numerous onerous burdens and to secure particularly to women a form of proprietary interest in real assets held for them by a trustee.348 These historical pressures were not present in the Hanseatic cities, which instead developed the public symbolic transaction into a public judicial procedure, of which records were made and compiled with a thoroughness and practicality that progressed as administrative methods expanded. These assuredly reliable records were thus accorded a superior evidentiary status and became a more complete description of the contemporaneous estates and proprietary interests in and legal claims to each land parcel as the centuries passed. In Hamburg by the end of the 17th century, the Recess of 1618 and the land title administration reforms led by Gerhard Kelp had brought the system to a principle of title by registration with already a striking resemblance to the

347 U Hübbe, above n 55.

system which was transplanted to South Australia as the Torrens system. The Hamburg land title registration system at 1840, with which Dr Hübbe was so familiar, shared so many similarities with the Torrens system that it seems more sensible to first revisit the differences before reiterating their similarities.

Most obviously, the public judicial ceremony of the Verlassung was not received into the Torrens system and this perhaps emphasises very much reduced importance which it retained in Hamburg by 1840. On the other hand, both Torrens and Hübbe emphasised the publicity and transparency of their system, and the completion of transactions at the Adelaide land title registry followed by immediate registration was advocated. Further, South Australia adopted the profession of land title agent to conduct conveyancing transactions. Similar professional representatives had conducted business for clients in the Hamburg Verlassung ceremonies and Hübbe himself had been engaged in this role for some years before immigrating to Australia.

The historical structure of the Hamburg City Books was also departed from when the Torrens Register Book was conceptualised. On the other hand, the individual certificates of title of the Hamburg Hauptbuch, which Kelpe first initiated in 1657, can certainly be seen as a model for the Torrens certificate of title, and by 1840 this "index" was the starting point for a title search with such reliability that its volumes were carried over as the Hamburg Grundbuch upon the establishment of the German federal system at the start of the 20th century.

The most significant divergence of the systems was in the conceptualisation and distinction between personal and proprietary interests which is most evident in the differing classifications of the lease. A less obvious manifestation of this divergence, but with more profound ramifications, is evident the greater status and potential accorded by
the Hamburg system to personal Claims\textsuperscript{349} and Demands\textsuperscript{350} even after abolition in 1802 of the Impugnation, which had been available also to assert personal interests. This point is well illustrated by the potential claims of single women following a non-marital sexual relationship, to whom a compulsory security was available thus sheeting their entitlements to an asset of the defendant. The alternative direction taken by the Torrens system into the English legal landscape did not find an equivalent proprietary remedy until well after 1945, and then not completely. Claims which cannot be asserted as proprietary through a constructive trust or other artifice of Equity remain in the labyrinth of civil judgment execution unless bankruptcy proceedings are invoked, in which priority to real assets is taken by registered legal interests and by unregistered interests for which an anchor in Equity has been found, diminishing the assets available proportionately to satisfy all unsecured personal claims. The classification of a claim to land as proprietary when an equitable remedy is available\textsuperscript{351} is thus no great advantage from a systemic point of view when on the other hand, in the absence of competition between claims, an order for performance of an obligation is the usual remedy regardless of the adequacy of monetary damages. The invocation of English equitable principles later in the judicial interpretation of the Torrens system, remarkably similar to the Roman law principles discussed by Baumeister,\textsuperscript{352} in order to address this problem was not intended by the Torrens group although the availability of compulsive remedies was. This differing proximity of the edge between proprietary and personal claims remains thus the most significant divergence between the Hamburg-Hanseatic and the Torrens systems. It might be that the repeals section in the original Torrens legislation,\textsuperscript{353} drafted by Hübbe in

\begin{itemize}
\item[349] \textit{der Anspuch}.
\item[350] \textit{die Forderung}.
\item[351] Doctrine in \textit{Walsh v Lonsdale} (1882) 21 Ch D 9.
\item[352] See above in text following n 253.
\item[353] s 1 Real Property Act 1858 (SA).
\end{itemize}
person, was intended to meet this divergence in its attempt to limit the application of the practices of Equity and thus unregistered proprietary interests, and that the failure of 'the Britshers' to grasp this explains the apparent uncomprehending, and thus rudely sceptical, reception of his evidence in subsequent inquiries.

Beside these divergences, the similarities between the Hamburg and Torrens systems are indeed striking. Foremost is plainly the obligation to register an estate or interest in land if it is to attain legal recognition and enforcement. In both systems the superiority of the register is maintained by its conclusive evidentiary status. In both systems the protection of registration takes effect immediately and is not subject to even actual knowledge of earlier unregistered interests in the land, subject to similar paramount exceptions such as for leases, real servitudes (such as easements) and fraud on the part of the person who has obtained registration. In both systems, inspection of the register was free to all subject to payment of a fee.

With respect to concepts of registered estates, both systems of title by registration afforded a degree of release from ancient rules of seisin. Both systems had complex classifications of Estates [Erbe] in land, and these were the object of ownership or burden rather than the land itself. As it emerged, despite arguable divergence in the original South Australian legislation, the Torrens system retained an English classification of estates. The Hamburg estates were classified according to land use in a fascinating application of civil law property concepts to the urban problem of placing

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354 s 32 Real Property Act 1858 (SA); s 51a Real Property Act 1886- (SA); s 41 Transfer of Land Act 1958 (Vic).

355 die rechte Gewere. See s 3 "Proprietor" and s 39 Real Property Act 1858 (SA); s 68 Real Property Act 1886- (SA); s 41 Transfer of Land Act 1958 (Vic).

356 s 3 'Land' and "Proprietor" Real Property Act 1858 (SA).
inconsistent or threatening land uses in tolerable spatial relationship to each other.\textsuperscript{357}

While at first sight this might appear as a divergence between the systems, a similar capacity was actually retained for the Torrens system by instituting an exception to the security of registered title, a paramount interest, in favour of conditions and reservations in the original Crown grant of freehold tenure.\textsuperscript{358} This capacity was apparently utilised in the early years of the implementation of the Torrens system in Australia, in order to restrict the uses to which land might be put when laying out the development of some early country towns.\textsuperscript{359} This was certainly done in South Australia in later periods with respect to land not under the planning authority of a local council.\textsuperscript{360} Other reservations and conditions of the Crown Grant for mining and grazing purposes have been more common. In such ways, broader social intentions were integrated in the Crown Grant with the description of the tenure. Such "pre-Planning" efforts in Hamburg and Australia to integrate the civil law object of ownership with its social and environmental context contrast strongly with their contemporary equivalents under the English general law system.\textsuperscript{361}

\textsuperscript{357} Juvenal indicates that in Ancient Rome industries posing a nuisance were located on the other side of the River Tiber: see O F Robinson, \textit{Ancient Rome - City Planning and Administration}, Routledge, London, 1992, 40.

\textsuperscript{358} ss 37 & 38 Real Property Act 1858 (SA); ss 69 & 161 Real Property Act 1886 (SA); s 42 Transfer of Land Act 1958 (Vic).

\textsuperscript{359} Law Reform Commission of Victoria, \textit{The Torrens Register Book}, Discussion Paper No 3, October 1986, 12. Inquiry has revealed that the relevant research files of the Law Reform Commission were lost by the Victorian Attorney-General's Department when the Commission was abolished.

\textsuperscript{360} Some examples are Crown Grant Vol 1746 Folio 20, which restricts the use of the land to business purposes, Crown Grant Vol 1750 Folio 153, which restricts use of the land to residential purposes, in addition to those granting land to public authorities for general and specified public purposes. I am indebted to Mr D Mackintosh, Deputy Registrar-General of South Australia, for correspondence on this point (letter of 29 January 1999 on file with author).

Another very obvious similarity is that between the Hamburg Hypothek and the "Torrens mortgage". Although Torrens originally contemplated a complex procedure for registration of the English general law mortgage,\textsuperscript{362} this idea disappeared from discussion when Dr Hübbe was taken into the Torrens group. Another interesting comparative point with respect to real securities is raised by the presence in Torrens legislation of significant provisions with respect to rentcharges and annuities,\textsuperscript{363} beside the complete insignificance of such transactions with land in Australian legal practice in view of the more conventional use of trusts, terms contracts and charges over land to achieve the same purposes. The annuity [Rente] and rentcharge transactions played important roles in Hamburg. They were the original source of the Hamburg Hypothek and retained importance in the intergenerational transmission of Hamburg landed wealth, as well as for securing interests in Hamburg building developments. It might be that their significance in Hamburg inspired the adoption of such provisions into the Torrens system.

Yet another similarity between the systems is revealed by the methods of noting in the land title register the existence of otherwise unregistered real interests. In 1840 the Hamburg system was in this respect still in some confusion following abolition of the impugnation in 1802, which had been available to claimants up until registration and then was the subject of inquiry if not accepted by the other parties or withdrawn by the claimant. The Clause! remained as a consensual form of caveat for the entry of which the registered land owner's permission was required. On one hand, loss of the simple and accessible Impugnation for disputed interests was regretted by commentators,

\textsuperscript{362} created by conveyance of the debtor's estate in the land to the creditor [mortgagee] subject to redemption [reconveyance] upon satisfaction of the relevant obligation, as it was for some medieval real securities in Hamburg.

\textsuperscript{363} See ss 52, 57 & 58, 61 and 89 Real Property Act 1858 (SA). The encumbrance provisions have since been consolidated in South Australia: see s. 128 Real Property Act 1886 (SA).
because it left application for a Supreme Court injunction [Inhibition] as the only avenue to assert unregistered claims. On the other hand, the virtually unlimited scope of the impugnation was acknowledged as the source of its problems. The simple and accessible form of caveat adopted into the Torrens system, leading to Supreme Court inquiry if disputed, reflected a reasonable consensus of policy considerations for further reform being discussed by the commentators in Hamburg around 1840, intelligently arranged into a practical system.

As mentioned above, the exceptions to the security of registration, the "paramount interests", such as for leases, real servitudes [such as easements] and fraud on the part of the person who has obtained registration, were also similar in both systems.

Some juristic companion principles with which the land title registration system enjoys a symbiotic relationship, although perhaps conventionally classified as belonging in other parts of the legal system, have been discussed and no doubt others may be identified. One example is the availability of damages or compensation when a proprietary entitlement is lost through operation of principles of public faith or indefeasibility. The Torrens group fully appreciated that the transplanted system of title by registration would generally shift the focus of disputes about registered land title from the relevant land parcel, unless fraud or another exception were involved, to questions of damages or compensation for loss of the registered interest. Provision of a public compensation system was an acknowledgment that the English legal landscape did not at that time provide the sophisticated web of personal obligatory claims, such as unjust enrichment, which had been available in Hamburg. Subtle understanding of the English remedies is suggested by the exclusion of actions for eviction or ejectment when principles of indefeasibility operated.364

364 ss 39, 121 and 122 Real Property Act 1858 (SA).
However, despite liberal progressive ideals being expressed in this respect by Hübbe at least, the vulnerability of registered interests held by spouses and the potential claims of single women on the assets of the male partner following a non-marital relationship of consortium, both of which issues were acknowledged and handled with reasonable efficiency for the times in the Hamburg legal system, were not dealt with expressly. In Hamburg the doctrines relevant to the first of these issues were located within family law, and those relevant to the second were located within the law of obligations. These may be regarded as companion principles because in the operation of the land title system in its cultural context it is inevitable that the application of such doctrines in practice will impact significantly upon the system, at least when women are juristically capable of owning property, in order to sheet claims back to secure assets. Thus the relationship should ideally have been juristically mediated. However, so far as property law was concerned, Hübbe's assertion that the transparency of land title registration would protect such interests better than English deeds conveyancing was correct. From this viewpoint the problem is not that the Torrens system was silent on the issue, but that the English legal landscape did not provide equivalent efficient companion principles to connect such claims to the defendant's real assets, and for this reason the transplant from Hamburg has not in this respect flourished in its new habitat so well as it might have. This is certainly a fertile field for future reform.

In the light of all these observations we might finally venture to identify the most fundamental and immanent attribute of a land title registration in the Hamburg-Torrens model. The civil law concept of an estate or proprietary interest in the system is

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365 see above, Part I following n 94.


pervaded by at least one obligation, the obligation to register in order to obtain recognition of it at law and protection of it through public institutions. The registration of estates and interests in land was intended to ensure certainty for wider society in transactions with land and thus this civil law obligation implicit in the concept of real property is properly described as a social responsibility. Adoption of title by registration in Adelaide was intended to effect basic change, as Torrens proudly proclaimed to the Legislative Assembly on 4 June 1857.\textsuperscript{368} Even if the English concept of property was indeed a "sole and despotic dominion"\textsuperscript{369} with no immanent responsibilities, which is extremely unlikely,\textsuperscript{370} it was replaced or transformed when title by registration was adopted. Structurally, the resulting Torrens land title registration system had more in common with the Hamburg system than with the English general law deeds conveyancing system, and this principle of registration\textsuperscript{371} with its implicit obligation, which actually defines title by registration, was adopted for the wider social good.

Social responsibility is not static - it is shaped in part by the needs of society which change from time to time. Society has identified an urgent need for environmental considerations to be integrated into decision making at all levels.\textsuperscript{372} Private law obligation implicit in holding a legal estate or proprietary interest in a system of title by registration thus juristically embraces an environmental obligation in the private law legal powers to deal with them. We have seen one irrefutable manifestation of the social and environmental interconnectedness of the Hanseatic model of title by registration in its

\textsuperscript{368} See above, Part I, n 29.


\textsuperscript{370} see M J Raff "Environmental Obligations and the Western liberal Property Concept" (1998) 22 MULR 657.

\textsuperscript{371} Hübbe above in Part I n 88.

\textsuperscript{372} This need has been identified not least by the international community: see above, Introduction.
concept of the registered estate [Erbe] in land, according to which land use was specified as an inherent civil law characteristic. In 1840 this system of classification remained current in Hamburg, if subject to the pressures of change which later led to a more comprehensive public system. There is some evidence that this manifestation of the more general principle was also transplanted to Australia in a form more compatible with the English system of estates.\(^{373}\) Regardless of this, the private law concept of estates and proprietary interests subject to obligation was transplanted, and by basic legal reasoning it must be concluded that registered estates and interests in the Torrens system are subject to an immanent principle of environmental obligation.

\(^{373}\) See above at n 358.
PART III

CONTEMPORARY GERMAN REAL PROPERTY LAW

Buchholz noted that,

[cent]ertain specific institutions of the [Hanseatic] City Law ... have, at the very least, contributed to the unique character of German real property law in detailed respects.¹

In this Part of the work, after reviewing important phases which helped to fashion the legislative basis and present understanding of German real property law, we shall examine in detail the contemporary system of land title by registration and the concept of property within it, as well as related principles.

A Development of the Property Law Sections of the German Civil Code

The decision to establish a national German system of private law followed a dramatic transition over the second half of the nineteenth century to -

- full competitive and then monopoly industrial capitalism,
- perception of the state as a facilitator of production, providing infra-structure and tariff protection, and
- unification of the German nation under Bismarck.²

² U Sieling-Wendeling, "Die Entwicklung des Eigentumsbegriffes vom Inkrafttreten des Bürgerlichen Gesetzbuches bis zum Ende des Nationalsozialismus" in W Däubler and U Sieling-Wendeling, Eigentum und Recht, Luchterhand, Darmstadt, 1975, especially 76-80. The unification of Germany can be dated from 18 January 1871 when Kaiser Wilhelm was pronounced Emperor [der Kaiser] of Germany in the Palace at Versaille, from 21 March 1871 when the Reichstag first sat, or from 16 April 1871 when the Reichstag adopted for Germany the Constitution of the North German Federation. For a general overview see Diether
The period saw legalisation of the formation of industrial unions (1869) and the formation of political parties representing the interests of industrial workers such as the General German Workers' Association\(^3\) in 1863 and the Social Democratic Worker Party\(^4\) in 1869. Industry associations were also formed, such as the Society of German Iron and Steel Industrialists\(^5\) in 1874. The state became active in the provision of electricity and gas, the railway network and in policing.

A national system of civil law was advanced by two National-Liberals, Lasker and Miquel, in the course of the unification of Germany under Bismarck.\(^6\) On 4 December 1873 the Bundesrat of the new German Reich called for the expansion of national legislative competence to include the entire civil law.\(^7\) This objective was pursued further in 1874 when a committee of five jurists drawn from the Bundesrat, was appointed to prepare advisory proposals for the plan and method of a civil law codification. This task was completed within months and the recommendations were adopted by the Bundesrat in the same year.

The First Drafting Committee\(^8\) was appointed with the task of preparing a draft Bürgerliche Gesetzbuch. It comprised 11 jurists\(^9\) chaired by Pape, who was the

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3 Allgemeiner Deutscher Arbeiterverein (ADA V).

4 Sozialdemokratische Arbeiterpartei (SDAP).

5 Der Verein Deutscher Eisen- und Stahl Industrieller.


7 See now Grundgesetz § 74(1).

8 Generally referred to in the literature as the First Committee.

9 Six judges, three ministry officials and two law professors.
President of the Superior Commercial Court of the Reich. Five members of the committee were appointed editors of the five Books which comprise the Code. Preparation of Property Law Book Draft\(^\text{10}\) was entrusted to Johow.\(^\text{11}\) He was assisted by Alexander Achilles from 1875 to 1877, who contributed mainly to the real property sections. Martini and von Liebe assisted Johow from 1877 until its completion in 1879-80, mainly with respect to possession and movable property.\(^\text{12}\)

The main deliberations of the First Committee commenced in 1881 and concluded in 1889. The committee considered all Book Drafts in detail and from them prepared the first draft of the Code which, with its draft Introductory Legislation,\(^\text{13}\) was published for discussion in 1888. The legal world responded to it very negatively. The non-legal world was generally uninterested. It was considered that the draft could form the necessary foundation of the desired Code but another committee should complete this work. An overview of the general criticisms of the first draft\(^\text{14}\) emphasises the ambiguity surrounding the actual purpose of drafting a national civil code. Between jurists there was no agreement for a code which would settle legal doctrinal disputes of the time, with one side warning that a code must not inhibit legal development and the other side seeing the whole point of the exercise to be a clear statement which would resolve controversy. The First Committee had tended to the latter view and in effect codified the German Common Law\(^\text{15}\) of the time, as it had developed from Roman law influences.

\(^{10}\) *der Teilentwurf* - referred to as the Book Draft in this work.

\(^{11}\) Johow (1823-1904) was a member of the Berlin Superior Tribunal *(das Obertribunal)* and later the Chamber Court *(das Kammergericht)*.

\(^{12}\) W Schubert, above n 8, 25.

\(^{13}\) The eventual EGBGB *(Einführungsgesetz zum BGB)* enacts the BGB and sets the parameters for its operation.

\(^{14}\) W Schubert, above n 6, 171-84.

\(^{15}\) *das Pandektenrecht*: with respect to this source of law in Hamburg see above Part II, following n 98.
The main source drawn upon for the committee's understanding of the Law of the Pandects was a recent publication by Windscheid,\textsuperscript{16} who also made significant and influential comments on the first draft. The first draft was widely criticised consequently for exhibiting a doctrinaire approach. It was also radically liberal, emphasising the extent to which German common law had adapted to the rapidly changing economic circumstances of the 19th century. The perception of the German common law, based around the Pandect law, as a living and developing body of law was very much current in the wake of the Historical School and chiefly Savigny.\textsuperscript{17} Many critics feared that the doctrinal and perfectionist approach of the first draft would severely narrow the potential of the law to unfold in the largely pragmatic way it had done in the past.\textsuperscript{18}

The Second Committee was not composed entirely of jurists. Most were ministerial officials. There were also representatives from the world of commerce and from politics. Nevertheless this group was not prepared to undertake a theoretical reappraisal of jurisprudential assumptions underlying the first draft. Consequently, the more radical critics of the first draft such as Gierke\textsuperscript{19} and Menger\textsuperscript{20} were sidelined. It was not that they

\textsuperscript{16} B Windscheid, Lehrbuch des Pandektenrechts, Düsseldorf, 1862-70 (three volumes).

\textsuperscript{17} Friedrich Carl von Savigny (1779-1861) founded the Historical School [die historische Rechtsschule], whose idealisation of the ability of the German Common Law, and its Pandectan sources, to renew itself in its ability to express the legal spirit of society at any particular time, is often viewed as a major delaying factor in the movement to codification. Bernhard Windscheid (1817-1892), see above n 16, was a Romanist follower of the Historical School. See G Kölbel, Deutsche Rechtsgeschichte - ein systematischer Grundriss, 4th ed, Franz Vahlen, München, 1990, 201-2 and 211-12.

\textsuperscript{18} W Schubert, above n 6, 131.

\textsuperscript{19} Otto Friedrich von Gierke (1841-1921) remains one of the most important jurists of this period. He was a Professor in variously Berlin and Breslau (1871-87) and was one of the Germanist followers of the Historical School. He is most famous in the English speaking world for his historically oriented work on the law of co-operative societies - Das Deutsche Genossenschaftsrecht has been translated in three stages - F W Maitland, The Political Theories of the Middle Ages, Cambridge, 1900, E Barker, Natural Law and the Theory of Society 1500-1800, Cambridge, 1934, and O Gierke, Associations and Law - the Classical and Early Christian Stages, [trans & ed G Heiman], University of Toronto Press, 1977. Other major works included Die Soziale Aufgabe des Privatrechts [The Social Task of the Private Law] (1899) and the monumental three volume Deutsches Privatrecht [German Private Law] (1892-1917). See U Seeling-Wendelssing, above n 2, 84.

\textsuperscript{20} Anton Menger (1841-1906) was a Professor in Vienna from 1877. Much of his work was devoted to developing a Socialist jurisprudence, and thus struggled on one side with social democracy and on the other
wrote unacceptable propositions - this was not even tested. The scope of their commentary was simply irrelevant to the objectives of the Second Committee and their contributions were passed over. The more conventional suggestions of other critics who confined their remarks to narrower doctrinal and practical questions, such as Bähr, Strohal, and Kindel, were accommodated as far as possible. The political members of the committee were drawn from the Reichstag and represented all major political parties except for the Social Democratic Party. The Second Committee set about first to refine the issues in the first draft about which discontent had been expressed. This was largely done in an unofficial "preliminary committee" in close consultation with the federal government, which has raised suspicions of agenda setting.

With the extensive work of the First Committee behind it and a clear view of its priorities, the Second Committee completed its task between April 1891 and June 1895. Very little was left in its original form, however, the underlying inspiration of the German 19th century application of Pandect law remained. The Second Committee considered the dynamics of practical transactions and adjusted doctrinaire provisions with a view to the protection of parties and actual outcomes. The Second Committee also played an important editorial role - for example, consolidating the unjust enrichment provisions set

with Marxism. His major work in this respect is Über die Sozialen Aufgaben der Rechtswissenschaft [Concerning the Social Tasks of Jurisprudence] (1895). See U Sieling-Wendeling, above n 2, 83.

21 Bähr's critique is outlined below following n 85.

22 Strohal's contribution is noted below following n 81.

23 Kindel's contribution is outlined below following n 83.

24 Ironically the influence of these commentators was very brief. See generally W Schubert, above n 6, 173.

25 The National-Liberal Party, the Conservative Party, the Centrists, the Free Conscience People's Party and the Reich Party.

26 Vormbaum, above n 6, xix-xlv.

27 W Schubert, above n 6, especially 143.
out in three separate parts of the first draft into one provision which is now in §§ 812-22 of the BGB. The major purpose of the Second Committee, while not totally absent from the work of the First, appears to have been the creation of a unified German civil law from the diverse systems of the new nation. The implementation of reform ideas and legal doctrinal purity took much lower priority. Provisions with pure doctrinal purpose were often simply struck out. If a legal principle did not apply in most, or even a large part of Germany its prospects of adoption were negligible. When agreement could not be reached on the principles to be applied to a topic the entire topic was generally exempted in the Introductory Legislation of the Code and left to separate regulation by the States. This drew criticism from Federalists who described the Introductory Legislation of the Code as the "casualty list of the German unification." 28 Liberal ideals to remove obstacles to trade and to increase its certainty were tempered with pragmatic considerations.

1  

Enactment and Social-Democratic Opposition

The new draft was delivered to the Chancellor of the Reich in October 1895, who introduced it without delay into the Bundesrat. 29 Some amendments were made there, particularly to the provisions concerning the law of associations. 30 In this resulting form the second draft was introduced to the Reichstag 31 in January 1896.

The Reich government had hoped that the Bürgerliche Gesetzbuch would be adopted promptly by the Reichstag, but it very soon became clear that a great majority in the

28 W. Schubert, above n 6, 175.
29 The "upper house" in Westminster terminology.
30 das Vereinsrecht.
31 The "lower house" in Westminster terminology.
chamber was not prepared to pass it without deliberation. The first day of the new century, 1 January 1900, had already been proposed as the day when the Code would take effect. It is unclear why the Reich government exerted pressure for cursory parliamentary consideration of the proposal in view of the time available. The legislation was nevertheless led through three plenary readings in the Reichstag - eight sittings for the second reading and three sittings for the third, and the deliberations of a committee in 53 sittings. The Social Democrats were again initially excluded from the committee. Social Democrat objections to the legislation, raised also in the plenary sittings were ultimately defeated. Numerous other amendments proposed by other parties were supported by the Social Democrats and succeeded. On 1 July 1896 the Reichstag voted 222:48 in favour of the *Bürgerlichen Gesetzbuch*. The members who voted against the Code were three Conservatives, three Hanoverians and all 42 Social Democrats who were present. The Bundesrat agreed to the legislation, as amended by the Reichstag, on 14 July 1896. It was signed by the Kaiser on 18 August and promulgated in Reich legislation on 24 August 1896.

The reasons for ultimate objection by the Social Democrats are much more complex than the parliamentary record reveals. Some investigation of their vote against the *BGB* is required in view of direct associations which are often drawn in the Common Law world between codification and legal positivism. An understanding of social democratic attitudes to the codification provide an informative and little known dimension to this issue. Also, in view of the development of Socialist ideologies at the time and their influence on the party one might expect a critique of the property law provisions on this basis. In other words, it would be reasonable to view the *BGB* with suspicion because of

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32 Vormbaum, above n 6, lxxxiv.

33 Vormbaum, above n 6, p xli.
social democratic rejection of it. Vormbaum has collected relevant statements from the social democratic press and other documents of the time which provide a coherent though multi-faceted explanation.

From the start it must be pointed out that the Social Democrats were not opposed to the concept of a Federal Civil Code. The question was not whether the drafting of a Bürgerlichen Gesetzbuch should be seen as hostile to social democracy, but whether the Party should lend its active help to the birth of legislation the substantive provisions of which afforded no advancement of the Party's policies and, in places, were contrary to the interests of working people. Only with respect to provisions concerning the Law of Associations did the social democratic parliamentary member Bebel take objection on an issue which we might describe as related to form of law. The objection was to imprecision and lack of clarity in the text which left too much room for the subjective discretion of judges. This objection first appeared in justifications of the position taken by parliamentary representatives which were offered after the event, and, the law of association provisions had been objected to on substantive grounds from the start in any case. Thus, the vote against the BGB should not be seen as a social democratic objection to codification per se. Indeed, if the vote of the Social Democrats against the Bürgerliche Gesetzbuch would have had a chance of carrying the day in the Reichstag it is thought that party solidarity might not have been maintained in the chamber. On the other hand, the opposition was not purely obstructionist.

34 Pursuit of the explanation of the rejection into the records of the Sozialdemokratische Partei Deutschlands (SPD) is frustrated by the necessity in the NAZI period to carry the most essential of the Party's archives into exile (1933), and sale of the archives at that time (1938): Vormbaum, above n 6, xcvi, citing "Mit Marx im Rucksack über die Grenze - Aus der Geschichte des Parteiarchivs" [Over the Border with Marx in the Rucksack - from the History of the Party Archives] in Sozialdemokrat Magazin, December 1974, 23.

35 Vormbaum, above n 6, p xc.

36 Vormbaum, above n 6, p xcl.

37 The main objection was to treatment of the juristic personality and possible powers of worker associations or unions.
The Social Democrats' major objections to the Bürgerlichen Gesetzbuch can be brought under the following issues -

(a) Marginalisation

The Socialist Workers' Party of Germany,\(^ {39}\) which in 1890 emerged as the Social Democratic Party of Germany,\(^ {40}\) was formed in 1875 through a union of the General German Workers' Association\(^ {41}\) under Lassalle with the Social Democratic Workers' Party\(^ {42}\) under Bebel. Probably until his death in 1864 Lassalle had maintained a relationship through correspondence and personal contact with Bismarck. Whether they had a real common understanding, or whether Bismarck was using the working class movement to defeat the liberal movements remains a great and unresolved question.\(^ {43}\) In the 1870s this changed however, and legislation was passed which outlawed socialist associations. Fear engendered by the Paris Commune is often suggested as a reason for this change. Legislation banning the SAPD was passed in 1878.\(^ {44}\)

The working class movement had its own problems with participation in the parliamentary process, fearing integration into bourgeois society.\(^ {45}\) The view had emerged, confirmed

\(^{38}\) One significant objection concerning the liability of public servants is too far removed from the theme of this work to warrant treatment.

\(^{39}\) die Sozialistische Arbeiterpartei Deutschlands [SAPD].

\(^{40}\) die Sozialdemokratische Partei Deutschlands [SPD].

\(^{41}\) der Allgemeine Deutsche Arbeiterverein [ADAV].

\(^{42}\) die Sozialdemokratische Arbeiterpartei [SDAP].

\(^{43}\) Vormbaum, above n 6, l.

\(^{44}\) Statute of 18.10.1878, RGBl 1878, 351.

\(^{45}\) Vormbaum, above n 6, lxiv.
by Engels,⁴⁶ that the law is the armistice between the battling classes and, with no revolutionary solution apparent, the institution of parliamentary democracy could be employed to shift the reigning truce further to the left than would otherwise be the case.

In pursuit of this strategy Social Democrats drew upon the writings of contemporary mainstream jurisprudential commentators such as Jhering⁴⁷ and Gierke,⁴⁸ drawing upon points of historical and social realism in order to attract agreement, just as they drew upon the liberal rights of the individual in opposition to electoral inequality, military conscription and other issues where potential common ground could be located.

Concerning at least one issue in the course of parliamentary consideration of the _Bürgerliches Gesetzbuch_ the effectiveness of this strategy was brought to a test. The outcome testifies to the marginalisation of the SPD. The Social Democrats devoted considerable energy to the issue of liability for damage caused by wild game, and specifically rabbits and hares. Although all other points advocated by them had been rejected in the Reichstag Committee, on this point they obtained the Committee's agreement. In the third reading debate, however, they were defeated on the issue by an alliance of the Centrists and the Conservatives.

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⁴⁷ Rudolf von Jhering (also Jhering) (1819-1892) was another jurist of the period who has retained the status of Savigny and Gierke. Although initially a follower of the Historical School, he later became a critic of it when he developed a theory of legal naturalism. His major theoretical work was _Der Zweck im Recht_, 3rd ed, 1893. The fourth edition of this work (Breitkopf & Hartel, Leipzig, 1903) was translated as _Law As A Means To An End_ [trans I Husik] Augustus M Kelley, New York, 1913. See G Köbler, above n 17, 213.

⁴⁸ See above n 19.
(b) Unification of Law

The Social Democrats saw advantage in national law. They objected to the reservation of some 97 aspects of the civil law to the States in the Introductory Legislation of the Civil Code.

(c) Family Law and the Social Position of Women

The Social Democrats consistently objected to the provisions concerning marriage, divorce, and the status of children born out of marriage. Improvement of the working conditions of domestic servants was also seen to be related to the position of women. Strong political agitation had been undertaken by the German women's movement, and particularly the Federation of German Women's Associations, through petition and strategically organised public meetings. Their submissions were taken up by the Social Democrats when the view was adopted that the reorganisation of social production anticipated in the party program embraced equal participation. This prevailed above objections that issues concerning family property were irrelevant to the cause because working class families had nothing to divide. The women's movement also formed allegiances with the Reich Party, particularly Baron von Stumm-Halberg, and the Free Conscience People's Party around natural law and liberal ideas of human equality. In most aspects this alliance could not muster sufficient numbers to ensure success for the position of the women's movement. Criticisms of the draft BGB by the women's movement were generally directed at the Fourth Book - Family Law. Discussion of claims to family property was based on principles of restitution which did not impact on third parties. Generally, the women's movement tended to side with the jurisprudential perspectives of participants favouring renewed Roman law inspiration for the BGB above those, such as Gierke, who advocated traditional Germanistic solutions which were
identified with return to the worst features of the structure of the peasant household. Menger's work, on the other hand, was widely discussed within the movement.\

\[(d)\] Working Conditions

Social Democrat objections in this respect centred on two issues. First, jurisdiction over the working conditions of domestic servants and some agricultural workers was to be reserved to the States, and at that time in some places still included a right of corporal punishment. Secondly, the right of association and the powers of associations were much too narrowly framed in the SPD view.

\[(e)\] Remarks

The failure of the Social Democrats to obtain agreement, or even concessions, on any of these points was the main reason for their vote against the Bürgerliches Gesetzbuch. Vormbaum points out that all of these goals were later achieved in Germany. Many were achieved following the revolution of November 1918 which ended World War 1, and subsequent institution of the Weimar Republic. The post World War 2 establishment of the Federal Republic of Germany constitutionally as a social and democratic state led to the rest.

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\[50\] Vormbaum, above n 6, lxxvii-ix.

\[51\] Grundgesetz § 20.
Schubert described the BGB as both the close of the German liberal era and the high point of the romanisation of German law. The concept of property in § 903 emerged from the debate over the latter part of the 19th century. It does not represent the particular view of Menger or Gierke. Above all it represents a concept of absolute, freely transactable property appropriate to natural law conceptions formulated in the context of a prevailing idealism for competitive capitalism. Ironically this was not the dominant economic reality in Germany at the time, when entire industries were dominated by giant conglomerates, such as the coal industry which by 1914 was 94 per cent controlled by the Rhine-Westphalian Coal Syndicate.

2 Major Issues in Drafting the Property Law Provisions

(a) Land Title Registration

Four different systems of real property law applied in the various States of the new German Reich at the time when the First Drafting Committee commenced its task of devising a national land law system -

- Roman common law title still applied to some land in Mecklenburg-Strelitz and the Prussian region of Homburg,
- a French system applied with various deviations in the Bavarian province of Pfalz, in Baden, Rheinhessen, Elsaß-Lothringen and in the Prussian Rhine province,
- Mortgage Book Systems operated in Mecklenberg, Bavaria, Württemburg, Weimar, Schwarzburg-Rudolstadt and the Prussian province of Lauenburg, and
- full Land Title Registration Systems were in operation elsewhere.

52 W Schubert, above n 6, 177.
53 U Sieling-Wendeling, above n 2, 88.
54 U Sieling-Wendeling, above n 2, 77.
Hamburg,\textsuperscript{55} Lübeck, Bremen, Saxony, Savony-Anhalt, Meiningen, Starkenburg, Oberhessen, Hessen-Nassau and some other cities and provinces operated their own systems. Prussia adopted its own system in 1872\textsuperscript{56} and this was adopted in many North and Middle German areas through until 1884.\textsuperscript{57} All of these systems shared essential basic principles - particularly superior evidentiary status for registration entries.\textsuperscript{58}

In its sittings of 15 and 16 October 1875 the First Committee decided to adopt a national Land Title Registration System and the issue was never again questioned by a Committee or by critics.\textsuperscript{59} The particular system adopted as the model for the new national system was the Prussian system established in 1872 under the EEG.\textsuperscript{60} Clearly a choice had to be made - the four systems could not be amalgamated. Mortgage registration systems were not seen as an alternative, but rather a middle step in evolution toward the optimum system of a Land Title Register maintained in conjunction with a Cadastre. The contemporary movement of Prussia and the North and Middle German areas to Land Title Registration confirmed this view. Further, only some 15,000,000 Germans lived under the first three systems, while almost the entirety of North, Middle and Eastern Germany with 30,500,000 inhabitants enjoyed Land Title Registration.

That the essential nature of the object of property is essential to the conceptualisation of proprietary rights in it, and to the substantive legal principles which order them, was

\textsuperscript{55} At this point the latest enactment of the Hamburg system was in the Gesetz über Grundeigentum und Hypotheeken für Stadt und Gebiet mit Ausnahme des Amtes Bergedorf [Hamburg G HypG], 4 December 1866.

\textsuperscript{56} Gesetz über den Eigentumsewerb und die dingliche Belastung der Grundstücke, Bergwerke und selbständigen Gerechtigkeiten [EEG], 5 May 1872, in Gesetz-Sammlung für die Königlich Preußischen Staaten [G S Pr St] pp 433-45, and Grundbuch-Ordnung, 5 May 1872, in G S Pr St pp 446-72.

\textsuperscript{57} Schubert, above n 6, 95-9. As discussed in Part II above, land title registration systems were in operation extensively in northern German areas from the 13th century (Lübeck - 1227). In Danzig (Gdansk, Poland) it had developed into a register compiled of separate Certificates of Title for each land parcel (das Realföliumsystem) from 1357: C Stewing, "Geschichte des Grundbuhces" (1969) 97 Rfleger 445, 446.

\textsuperscript{58} See further S Buchholz, "Die Quellen des deutschen Immobilienrechts im 19. Jahrhundert" (1978) 7 Ius Commune 250.

\textsuperscript{59} W Schubert, above n 6, 99 and 118.

\textsuperscript{60} See above n 56.
recognised early in the drafting process. The issue was how to express the most obvious of constraints on the power of the owner, those stemming from the nature of the thing itself -

This dominion (of a human over a thing) is completely unlimited; it extends as far as the physical possibility to exercise it. However, it admits limitations, without altering its essence. ...31

Limitation of ownership "through nature" or "the physical qualities of the thing" was also discussed in the Johow justification, but an express limitation to this effect was not adopted because it was considered that the express limitations of the powers of the owner62 "through law" or "the rights of third parties" would also encompass the constraints of reality. In discussion of the former, emphasis was placed on the flexibility of the content of the right of ownership as an institution of natural law,63 and a natural law resting upon "immanent and teleological qualities"64 could hardly ignore the constraints set by nature herself, just as law cannot require what is physically impossible. Similarly, the Motivations for the Final Draft expressly acknowledged the hand of the Universe in stamping the nature of the object - "[i]he division of things into movable and immovable is a reality of nature."65

61 Diese Herrschaft ist an sich vollkommen unbegrenzt; sie reicht sowohl wie die physische Möglichkeit, sie zu üben. Aber sie gestattet Einschränkungen ... 

62 See § 903 BGB - set out in Appendix III.

63 R. Johow, above n 61, 499 [923].


The necessity of a system of land title registration was also acknowledged from the start, although other possibilities were discussed and dismissed. In the Johow Justification registration was seen as constitutive of the ownership of land, in that the absolute effect of property - its validity vis à vis third parties - would be dependent upon it. The exception to this, in favour of an unregistered acquisition of ownership of which actual knowledge had been obtained, was required by consideration of the legal security of land transactions. The Motivations briefly traced the history of the requirement of publicity in land transactions, from public ceremony before the assembled community, through the City Books of Hamburg and Lübeck, to the Prussian system adopted in 1783 "... with consideration of the requirements of land transactions and real securities ..." and "... the security of the public ..." The various systems were then reviewed in detail. It could hardly be doubted that a unified codification of real property law could be achieved only on the basis of public books, and full implementation of the registration and publicity principles, which would guarantee to land transactions their necessary legal certainty.

The first legislation establishing a national land title registration system took effect on 24 March 1897. Although the nature of the new land title system was agreed with relative ease, there was nevertheless extensive discussion of the proper principles for Land Title Registration which were to be set out in the Bürgerliches Gesetzbuch.

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66 On the distinction between absolute and relative proprietary concepts see below in text following n 321.
67 Johow, above n 61, 639-41 [763-5].
68 Motive, above n 65, 9-10.
69 Ibid.
70 Ibid 16.
71 Ibid 20.
72 Grundbuchordnung, 24.3.1897 RGBI 139 (GBO).
(b) The Principle of Consent and the Principle of Registration

The Principle of Consent\textsuperscript{73} is that an agreement between the registered proprietor and an assignee is necessary for the creation, assignment or burdening of an interest in land, involving the proprietor's declaration of free will in the assignment. The Principle of Registration\textsuperscript{74} is that registration in the Land Title Register is necessary to effect such transactions — that is to achieve passage of a proprietary interest. Related to these principles in a practical way is the Abstraction Principle,\textsuperscript{75} that a clear distinction is to be maintained between the contractual, or personal obligatory, aspects of the transaction and the aspects with proprietary effects. Thus, once registration is achieved a defect in the personal obligatory transactions leading to it becomes irrelevant. A claim by the assignor against the assignee is not framed as a challenge to validity of the completed transaction, but rather as a restitution claim against the assignee on the basis of unjust enrichment.\textsuperscript{76}

In the North German and Prussian systems the agreement between the parties before registration necessary under the Principle of Consent was concluded in a juristic act or ceremony called die Auflassung, which took place at the Land Titles Office before a registration officer, or in a court nearby from which the records were entered in the register in the same order of treatment. In some of these systems no new agreement was made at this point of the transaction. Instead, a simple consent to registration was

\textsuperscript{73} das Konsensprinzip: this and the following principles are more fully explained in the Glossary.

\textsuperscript{74} das Eintragungsprinzip.

\textsuperscript{75} das Abstraktionsprinzip.

\textsuperscript{76} The classification of this claim as personal would be misleading for readers educated in the Common Law tradition through different conceptions of the problem and the greater ease of anchoring the claim in real assets — an issue we have already seen in relation to the Hamburg legal system: above Part II, following section 5 Notable Companion Principles.
The interplay of these principles gave rise to considerable debate in the First Committee. In the Book Draft, Johow had given full effect to the North German and Prussian principles except that the pre-registration agreement of the parties was to be a formal proprietary contract. Interestingly, this highly formalistic requirement proposed by Johow cannot be viewed as a romanisation. The debate in the First Committee raised seven issues which remained in dispute until settled by the Second Committee -

- should failings in the preliminary transaction deny the registration validity, at least until a third party became involved?
- should the consent to registration be a formal proprietary contract but merely a consent?
- should the consent or agreement be completed at the Land Titles Office?
- should a person who is merely entitled to obtain registration, by holding an agreement or consent to registration, be able to enter further agreements or give further consents before he or she actually obtains registration?
- should it be possible to give consent or make an agreement subject to conditions or time limits?
- should the assignor be able to recall the consent or agreement before registration?
- should the Land Titles Office examine the validity of the entire preliminary transaction before accepting an application for registration?

Viewed most simply, the debate really offered a choice between two methods of structuring the transaction, in turn depending upon whether the final transaction was to take place at the Land Titles Office. If it were to take place at the Land Titles Office, it

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78 der dingliche Vertrag, contrasted to der obligatorische Vertrag - see § 873 BGB. The obligatory contract binds the parties at the commencement of the transaction. The proprietary contract is the agreement between the parties to conclude the transaction by transfer of the property.

79 C Stewing, above n 57, 447.

80 W Schubert, above n 6, 100-109.
would be possible for a string of transactions to be settled at once - the North German and Prussian solution. If the final transaction were to take place elsewhere, such as before a notary or judge, it would be necessary for an assignee to be able to give further consents before registration, to protect respective interests pending registration, such as conditions and time limits, and for the Land Titles Office to examine the transaction - the South German solution. The First Committee, above opposition within its ranks, basically adopted the North German and Prussian solution with the concession on the fourth issue, that a person who is merely entitled to obtain registration, through holding an agreement or consent to registration, would be able to enter further agreements or give further consents before actually obtaining registration.

Public submissions on the first draft basically repeated points previously made in the debate on these issues. Most critics were against the requirement of a further proprietary contract before registration, or against it being required in the BGB - it could have been required in the Grundbuchordnung. Some saw it as an invention of the new legal science with more relevance to doctrinal purism than the proper conduct of life’s affairs.\(^{81}\)

One proposal, made by Strohal, was that the Abstraction Principle would be adequately preserved by a mere pre-registration declaration from the parties. In addition however, in the event of a mistaken transfer the assignor should retain a right to challenge the registration, and this right should be a right of real property in the relevant land. It was acknowledged that this would undermine the principle protecting good faith acquisition\(^{82}\) but it had the advantage of affording the transferor some protection in the event of the transferee’s bankruptcy. This would also compensate for the perceived incapacity of the

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81. W Schubert, above n 6, 119.

82. der gutgläubige Erwerb - see § 892 BGB.
Another proposal, made by Kindel, was that a form of property should pass to the assignee with the pre-registration *proprietary contract* which would give the assignee rights against third parties to obtain possession and to deal with the assignor's secured creditors. Ownership should not pass until registration, which had to be based upon a valid transaction. A further argument was put that the consequence of the property provisions in the Code as drafted gave ownership to a person in possession who was not entitled to it, and which the true owner could not regain even from a third party who acquired it in bad faith. Kindel also wished to retain, beside the new system, the conveyance of real property by traditional methods without the need for registration in the Land Title Register. These proposals had little chance of success. For one thing, the adoption of a new form of property arising before registration would have required the redrafting of much of Book Three, and for another it would have challenged the accepted distinction between the Law of Contract and Property Law. There was also little chance for acceptance of a proposal which undermined the universality of the Land Title Register.

Only a few critics objected to the Principle of Registration, but they included the influential professional newspaper for notaries. Two critics, Bähr and von Liebes, advocated passage of title with completion of the *proprietary contract*. Registration would be important only with respect to third parties. The *Deutsche Notariats-Zeitung* on the other hand advocated the creation of a completely new system from basic principles. Greater attention to economic consequences was advocated. The substance of the proposal

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83 See below in text following n 122.
84 W Schubert, above n 6, 122.
85 *Deutsche Notariats-Zeitung* (D Not Z).
was, however, not so radical and was even predictable from the organisation whose members stood to lose most under a national system featuring settlement at the Land Titles Office. Property should pass, the paper argued, with the Auflassung ceremony. There should be no additional pre-registration proprietary contract, but rather a mere declaration addressed to the Land Title Register officials that the parties permitted what they were obliged to permit in any case. It should be pointed out that in many parts of Germany at that time notaries attended to the Auflassung ceremony, as they may now do in all of Germany.

The submissions did not move a majority, and indeed appear to have moved the Federal government and later the Second Committee to particular satisfaction with the relevant aspects of the first draft. From the view of the security of the transactions and cost, there would have been considerable disadvantage in the existence of two forms of property in different hands in the period between the initial transaction and eventual registration. In particular, it left something further assignable in the hands of the assignor, and the status of this right was problematic, especially in relation to mortgagees and creditors. The criticisms left the impression that the basic ideas of the first draft were not widely or too seriously contested, even if there was room for some reconsideration of the detail and of the disadvantages which had been clarified. Further, beside the confusion and complication of many of the submissions, the apparent precision of the first draft was actually brought into contrast and magnified by them.

The Second Committee made many changes to the provisions expressing the Principles of Consent and Registration but retained the general principles of the first draft, as well

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86 W Schubert, above n 6, 123-4.
87 ein doppeltes Eigentum.
88 W Schubert, above n 6, 125.
as the Abstraction Principle. Decisively, the Abstraction Principle applied in most of Germany and was considered to contribute to the simplicity and security of transactions. The proposal that the Land Titles Office should examine the entire transaction for validity before registration was rejected.\(^89\)

The next question for the Second Committee was whether a proprietary contract was necessary before registration, or whether a simple declaration by the parties of their willingness to complete the transaction would suffice. Taking up the criticisms that had been made in submissions, particularly that this requirement in the first draft was too doctrinaire, some members of the Committee argued for the view that a simple declaration of the parties should be sufficient. Another group nevertheless defended the requirement in the first draft that the pre-registration consent be in the nature of a contract, but that it should be specified clearly in the Code that the consent could be regarded as a contract formed from the owner's expression of consent to the registration of another as owner in the Land Title Register, and the acceptance of it by the assignee. The majority accepted the proposition that the pre-registration consent could be in the nature of a declaration, and the classification of this transaction as a contract or otherwise should be left to developing legal science.

The form which the settlement of the transaction, the Auflassung, should take was very much disputed in the Second Committee.\(^90\) Of ten motions for amendment, half advocated settlement before a court or notary. The other half pressed for retention of the essence of the first draft provision that it be before an official of the Land Titles Office because this would best bring the importance and finality of the event to the

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\(^89\) W Schubert, above n 6, 131-2.

\(^90\) W Schubert, above n 6, 133.
consciousness of the parties. Further, prompt registration would protect the assignee from further post-contractual transactions by the assignor, and from new limitations of the assignor's power of disposition, such as through bankruptcy. The majority (11:6) favoured amendment of the first draft to permit Auflassung before a court or notary. This result eventuated because some North German representatives voted with the majority in order to secure a uniform provision for all of Germany although they preferred the provision in the first draft. An advantage was also seen in the Auflassung being conducted before a notary who could advise the parties. Nevertheless, with a view to the position of Prussia it was agreed that provisions of State legislation providing for settlement at the Land Titles Office should remain undisturbed. This compromise also accommodated the regions of Germany, mainly in the south, with a strong notarial tradition. To reinforce the advantages of the agreed provisions the Second Committee also adopted the rule that the parties must be present at the Auflassung simultaneously and orally declare their willingness to proceed with the transaction. These new provisions in the second draft concerning the Auflassung struck a problem in Parliament however, when the Bundesrat rejected them and restored the provisions of the first draft, perhaps through the influence of the middle and north German States. Although an amendment motion was on its agenda, in Committee the Reichstag made no mention of this resolution of the Bundesrat.

Today, § 873 of the BGB reflects the uneasy conclusion with respect to acquisition of title by agreement and registration. This is further illuminated by § 925 concerning the formalities of Auflassung.

91 W Schubert, above n 6, 134.
92 With respect to enactment and consideration of the Bill for the BGB by the Reichstag in Committee, see text above following n 30.
The Second Committee also concluded that a person holding a consent to registration, made by the registered proprietor of the relevant interest, would be entitled to give further consents to registration with respect to the same land parcel. As noted above, this conclusion is practically essential if settlement is not to take place at the Land Titles Office. The Second Committee further resolved that the agreement of the parties to registration should be immediately binding between the parties when made before a notary or a court, and not later upon lodgement at the Land Titles Office. A related question was until what point newly created limitations of the assignor's power of disposition, such as those arising upon bankruptcy, could have an impact on the rights of an assignee. The Second Committee accepted the view of the First Committee that such limitations should have no impact beyond lodgement for registration. The act of registration itself was favoured, but retreated from in consideration of the provision to be inserted in the Grundbuchordnung that dispositions were to be registered in order of lodgement.

The Second Committee decided that it should not be possible to give a consent to registration subject to a condition or a time limit, thus departing from the view of the First Committee. It was considered that qualifications on the part of the assignor could be protected by caveat. As noted above, the necessity for a conditional consent is practically removed if the consent to registration becomes binding when concluded and assignee can perform his or her part of the transaction at that time in confidence that title will be obtained.

93 In text above following n 60.
94 W Schubert, above n 6, 136.
95 See text above following n 80.
(c) The Principle of Publicity

The Principle of Publicity\(^{96}\) holds that in favour of an assignee the content of the Land Title Register is to be regarded as correct. The First Committee embraced this principle as early as its sittings of 15 and 16 October 1875. The principle was, and still is, at the heart of the idea of public faith in the Land Title Register\(^{97}\) - that a person registered in the Land Title Register as owner, or as entitled to another proprietary right, is to be regarded as so entitled even if in the absence of registration there would be no such entitlement. The principle is attributed by Schubert to German law, reconciled with Roman law over the 18th and 19th centuries\(^{98}\) and by the 1880s had been adopted into virtually every German Land Title Registration and Mortgage Book system.\(^{99}\) Although unanimity for the principle was not hard to reach in the First Committee, there were differences of opinion about the range of transactions which should enjoy the presumption of correctness, and about the relevance of good faith in the transaction to the application of the presumption.

General submissions by critics with respect to the Publicity Principle generally acknowledged its appropriateness. On one view the unassailability of private property had been sacrificed to public faith in the Land Title Register - a lasting and sweeping confiscation of private property was being made in favour of the security of transactions.\(^{100}\) Schubert points out that just as well as the interest in retention of property, the security of transactions is also worthy of protection. The protection of

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\(^{96}\) das Publizitätsprinzip.

\(^{97}\) der öffentliche Glauben des Grundbuchs.

\(^{98}\) Study of the Hamburg-Hanseatic system above, in Part II above, suggests a much earlier reconciliation.

\(^{99}\) W Schubert, above n 6, 109.

\(^{100}\) W Schubert, above n 6, 127.
acquisitions made in good faith increased credit worthiness by affording a sounder security, carrying with it advantages in lower interest rates. Also, a purchaser need not be terrified by the prospect of discovering at a later date that the assignor had already conveyed the title and thus had nothing to sell. Further, true owners who lost their interests in the land through operation of the principle had reliable claims under unjust enrichment or compensation principles against the unentitled registered proprietor who had effected the relevant transaction.

The Second Committee also adhered generally to the Publicity Principle but engaged in discussion of the details. Discussion ranged over five issues -

(i) Securities Over Land

The First Committee eventually agreed that registered mortgages obtained in good faith should enjoy the Principle of Publicity even when the true debtor was not rightfully registered as owner. The Committee resolved that the position of a purchaser from a mortgagee exercising a power of sale should be governed by special legislation regulating a creditor's powers of sale, and favoured the view that compulsory sales at the behest of creditors should be regarded in the same way as other legal transactions for the benefit of good faith transferees.

The Second Committee proposed different solutions with respect to these points. In particular, a good faith purchaser from a mortgagee exercising a power of sale would not be entitled to protection. Also revised was the possibility of good faith acquisition of a

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101 Hobbe made this exact point in favour of the Torrens system: see above, Part I at n 105.

102 W Schubert, above n 6, 127-8.
compulsory mortgage\textsuperscript{103} over land which does not belong to the debtor. The protection of public faith would, however, apply when the person entitled to the relevant interest was expressly adjudged by a court to be entitled to obtain registration.\textsuperscript{104}

(ii) Gifts

Adopting the Book Draft, the First Committee resolved that a volunteer acquiring in good faith should obtain indefeasible title, although there was no precedent for this in the Land Title Registration legislation of the various German principalities.\textsuperscript{105} One consideration which led the Committee to this conclusion was that a third party could not discover from the Land Title Register how the registered owner acquired title but could be prejudiced by the volunteer's assailability. Also, problems would be created in the case of transactions which were partly by way of gift. Above all, however, the Committee seems to have wished to fulfil its doctrinal objective that the Principle of Publicity be laid down with the fewest possible exceptions.\textsuperscript{106}

This position was assailed by most critics of the first draft and by the federal government itself. It went too far in protecting a good faith acquisition not supported by value without also providing an enrichment claim against the donee. At least, they claimed, the earlier owner who had made the gift should be liable under enrichment principles.\textsuperscript{107}

\textsuperscript{103} Die Zwangshypothek: a mortgage granted to a judgment creditor to secure the judgment debt.

\textsuperscript{104} W Schubert, above n 6, 138.

\textsuperscript{105} § 3 Hamburg G HypG - see above n 55.

\textsuperscript{106} W Schubert, above n 6, 110.

\textsuperscript{107} W Schubert, above n 6, 128.
This question was debated extensively in the Second Committee. It decided, on the chair's casting vote, in favour of the position in the first draft that a good faith acquisition unsupported by consideration should also enjoy protection. The members against this position pointed out that a gift should not be made at the expense of a person not a party to the transaction, and that in the case of gifts there was less compelling reason to overlook substantive rights in favour of formal rights and the demands of certainty in transactions. They rejected the magnitude of difficulties which were said to follow a distinction between fiscal and non-fiscal transactions. Rather, injustices would follow failure to make such a distinction. Members for the adopted position repeated the debate in the First Committee. Not insignificant was the influence of doctrinal considerations, such as limiting exceptions to the correctness of the register and the Abstraction Principle. The majority did, however, adopt the view for an enrichment claim against the donee, and against the beneficiaries of further gifts.

(iii) Completeness of the Land Title Register

The principle of a conclusive Land Title Register raises the issue of whether presuming the Register to be correct extends to presuming it to be complete. That is, should one be able to rely upon the absence of contrary interests from the Register as well as the correctness of the entries actually made in it? In the Land Title Registration and Mortgage Book systems of the various German principalities this basic principle was already in place. The First Committee adopted both the guarantee of correctness and the guarantee of completeness. In particular, unregistered limitations of the power to make dispositions were to have no validity as against a transferee, which also corresponded to the position in most of the German states. Adoption of the principle was not significantly disputed.
(iv) Good Faith Acquisition

It was generally accepted that the conclusive Land Title Register would not assist a person acquiring a registered interest if he or she was aware of the facts from which a disagreement between the state of the Land Title Register and the actual legal situation followed, and that the assignee would not have the burden of proving his or her good faith. The First Committee was not prepared to equate grossly negligent ignorance with positive knowledge of the incorrectness or contestability of a register entry. The first draft provided that assignees were to be considered in bad faith when they first became aware of the facts, and not when they first realised that there must be an error in the Land Title Register. The First Committee maintained this - the Land Title Register should not be held responsible for an incorrect interpretation of facts; it would not be its task to protect the assignee from the consequences of a legal error. Schubert notes that in maintaining this view the First Committee had in contemplation the citizen who is confident in the law and not the usual citizen who is largely ignorant of it. The Second Committee generally embraced the principle of good faith acquisition, but again re-examined the details. Contrary to the First Committee, the knowledge of the true facts which would efface the transferee's good faith was, in the Second Committee's view, positive knowledge of the actual incorrectness of the Land Title Register.

According to the First Committee the assignee's knowledge should be assessed at the time when the transaction is settled between the parties - that is, the Auflassung. Schubert considered this a doctrinaire position. As the time of acquisition is

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108 der grobfahrlässige Nichtkenntnis.
109 die Bosgläubigkeit.
110 W Schubert, above n 6, 112.
111 ibid.
registration in the Land Title Register, one might consider that also to be the relevant time for acquisition in good faith. On the other hand, selecting the moment when the application for registration is lodged emphasises this time as the moment of acquisition and thus detracts from the Principle of Registration. The prevailing consideration for the First Committee was that generally an assignee will not know the time of registration and or have influence over it. One might also retort that assignees transact on the faith of the register when they give value in exchange for a registrable transaction and thus selection of this moment is, contrary to Schubert, a good and practical meeting point of the doctrine of public faith in the register and the doctrine of good faith acquisition. The Second Committee recognised that extension of the time for assessment of good faith to the point in the transaction where the interest is actually acquired would be in the interests of the true owner. Nevertheless, the members did not wish to leave unprotected the assignee who had contributed value in good faith but then obtained knowledge of the incorrectness of the register before the moment of registration. They resolved upon the time when the application for registration was made, or, when the application for registration followed Auflassung, the time of the Auflassung.112

(v) Compensation

Could a person who lost a right in property113 through operation of the conclusive register rely on unjust enrichment114 (restitutionary) principles to demand return of the proceeds from the unentitled person who made an effective disposition of the property? In the Book Draft this principle had been included with other causes of action for the assertion

112 W Schubert, above n 6, 139.
113 der Rechtsverlust.
114 die Bereicherungsgrundsätze.
of real property interests\textsuperscript{115} but it was later moved to a position among the indefeasibility provisions in the first draft.\textsuperscript{116} The Book Draft retained the German common law distinction between a person without title who had made a disposition of the property in bad faith and such a person who did so in good faith. Enrichment principles were not applicable in the first case because the true owner had an action in damages. The second case was at common law a situation to which enrichment principles properly applied.

The First Committee amended the Book Draft in many respects. The common law distinction between good and bad faith transactions was abandoned so that enrichment principles were to apply in both cases. Further, the principles were to apply to effective transactions by the registered proprietors of any rights in the land, and not just to the person registered as owner,\textsuperscript{117} making them liable to make restitution of the proceeds of their transactions to the persons truly entitled. A minority of the First Committee wished to delete the particular real property enrichment provisions from the Code altogether because in their view the duty to make restitution arose directly from the general unjust enrichment provisions. The majority considered, however, that all doubt should be avoided and a broadened special provision was incorporated into the first draft.\textsuperscript{118}

The Second Committee extended the principle of unjust enrichment to voluntary assignments. Shortly before the close of its proceedings it also decided to include a single provision which now appears as § 816 \textit{BGB}, instead of the separate principles set

\textsuperscript{115}§ 195.

\textsuperscript{116}§ 839.

\textsuperscript{117}\textit{der Bucheigentümer}.

\textsuperscript{118}W Schubert, above n 6, 113-14.
out in various books of the first draft.\footnote{119}\\

(d) **Claims for Rectification of the Register and Caveats**

The first draft of the Code provided a right *in rem* for rectification of the Land Title Register which was to be available to one whose rights were impaired by an incorrect entry of a right in, or removal from, the register against the person incorrectly registered or benefited. The origin of this claim was already in the Book Draft and was seen as a consequence of the Principle of Consent adopted by the First Committee. Among the systems of the German States, Schubert found a model only in the Prussian EEG.\footnote{120} Virtually all of the other States' systems acknowledged no concept of incorrectness in the register but provided appeals against the incorrect registration entry.\footnote{121}

In order to secure the registration of an existing right, in the face of error in the Land Title Register, the person correctly entitled was to be entitled to have a caveat\footnote{122} entered. On the other hand, the first draft provided no right to enter a caveat to protect a personal claim for the entry or deletion of a right in the Land Title Register - a position which deviated from the provisions of most State legislation.\footnote{123}

The Book Draft extensively adopted the position of the EEG,\footnote{124} allowing caveats to protect existing real rights as well as personal claims for them. In formulating this

\footnote{119} W Schubert, above n 6, 139.

\footnote{120} See above n 56.

\footnote{121} W Schubert, above n 6, 114.

\footnote{122} *die Vormerkung* has been translated as caveat, which is the equivalent instrument in the Australian Torrens Systems.

\footnote{123} W Schubert, above n 6, 115.

\footnote{124} See above n 56.
position Johow considered the protection of personal claims advisable in order to protect the claimant from the machinations of a system of title by registration. For this reason a caveat entered to protect a personal claim was to have effect against third parties and the land parcel itself as the object of the competing rights. The Book Draft restricted protection to fully effective and enforceable claims.

The First Committee declined the position of the Book Draft with respect to personal claims to land largely on doctrinaire grounds. The Committee viewed this protection as anomalous; it did not qualify title to personal property. Inclusion would breach the principle that knowledge of a mere personal obligatory claim should not prejudice acquisition by a third party. The Committee acknowledged obstacles to protection of personal claims - that the caveat did not itself found a real right, the transaction to be caveated did not fall under the Registration Principle, and third party assignees could not take advantage of faith in the Land Title Register. They did not wish to establish as a principle in the first draft such an intermediate point as a caveat for protection of personal rights. Such a caveat would have been equivalent to a real right, and challenged the distinction between contractual and property rights.

The First Committee also rejected the notion of a caveat for the protection of personal rights from more practical points of view. There was no requirement to obtain permission for the entry of such a caveat, and besides, there were other legal methods for securing such rights - a temporary disposition was offered as an example. Further, every creditor wants to advance the rank of his or her security and, the Committee feared, the availability of a caveat to protect personal claims would restrict transactions because, as it stood in the Book Draft, the intentions of the debtor would not be relevant to entry of a caveat. Such a caveat, opined the First Committee, would fetter the owner's freedom of disposition, block the register book, and above all, render property unavailable to meet
In view of these disadvantages and possibilities of misuse, the Committee simply did away with the whole idea rather than dealing with the problems in appropriate provisions.\textsuperscript{125} Instead, the Committee retained the caveat for the protection of existing real rights in order to protect the parties entitled to them from the dangers which public faith in the Land Title Register carried with it. The means for this was to be the Contradiction,\textsuperscript{126} an instrument to be lodged when the state of the register is disputed. The first draft provided that a court would have the function of ordering the registration of a caveat where the registered holder of the relevant right did not agree to it.

The critics hardly queried the cause of action for rectification of the register. Only a lack of clarity of expression drew criticism - the status of the action as a real proprietary claim stemming from ownership or a right in land should be clarified.\textsuperscript{127} Widely challenged, however, was the restriction of the role of the caveat to protection of existing real rights in the face of error in the Land Title Register. The general view was that caveats should also be available to protect claims for the alteration of real rights, such as for transfer of title to the land. Critics were not convinced by the parallel drawn by the First Committee with personal property, for which there is no system of caveats, nor by fears of corrupting the distinction between contract law and property law. Most critics lent toward practical rather than doctrinal considerations in this respect - the potential facility of the land title register to secure personal obligatory claims should be utilised exactly because the system of title by registration endangered such claims through the ability of the registered proprietor to make further dispositions with the title.

\textsuperscript{125} W Schubert, above n 6, 116.

\textsuperscript{126} der Widerspruch.

\textsuperscript{127} W Schubert, above n 6, 129.
The Second Committee did not alter the substance of the claim for rectification of the register. The Committee retained the role of the caveat as a protection for existing real rights. As with the First Committee, the members differed substantially in opinion about the preconditions necessary for the entry of a caveat in the register and its function when registered. This debate extended to caveats for the protection of personal claims. In none of the nine motions for alteration of the caveat provisions was the protection of personal obligatory claims entirely excluded. Some motions proposed the availability of caveats for all claims based on personal obligation, while others specified particular claims which merited protection, such as unjust enrichment claims and part performance. The Committee adopted a motion in favour of protecting all obligatory claims for the grant or dissolution of an interest in land, as well as for conditional and future claims. In order to differentiate such caveats from those intended to secure existing real rights, the Committee decided to establish a clear terminological distinction - the term *die Vormerkung* [caveat] was to be retained for personal claims to an interest in land, and the term *der Widerspruch* [Contradiction] was designated for the caveat to secure an existing real right not revealed, or incorrectly revealed, on the register.

The Committee canvassed the advantages of the protection by caveat of temporary security transactions, and some issues regarding the status of a caveat and the rights underlying it were discussed in that context. For example, members discussed the legal effect of a caveat lodged by a creditor to protect a temporary security if the debtor further assigned or burdened the land. One proposal was that the caveator should have a claim directly against the assignee for realisation or substantiation of the caveated interest.

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128 W Schubert, above n 6, 140.
129 *die schon entrichtete Gegenleistung*.
130 Often referred to as *die obligatorische Vormerkung*.
131 Often referred to as *die dingliche Vormerkung*. 
perhaps through registration. Schubert wrote that implicit in this proposal was the perception that, similar to the mortgage, the caveat would constitute an independent right and be a real proprietary burden on the title. The Second Committee nevertheless rejected this conception of the caveat and saw it as a relative prohibition on assignment or burden with real proprietary effects, certainly in bankruptcy. It saw no need to conceptualise the caveat, contrary to existing law, as a real proprietary right conferring new rights on the creditor.

B  The Land Title Register Statute [Grundbuchordnung]

This legislation implements the principles of the BGB in detailed provisions and provides general instruction on procedures. Even more specific are the regulations made under the Grundbuchordnung. The GBO thus exists at an equivalent level to the Torrens legislation such as the Transfer of Land Act 1958 (Vic), with the more general norms of the Common Law above it and specific regulations prescribing forms and procedures below it. Work on the GBO was commenced in 1882. The concept draft was prepared by Alexander Achilles, largely modelled on the legislation of Prussia and the North German States, and delivered to the First Drafting Committee for the BGB in 1883. It was largely adopted as the First Draft. The Second Drafting Committee largely adopted the First Draft with some further work. The GBO passed the Bundesrat on 21 January 1897 and the Reichstag on 8 March 1897. The GBO was executed by the Kaiser on 24 March 1897, taking effect from publication on 3 April 1897.

132  *die Be/astung* an encumbrance - in this work burden and burdening are the preferred terms.

133  W Schubert, above n 6, 142-3.

The Bürgerliche Gesetzbuch contains no abstract definition of property because, according to the intentions of the drafting Committees, § 903\footnote{§ 903 is set out in Appendix III.} was to set down the powers which an owner would be entitled to exercise over the object of ownership, the thing, whatever form it took.\footnote{Deutschland, Motive zum Bürgerlichen Gesetzbuch, above n 65, Vol III, 262.} At first sight these powers appear to accord the owner great latitude. The provision was, however, intended as a starting point which, it was recognised, would in particular circumstances might lead to doubt,\footnote{See above n 65, 263.} but which would encapsulate the essence of ownership as something greater than the sum of its elements in contrast to the limited proprietary interests which were sharply defined.\footnote{See for example the definition of a real servitude in § 1018 or of a mortgage in § 1113.} This objective would not have been achieved by suspending the concept somewhere between a list of express powers on one side and a list of express limitations on the other. The debates of the drafting Committees, the Bundesrat\footnote{"Upper House" in the Westminster tradition.} and the Reichstag,\footnote{"Lower House" in the Westminster tradition.} confirm this.

Considerations weighed by the First Committee\footnote{Sitting of 18.4.1884: H H Jakobs & W Schubert, Die Beratung des Bürgerlichen Gesetzbuchs - Sachenrecht I - BGB §§ 854-1017, Walter de Gruyter, Berlin, 1985, 442.} are particularly instructive. It was recognised that the Committee was not attempting a theoretical definition of the concept of property, but instead specification of the actual content of the right which an owner would hold. So far as this concerned legal rights, provisions for effecting claims to ownership and permitting disposition (legal alienation) of the property could be thought to...
suffice. However, the most extensive power of factual disposition was also to be expressed, thus removing the need for specific reference to the right of an owner to possession and to consume the fruits of the thing, which was to be the maximum permissible. Later debates were concerned with the problem of the power of factual disposition being exercised by an owner through sheer arbitrariness, and in the Bundesrat sitting of 15 October 1895 it was proposed to add a second paragraph to the clause of the Bill which emerged as § 903 -

An exercise of ownership which can have only the aim of causing another damage is impermissible.\(^{142}\)

The Reichstag restored the definition which was to emerge as § 903, after a jab at the opinion which the Social Democrats expressed in the Bundesrat, and deleted the proposed new second paragraph on the ground that the problem was covered by other provisions.\(^{143}\) The latitude of the power of factual disposition was thus primarily intended to encapsulate the owner's right to possession and the fruits of the property in contrast to the limited rights of the proprietors of lesser interests, and not in an absolute sense - it was not imagined that the power to exploit the thing could exceed its natural or inherent capacity.\(^{144}\) The phrase chosen after long deliberation to express the power was "nach Belieben" [at pleasure or at discretion], and not "nach Willkür" [arbitrarily or despotically].

In his influential work *Der Zweck im Recht*, Rudolf von Ihering wrote,

The individual interest of the owner already requires that he make orderly use of his property, which at the same time corresponds to the interests of society. This circumstance alone is the reason why society makes so few

\(^{142}\) Ibid 445.

\(^{143}\) Specifically § 220a of the draft then under consideration. This became § 226 of the *Bürgerliches Gesetzbuch* which extends to the exercise of any right.

\(^{144}\) See above n 62.
demands on private property ... It is thus not true that the idea of ownership would lock within itself an absolute power of disposition. Ownership in such a form cannot be tolerated by society and has never been tolerated.\textsuperscript{145}

In his account of Property Law published only five years after the \textit{BGB} took effect, Professor Dr Otto Gierke had no doubt that the right of property was less than absolute -

When the concept of ownership is considered in isolation it cannot be viewed as an unlimited right of dominion. Only in comparison with the other rights of property can it be described as unlimited. If on the other hand it is to be measured beside the illusion of absolute power, it carries limitations within its very concept today as well. It confers not arbitrary power but power bound by right. ... The power of the owner to deal with the thing at pleasure is today narrowed through extensive limitations of free consumption, and in part virtually eliminated. Here the continuation of the German legal idea reveals itself - ownership is pervaded by responsibilities.\textsuperscript{146}

In this passage Gierke drew attention to the following aspects of property as evidence of its limitations: one may not misuse it to the detriment of others, use may be made of it by others in emergencies, and the powers over particular things, and specifically land, are limited by a growing body of legislative provisions.\textsuperscript{147} Equally important however, is Gierke's reference to the continuation of a German conception of property rights. In this respect reference should be made to his description of the German property concept of the Middle Ages -

The German concept of property [at this time] carries limitations within it. It is not therefore an unlimited (absolute) right in comparison with other rights. Much more, it extends only so far as limited legal interests require, so far as approved by the legal order and so far as appropriate considering the nature and purposes of the particular object. Further, ownership is not to be misused, but rather it is bestowed for rightful use. Its content comprises not arbitrary power\textsuperscript{148} but power ordered by right. And it is not pure authority,\textsuperscript{149}


\textsuperscript{147} Ibid.

\textsuperscript{148} \textit{die Macht}.

\textsuperscript{149} \textit{die Befugnis}.
but authority pervaded by responsibilities with respect to family, neighbours, and the common good.\footnote{150} The historical accuracy of Gierke's account of the medieval German property concept is not here in question.\footnote{151} The point is that he drew upon it so solidly in his interpretation of § 903 of the BGB, so close to its enactment on the first day of the new century in an authoritative text on the subject.

Reflecting these developmental thrusts, today in the German civil law system property is conceived, conceptually, as the full right to exercise dominion over movable or immovable property, in accord with the legal order,\footnote{152} factually, through use or consumption, and legally, through burdening or alienation.

The content of the property right is determined by the extent of the powers of the owner flowing from the right of dominion, relative to the nature of the thing itself. The content of the right of property therefore follows from the legal order which can decisively organise the content of the right with respect to determined categories of things, and is, with the legal order, changeable. For that reason, the limitation of the right of dominion through law and the rights of third parties in § 903 is not an exception to a fundamentally total right of dominion, but instead an inherent limitation of the content of the property right itself.\footnote{153} The BGB does not proceed from a conception of property divided between superior property and inferior property use rights, but instead regards the temporary assignment of ownership powers to a third party as the burdening of the undivided
property with a limited real right.\textsuperscript{154}

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1 Concepts of Property in Other Legal Fields

In the Common Law world one often meets the understanding that the \textit{Bürgerliche Gesetzbuch} encapsulates an \textit{absolutist}\textsuperscript{155} concept of property, as though the German legal system has been completely incapable of self-reflection following recognition of the limitations of Newtonian conceptions of the Universe.\textsuperscript{156} Although historically there has been debate on this point,\textsuperscript{157} in a contemporary setting such conclusions in an English text are likely to result from confusion about the conceptual distinction drawn between \textit{absolute} and \textit{relative} rights.\textsuperscript{158} I have introduced above the conventional view that, instead of property being fundamentally the complete domination of things which is in turn limited only by law and the rights of third parties, the right itself is subject to inherent limitations and responsibilities. A further question \textit{vis \& vis} the issue of \textit{absolutism} is the extent to which the civil law concept is drawn upon in other fields within the German legal system.

Although the provisions of the \textit{BGB} operate at the level of \textit{legal norms},\textsuperscript{159} the concept of property described in Book 3 does not have a universal or absolute significance within

\begin{footnotesize}

\textsuperscript{155} In the sense of property as a universal and absolute cog in the complex natural law clockwork of the early modern cosmos.

\textsuperscript{156} In physics this recognition was very strongly connected to the early work of Heisenberg and Einstein. See generally T S Kuhn, \textit{The Structure of Scientific Revolutions}, University of Chicago Press, 1970.

\textsuperscript{157} See U Sieling-Wendeling above n 2. With respect to this point in drafting the \textit{BGB}, see above around n 62.

\textsuperscript{158} See below following n 322, and see Glossary: \textit{das Recht}.

\textsuperscript{159} \textit{die Rechtsnorm}: § 2 EGBGB.
\end{footnotesize}
the German legal system, even if that was the original intention of the drafting Committees, as it certainly was the intention in production of the Prussian Civil Codes of 1791 and 1794. Instead, today there is a complex interplay between the civil law concept of private property in Book 3 and other ideas of property in the German legal system, including:

a) custody in criminal law and civil procedure,

b) the concept of economic property,

c) public property, and

d) the constitutional concept of property.

It is important to consider these other concepts of property, first, to place in a wider context the view that the German Civil Law property concept is absolutist, and secondly, because they have been formulated partly through reflection upon the civil law concept and its inadequacies for the task at hand, and therefore afford a view from outside the civil law of what the civil law concept means.

The constitutional concept of property deserves extensive consideration. This follows partly from the slightly different demarcations between public law and private law found in the Common Law world and the German system. Specifically, the question of the social value and place of private property as an institution is generally placed by the Common Law in treatments of Property Law, whereas the most extensive consideration of such issues in the German system is found in the constitutional sphere. More importantly, the

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161 das öffentliche Eigentum.

162 The value of this approach was recognised with respect to common law concepts of property in K Gray, "Property in Thin Air" (1991) 50 Cambridge Law Journal 252.
most complex interplay takes place between the constitutional and civil law conceptions, to such an extent that they are, philosophically at least, interdependent. According to the Common Law division of the legal discipline, this also involves an excursion into Tort law because, again, the demarcations within the legal discipline are slightly different and a true appreciation of German real property law is incomplete without it, or, as the authors of one of the most authoritative text on property law put it -

[a] portrayal of property law which ignored this overlap of the public law with the private law substance of ownership would be incomplete, indeed divorced from life. 163

Practitioner texts on German civil law recognise the overlap, 164 which is also accepted in academic writing. 165

The comparison reveals that concepts of ownership and related proprietary interests found in the codes and legislation of the German legal system have been formulated with reference to the objects of each particular piece of legislation in mind. Discussion of the concepts takes place in terms of whether they are similar or analogical, rather than how accurately they replicate the civil law concept.

163 Baur & Stürmer, above n 160, 2.


(a) Custody in Criminal Law and Civil Procedure

The object of a theft\textsuperscript{166} must be a \textit{remote movable thing}.\textsuperscript{167} For the charge to be substantiated the thing cannot belong to the thief, nor be ownerless property, nor \textit{ferae naturae}. The appropriation of the thing must be made through a breach of the victim's custody\textsuperscript{168} of the thing. Custody is an actual relationship of dominion over a thing which is not identical with the concept of possession\textsuperscript{169} elucidated in the \textit{BGB}.\textsuperscript{170} The theft is complete when the actor takes the thing out of another person's custody and appropriates it, establishing his or her own custody.\textsuperscript{171} The appropriation is conceived as taking possession, to the exclusion of the person entitled to the thing, with the intention of dealing with the thing as an owner.\textsuperscript{172}

A concept of custody is also employed in the law of civil procedure in relation to the rights of a court appointed administrator to goods which have been pledged by way of security.\textsuperscript{173} As a presumption of ownership flows from the existence of this form of custody it could be likened to direct possession.\textsuperscript{174}

\textsuperscript{166}der Diebstahl - see § 242 Strafgesetzbuch.

\textsuperscript{167}die fremde bewegliche Sache would be literally translated as \textit{foreign movable thing}. "Remote" has been employed; the point being that the thief has no connection or entitlement to the thing.

\textsuperscript{168}der Gewahrsam.

\textsuperscript{169}der Besitz.

\textsuperscript{170}Baur & Störner, above n 160, 55.

\textsuperscript{171}Contrast embezzlement \textit{(die Unterschlagung)} in § 243 Strafgesetzbuch.

\textsuperscript{172}See § 242 Strafgesetzbuch.

\textsuperscript{173}§ 803 Zivilprozeßordnung.

\textsuperscript{174}Baur & Störner, above n 160, 27. See § 1006 BGB.
(b) Economic Property

A concept of economic property\textsuperscript{175} was first developed in the Weimar period following the First World War. Previously, the taxation system had rigidly applied the civil law conception.\textsuperscript{176} The immense post-war financial requirements of the state, and the adoption in this time of a taxation policy which was intended to establish a democratic and efficient taxation base on fiscal principles, led to the development of a concept of economic property in conscious contrast to the formal civil law concept. The calculation of income and property taxes thus turned from formal juristic entitlement and ownership to the question of who had actual use of the powers of ownership, and a preference for the person deriving economic benefit when both the formal and the economic aspects of entitlement to the asset were not vested in the same person. The identification of economic property thus became inextricably bound with identification of the correct taxpayer. The question of economic benefit was not to be identical with the identification of formal property use rights, such as \textit{der Nieszbrauch}.\textsuperscript{177} As tests of economic benefit have emerged from taxation appeal decisions, a wide range of issues have become relevant, such as powers to administer the asset, powers to dispose of it and entitlement to any increase in its capital value. In short, if it is possible to derive a general principle from a host of single cases in a combined economic and juristic issue where no single factor is determinative, economic ownership is a participation in the economic potential of the asset for taxation purposes.


\textsuperscript{176} According to \textit{Staudinger}, above n 165, 313-14 [no 14], the concept was already developed in the late 19th Century but not then designated "economic property".
The questions employed to test the existence of economic ownership did not appear to Werndl at first sight juristic - to whom does an asset belong, whom it serves or who utilises it? However, while the concept of economic property was deliberately designed to contrast with civil law property, it can also be seen as a deviation which grew from formal civil law property. By contrasting the content of the two conceptions of property one can gain insight into both, and in many situations the economic owner is also the formal title holder. The elements of civil law property in § 903 of the BGB are classically divided into positive powers, namely the power to dispose of the thing at will, and negative powers, basically the power to exclude others from interfering with the thing. With this analysis in mind one may point out that, first, the civil law concept is also concerned with a relevant person - the person entitled to exercise such powers. Secondly, economic property is very similar to the positive element of civil law property. So much so that if the civil law concept did not have negative elements a separate concept of economic property would be superfluous.

From a wider viewpoint, it is clear however, that the concepts are employed for different purposes. That economic property is applied in a public law matrix is even more apparent than its undoubted links to the civil law concept. On this view other developments in the public law realm, and their extension into the private law sphere, which originated in the same era as the transformation of taxation policy, have much in

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177 Usufruct §§ 1030-1089 BGB.
178 Ibid 5. While Werndl is drawing attention to use of the generally colloquial expression gehört [to belong] in taxation legislation, it should be remembered that this term is also used from time to time in the BGB.
179 dienen.
180 verwenden.
181 These are explored below at n 356.
182 These considerations are explored further by Werndl at ibid 81-106.
common with regard to its normative development in response to 20th century social change.

One result of applying the concept of economic property is that juristically trust property is not counted among the assets of the beneficiary,\textsuperscript{184} but is counted as his or her economic property. Whether the existence of economic property should in turn be recognised juristically, other than for taxation purposes, thus according the beneficiary a form of ownership of the trust property, has not been conclusively decided.\textsuperscript{185}

Norbert Reich explored a similar issue with respect to the interest retained by the mortgagor of a chattel in the case of an assignment of both ownership and possession to the mortgagee for security purposes.\textsuperscript{186} This form of transaction is not in formal legal contemplation the conventional method for creating securities,\textsuperscript{187} and consequently there are no express provisions in the \textit{BGB} prescribing the status of the mortgagor's right to regain the property upon repayment.\textsuperscript{188} Incongruous priority rules have consequently been applied to the competing claims of secured and unsecured creditors to the security property in the event of insolvency. For Reich, the anomaly was particularly evident when he analysed functionally the legal positions of parties to sale agreements in which the vendor has reserved ownership until payment of the full purchase price,\textsuperscript{189} and the relationship between trustee and beneficiary.

\textsuperscript{183} Ibd 9.
\textsuperscript{184} der Treugeber.
\textsuperscript{185} Staudinger, above n 165, 314 [no 14].
\textsuperscript{186} N Reich, above n 175.
\textsuperscript{187} See Glossary: \textit{das Pfandrecht} and \textit{die Hypothek}.
\textsuperscript{188} der Rückübertragungsanspruch: claim for redemption, or in English legal terminology an equity of redemption.
\textsuperscript{189} der Kauf unter Eigentumsvorbehalt, or sale subject to a Romalpa Clause: see below n 329.
The possibility of the chattel mortgagor retaining some form of economic property in the security property, and thus enjoying more than a contractual claim for its return, had been mooted by the Reichsgericht even before the BGB had been brought into effect. Nevertheless, even if it is possible to reason juristically from the existence of economic property to the existence of a proprietary right, and thus to fragment the concept of property in the BGB into formal and economic ownership, Reich found it difficult to see what economic use could be made of the security property by the mortgagor, or even intended by the parties to be made, when both title and possession had passed to the mortgagee. It was thus questionable that the mortgagor holds even economic property. Therefore, according to Reich, in the cases which might be seen as building blocks for a civil law property concept modified through reflection upon the economic concept, the court had actually employed the concept merely as a "juristic metaphor", rather than as a "doctrinal concept", in resolution of the single case.

(c) Public Property

The status and administration of public property is recognised as an established field within administrative law by public law commentators, but has been widely criticised and even disapproved of by civil law writers. Things in public ownership are not, without more, possible objects of valid private transactions even on a temporary possessory

190  N Reich, above n 175, 252.

191  N Reich, above n 175, 253.

basis. In the Passport Case\textsuperscript{193} the plaintiff handed over her passport as security for an unpaid amount of the purchase price of a car. A German passport is public property of the German state and in the possession of the citizen whose identity it proves. The transaction was held void although the state did not require its return, and thus, according to Common Law reasoning did not exercise its superior right to possession as owner. The plaintiff was simply not entitled to enter such a transaction with the document.\textsuperscript{194}

The various manifestations of public property have been systematically classified. Characterisation of a public thing within this system, it is said, flows from two aspects -

. its public beneficial function,\textsuperscript{195} and

. the establishment of public law dominion\textsuperscript{196} by dedication.\textsuperscript{197}

When a thing is public property, it is regarded as removed from the private law order and regulated by an administrative law order of dominion and use which is oriented to fulfilment of its public function. In examining these aspects attention is first drawn to the formal legal step by which the thing could become a public thing. This step is the dedication of the thing, which can be made pursuant to legislation, common law or administrative act and founds the future legal status of the thing.

In discussion of public property, public property proper is distinguished from public property held in a private capacity by a public authority as a legal person for the purpose

\textsuperscript{193}(1974) 27 NJW 2182.

\textsuperscript{194}This case does not establish the possibility of ownership of such documents in civil law at all: cf Palandt, above n 164, 1096.

\textsuperscript{195}die Gemeinwohlfunktion.

\textsuperscript{196}die öffentlichrechtliche Sachherrschaft.

\textsuperscript{197}die Widmung.
of exercising its public functions - these are called public financial assets\(^{198}\) and never leave the private law realm. An example of such assets would be an office building leased to a private tenant in order to generate public income, in contrast to a public park which may freely be entered by citizens without any particular permission. Another form of public property which remains within the private legal sphere is the so-called factually public thing.\(^{199}\) Such property is not administrated publicly, but managed by its private owner for some public purpose. Examples include private swimming pools and art galleries. Private ways do not become subject to the law of public property even when they are in fact used by general traffic, but traffic regulations with criminal sanctions often nevertheless apply to them.\(^{200}\) While it is not disputed that public financial assets and factually public things remain in the private law sphere, willingness of commentators to ascribe to them the term public property at all seems to follow the public law - civil law dichotomy of opinion described above.\(^{201}\) In the following discussion public financial assets and factually public things are not embraced by the term public property [or things] proper.

Public things proper are thus those things -

... which through their use directly and specifically serve the common good or the particular needs of the public administration on a permanent basis, and which, at least to the extent that they are bound to a purpose, are subject to the provisions of public law and specifically the public dominion over things.\(^{202}\)

This status follows foremost from the content of the relevant dedication. When the content and circumference of a thing’s public law status is not specified in the relevant

\(^{198}\) das Finanzvermögen.

\(^{199}\) die tatsächliche öffentliche Sache.

\(^{200}\) E. Pappermann, above n 192, at 795.

\(^{201}\) See above n 192.

\(^{202}\) E. Pappermann, above n 192, at 795 (my emphasis).
dedication a general principle applies, to the effect that the special administrative
property law status of the thing is a proprietary right. To this extent, at least, the civil law
distinction between absolute rights, particularly proprietary rights, and relative rights,
particularly rights based on claims, is carried over into administrative property law.
Such public things proper are further broken down, according to the purpose which they
serve, into things which are –

1) for administrative use,

2) for citizen use, or civil use, including (a) common use, (b) special use,
and (c) institutional use, or

3) res sacrae, which is a religious use, and is here treated as the last
classification, although the position of such things within the concept of public
things proper is contented.

(i) Administrative Use

Public things dedicated to administrative use are those directly employed internally by
public administrators in fulfilment of their tasks. In this context public administration
includes all three conventional arms of government: legislative, executive and judicial.
Public buildings and fittings, vehicles, fire fighting equipment, parking areas for public
officials and police weaponry have all been included in this category.
(ii) Citizen or Civil Use

This category encompasses those things which are maintained by the public administration for external use by citizens. A further distinction is made between things for the use of which no prior permission need be granted pursuant to legislation (common use),\(^{208}\) and things for the use of which a particular permission, which may be express or silent, is required from the public authority in which the public dominion is vested. This second group is divided further into special use\(^{209}\) and institutional use.\(^{210}\)

(iii) Res Sacrae

Things devoted to religious use are said by some public law commentators to be public property,\(^{211}\) following from the characterisation of Churches as public law corporations.\(^{212}\) Thus church property might be classified as it would be in the hands of a government department into institutional use\(^{213}\) and administrative use.\(^{214}\) The private law commentator Wieling, on the other hand, maintains that the state plays no part in the devotion of such things, and when the relevant thing has been privately owned the devotion of it by its owner does not alter the private right to it except so far as it has been limited by the terms of the devotion.\(^{215}\)

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208 *der Gemeingebrauch.*

209 *der Sondergebrauch.*

210 *der Anstaltsgebrauch.*

211 Papier, above n 192, 98. Pappermann, above n 192, 795 n 7.

212 § 137 V Weimar Constitution adopted through § 140 of the Grundgesetz. According to Wieling it follows from 19th century state and local laws which nevertheless remain in force: above n 192, 24.

213 Church buildings, hospitals, kindergartens, objects used in the course of worship, burial places, & c.

214 Things employed in church administration.

215 Wieling, above n 192, 24.
The concept of property in public law is often defined by reference to the aspects of private property which it does not display. For example, contrary to § 90 of the BGB, incorporeal phenomena can be the object of public ownership, such as electrical energy. Contrary to §§ 93-95 of the BGB, a [public] essential component part of a larger [private] thing can retain its own public attributes. Principles applying to accessories in § 97 are similarly differentiated. Further, contrary to the civil law Principle of Speciality, a collection of things can be one object for public ownership, so a collection of books in a public library can be one thing instead of a number of individual things, and a public street over private land is one public thing instead of a line of connected easements.

In view of this process of negative definition and relative differentiation, it is questionable whether the property concept in public law can be regarded as an independent juristic idea, or whether it is merely a deviation from the private civil law concept. Such an issue would have all the hallmarks of an abstract jurisprudential internal disciplinary border struggle, but for the fact that the choice between litigation in the ordinary courts or through the administrative courts depends upon correct categorisation. This procedural difficulty is one aspect of the Theory of Modified Private Ownership, as it is known by civil law commentators, or the Dualism of Private and Public Ownership, as it is known by public law commentators. The complexity of the underlying theoretical problem is

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216 Papier, above n 192, 93. Pappermann, above n 162, 797-8.
217 der wesentliche Bestandteil.
218 das Zubehör.
219 das Spezialitätsprinzip: see Glossary.
220 die Theorie des modifizierten Privatgutes.
221 der Dualismus von privatem und öffentlichem Recht.
most fully revealed in the status of public streets over private land. From the civil law perspective, property only ceases to constitute private civil law property to the extent necessary for the furtherance of its dedicated public function. Thus, the thing cannot be the object of private legal transaction, but is not totally withdrawn from the greater sphere of the civil law for many other purposes, such as civil liability for injuries.

(d) Constitutional Concept of Property

Issues surrounding the constitutional concept of property are generally arise in the protection of private property under Art 14 of the modern German Constitution. Legislative protection of private property has been a feature of German legal orders at least since the Prussian codification of 1791.

Every inhabitant of the State has a right to demand its protection for his person and property.

This is probably the first and last uncontroverted expression in the German legal system of property in the absolutist sense explained above, and ironically at a time when feudal property structures in Prussia remained strong.

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222 See further Pappermann, above n 192, 79ff and Baur & Störmer, above n 192, 5. The nature of public property in Hamburg with respect to streets, watercourses and high-water protection systems (dykes), and in Baden-Württemberg with respect to the beds of watercourses, is widely thought to deviate from the general German model: see O Gierke, "Das Eigentum" in O Gierke, Deutsches Privatrecht, Duncker & Humblott, Leipzig, 1905 - Vol 2, 364 n 52; Hamburg Dyke Case (1969) 22 NJW 309; Alsterchausee Case (1967) DVBl 917; Hamburg Street Case (1976) 29 NJW 1835.

223 der Rechtsverkehr.

224 Staudinger, above n 192, 325 [no 46].

225 Grundgesetz für die Bundesrepublik Deutschland, 23.5.1949 (BGBl. S. 1) - often translated as Basic Law during its transitory phase, Constitution is widely regarded as more appropriate following Unification of the Federal Republic and the Democratic Republic. The text of relevant provisions is set out in Appendix III.

226 § 83 of the Prussian General Code of 1791, reproduced in § 83 of the Allgemeines Landrecht of 1784.

227 See above n 156.
The text of Art 14, including the express social obligation in the use of property in Art 14 (2), was derived from Art 153 of the Weimar Constitution of 1919.\textsuperscript{228} It expresses Natural Law principles reaching back to the Enlightenment\textsuperscript{229} and an historical cultural limitation of the German liberal conception of property rights on the ground of social obligation found in Gierke\textsuperscript{230} and also expressed in a long history of planning law.\textsuperscript{231} That the liberal concept of private property has inherent limitations was also considered in the French revolutionary period - Robespierre proposed the following "Truths" for the Declaration of Civil and Human Rights of 1789 -

\begin{quote}
Article 1: Property is the right of each citizen to deal freely with that part of the wealth which the law guarantees to him.

Article 2: The right of property is, like every other right, restricted by the duty to respect the rights of the next.

Article 3: Ownership may impair neither the security, the freedom, the existence nor the property of our fellow humans.\textsuperscript{232}
\end{quote}

For Adam Smith the good of all was best served by unlimited free trade in private property. Kimminich\textsuperscript{233} points out that Adam Smith thus also saw the highest object of private property to be achievement of the common good. Interestingly Smithianismus [Smithism] was extremely fashionable in Prussia between 1807 and 1848.\textsuperscript{234}


\textsuperscript{229} Measures of the Housing Department Case (1952) 6 BGHZ 270, 278.

\textsuperscript{230} See above n 146.

\textsuperscript{231} R Dolzer, \textit{Property and Environment: The Social Obligation Inherent in Ownership - A Study of the German Constitutional Setting}, IUCN, Morges, 1976, 34 n 88, and 44.

\textsuperscript{232} Quoted from H Welkoborsky "Die Herausbildung des Bürgerlichen Eigentumsbegriffs" in W Däubler, U Sieling-Wendeling & H Welkoborsky, above n 2, 38.


The text of Art 14 is thus another expression\textsuperscript{235} of a well established liberal principle and not the source of the obligation.\textsuperscript{236} Many commentators see such a firm relationship between private property and its contribution to the common good that Art 14 (2) might well be superfluous. Support for this view is drawn from the existence of obligation in the concept of property from periods before the \textit{Weimar Constitution} made it explicit. We have seen that the Hamburg legal system demonstrated clear evidence of it.\textsuperscript{237} The \textit{Kreuzberg Monument Decision}\textsuperscript{238} also demonstrates the point that obligation can be found without an express text. In 1878 a national monument to victory in the Freedom War\textsuperscript{239} had been erected on the Kreuzberg in Berlin. In the following year a Regulation was issued for its protection, one object of which was to preserve the view of the monument from the city and the view of the city from the monument. To achieve this, areas on the Development Plan for the Berlin Environs were designated within which city approval of building proposals had to be obtained, with particular consideration for their height and manner of construction. Permission was refused for the plaintiff’s proposed five storey building and he appealed successfully to the District Administrative Court. The city took the case on to the Superior Administrative Court unsuccessfully and then appealed to a Full Bench of the same court. The court examined the legislation under which the Regulation had been made, and that under which the building was regulated. This inquiry revealed that the critical functions of the Police were to maintain public peace, security and order, and to protect the public and individual members of it from imminent danger.\textsuperscript{240} The city certainly had building control functions, but these were

\textsuperscript{235} \textit{die Konkretisierung}.

\textsuperscript{236} \textit{The Kreuzberg Monument Decision} (1882) 9 \textit{PrOeVG} 353, reproduced in (1985) 100 \textit{DVBl} 219, is a decision exhibiting similar principles without the support of express statutory or constitutional text.

\textsuperscript{237} See Part II above.

\textsuperscript{238} (1862) 9 \textit{PrOeVG} 353, reproduced in (1985) 100 \textit{DVBl} 219.

\textsuperscript{239} \textit{der Freiheitskrieg} - the war of liberation from Napoleon.

\textsuperscript{240} A direction issued under “breach of peace” provisions to the owner of rocky ground to secure it.
generally related to issues such as fire control and inhabitability. One specific power concerned the building form in streets and public places, but the appeal court concluded that this referred to outright ugliness rather than architectural harmony and, as a plain appeal question, the plaintiff's proposal did not exhibit this. The appeal court thus found that although the city had the authority to make Regulations limiting the height of buildings and specifying materials, the Regulation in question was made for a purpose not contemplated by the empowering legislation. The plaintiff thus succeeded.

In the course of arriving at this decision the appeal court made reference both to the constitutional inviolability of private property rights and to rights to compensation for expropriation of property and rights generally concomitant to property rights in land, such as building, particularly with regard to limitations imposed on those rights.\textsuperscript{241} In consideration of an unreported Reichsgericht decision it had to be acknowledged that some public measures "... for the advantage of a common existence ..."\textsuperscript{242} had to be tolerated by citizens as both constitutional and uncompensatable. At this time there was no express provision that private property had public interests to serve. In the instant case it was considered that the interference with the plaintiff's rights would have been so great that compensation would have been payable if the measure had been valid.

In the interpretation of Art 14 the German courts have applied a number of doctrines to part-expropriations\textsuperscript{243} of the type discussed in the Kreuzberg Monument Decision\textsuperscript{244} and

\textsuperscript{241} Kreuzberg Monument Decision, above n 238, OVG Koblenz Rock Fall Danger Case (1998) 51 NJW 625.

\textsuperscript{242} "zum Besten des gemeinen Wesens".

\textsuperscript{243} That is, where ownership or a limited proprietary interest is not entirely expropriated but the value of it is diminished by governmental action in some way - such governmental interferences in an environmental context are dealt with in more detail below at n 299.

\textsuperscript{244} See above n 238.
they are evident in discussion of the cases which follows. Most important are -

- the *individual sacrifice* doctrine under which a citizen cannot be expected alone to make an extraordinary sacrifice for the common good.

- the *expropriation threshold* doctrine under which governmental interference has to reach a determined level before it would be regarded as expropriation.

- the *interference intensity* doctrine under which the actual effects of the interference on the citizen could amount to expropriation regardless of an interference threshold determined in abstract. This is matched on the other side by identifying the "intensity" of the proprietary interest being expropriated through an examination of the elements of the "bundle of rights" actually being enjoyed.

Consideration of expropriation cases suggests that progression from one doctrine to the other has not been clear cut and more practical ramifications of distinctions are difficult to detect. However, all of the doctrines, and particularly the *individual sacrifice* doctrine, underscore a concern with specific injustices evident in the confiscations and expropriations suffered generally during the National Socialist phase of German history. By 1933 the National Socialist support for private property and the facilitation of individual initiative was extreme. In a characteristic self-contradiction this did not prevent them confiscating the property of German citizens who were Jewish or deemed enemies of the State following suspension of most of the Weimar Constitution, including Art 153. However, expropriation did not end there. Although the courts resisted

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245 Noise intrusion is a good example; see *Munich Airport Case* below n 304.


247 des Rechtsbündel.


249 The Constitution of the Weimar Republic was suspended by the Verordnung des Reichspräsidenten zum Schutz von Volk und Staat of 28 February 1933, RGBI 1933, 83. Communists were denied rights of property by legislation of 26 May 1933, RGBI 1933, 293; Social Democrats and others by legislation of 28 April 1933, RGBI 1933, 476; Jews by legislation of 28 April, 12 November and 2 December 1938. To continue the Hamburg story in this respect, see above Part II n 97, in 1933 the city had a Jewish population
application of the NAZI Party program as positive law, they exercised little creativity in finding civil remedies for clear expropriation situations following suspension of public law rights.

The Fascist Freeway Construction Case arose from the construction in 1934 of a new stretch of the Köln-Düsseldorff national freeway, passing only 4.8 metres from the plaintiff's home on a 4 metre high embankment. In 1931 when the plans were displayed and public comment invited the freeway was to pass 14 metres from the house. The house was affected by noise, vibration, gas and spray, and the outlook was ruined. Tenants had left because of the interferences. On the other side of the house there was already a State highway. It was alleged that the value of the house had decreased by half. The Reichsgericht refused the compensation claim. It was certainly considered possible to sue the freeway construction authority as a neighbour with a duty not to create interferences on neighbouring land under § 906 BGB. Membership of the "neighbourly community" brought with it a duty to have regard for the interests of neighbours as well as higher considerations. However, the ideas of the "people's community" and "neighbourly community" which the Reichsgericht was then adopting had led to a wider interpretation of § 906 - one must give consideration to the generally existing local relationships in the contemplated area. When the area is industrial, further...
industrial development would not breach § 906 unless it was in such a manner and mass that it threatened the economic viability of the existing neighbouring land uses. The court considered that when considering the construction of a freeway, one should have regard to ordinary traffic volumes and not the heaviest flow which might be experienced.

It would mean an unbearable obstruction of transport development if one were to burden such a progressive innovation, which is offered for the entire population, with unforeseeable incalculable claims for damages.\textsuperscript{256}

Thus the plaintiff's interests were to be an individual sacrifice to automobility. Only exceptional cases could occasionally be allowed when the neighbour's economic existence was fundamentally affected. There was heavy traffic in the area before construction of the freeway. Indeed, with respect to cracks in the walls it would be very difficult to decide whether responsibility lay with the national or the state highway. The plaintiff's building remained basically a residence and the loss of value was not sufficient to take her outside this principle. Use of the land as a freeway therefore did not contravene § 906 BGB.

Underscoring later judicial decisions on Art 14 is a clear concern to avoid situations resembling the appalling absence of compensation which occurred under the NAZI regime in cases such as the Fascist Freeway Construction Case,\textsuperscript{257} although this is rarely made explicit.

\textit{(i) The Guarantees of Private Property in Article 14}

The guarantee of property in Art 14 has two dimensions -

\textbf{the institutional guarantee, and}

\textsuperscript{256} See above n 251, 526.

\textsuperscript{257} See above n 251.
the guarantee of individual property rights.

The institutional guarantee protects the economic order based on private property. This was explained in detail by the Federal Constitutional Court in the Hamburg Dyke Case\textsuperscript{258}.

Ownership is an elementary Basic Right\textsuperscript{259} which stands in a close connection with the guarantee of personal freedom. It has the task, within the total structure of the Fundamental Rights, to secure for the bearer of the Fundamental Rights a realm of freedom in the field of property rights and thus facilitate a self-responsible form of life. The guarantee of property as a legal institution serves the security of this Basic Right. The Fundamental Right of the individual presupposes the legal institution of "property"; it would not be effectively guaranteed if the legislator could establish something in the place of private property which no longer deserved the title "property".\textsuperscript{260}

The constitutional guarantee of individual property rights conceives as property the proprietary interests of the civil law, such as ownership of goods, registered ownership of land, entitlement to use rights, and so forth, as provided in Book Three of the Bürgerlichen Gesetzbuch. However, it also goes much further. The property concept in Art 14 also embraces\textsuperscript{261} such rights as -

- land and rights in relation to it, such as possession, fishing rights and hereditary building rights,
- patents, trademarks and copyright,
- bills of exchange
- superannuation
- a claim for unemployment benefits, but not a mere expectation of it.\textsuperscript{262}

\textsuperscript{258} (1969) 22 NJW 309.

\textsuperscript{259} das Grundrecht - Basic Right and Fundamental Right are here used interchangeably.

\textsuperscript{260} ibid 309.

\textsuperscript{261} For an extensive catalogue of value held to amount to property, and value denied protection, see B Schmidt-Bleibtreu, F Klein & H B Brockmeyer, Kommentar zum Grundgesetz, 7th ed, Luchterhand, Neuwied/Frankfurt, 1990, 321-8.

\textsuperscript{262} In view of the classification of social security benefits as value amounting to property in its
Some of the rights not included within Art 14 are:

- rights the merits of which are in dispute, such as a contested right to raise rent,
- the right to occupy a public office, such as a position in the public service,
- most expectations of social support.

(ii) Obligation Immanent in Property

While no doubt available as an interpretive principle, there are difficulties in construing from Art 14 (2) a duty which is enforceable positively between private citizens, in contrast to its role as a constitutional limitation of private rights vis-à-vis the State. There are exceptions to this. The Grundgesetz provides that Germany is a democratic and social federated nation, from which the Social State Principle is deduced. One aspect of this principle is that constitutional freedoms may not be exercised oppressively against fellow citizens. Similarly, public permission for building works on neighbouring land may be challenged under Art 14.

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constitutional meaning, it is tempting to draw comparisons with the New Property movement led by C A Reich "The New Property" (1984) 73 Yale Law Journal 733. See also C B Macpherson, Democratic Theory: Essays in Renewal, Clarendon Press, 1973, 120ff and "Liberal-Democracy and Property" in Property - Mainstream and Critical Positions, University of Toronto Press, Toronto, 1978, 198ff. Although the status of social security payments is beyond the scope of this work, one might conjecture that, in view of the German distinction between civil property and property for the purposes of constitutional protection, the Common Law property concept actually appears far more absolutist [see above n 155] in comparison, in its effort to make the one concept serve all legal purposes. The failure of the critique made by the New Property movement to have any great practical impact is perhaps explained by this ambitious undertaking.

263 M Kloepfer, Umweltrecht, C H Beck'sche, München, 1989, 52-3 and 564.

264 Art 20 GG - see Appendix III.

265 das Sozialstaatsprinzip: see Glossary.

266 E Stein, Staatsrecht 15th ed, J C B Mohr (Paul Siebeck), Tübingen, 1995, 176, illustrating the limitation with cases of oppressive use of freedom of the press.

267 H Durr, Baurecht, 166-7.
Nevertheless, the public law character of the obligation has in the past bolstered the confidence of some private law commentators in their assertions that as a matter of civil law the right to use one's property is *prima facie* unlimited. These have in turn been criticised by many.268 One might point out that Art 14 assigns to the legislature the task of defining property in detail, and this is done in the *Bürgerlichem Gesetzbuch*. As a constitutional guarantee, Art 14 (2) prevents such legislation creating a concept of private property which carries no obligation.269 Environmental and planning law is seen as an expression of the obligation. Further, Art 14 (2) has been drawn upon by way of analogy in the development of private law doctrine, such as the doctrine of neighbourly consideration.270 The extension of the private law doctrine of *trust and faith*271 into neighbourhood environmental relations also suggests a sense of obligation going much further than common law concepts of nuisance.272 After considering these issues with respect to private law, Jauernig concluded -

That the social obligation in ownership of land is extraordinarily strong remains without doubt.273

With respect to the interpretation of Art 14 of the German Constitution two directions are most relevant for the purposes of this paper -

  environmental obligations of an owner, and

268 Böhmer discusses this issue at length, above n 246, 2569 ff.

269 See M Burgi “Die Enteignung durch "teilweisen" Rechtsentzug als Prufstein für die Eigentumsdogmatik” (1994) 13 NVwZ 527.

270 See Gable Wall Case (1951) 18 BGH LM (to § 903 BGB) Nr 1 and Ruin Rebuilding Case (1953) 18 BGH LM (to § 903 BGB) Nr 2. These cases are discussed more extensively below following nn 420 and 422 respectively.

271 *Trau und Glauben:* § 242 BGB. For an overview of the doctrine with respect to contract see M Vranken, *Fundamentals of European Civil Law and Impact of the European Community*, Federation Press, Sydney, 1997, 101ff. In this work *trust and faith* has been adopted with respect to § 242 in order to distinguish it from the principle of *good faith* [guten Glaubens] in § 892 BGB.

272 See for example Garden Wall Cleaning Case (1966) 19 NJW 599.

constitutional guarantee against undue environmental interference from governmental projects.

environmental obligations of an owner

The most extensive development by the German courts of the obligations in Art 14 (2) of the Constitution has been in cases initiated by private property owners claiming that a government planning or environmental initiative amounted to an expropriation contrary to Art 14 (1) which must be compensated under Art 14 (3). The courts have held that when a citizen has an obligation to preserve or maintain an environmental quality of his or her property Art 14 (2) can preclude a right to compensation for what would otherwise be an interference with private property initiated under a law made to express that obligation. Thus, compensation can be claimed only for governmental limitations which exceed the obligations which the owner already had. Whether the citizen was already under an obligation to act with respect to his or her property in the way later required by the legislation complained about depends upon the social and environmental context of the property.

The principle of Situationsgebundenheit, or Environmental Context,274 is of particular interest in the application of Art 14 (2) in compulsory acquisition cases. In the view of the German Constitutional Court,275 the German Constitution conceives a citizen to be a person living within and dependent upon society and not as an egocentric individual. The constitutionally protected sphere of property in land cannot be determined by abstract reasoning. The owner's rights are alterable and must be determined through an

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274 Also translated as "situational commitment": Delzer, above n 231. "Locational relativity" is another possibility. "Obligation to a Place" is a further possibility because, at least in the sense of a contract, die Gebundenheit connotes Obligation - however, discussion of the principle in cases and texts suggests "environmental context".

275 Bundesverfassungsgericht.
integrated view of the setting and the environment in which the property is located. An owner has no inherent or underlying right to use property in a way which would be socially disruptive in context. The court judges the sphere of protected property by considering what the reasonable thoughts would be of the rational or understanding, but nevertheless economically minded, citizen when contemplating potential uses of the particular property in its social and environmental context in the absence of legal regulation.\textsuperscript{276} The principle retains great importance although in more recent times there has been a tendency to emphasise the substance and limitations of the proprietary right being appropriated,\textsuperscript{277} which lawyers no doubt find easier to deal with than the real vicissitudes of ecology and society which in fact fashion land use, its limitations and human expectations about it. In this respect, more precise identification of what in reality is being expropriated is achieved through the natural and social sciences.

The obligation to the common good in Art 14 (2) was first held to include an environmental obligation in the leading decision of the German High Court for Civil Cases\textsuperscript{278} in the Cathedral of Beech Trees Case.\textsuperscript{279} The court held that the content of the environmental obligation depended in turn upon the environmental context of the relevant property. The plaintiff owned a farm where a centuries old grove of beech and oak trees stood, popularly known as the Cathedral of Beeches. The trees were first designated for protection in 1925, and thus the owner was prohibited by legislation from felling them. After 1945 the owner sought removal of the trees from the protected list without success. He then sought compensation, arguing that the preservation order amounted to an

\textsuperscript{276}Dolzer 1976, above n 231, 22-3 and 51.

\textsuperscript{277}M Burgi, above n 269, 534. This has been one consequence, though not a necessary one, of present movement to favour an analysis based on intensity: see above n 247. One possible future problem with this is that the "real intensity" of present proprietary interests could be substituted by a legalised intensity.

\textsuperscript{278}Bundesgerichtshof.

expropriation of property for which compensation had to be paid. The court found that the natural features and landscape of the land imposed a social obligation on the owner to preserve the trees, even in the absence of legal regulation, as a reasonable and economically oriented owner of that land, with the common good in mind, would recognise. Therefore, the preservation order was not an expropriation of property - it merely formalised an existing obligation.

The Bundesgerichtshof recalled that a sovereign interference in ownership rights is to be characterised as an expropriation when it contravenes the constitutional guarantee of equality,\textsuperscript{280} by requiring of an individual or a group an unreasonable sacrifice in the interests of the commonality. On the other hand, a limitation of ownership is acceptable when, without contravening the guarantee of equality, it expresses inherent and social limitations of the property which stem from the general nature of its existence. The natural features of property which make it worthy of preservation are an example of such inherent limitations. Legislation, or administrative action, requiring preservation is not an interference with the owner's power of disposition but instead a concrete expression of the social obligation which burdens the property in view of its situation.

The limit lies at the point where the conservation merits of the property would appear in the concrete situation to the owner, as a rational economically thinking person, when acquiring it as an economic asset with economic intentions or pursuing such intentions in relation to it.\textsuperscript{281}

The court concluded that preservation of the trees lay within the inherent situation of the property. The limitation of the plaintiff's use of the land was one of which the rational and reasonable owner with consideration to the particular situation would be mindful.\textsuperscript{282}

\textsuperscript{280} Art 3 Grundgesetz.

\textsuperscript{281} (1957) DVBl 861-2.

\textsuperscript{282} Ibid 862.
The test of the reasonable economically minded person was confirmed, and to an extent expanded, with respect to both nature conservation and ground water management in the Gravel Extraction Case. The owner of land on which a gravel deposit was situated was refused permission to develop it further for two reasons. First, extraction had interfered with ground water management - a lake had already formed on the land. There was evidence that other gravel pits in the area also had such ground water problems. Second, the area to be developed was a small forest which was the habitat of various animals. The forest was seen as vital for the future regeneration of the area. The Bundesgerichtshof decided that compensation was not required when development permission was refused. With respect to the forest alone -

... a rational and reasonable owner, who had not lost sight of the common good, would abstain from gravel extraction. He would not close his mind to the knowledge that the completely paramount interest of landscape protection requires retention of the remaining forest and compels him to refrain from the otherwise economically rational exploitation of the gravel deposit which lies in his private interests.

That the objective perception is to be that of the owner from time to time, and not at the point of purchase was made clear by the New Forest Case. The plaintiff had acquired land for building development, but with the passage of time a forest had grown there naturally. The land thus could not be developed because of nature protection laws. The Federal Administrative Court did not even grant leave to appeal because the answer could clearly be gathered from judgments on the point - there was no expropriation.

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283 (1984) 14 Agrarrecht 281. The approach of the Bundesgerichtshof has been considered far more conservative than that followed by the Bundesverfassungsgericht in its famous Naßauskiesungs Decision (1981) 58 BVerfGE 300, 344; M Kloepfer, above n 263, 638. According W-R Schenke to the approach of the Bundesverfassungsgericht in this case remains the last word on the social obligations of property: "Der Rechtsweg für die Geltendmachung von Ausgleichsansprüchen im Rahmen der Sozialbindung des Eigentums" (1995) 48 NJW 3145. For the purpose of this work the later decision of the Bundesgerichtshof represents a sufficient, if conservative, reconciliation of the views.

284 Ibid 282.

Some cases concerning the environmental obligation in Art 14(2) extend the owner's social obligation to refrain from anti-social uses of property so far as to require performance of positive acts to maintain and preserve the property which a reasonable owner would perform in the absence of legal regulation. These include planting greenery, cultivation and restoring land after mining.\textsuperscript{286}

The problem of historically valuable building forms was explored in the \textit{Kölner Hinterhaus Case}.\textsuperscript{287} The plaintiffs owned land in the Old City of Köln where a cluster of three old buildings had stood. The front and middle sections were extensively damaged during the Second World War. The rear section, the Hinterhaus, was virtually destroyed, requiring a demolition order in view of possible collapse. The front section was restored and the middle section partly rebuilt. Permission was, however, refused for reconstruction of the rear section in the old style because this would have contravened building regulations. The plaintiffs claimed that this refusal amounted to an expropriation. The Bundesgerichtshof noted that since the 19th century, when the Hinterhaus was built, building regulations concerning such tenements had changed. The court added that they had changed with good reason - accommodation in an old Hinterhaus was not very healthy, with limited light and fresh air.\textsuperscript{288} A reasonable owner with an economic outlook and a view to wider society would not rebuild the Hinterhaus even in the absence of legal regulation. While historical value is an aspect of the nature of a thing, to which regard

\textsuperscript{286} Dolzer, above n 231, 37-8 and 51-4.

\textsuperscript{287} (1967) 48 BGHZ 193.

\textsuperscript{288} Ibid 197. The Court also referred (at 198) to provisions of the \textit{Bundesbaugesetzbuch} relating maintenance of healthy living and working environments. See now the \textit{Baup- und Raumordnungsgesetz} of 18.8.1997 (BGBl I, 2001), which came into force on 1.1.1998 (BauROG 1998). This legislation was developed by the Schlichter-Kommission, chaired by Prof Dr Schlichter who was formerly Vice President of the BVerwG division for building matters: K Finkelnburg "Bauleitplanung, Teilungsgenehmigung, Vorkaufsrechte und Zulässigkeit von Vorhaben - Anmerkungen zur Neufassung des Baugesetzbuchs" (1998) NJW 1. Discussed further in O Groschopf "Beschränkungen im Grundstücksverkehr nach der Novelle zum Baugesetzbuch - Grundstücksteilungen, Vorkaufsrechte, Aufteilung in Wohnungseigentum" (1998) 51 NJW 418.
must be given, and environmental context does not necessarily imply strict adherence to contemporary building standards, the social obligations surrounding property do change over time. In this case, the social perspective of the reasonable owner had changed more or less to accord with contemporary building regulations and refusal of permission to reconstruct the Hinterhaus was not an expropriation. Both an order to demolish an intact Hinterhaus, and an application to rebuild one in a way which did not infringe contemporary standards, would be treated differently.\(^{289}\)

The case did not disrespect the historical value of old buildings; the old building was no longer there. That was the reality of the situation of the land in question. The question was whether the land owner was to be prevented from building the same thing again, and if so, whether compensation had to be paid. Rather than abandoning historical values, the court rejected the conservative outlook of the land owners in favour of a more progressive view that tenants (we might reasonably suspect) cannot be expected to live in a museum of the worst features of urban life of past centuries, at least once it is gone.

Requirements in planning and building law\(^{290}\) that the appearance of a building be in harmony with the surrounding street- and landscape is a permissible legislative specification of the substance of property within the meaning of Art 14 I s 2 GG. As well as protecting the form of the area and the interests of neighbours, such provisions assist the psychological well being of the citizens and the social peace of the community. In the \textit{Artistic Landowner Case},\(^{291}\) the court had to deal with a conflict between the artistic freedom\(^{292}\) of a house owner to spray paint the facade of his house with bright graffit-
style designs. It concluded that, in the circumstances, the interference with community well being was not so strong that the owner's fundamental artistic freedom should be limited. The freedom of property owner to do what they like with what is theirs played no role in the decision because there is no right to use this freedom to disturb the values which such legislative provisions seek to protect. The designs qualified as art, and did not offend prevailing values or other constitutional rights.

The German constitutional approach might well appear innovative, far sighted and sophisticated to one educated in the common law property tradition. However, the eminent text writer Kloepfer expresses some frustration at restriction of the range of legal actions which might be initiated on the basis of Art 14 (2) to citizen-state relationships, and with the narrowness of the social and environmental qualification of the concept of property. While Kloepfer\textsuperscript{293} refers to no cases militating against the possibility, he is clearly concerned that das Wohl der Allgemeinheit, or the common good, should not be interpreted in an anthropocentric way, but rather should extend to the benefit of other species and their habitats.\textsuperscript{294}

The common good is also brought into consideration when calculating the amount of compensation which must be paid, and hence the social and environmental obligations of the property owner are also relevant here. Von Brünneck\textsuperscript{295} has noted a difference of view between the German Constitutional Court\textsuperscript{296} and the Bundesgerichtshof concerning the relevance of market value in determining the measure of compensation or "just

\textsuperscript{293} Prof Dr Michael Kloepfer was formerly a judge on the Superior Administrative Appeals Court (Oberverwaltungsgericht) for Rheinland-Pfalz and is now a Professor for Public Law (Staats- und Verwaltungsrecht) at the Humboldt University in Berlin. Most recently he was deputy chair of the Federal German Government project to codify environmental law: see below n 314.

\textsuperscript{294} Kloepfer, above n 263, 566.

\textsuperscript{295} A von Brünneck, above n 228, 199-200.

\textsuperscript{296} Bundesverfassungsgericht.
However, even the Bundesgerichtshof case which he cites confirms that the inherent limitations and the social and environmental context of what has been expropriated are vital determinants of its value. The object of compensation is not to place the property owners in the position which they might otherwise have enjoyed, as with the calculation of damages, and so conjectural future development and profits are irrelevant. The point is to determine, on one side, where the limitations and obligations inherent in the property end, and, on the other side to determine where an objectionable individual sacrifice is being required.

Delzer concluded that the core indicia of property in German law are the power to transact with the thing and the power to exclude others from it, but there is no right of unlimited use. Legal limitations of property use are inherent in the conception and essence of ownership itself. Therefore, even as a matter of law, when one stands for the status quo of existing property rights one stands also for the obligations stemming from the social and environmental location of the property. So conceived, the law reflects the real social and environmental relationships to property expressed in the traditional poles of debate about the conservation or the development of land when it is fulfilling a conservative social role. The Common Law position has in contrast been understood to be that unlimited freedom radically to alter the status quo will be presumed

297 Art 14 (3) Grundgesetz.


299 This approach was followed by the German Administrative Court [Bundesverwaltungsgericht] in the Munich Airport Case (1991) 87 BVerwGE 332.

300 Dolzer, above n 231, 57. The importance of the power to assign or right of disposition as an essential element of property was confirmed by the BGH in the Hotel at Konstanz Case (1997) 50 NJW 3432. A couple sought to sell four adjoining pieces of land in a rural area. One was a guest house. The other three led to the lake and, although designated for wine production and agriculture, they were used to gain access to the lake. A contract of sale was made but the Agriculture Department delayed in approving it. BGH concluded that unreasonable delay amounted to a part-expropriation of the power of disposition, and the costs and expenses incurred were to be compensated with damages.

in favour of one party, which is plainly the opposite of conservatism. The German position is that the preservation of property and the status quo is the preservation of the thing's environmental qualities.

A further implication of characterising governmental limits and interferences with private land use as expropriation is that environmental interferences which emanate from public projects must also be so characterised. In view of the social obligations implicit in property, a property owner must tolerate a level of interference generated by public initiatives for the common good. However, when interference with the usual use of the property reaches the expropriation threshold compensation must be paid. There is yet a further level of interference with the property, or an integral part of it, at which the property cannot be used in a relevant sense, and when that level is reached the property must be acquired.

The Munich Airport Case is a recent illustration of the application of these principles with respect to noise intrusion. The environmental assessment of plans to construct a

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302 With respect to environmental interferences, an expropriation-like interference takes place at the level of impairment of ownership at which a neighbour would contravene § 906 BGB (see below n 388): BGH in Ramstein Air Base Case (1995) 45 NJW 1823.

303 A home and its garden are considered integrated in a social and familial sense: Highway Construction Case (1981) 61 BVerwGE 295, 300-301.

304 See above n 299.

305 The Planfeststellung procedure was conducted by an independent agency [die Planfeststellungbehörde] with authority to arrive at an actual decision. This procedure was subject to ordinary avenues of appeal to the administrative courts, however the agency retained an area of discretion, generally limited to the weighing of facts and planning policy, with which the German Administrative Court [Bundesverwaltungsgericht] would not involve itself. This case reached the German Administrative Court from the Munich Administrative and Higher Administrative Courts. The environmental assessment was conducted within the provisions specifically applicable to civil aviation projects set out in the Civil Aviation legislation [Luftverkehrsrecht].
second airport at Munich led to the designation of a noise intrusion area where noise was expected to reach 55 dB(A) in inner living areas with closed windows. In this area noise management measures, such as sound proofed windows, were to be installed with the object of keeping noise intrusion below 55 dB(A). One ground of appeal by citizens and municipalities was that the assessment agency had erroneously omitted affected land from the designated area. The court concluded that it was within the discretion of the agency to designate areas within which it would be presumed that noise would reach unreasonable levels requiring attenuation measures. This could not however exclude the right of a private property owner outside the area to seek compensation where unreasonable intrusion is actually experienced, or to require complete acquisition where the intrusion is so unbearable that meaningful usual use of the land could not be made.

Naturally, in the complex situation of aircraft noise a vast range of factors is involved. These include the time of day, pre-existing conditions in the area, and the mixture of

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306 For most of the following explanation of the decibel noise measurement scale I am indebted to M Allaby, Macmillan Dictionary of the Environment, 3rd ed, Macmillan, London, 1988 -

decibel (dB). A unit used to measure the intensity of sound, on a logarithmic scale based on measurements of sound intensity in watts per square metre and related to a reference $10^{-12}$ W/m², which is the intensity of the quietest sound perceptible to the human ear. Because the scale is logarithmic (lo logx), each doubling of intensity increases the decibel value by three - a noise measured at 65 dB(A) is thus twice as intense as a noise measured at 62 dB(A). The scale is then weighted according to three further systems, designated A, B and C (of which A is the most commonly used, to give the dB(A) unit) to reduce the response of measuring instruments to very high and very low sound frequencies and to emphasise those within the range that is audible to humans. Some sound meters have a further (D) weighting, to measure perceived noise (PNdB), often used in assessing aircraft noise. On the dB(A) scale, the rustle of leaves is 10 dB(A), a quiet office 40, an alarm clock at one metre distance 60, a Saturn rocket lifting off at 300 metres distance 200. One decibel is equal to one-tenth of a bel (although the bel is rarely used). The unit is named after Alexander Graham Bell (1847-1922).

307 See above n 299, 360-1.

308 The pre-existing conditions of an area did not justify additional interference which took the total interference over reasonable limits: above n 299, 355. This contrasts with some 19th century English decisions such as Walter v Stele (1861) 4 De G & Sm 315, St Helen's Smelting Co v Tipping (1865) 11 HLC 642, 650 which are sometimes thought to introduce the opposite principle into the Common Law of nuisance. Cf Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145, and specifically with respect to noise, Munro v Southern Dairies Ltd [1955] VLR 332.
active solutions, for example through air traffic control and restriction of aircraft types, and passive solutions, such as the installation of sound proofing. Perhaps in view of this complexity the court declined to specify decibel levels for the *expropriation threshold*, although it noted the levels considered tolerable in other cases.\(^{309}\) Rather, it reasoned from basic principles applicable to private ownership and found that the levels set by the environmental assessment agency, in consideration of expert evidence of the effects of noise disturbance, were generally consistent with them.

Underlying this reasoning\(^{310}\) was the constitutional objective of protecting private property in a modern democratic republic, which was identified by the German Constitutional Court in the *Hamburg Dyke Case*.\(^{311}\) The application of this fundamental perspective to environmental rights in one's residence led to the conclusion that in ascertaining relevant noise toleration levels it was correct to take into account human health needs for a sound sleep, occasionally with the window open, and thus the noise level at which the autonomic reaction of the human nervous system awakens one (55 dB(A)),\(^{312}\) and that at which communication is interfered with (65 dB(A)).\(^{313}\)

\(^{309}\) See above n 299, 382-3.

\(^{310}\) See above n 299, 380.

\(^{311}\) See passage set out above n 258.

\(^{312}\) See above n 299, 372-6 and 388.

\(^{313}\) See above n 299, 386. Naturally it remains within the powers of German legislators to set more stringent standards. An example of this is to be found in the *Traffic Noise Protection Regulation*: 16. Verordnung zur Durchführung des Bundes-Lärmenschutzgesetzes (Verkehrslärmenschutzverordnung) of 12 June 1995 (1990 BGBI Vol I, page 1036). Pursuant to this regulation the construction or significant alteration of public streets, railways and tramways is to be executed in such a way that specified minimum levels of noise interference are achieved. In residential areas the levels are 59 dB(A) in the day and 49 dB(A) in the night; § 2(1)(2).
(iii) Recent Developments

A *draft Environmental Code*\(^{314}\) has recently been published. It was prepared by an independent commission appointed by the conservative Kohl-CDU government. In § 10 (1) the basic principle of environmental responsibility for property is codified -

> Use of natural resources and interference in nature and landscape is justified by ownership so far as the preconditions set down in environmental law for sustainably securing the natural basis of life are fulfilled (environmental responsibility in ownership).

This principle is drawn upon in other provisions of the draft Code.\(^ {315}\) The justification of the draft provision also contains discussion of the principle,\(^ {316}\) anchoring it in the legislative power to specify the content and limits of proprietary rights in Art 14 (1) of the Constitution and as an expression of social responsibility in Art 14 (2).\(^ {317}\) The discussion challenges one commentators' idea of a presumption of the owner's freedom to build, and refutes the criticism that interference with economic activity will result with the view that environmentally sound economic activity will go on and environmental protection offers its own economic opportunities.\(^ {318}\)

The German public law concept of property is pervaded by social and environmental responsibility with respect to the actual land in which the relevant proprietary interest is


\(^{315}\) § 319 - liability of the States for unreasonable interference in property rights (see discussion in Justification Text at p 963); § 346 - interferences through soil protection plans; § 357 - land owners' rights to water (see discussion in Justification Text at p 1067 and p 1080); § 394 - rights and duties in water protection areas.

\(^{316}\) Ibid, Justification Text, 462-3.

\(^{317}\) Protection of the natural preconditions of life has already been established as one of the social responsibilities of property within the meaning of Art 14 (2) GG.

\(^{318}\) Ibid, Justification Text, 462-3.
held, and not simply with respect to neighbours and the surrounding area. The principle of environmental context [Situationsgebundenheit] holds that the powers of the owner are relative to the qualities of the object of ownership. The interrelationship between the public law obligation expressed in Art 14 and the civil law concept of property is strengthening.\footnote{Reference has already been made to the development of civil remedies through analogical analysis of Art 14. See text above at n 270 and below at n 422.} The objection that the civil law concept is distinct and knows no equivalent inherent obligation or constraint is to be tested by analysing the civil concept itself.

D The Concept of Property in the Civil Code

The private law concept of property in the Civil Code is best understood within the wider classification of rights and claims.

1 Classification of Private Rights and Interests

(a) Objective and Subjective Rights

In the German legal system a most fundamental distinction is made between \textit{objective right} [das objective Recht] and \textit{subjective rights} [das subjective Recht].\footnote{This distinction is necessary not least because the word \textit{das Recht} means both "law" [objective] and "right" [subjective].} The first is a right which is universally valid and binding, the best example of which is a right conferred in a section of a statute. The second is a right held by a person in relation to another, or others - it belongs to the legal subject. A subjective right generally rests on objective
right. For example, § 433 I BGB\(^{321}\) obliges the vendor of a thing to deliver it to the purchaser and to provide him or her with title to it.\(^{322}\) This is objective right, or positive law. The purchaser has a subjective right to require the vendor to deliver the thing and provide title. The purchaser's subjective right rests upon objective right, or law, in § 433 I BGB.

(b) Classification of Subjective Rights

A right arising from a relationship between two or more particular persons is called a relative subjective right [das relative subjective Recht] and corresponds generally to in personam rights in the Common Law systems. Relative subjective rights are further divided into claims [der Anspruch] and demands [die Forderung]. The vendor of a thing has a claim [der Anspruch] against the purchaser for the sale price. The purchaser has a demand [die Forderung] against the vendor for delivery of the thing upon payment of the purchase price. Rights of this nature are generally contractual and are regulated by the Law of Obligatory Relationships [das Schuldrecht] in Book Two of the Bürgerlichen Gesetzbuch.

In contrast, an absolute subjective right [das absolute subjective Recht] is valid against all, and corresponds generally to rights in rem in the Common Law systems. Ownership is the most extensive of these rights absolute rights - as extensive as the law permits - whilst the others are strictly defined. These rights are generally governed by the principles of the Law of Things [das Sachenrecht]\(^{323}\) in Book Three of the Bürgerliches Gesetzbuch.

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321 Durch den Kaufvertrag wird der Verkäufer einer Sache verpflichtet, dem Käufer die Sache zu übergeben und das Eigentum an dieser Sache zu verschaffen.


323 In this work referred to as Property Law.
A further subjective right is the unilateral right to found, alter or conclude a legal relationship with another party. This might be called a *formative right* [das Gestaltungsrecht].

(i)  *Land and Goods*

The distinction between real and personal property is in German Property Law a distinction between *immovable things* [die unbewegliche Sache or die Immobilien] and *movable things* [die bewegliche Sache, die Fahrnis or, less frequently, die Mobilien]. In this connection the concept of a *fixture* - a movable thing affixed to land in such a way that it forms part of it - is that of the *essential component part* [der wesentliche Bestandteil].

(ii)  *Ownership and Possession*

Full title is the same concept with respect to both movable and immovable things, and is generally best rendered as *ownership* [das Eigentum], although in many contexts *property* is the best translation. In day-to-day speech "der Besitz" is used interchangeably to describe ownership. As a legal expression however, the term means...
strictly possession. Collective ownership [das Gesamthandseigentum] is a community of ownership which is undivided between its members. Thus, the members cannot transact with respect to their interests individually. With respect to co-ownership [das Miteigentum] on the other hand, the shares or fractions of ownership are settled and the co-owners may transact with them.

The main example of a property-like right [das eigentumsähnliche Recht] is the hereditary building right [das Erbbaurecht]. The creation of this right by a land owner was enabled by Weimar Republic legislation in order to stimulate housing for less wealthy citizens, although historical functional equivalents can be found. The right allows the grantee to erect a building and retain property in it. The grantor retains ownership of the land and receives a form of interest payment. The building right can be registered, burdened and assigned.

There are two categories of relative ownership [das relative Eigentum]. The first is a prohibition of assignment [das Veräußerungsverbot], which places the assignee of the benefit of the prohibition in the position of an owner as against third parties, but the assignor remains owner as against the assignee. The second category is a transfer to another in trust [eine Übertragung zu treuen Händen, or, eine fiduziarische Überseignung]. This is conceived as a division of the legal and economic ownership. The trustee [der Treuhänder - "the trusted hand"] holds trust ownership [das Treuhandeigentum] which is full ownership in relation to third parties, but has obligatory [schuldrechtlich] relations with the beneficiary [der Treugeber - the "giver of trust"]. There are two forms of trust - the administrative trust [die Verwaltungstreuhand] under which the trustee exercises ownership on behalf of the beneficiary, and the security trust [die Sicherungstreuhand] under which the trustee deals with the property for his or her own benefit so far as

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325 §§ 1012-1017 BGB and Erbbaurechtsverordnung of 15.1.1919.
necessary for the security of a claim against the beneficiary.

Property-like rights and relative ownership are regarded as versions of ownership, and not a fragmentation of ownership, fragmentation being contrary to the principle of absolute ownership [das Einheitsprinzip].

(iii) Lesser Proprietary Rights

The owner of a thing can create further rights of a proprietary nature in it, such as security interests and rights to use the thing on a temporary or long term basis, while retaining ownership of it. This is not described as a fragmentation of ownership, as it often is in the Common Law world, but rather as the creation of limited proprietary rights [das beschränkte dingliche Recht]. Limited proprietary rights are divided into use rights [das Nutzungsrecht] and security rights [das Sicherungsrecht]. The characteristics of the rights differ with respect to movable and immovable things. Only the most important of these are described below.

With respect to movable things, the usufruct [der Nießbrauch] is the only form of use right which is regarded as proprietary. Movable property may also be leased, but at German law a lease agreement creates for the lessee a relative subjective right and thus is not considered proprietary. A person who leases a movable nevertheless has

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326 Baur & Stürmer, above n 160, 18.

327 The different attributes of Miete and Pacht leases are not explored in detail in this work. The difference is not identified in the mere form of the agreement [Vertrag] creating one or the other, but, as with leases under English property law, according to the actual incidents of the possession. Basically, a Mietvertrag permits only use of the leased object or land, whilst a Pachtvertrag entitles the lessee to take the products of the leased object or land. A Pacht can also be made with respect to property other than things, such as rights, for example choses in action, and incorporeal property, for example patents and copyright: see Bassenge, Diederichsen, Edenhofer, Heinrichs, Helnrich & Pütz, Palandt's Bürgerliches Gesetzbuch, 45th ed. C H Beck'sche, München, 1988, 531-39. In the illustrative cases, Pacht leases tend mainly to concern agricultural land. With respect to Miete see §§ 535-590a. With respect to Pacht see §§ 581-597. Translation of Mietvertrag as lease and Pachtvertrag as usufructuary lease is nevertheless a little misleading.
proprietary rights against third parties stemming from possession of the thing. The only
security right over a movable thing is the pledge [das Pfandrecht or das Faustpfandrecht] which requires delivery of possession to the creditor/pledgee. Because this removes the object of security from use by the owner a more practical, if virtually informal transaction with no specific basis in the BGB, is the assignment by way of security [die Sicherungsübereignung]. This resembles an English general law mortgage in that ownership of the thing is assigned to the creditor but the debtor retains day-to-day use of it. A retention of title [der Eigentumsvorbehalt] can also be considered a security over a movable. At English law this is also a delivery subject to a Romalpa Clause.

With respect to land the limited proprietary use rights are the usufruct [der Nießbrauch], which carries with it a full right of use, and the various servitudes [die Dienstbarkeit], which carry only limited use rights, such as rights of way and rights to convey utility services across the land. A servitude for the benefit of another land parcel is a real servitude [die Grunddienstbarkeit], and one for the benefit of a specified person is a limited personal servitude [die beschränkte persönliche Dienstbarkeit].

The most significant securities over land are the mortgage [die Hypothek] and the land debt [die Grundschuld]. These real securities are also at a more general, almost colloquial level, called real pledge rights [das Grundpfandrecht], sharing economic function but with distinct legal meanings. Naturally these real securities must be registered in the Land Title Register, and priority takes effect in order of registration. A letter [der Brief] may be issued for a real security which has been registered. Assignment of the security may then be accomplished by a written declaration of

particularly when the attributes of a usufruct in English law are considered.

328 This transaction was considered under Economic Property, above n 175.

329 Aluminium Industry Vassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676.
assignment [die schriftliche Abtretungserklärung] and delivery of the letter [die Übergabe des Briefs], and without registration of the assignment in the Land Title Register. Such letters of real security [das Briefgrundpfandrecht] are very common in practice. This is not considered a great deviation from the principle of completeness of the Land Title Register because the existence and amount of the mortgage remain registered - only the identity of the person entitled to it remains to be determined by possession of the letter and proof of assignment leading back to the registered proprietor of the security.

There are two general methods of civil execution which are available to enforce claims and securities - the compulsory auction [die Zwangsversteigerung], also referred to as compulsory sale [der Zwangsverkauf], and the compulsory administration [die Zwangsverwaltung]. A compulsory mortgage [die Zwangshypothek] is also available to secure claims. The advantage of a registered security is thus recognition that the claim is proprietary and therefore its priority accords with the order of registration.

A further group of limited real rights is the acquisition rights [das Erwerbsrecht] which enable the holder to acquire ownership under prescribed conditions. These include the right of pre-emption [das Vorkaufsrecht] and the appropriation right [das Aneignungsrecht], such as the right to appropriate wild animals in hunting.

Some limited real rights can be held by the owner of land over the relevant land as a separate right. The apparent theoretical difficulty of this is tolerated in view of the common practice of owners creating real securities in favour of themselves and then

\[330\] A personal right of pre-emption is provided for in §§ 504-514 BGB. A proprietary [dinglich] right of pre-emption is provided for in §§ 1084-1104 BGB - see Appendix III. The latter derived from the Niederrecht of old German law - see above Part I, following n 273; §§ 2034 ff BGB; and H J Wieling, Sachenrecht, Springer, Berlin, 1994, 369 n 29. A "social right of pre-emption" for the advancement of urban planning was provided in the BBauG §§ 24-28. See now BauROG 1998, above n 288.

\[331\] Baur and Stürmer, above n 160, 21.
assigning them to the relevant creditor when the advance is made. This appears to be the only example in practice, and discussion of other possibilities is generally speculative.

Further rights can be created over limited proprietary rights, such as a usufruct over a right, or a security over a right. (iv) Expectation Rights

Another lesser proprietary right is the expectation right [das Anwartschaftsrecht] which arises in a transaction where some but not all of the preconditions for the acquisition of a real right are already in existence but some others are not yet. Three main examples are:

- a purchaser's interest in property acquired subject to express reservation of title,
- the interest of an assignee of an interest in real property, and especially ownership, after settlement of the transaction [die Auflassung] and lodgement of the registered dealing but before registration of it,
- the position of a mortgagee before the claim to be secured comes into existence.

The nature of the expectation right has been much debated, particularly concerning the strength of expectation which is sufficient to found it. German law draws a sharp theoretical distinction between the generally contractual transaction which joins the parties, and the proprietary transaction which gives effect to the transaction - this is the abstraction principle [das Abstaktionsprinzip]. The possibility of an assignment is

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332 §§ 1068-1084 BGB.
333 §§ 1273-1296 BGB.
334 Baur and Stürmer, above n 160, 22.
335 § 455 BGB - Romalpa Clause, see above n 329.
insufficient because this relates merely to the enforceability of the underlying transaction. In principle, the minimum requirements are that the structure of the eventual expected right and the person entitled to it must be recognisable. With respect to a purchaser of land, lodgement of the registrable transaction at the Land Title Registry suffices but might not be necessary to ground such an expectation. This is a debated question, although all agree that completion of the Auflassung ceremony [settlement] is required. From a practical view the question is not so important because a caveat [die Vormerkung] can be lodged on the basis of the claim to the land arising from the contract of sale.

(v) 

*Conditional Relative Rights*

The *conditional relative right* [das verdinglichte relative Recht] is described as *quasi-proprietary* [quasidinglich] and relates more to the position of the person who holds them than to the nature of the relevant rights. An example is the position of a tenant who through possession holds a position similar to an owner as against third parties, but whose position in relation to the landlord is personal. The right is considered to display only some "offcuts"\textsuperscript{336} of a proprietary right.

2 

*Objects of Property*

The possible objects of civil law ownership are restricted by § 90 of the *BGB* to corporeal\textsuperscript{337} movable and immovable things. Ownership of incorporeal phenomena is achieved through other legislation.\textsuperscript{338}

\textsuperscript{336} Baur and Stürmer, above n 160, 23.

\textsuperscript{337} körperliche Gegenstände.

Following the *animal rights amendment* of 1990, § 90a provides further that -

Animals are not things. They are protected through particular legislation. To them the provisions in force for things are to be applied correspondingly, so far as nothing is otherwise specified.

This progressive amendment militates against the view that Civil Codes are more or less impervious to changing social values, and the absence of a similar innovation in the Common Law world suggests that they are less impervious. The provision was considered by the Amtsgericht at Bad Mergentheim in the *Poodle Access Case* when dealing with the rights of a separated couple to the family dog. If an animal is not a thing, how could it belong to the household objects to be divided by married couples when they separate? The court noted that § 90a requires the law relating to things to be applied analogically, and thus it had to deal with the dog in the same way as other household objects, but at the same time considered that the appropriate solution could not be reached without consideration of the principles of justice expressed in § 90a, "... in which the legal order recognised animals as companions in Creation. That means that they, unlike lifeless objects without feelings, cannot be dealt with without consideration of their nature and feelings." Accordingly, the evidence of an animal psychologist was received that it would be better for the dog to remain in its familiar surroundings, and contact with the other party, measured in hours, would also promote its welfare. The court interpreted the concept of the "division" of household objects analogically through consideration of § 90a *BGB* to accommodate this arrangement, which plainly would not be made with respect to, say, an electrical appliance.

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339 *BGBI* 1990 I, 1762, § 1.

340 Tiere sind keine Sachen. Sie werden durch besondere Gesetze geschützt. Auf sie sind die für Sachen geltenden Vorschriften entsprechend anzuwenden, soweit nicht etwas anderes bestimmt ist.

341 Promulgated by the conservative Kohl-CDU administration. A new sentence was also added at the end of § 903, which is set out in Appendix III, and below at n 368.

342 (1997) 50 NJW 3033.

343 § 8 Hausratsverordnung.
The possible objects of civil property are more restricted than those embraced by the constitutional conception of property. The concept of an incorporeal object of ownership is also more restricted in the German civil law than in the Common Law. Thus a whole range of limited proprietary interests in land from servitudes to securities, considered incorporeal at Common Law, are expressly included in Book Three as subject to the Law of Things. The importance of entitlement to documents evidencing claims, which one finds in the provisions concerning security by pledge, could also be explained by the otherwise incorporeal status of the claims themselves.

3 Forms of Ownership

*Individual ownership* [das Alleineigentum] is possible only by a juristic person. German civil law distinguishes two concepts of co-ownership -

- *ownership in common,* under which the proprietors have ideal shares in the entire object of ownership which they may freely assign, and
- *collective ownership,* of the assets of a collective society, or of a family, which is enjoyed by its members. Each member is considered an owner of all of the property so long as it is undivided, and until it is divided has no individual power of disposition over the property.

The right of survivorship which characterises Common Law *joint property* is not known in

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344 See above n 261.
345 §§ 1016-1203 BGB.
346 §§ 1204-1296 BGB.
347 das Miteigentum - see § 1008 BGB.
348 das Gesamthandseigentum.
349 die Gesamthandgemeinschaft.
350 die Gütergemeinschaft; §§ 1418 and 1485 BGB.
351 Baur & Stümer, above n 100, 16.
German law, so use of this term in translation is misleading.\textsuperscript{352} There are other specific forms of co-ownership relating to mines,\textsuperscript{353} and to horizontal subdivision of airspace in its earlier\textsuperscript{354} and current\textsuperscript{355} versions.

4 Powers of the Owner

The powers of an owner over the object of ownership encapsulated in § 903\textsuperscript{356} are conventionally divided into four elements:

- "dealing with the thing at discretion,"
- "excluding others from every use or misuse of it,"\textsuperscript{357}
- "so far as it is not contrary to law ..." and
- "so far as it is not contrary to ... the rights of third parties."

The power of an owner to deal with a thing at discretion, and to exclude interference by others, are generally described, respectively, as the positive and negative effects of ownership.\textsuperscript{358}

\begin{itemize}
  \item \textsuperscript{352} Cf translation of §§ 1008-1011 in I S Forrester, S L Goren & H M ligen, The German Civil Code, North Holland Publishing Co, Amsterdam, 1976.
  \item \textsuperscript{353} das Bergwerkseigentum in § 91 of the Bundesberggesetz.
  \item \textsuperscript{354} das Stockwerkseigentum in §§ 131 and 182 EGBGB.
  \item \textsuperscript{355} das Wohnungseigentum over individual apartments in conjunction with das Teileigentum over common property in the building referred to in § 1 of the Wohnungseigentumsgesetz.
  \item \textsuperscript{356} Text set out in Appendix III.
  \item \textsuperscript{357} § 903 BGB, "jede Einwirkung". "Die Einwirkung" is literally translated as "effect", so an alternative translation of this subordinate clause in § 903 would be "and to exclude every effect by others upon it". The Common Law terminology in this situation suggests the exclusion of "interferences". In view of the significant differences between the systems in what is juristically regarded as amounting to an "interference" this terminology has been avoided in favour of "use or misuse". "Use or misuse" also catches the tone of relevant commentaries and decisions.
  \item \textsuperscript{358} die positive Wirkung and die negative Wirkung. These concepts have already been briefly introduced above n 181.
\end{itemize}
(a) Positive Powers - Dealing with the Thing at Discretion

Freedom of property in civil law is classically divided into legal transactions with the property, such as assignment, abandonment\textsuperscript{359} or burdening\textsuperscript{360} of it with limited real rights, on one hand, and factual activities, such as occupation, use or non-utilisation, alteration, consumption or destruction, on the other.\textsuperscript{351} As in the Common Law, discussion of the extent of these factual powers, so far as it does not affect the orthodox civil law interests of others, is not extensive in the more conventional civil law sources. On the other hand, in public law writing the status and strength of the powers as inherent rights has been discussed extensively in the context of public regulatory land use restrictions which might amount to an expropriation.\textsuperscript{362} The ensuing public law principles and concepts, such as the concept of an expropriation threshold,\textsuperscript{363} have been developed in reflection upon the civil law position and are important in order to understand it.\textsuperscript{364} The disinclination of civil law commentators to regard these considerations as property law, while at the same time devoting considerable attention to them, seems to rest on the inability of private citizens to invoke the ensuing principles in litigation \textit{inter se} without a further legislative basis.\textsuperscript{365} However, in German law the potential enforceability of a right is not generally a basis for conceptual differentiation or a determinative consideration when testing the existence of the right in the first place.

As a matter of civil law the inherent powers of ownership are not fixed, but accord to the

\textsuperscript{359}§ 859 BGB.

\textsuperscript{360}as encumbrance is a distinct term of art at Common Law use of the term has been avoided in favour of burden and burdening.

\textsuperscript{361}Palandri, above n 192, 1096-7.

\textsuperscript{362}See above following n 224.

\textsuperscript{363}See above following n 244.

\textsuperscript{364}The constitutional concept of property has been introduced above n 226.

\textsuperscript{365}See for example Baur & Störmer, above n 160, 2, and Ch 3.
nature of the object of ownership. Although § 903 was intended as a universal statement of the ownership of corporeal matter, the positive powers of the owner are also clearly relative to qualities of the object, such as whether it is immovable or movable and whether it is consumable. Very different methods are employed with respect to land and goods when the owner's positive legal power of disposition is to be exercised, say through the transfer of ownership.\textsuperscript{366}

With respect to powers over animals, the last sentence added to § 903 by the \textit{animal rights amendment}\textsuperscript{367} -

\begin{quote}
The owner of an animal has to observe the particular [legislative] provisions for the protection of animals in the exercise of his powers.\textsuperscript{368}
\end{quote}

might not add much in view of the third element - to observe the law - especially if animals are to be treated in a manner corresponding to other things, so far as animal protection legislation does not otherwise provide.\textsuperscript{369} However, in the \textit{Poodle Access Case}\textsuperscript{370} the court made it clear that the \textit{animal rights amendment} was to be given meaning and employed analogically in arriving at an interpretation of other provisions which best advances the animal's welfare. Thus, we have another example of positive powers being relative to the nature of the object.

\begin{itemize}
\item[366]This distinction accorded to the natural law rights of property contemplated in 1781 and 1794 - see above n 226.
\item[367]See above n 339.
\item[368]Der Eigentümer eines Tieres hat bei der Ausübung seiner Befugnisse die besonderen Vorschriften zum Schutz der Tiere zu beachten.
\item[369]§ 90a BGB set out above n 340.
\item[370]See above n 342.
\end{itemize}
(b) **Negative Powers - Excluding Interference by Others**

In exercise of the power to exclude others from the object of ownership one may prevent the thing being used, carried away, destroyed, or subjected to intruding material immissions.\(^{371}\) Interesting issues have been considered in connection with the extent of mere use made of a thing by others which the owner must tolerate.

(i) **Use and Misuse**

The decision of the Bundesgerichtshof in the Bottle Recycling Case\(^{372}\) is a frequently cited example. The parties to the case were competing bottlers of lemonade and mineral water who received their empty bottles back for refilling. The plaintiff objected to her distinctive bottles being filled by the defendant with its drink for sale. A case of trademark infringement could not be maintained.\(^{373}\) The plaintiff pursued her claim successfully against an interference with her property in the bottles.\(^{374}\)

The defence was that the plaintiff's empty bottles were collected and delivered to it by another party and pursuant to a trade usage it was entitled to fill them and put them back into circulation. The defendant did not maintain that it had obtained property in the bottles. The court considered this a correct concession because the bottles' distinctive brand excluded the possibility of a good faith acquisition\(^{375}\) from third parties in

\(^{371}\) Palandt, above n 192, 1097. As the word *emission* [material given off or discharged] is used in English it is surprising that its opposite, *immission* [material which enters] is not also current.

\(^{372}\) (1956) BGH LM § 1004 Nr 27.

\(^{373}\) Bottle Recycling Case, above n 372, 979 ff.

\(^{374}\) § 1004 BGB - set out in Appendix III.

\(^{375}\) § 932 BGB.
possession of them,\textsuperscript{376} and the loss of ownership through mixing of goods in the course of manufacture.\textsuperscript{377} No assignment between the parties was possible because there was no "meeting of minds" or intention that property should pass.\textsuperscript{378} Trade usage is not a source of objective right; it explains the nature of mercantile relationships, which must otherwise accord with law. In absence of the claimed trade usage, the plaintiff had a basic right stemming from her ownership of the bottles to prohibit uses of the bottles which she did not wish to tolerate.

Another interesting example arose in the context of improvement\textsuperscript{379} and artistic freedom.\textsuperscript{380} The Swiss artist Naegeli, publicly known as "The Sprayer from Zürich", was found guilty by a Zürich court of 100 instances of criminal damage to property. He was sentenced in absence to nine months' imprisonment without probation and ordered to pay 101,534.60 Swiss Francs in compensation. Application was successfully made to a German court in Schleswig for an order to deliver him to the Swiss authorities. Naegeli initiated an appeal to the German Federal Constitutional Court on the basis that the Schleswig order was unconstitutional in view of the constitutional guarantee of artistic freedom.\textsuperscript{381} The application was refused because it had little hope of success. The guarantee of artistic freedom could not prevail over property rights, which are also

\textsuperscript{376} See above n 372, 978 I.

\textsuperscript{377} § 948 BGB. See also § 950 [Further Manufacture] considered below following n 380.

\textsuperscript{378} § 929 BGB.

\textsuperscript{379} die Verschönerung.

\textsuperscript{380} J Hoffman, "Kunstfreiheit und Sach Eigentum" (1985) 38 NJW 237. This article contains an extensive discussion of issues raised in the decision of the Bundesverfassungsgericht in the case of The Sprayer from Zürich (1984) NJW 1293.

\textsuperscript{381} § 5 Grundgesetz.
guaranteed.  One issue raised by the case was the contrasting positions of the civil law rights with respect to the improvement\textsuperscript{383} of movable and immovable property. The ability to obtain property in a thing by painting it was identified as the exceptional position, in any case applying only to movable property, and the basic proprietary right to exclude "every use or misuse" extended to "imposed decoration".

The owner can at pleasure exclude the aesthetic uses and misuses which others make of the thing.\textsuperscript{384}

According to Art 14 (1) of the Constitution the content and limitations of property are to be provided in legislation, and § 903 BGB constitutes such a provision, bringing the constitutional guarantee of property into effect. There is no reason to restrict the interpretation of § 903 to achieve constitutional conformity with the guarantee of freedom of art. By spraying buildings belonging to others the artist had injured their constitutionally guaranteed rights of property and overstepped the freedom of art which the Constitution also guarantees.\textsuperscript{385} A similar clash of fundamental rights occurred in the Nuclear Fuel Blockade Case,\textsuperscript{386} in which the power of an owner under § 903 BGB to exclude others, or impairing effects, included a demonstration on a private entry street. The fundamental rights of assembly and association in Art 8 GG do not extend to purposes which contravene other rights, and certainly not civil law rights with effects on third parties, the court concluded.

\textsuperscript{382} § 14 Grundgesetz.

\textsuperscript{383} § 950 BGB.

\textsuperscript{384} Hoffman, above n 380, 245.

\textsuperscript{385} Contrast the Artistic Landowner Case, above n 291.

\textsuperscript{386} (1995) NJW 269, 271. See also Gulf War Demonstration Case (1998) 51 NJW 1405 where the City of Köln had used private law rights to get a relatively permanent structure in protest against the Gulf War removed from square before Köln Cathedral.


(ii) *Immissions*

Even when neighbouring land parcels do not abut, it is clear that exercise of the *positive* powers of one owner can clash with the *negative* rights enjoyed by another. In German law the correct balance of these rights is conventionally characterised as an issue of *property law*, rather than law of *Torts*. Direct violations of the boundaries of the affected property by something of substance, such as an animal or an object,387 are clear interferences within the terms of § 903 itself. However, the *BGB* provides a less certain position in relation to *insubstantial matter* in § 906 (1).388 The last two sentences were inserted in 1994,389 and require that the civil law standard will be contravened by immissions which contravene the Federal Pollution Statute, § 48 of which empowers administrative regulations which set immission standards directed to achievement of the aims of the Act. These aims are to secure human, plant and animal life, culture and other values against environmental dangers, burdens and disadvantages. The amendment thus formalised a substantial link between civil law property and public regulation. It may legitimately be regarded as entrenching an interpretation of the civil property concept, which was already evident in court decisions390 and which stemmed from the substantial interplay which takes place between the constitutional concept of property and its civil law counterpart.

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387 With respect to unsolicited junk advertising material deposited in a letter box see *Junk Mail Case* (1998) 49 NJW 934. The recipient has a power of self help stemming from property rights through §§ 1004, 903, 863 609. There is no obligation of tolerance [Die Duftungspflicht] on the part of the recipient when there is a "No Junk Mail" sticker on the letter box with respect to mail not addressed to him or her by name.

388 Set out in Appendix III.


Interpretation of the first sentence of § 906 (1) has favoured a restrictive view of permissible interferences. First, it should be observed that the intrusion must be created on another land parcel and thus stem from the exercise of the positive power to make use of the other parcel. Secondly, the negative phrasing of the sentence appears to create a duty of tolerance which is an exception to the general negative power to exclude every use or misuse, and is restricted to that which is not prejudicial or only negligibly prejudicial.\footnote{391} It should be noted that § 906 (2) provides a right of compensation where customary rights of discharge need not be restrained. § 906 III prohibits intrusions through particular channels such as pipes and chimneys.

A related question concerns the possibility of an interference emanating from other land when no physical matter, whether substantial or insubstantial, crosses the boundary. Practical instances of this are conventionally characterised as (i) negative interference, and (ii) immaterial interference. This issue is complicated by the rights of private citizens to enforce planning, building and other public regulations against neighbours. Nevertheless, the basic issue was explored by the Bundesgerichtshof in the Television Reception Case.\footnote{392} A high rise building erected in Hamburg for use as a hospital rendered television reception in the plaintiffs' neighbouring family home virtually impossible. They requested that a connection to the antenna on the building be provided at the hospital's cost. The ensuing case led the Bundesgerichtshof to undertake a fundamental reconsideration of the interferences about which a land owner may legitimately complain. The conclusion reached was that established principle maintained

\footnote{391} The noises of disabled people are entitled to a special level of tolerance: OLG Köln - Community House Case (1998) 51 NJW 763. See also the comment by K Lachwitz "Nachbarschaftliche Toleranz gegenüber Menschen mit geistigen Behinderung" (1998) 51 NJW 881.

a distinction between, on one hand, *negative interference* through the obstruction of natural forces, such as light and air by something which remains within the boundaries of the neighbouring land parcel, and on the other hand, *positive interference* by substances actually travelling or protruding from the neighbouring land parcel even if they are *insubstantial* substances, such as the gases, vapours, odours, smoke, soot, heat, noise, vibrations and similar interferences, listed in § 906 (1). The court has stressed that to fall within "similar interferences" the effect must be positive because none of the substances listed are negative. As the *BGB* made no provision for defence against negative effects it must be taken to have left it within the positive freedom of property enjoyed by the neighbour to produce them.\(^{394}\)

Within the boundaries of their land parcels everyone is fundamentally permitted to deal with their property at discretion\(^{395}\) and need no further justification.\(^{396}\)

The court conceded that the problem of television reception was one which the framers of the *BGB* could not have contemplated in the later decades of the 19th Century, but the problem could have been addressed when § 906 was amended in 1959.\(^{397}\) Failing such legislative direction television waves, directly interfered with or reflected in a distorted form, had to be treated in principle in the same manner as the redirection of natural forces from, and the deflection of wind and rain onto, a neighbouring property.\(^{398}\)

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393 *die negativen Einwirkungen.*

394 *die Eigentumsfreiheit.*

395 "... nach Belieben verfahren ..."

396 *Television Reception Case,* above n 392, 729.

397 Statute of 22 December 1959 (BGB I, 781). With respect to dangers posed by electro-magnetic radiation see L. Determann "BVerfG zur staatlichen Pflicht zum Schutz der Gesundheit vor elektromagnetischen Feldern" (1997) 50 NJW 2501. In the *Electro-magnetic Field Case* (1997) 50 NJW 2509, the BVerfG decided that the Federal Pollution Discharge Statute [BImSchG] had made adequate provision and exposure to 100 Mikrotesla (lower frequency) was not unconstitutional.

398 *Television Reception Case,* above n 392, 730.
Of the other unsuccessful grounds advanced by the plaintiffs in the *Television Reception* Case, two deserve particular mention. First, the lower court, which allowed the claim,\(^{399}\) had drawn parallels with judicial opinion concerning the interferences with the enjoyment of property which amount to an expropriation. So far as it had done so -

... it overlooked that these judicial opinions proceeded from another concept of property. In the cited decisions it was, further, only concluded that entry to and exit from private land to a public way were generally decisive preconditions for the use of private land. ... These cases do not avail themselves for analogy with effects on the possibility of television reception.\(^{400}\)

Second, the plaintiffs also sought to rely upon the principle of *neighbourly community relations*\(^{401}\) which was developed by applying the doctrine of *Treu und Glauben* [Trust and Faith]\(^{402}\) to neighbourhood law. The Bundesgerichtshof concluded that the principle is not an independent ground of claim, and instead depends upon the existence of an obligation in neighbourhood law. When such an obligation exists it must be discharged in substance and not merely *pro forma*. In this case there was no obligation and thus the principle could not apply.

Thus, the plaintiffs were not entitled to a remedy which would allow connection to the hospital antenna, nor to damages.

The situation differs, however, when the activity on the neighbouring property which creates negative interference on one's own land is also contrary to a provision of the public law, even if physical effects are contained within the boundaries of the neighbouring land. Clearly, this brings limitations of the powers of an owner through

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\(^{399}\) Oberlandesgericht Hamburg (Hamburg State Supreme Court).

\(^{400}\) *Television Reception Case*, above n 392, 730.

\(^{401}\) *das nachbarrechtliche Gemeinschaftsverhältnis* 

\(^{402}\) § 242 BGB, and see text below following n 417.
planning and building regulation into play in such litigation.

In the Television Reception Case the Bundesgerichtshof acknowledged the existence of a considerable body of literature critical of the long established principles upon which it relied.\textsuperscript{403} It fell back on conventional justifications which would have been familiar to a Common Law court -

\begin{quote}
If older legislative provisions have been refined in the course of time through established judicial opinion, then the juristic values of legal certainty and preservation of confidence step into the foreground and generally require steadfastness with respect to a legal development pursued in a single case. A departure from the continuity of judicial opinion can be made only exceptionally, when plainly predominating or even quite cogent reasons speak for it. Such reasons are not present here.\textsuperscript{404}
\end{quote}

One of the most telling criticisms of the conventional approach, such as that adopted in the Television Reception Case was made by Tiedemann\textsuperscript{405} against the courts' understanding of the relationship between §§ 903 and 906 of the BGB. Tiedemann pointed out that under § 903 the owner has the power to exclude "jede Einwirkung", literally "every effect", and this expression is wide enough to encompass so-called negative effects. This expression is not clarified by § 906, as the conventional view has held since the Wooden Wall Case,\textsuperscript{406} but instead limits the owner's power to exclude the substances which are listed in § 906\textsuperscript{407} in defined circumstances. Further, if negative effects are not "ähnliche ... Einwirkungen", literally "similar effects", as the conventional view has it, then the owner's power to exclude them under § 903 is not limited. In the

\begin{footnotes}
\item[403] See above n 392, 729.
\item[404] Television Reception Case, above n 392, 729-30.
\item[405] P Tiedemann "Vom Mythos der negativen Immissionen" (1978) 32 MDR 272.
\item[406] (1920) 98 RGZ 15. This case is explained below.
\item[407] See above text following n 393.
\end{footnotes}
Wooden Wall Case, a neighbour had erected a wooden wall which limited very substantially the light and air entering windows in the plaintiff's building. It is possible to read the reasoning of the Reichsgericht as a misunderstanding of the relationship between §§ 903 and 906 as Tiedemann suggested. However, it is also possible to read it as excluding negative interferences from the concept of "every effect" in § 903.

Nevertheless, the cases which followed have still tended to exclude negative effects, applying the conventional ground explained by Tiedemann. These cases include further cases ruling that the obstruction of -

- light or air by construction of buildings and walls and tree planting,

- a stream of cold air across a vineyard by a dump of material extracted from a tunnel,

- a view across a valley, and

- overlooking from an attic room are negative interferences from which § 903 provides no protection.

Tiedemann asserted that there was no intention to exclude remedies for the so-called negative effects from civil law. Before preparation of the Bürgerlichen Gesetzbuch there had been successful cases in which the German common law had protected, for example, the stream of air to windmills. The earlier Prussian Codifications of 1791 and

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408 See above n 406.


410 Railway Tunnel Spoils (1991) 44 NJW 1671.


1794 had expressly protected windmills, and classical Roman Law had protected land owners against certain negative effects through express provision in Justinian's Code and Digest. In drafting the BGB, Tiedemann argued, it was assumed that § 903 was adequate so far as the law of the German states did not continue to protect access to light and streams of air.

(iii) Neighbourly Community Relations and Treu und Glauben

The German Courts have themselves recognised the inadequacy of limiting §§ 903 and 906 in this manner. Despite initial temptations to invoke the principle in § 14 (2) of the Constitution, that private property is to be used for the common good as well as for private enjoyment, the courts have drawn upon the principle of Treu und Glauben in § 242 in developing a principle of neighbourly consideration. Although as early as the Wooden Wall Case it was suggested that the law could develop along different lines, Tiedemann claimed that the Treu und Glauben approach derived from questionable jurisprudential origins in the 1930s.

The Bundesgerichtshof had first considered the approach in the Gable Wall Case. A neighbour constructed a building extension hard up against the gable wall of the plaintiff's

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413 Tiedemann, above n 405, 275.
414 See above n 405, 276.
416 Digest VIII.5.8.5, XXXIX.3.12.2 and XXXIX.2.24.12.
417 See above n 405, 273-5. See also O Jauernig "Zivilrechtlicher Schutz des Grundeigentums in der neueren Rechtsentwicklung" (1966) 41 JZ 607, 610.
418 See above n 406, 17.
419 See above n 405, 275. Interestingly the neighbour principle in Donoghue v Stevenson [1932] AC 562 shares the same epoch.
building, thus blocking a gable window. After holding that obstruction of light and view are negative effects not contrary to §§ 903, 906 or 907, the court went on to consider the existence of a duty of neighbourly consideration, arising from neighbourhood community relations, and derived ultimately from the principle of Treu und Glauben. It concluded that the exercise of the property right by a neighbour to use the property as he or she might wish would be impermissible where the neighbour could achieve the same objective in a different way without harming the plaintiff. Such considerations could not displace rights arising from the Neighbourhood Law provisions of the BGB, except for the most compelling reasons. Art 14 (2) of the Grundgesetz was not seen as contrary to this principle. Indeed, § 242 of the BGB could be seen as one provision creating content and limits for private property as required by Art 14 (1). So far as the principle of common good in Art 14 (2) was concerned, however, the neighbour's building extension would provide more living and business space, and in 1951 this was important. In conclusion, as the compelling reasons required to invoke neighbourly consideration were not present, the plaintiff had no complaint against the negative effects. It was not that achievement of the common good, as required by Art 14 (2), was irrelevant but that the generality of the responsibility which it creates made it difficult to apply unambiguously to the facts of that case.

Such considerations were successful in the Ruin Rebuilding Case. The plaintiff owned land on which a ruined house stood, and wished to rebuild a much larger house which would have blocked a row of windows in the defendant's house along the entire length of the boundary. The plaintiff sought the defendant's agreement to the plan and when this was refused sought a declaration of his entitlement to build what he wished. The

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420 See above n 409.
421 *das Nachbarrecht* · §§ 903-24 BGB.
422 (1953) 18 BGH LM (to § 903 BGB) Nr 2.
Bundesgerichtshof held that the obstruction would be a negative interference not excludable under § 903 BGB. The court nevertheless refused the application because the plaintiff had not given sufficient consideration to the defendant as a neighbour, as he was required to do within neighbourly community relations. The right which the plaintiff asserted could not be exercised in this situation because it would rob many rooms in the defendant's house of air and natural light, to the point where it was questionable that her building could be used for very much at all. On the other hand, the plaintiff could easily alter his plans with this in mind and so the exceptional conditions required for the application of the *Treu und Glauben* principle existed. On the other hand, Art 14 (2) of the *Grundgesetz* could not be applied directly in the case because, again, in 1953 the rebuilding would also serve the common good. The real problem was that it would place an unbearable burden on the defendant.

The duty of neighbourly consideration has been applied in later cases which otherwise risked foundering on the limitation of negative interference. In the *Railway Tunnel Spoils Case*,\(^4^2^3\) in view of the great loss suffered by the plaintiff, greater neighbourly consideration should have been shown when Environmental Impact Assessment was conducted by the German Federal Railways,\(^4^2^4\) and the spoils dump better designed. It was too late to relocate the dump but the plaintiff might have had a claim for lost profits. In the *Radio Antenna Case*\(^4^2^5\) the court concluded that the defendant had been extremely inconsiderate of his neighbours' interests when he effectively blocked their valley view by erecting an amateur radio transmission mast in front of their living room window. Exercising the required consideration, if one weighed the impairment of the substantial

\(^{423}\) (1991) 44 NJW 1671 - referred to above n 410.


\(^{425}\) (1989) 4 NJW-RR 464 - also referred to above n 411.
advantage of the plaintiff's land, a mountain valley view, against the pure hobby interest
of the defendant, it was clear that the mast had to be removed.

(iv) Statutory Limitations

Another approach taken in the cases of negative interference has been to appeal to
other legal limitations of ownership. In the *Boundary Hedge Case*\(^{426}\) a two meter wall
had been erected contrary to a clause in the contract of sale between the defendant and
a building developer which required that the lots be divided by hedges. The plaintiff was
also subject to such an agreement, but was not a party to the defendant's agreement. A
provision in other legislation\(^{427}\) required that boundary construction be in a manner which
was usual in the locality. This was considered a question of fact. A land owner who
erected a wall in an area where most proprietors had entered into such an agreement
with the developer clearly took the risk that the structure might not be usual in the
locality. The case was returned to the court below with a direction to ascertain what was
usual in the locality and to enforce the Westphalian Statute accordingly.

(v) Non-Material Effects

Even less frequently restrained than negative interferences with the enjoyment of private
land are the so-called *Non-Material effects* or *Imponderablen* [imponderables]. These
are activities on neighbouring land which a landowner considers objectionable on moral
or aesthetic grounds. This topic demonstrates an interesting and protracted doctrinal
disagreement between academic and judicial opinion. The issue also represents an
intersection of the owner's positive powers, to be or not to be restrained by moral and

\(^{426}\) (1992) 45 NJW 2569, referred to above n 409.

\(^{427}\) § 35 I of the Nord Rhein-Westfalen *Nachbargesetz*. 
aesthetic considerations, and the neighbour's negative powers to exclude ugly vistas and offensive behaviour.

In the *Dumped Rubbish Case*\(^4\) the Amtsgericht at Münster\(^5\) waxed creative, and with good reason. The plaintiff and the defendant were neighbours with a history of disputes. At one point the plaintiff pointed out that some of the defendant's garden structures encroached on his land. The defendant responded by dumping a load of rubbish beside the boundary. He then erected a fence which screened his own view of it. The court considered the possibility of a claim of non-material disturbance where aesthetic sensibilities are involved, pointing out that the literature supported the application of § 1004 BGB to such claims. A general acknowledgment of *personality rights*\(^6\) in property law and wider jurisprudence raised the question of why it would not be just to deny a right to create disturbances of a non-material character, such as the creation of ugly or obstructive sights. Such an interpretation would correspond to the wording of § 1004 which is not expressly limited to material interferences.

... § 1004 BGB must be seen today in the light of an altered and sophisticated environmental consciousness. In this respect, it would barely be justifiable to consider non-material burdens as not embraced by the provision.\(^7\)

The last decision of the Bundesgerichtshof on the point had been handed down almost nine years beforehand\(^8\) and, in view of the altered environmental consciousness and the unanimous view in the literature against the denial of relief for non-material interferences, the position might be altered. In any case, the BGH had left open an

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429 See Glossary: das Amtsgericht.
430 *das Persönlichkeitsrecht*.
431 Ibid 2887.
432 *Metal Fence Case* (1975) 28 NJW 170 - discussed below in text following n 445.
exception for particularly crass cases and this was one of those, particularly in view of the defendant's dubious intentions.

While the view of the Münster court was truly on the crest of legal development, it is a wave which the Bundesgerichtshof has so far let roll on without it. In the Brothel Case 2 it adhered to the conventional position maintained since the Brothel Case 1 and the Naked Bathing Case despite repeated predictions that the High Court for Civil Cases was about to surf the movement for innovation. In the Brothel Case the plaintiff had complained that her property rights were impaired by the defendant's newly established brothel in her "thoroughly respectable" street, and particularly by the increased volume of carriages. The Reichsgericht held that §§ 906 and 1004 are concerned with effects to land which are perceptible to the senses, and the concept of a non-material immission is foreign to the BGB. The disturbance from carriages did not emanate from the defendant's land. This reasoning was expanded in the Naked Bathing Case. The plaintiff's land was separated from the defendant Community Free Pool by a 15 meter wide stream. The distance from her house ranged between 82 and 192 meters. She complained that the dressing rooms were open in her direction, and that naked swimmers sunbathed on the opposite stream bank and pursued all forms of shameless activity. The reasoning applied by the Reichsgericht strongly resembles the approach to negative interferences discussed above. The interfering materials listed in

434 (1904) 57 RGZ 259.
435 (1911) 76 RGZ 130.
436 See U Loewenheim, Commentary on the Metal Fence Case in (1975) 26 NJW 826.
437 See above n 434.
438 See above n 435.
439 See above n 393.
§ 906\textsuperscript{440} have two similarities -

- they are either damaging to the land or to things on it, or
- they can burden people present there by damaging their healthy well-being, or by causing physical discomfort.\textsuperscript{441}

For an effect to be characterised as a "similar effect" within § 906 it must also display these similarities. An analysis of vision, characteristic of the period, was undertaken in which the physical discomfort caused by intense reflection of light was contrasted with the reflection of light which makes something "merely visible", and thus can disturb only the emotional sensitivities of the viewing person. The latter does not fall within § 906.

In contrast to the analysis advocated by Tiedemann,\textsuperscript{442} the reasoning in these decisions reveals judicial awareness of the ramifications of restraining negative and immaterial immissions, not least an anticipated flood of vague moral and aesthetic cases to restrain the owner's positive factual powers. If such effects were to be considered interferences at all, then under § 903 virtually all effects could be challenged as interferences. The framers of the Bürgerlichen Gesetzbuch could not have intended that. The right of the landowner to deal with the land was at risk of being overwhelmed. The drafting debates considered by the Reichsgericht to be relevant excluded Imponderabiliien and restricted the interferences justifying complaint to "solid bodies" such as bees, pigeons and flying stones from quarries. An outlook is thus Imponderabiliien, an effect not embraced by the BGB. The plaintiff could pursue remedies by other methods. The alternative reading would have the impossible consequence that not only morally offensive sights would be excludable, but also views which might offend aesthetic sensibilities.\textsuperscript{443} The courts

\textsuperscript{440} See above in text following n 393.
\textsuperscript{441} Ibid 131.
\textsuperscript{442} See above n 405.
\textsuperscript{443} Ibid 133.
avoided this result by working backwards from § 906 and confining "every effect" in § 903 accordingly, rather than working forward from the general § 903 to the particular § 906.

After a series of cases in the post-war era which reaffirmed this judicial analysis, and encountered severe criticism for it, the Bundesgerichtshof displayed three characteristic symptoms of being on the verge of innovation in the Metal Fence Case. The defendant had erected a metal rail and sheet metal fence near garages, apparently with the object of directing traffic. The plaintiff complained of its ugliness when viewed from his land. The BGH concluded unremarkably that, in view of § 906, events and situations on land which are optically perceptible from neighbouring land and offend the aesthetic sensibilities of the neighbour are not embraced by the procedure for injunction or removal under § 1004. The court acknowledged the hostility which its view had encountered in the literature, and conceded that the interpretation was not without possible exceptions, especially in particularly crass instances, but that was not the case before it. Nevertheless, application of the relevant provisions to the impairment of aesthetic sensitivity would lead to a widening of the cause of action "with no riverbanks in sight."

Loewenheim's three symptoms of imminent change were that the BGH had -

- introduced a possible exception to its conventional principle, for cases of particularly crass aesthetic or moral lack of taste,
- acknowledged extensive criticism, and
- fallen back on the image of flooded North German estuaries implicit in the predicted uferlose Ausweitung.

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444 Loewenheim, above n 436. The observation is explained in text below n 447.

445 (1975) 28 NJW 170.

446 eine uferlose Ausweitung - equivalent to fears of opening the floodgates expressed by English courts.

447 Loewenheim, above n 436.
Nevertheless, the BGH had not acknowledged the methodological error pointed out by Tiedemann.\textsuperscript{448} For Loewenheim it was plain that the true analysis proceeds from §§ 903 and 1004 as the basis of the claim, and § 906 then restricts it where the emission is insignificant or usual in the area, as Tiedemann had pointed out. Drawing attention to the virtually universal opinion in academic commentary, he pointed out that -

... foremost, property serves the personal development of the bearer of that legal right and ... harmony with contemporary judicial opinion about the general Personality Right is maintained only if a claim in defence of property is available not only with respect to physical but also with respect to psychological impairments.\textsuperscript{449}

Even if the framers of the \textit{BGB} did not have non-material interferences in mind, this consideration has never been an obstacle for legal development by the highest judicial voice of the law. Recognition of non-material interferences would not necessarily bring about a flood of claims because the claim of aesthetic interference would be subject to the same restrictions as material immissions - general insignificance and what is usual for the area. Further, non-material effects are usually more confined spatially than material effects such as noise, odour and dust. Loewenheim concluded that such a flexible solution would be more appropriate for the contemporary protection of personality than the stark refusal to protect property from non-material interferences.

In view of these developments it was not surprising that the Amtsgericht in Münster took such an adventurous step.\textsuperscript{450} However, at its next opportunity the Bundesgerichtshof again dampened expectations.\textsuperscript{451} The BGH affirmed that disturbances of a moral nature

\textsuperscript{448} See above n 405.

\textsuperscript{449} Loewenheim, above n 436, 827.

\textsuperscript{450} See above n 428.

\textsuperscript{451} 	extit{Brothel Case 2}, above n 433.
emanating from land do not have detrimental effects\textsuperscript{452} in the sense of § 906 BGB. The plaintiff could not succeed in property litigation just because the moral sensitivities of the neighbourhood had been injured by the presence of a brothel.\textsuperscript{453} In interpreting the ground of claim in § 1004, the concept of interference in § 906 has been drawn upon with the consequence that a landowner with troubled feelings can prevent only those effects emanating from other land which either cause damage to the land or things found upon it, or irritates people staying there to the point that their well being is disturbed or a physical discomfort is caused. An action under §§ 1004 and 906 cannot arise when the only effects experienced on neighbouring land are senses of shame or offence to aesthetic sensitivities.

The court acknowledged that this view had been maintained in the face of critical views in the literature, but an exception had nevertheless been left open for particularly crass cases. That, however, was not the case here.\textsuperscript{454} The court went on to examine further the distinction between those non-material interferences, moral or aesthetic, which are perceptible by the senses and those which are not. If an action based on injury to the sense of shame is to be contemplated, it must be based on a perception of the indecent event and not just from knowledge that it is going on. Circumstances alleged to cause a loss of property value must also be perceptible by the senses because otherwise the imperceptible event is not the sole source of loss of value.\textsuperscript{455}

This conventional analysis leads naturally to the question of what the courts will consider a sufficient irritation of people on the land to disturb their well being or cause physical

\textsuperscript{452} beinträchtigende Einwirkungen.

\textsuperscript{453} ibid 308-9.

\textsuperscript{454} ibid 308-9.

\textsuperscript{455} ibid 310.
discomfort. In the Belligerent Neighbour Case the owner of a rented apartment sued the owner of a neighbouring apartment with respect to his aggressive behaviour toward her tenant. The court considered that the issues in the owner’s action concerned only property law because the tenant could pursue her own legal avenues on a personal basis against harassment. The defendant had over a long period of time disturbed the plaintiff’s tenant with loud radio noise, swearing, derision and threats. The plaintiff had lowered the rent for the apartment as a result and claimed 1482.25 Marks by way of damages. The court found that the intensity and duration of the interference was amounted to an impairment of the physical well being of the tenant, and was thus actionable by the landlord, even if it were considered an intellectual impairment of the landlord’s interest. The plaintiff’s tenant claimed that the behaviour had just about driven her crazy, that she could not enjoy a peaceful night there, and that the bellowing terrified her son. Even if psychological, this was sufficient to establish impairment of physical well being, and the likelihood of its future continuance was sufficient to justify the award of an injunction. With respect to damages, however, there was no obligation on the plaintiff to lower the rent and the loss could not be recovered from the defendant.

The duty of neighbourly consideration, arising through application of the doctrine of Treu und Glauben to neighbourhood community relations, was considered very briefly by the BGH in the Metal Fence Case. It concluded that on the facts the defendant had

457 §§ 823 II, 826 and 1004 (analogically applied) BGB or § 185 StGB. § 14 of the Wohnungeigentums Gesetz (referred to above n 355) was held to permit a landlord owner of a "strata title" to take action against injury to his or her own property rights when the interference is suffered by a tenant.
458 Related by the Court in equally colloquial terms and without medical evidence.
459 See above n 456, 587.
460 Already considered with respect to negative interferences above following n 418.
461 See above n 445.
misused his legal position under neighbour law. Inasmuch as obstruction of the mountain valley view was considered in the Radio Antenna Case to be a non-material aesthetic interference, the court was prepared to apply the duty of neighbour consideration. In another "post- Brothel 2" decision the court appears to have relied on both the duty of neighbourly consideration and the exception maintained by the BGI for particularly crass cases. In a very short judgment not over-burdened with citation the court considered that a substantial gallows structure erected beside the boundary, with large hanged human figure bearing a sign which read "I was a dirty bastard," was morally offensive in the extreme, and it was not necessary to consider issues of intentions and against whom the structure was directed. A neutral observer would have considered it offensive to neighbours, even before considering the provision in § 226 BGB against the exercise of a right with the purpose of causing another damage. In the Undisclosed Building Permission Case the Federal Administrative Court held that it is not only a power of the owner, with the object of averting damage from neighbouring land, to challenge unlawful building on neighbouring land, but also a civil claim to enforce the obligations of the neighbour under Treu und Glauben. Use of the aversion right to challenge illegal building on neighbouring land had already been recognised by the court in the Tennis Court Case, where it was said,

462 See above n 411.
463 Discussed above n 425.
465 See above n 143.
467 Bundesverwaltungsgericht.
468 der Abwehranspruch.
469 das Abwehrrecht.
Neighbours stand in a particular neighbourly community relationship toward each other, which in accordance with Treu und Glauben requires from them particular consideration toward each other. It obligates them to cooperate through a reasonably active communication, to prevent economic damage to the builder, and to keep asset losses to the minimum possible.

It followed that objections to building works had to be made promptly, before investment is lost. In the case, the plaintiff had even expressed approval of the project, and therefore lost substantive rights.

Jauernig examined the position of legal development which has been reached in the three foregoing areas of the civil law - non-material immissions, disturbance to moral values and aesthetic sensibilities, and negative immissions - beside the public law responsibilities to use land in an environmental and neighbourly way. He concluded -

That the social obligation in ownership of land is extraordinarily strong remains without doubt. It has become problematic whether and how far ownership can be remodelled through new legislative provisions specifying its contents and limitations without payment of compensation being required.

In his view, the correct direction would be to allow the considerations developed in the public law of expropriation to be carried over into private law. The test, then, of whether a negative or non-material immission was significant enough to justify intervention, would be decided by whether there had been a decrease in the financial value of the land. As we have seen, this would be only one aspect of the deliberate adoption of the same test in both fields, so close as they already are. The public and private law conceptions of the obligations stemming from ownership do appear out of balance to some extent, but one

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471 das nachbarliche Gemeinschaftsverhältnis.

472 ibid 730-1.


474 ibid 613.
wonders if the reduction of non-material impacts to material market values can provide a durable solution. Perhaps it would lock the obligations implicit in the private law conception for some time into a material test of the significance of activities outside the borders of the land, leaving the landowner free to treat the land exactly as he or she would wish so long as effects remained within the boundaries. In contrast, the public law issues, in the eyes of even mainstream commentators such as Kloepfer, are whether the obligation to "the common good" in Art 14 of the Constitution is anthropocentric, or whether "the common good" embraces the good of other life forms regardless of their usefulness to humans. Commentators are noting a definite trend to harmonise the public law and private law concepts of property, and this is being achieved largely through innovative interpretation of the civil law concept.

In this respect the German civil law appears to be on the verge of a paradigm shift. The duty of neighbourly consideration, based upon Treu und Glauben, might well have been advocated in a period of questionable jurisprudence in the 1930s as Tiedemann suggested, just as the most intense experimentation with solutions to doctrinal problems based upon the trust took place then. Judicial recognition of the duty was nevertheless achieved in the post war period in through contemplation of the social obligation in Art 14 of the Constitution, and any author writing in the Common Law tradition would naturally hesitate before concluding that a solution based upon fiduciary relationships and unconscionability, creatively extended to the neighbourhood

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475 See in text above n 294.


477 Tiedemann, above n 419.

478 Ruin Rebuilding Case, above n 270.
relationship, could be characterised as fascist - 1930s style or otherwise. At the same
time, it is questionable that such solutions can be extended to meet the challenge of
giving effect to environmental responsibilities implicit in the civil law concept of property,
not least because they generally depend upon an obligatory relationship with an
identifiable human being. The alternative and more direct legal solution would be to
recognise as a matter of principle the social and environmental obligations implicit in the
civil concept of property and allow to neighbours a remedy to apply for restraint of
activities which are manifestly destructive of the environment, such as the destruction of
the natural habitat of "companions in Creation", as they were described in the Poodle
Access Case. All the juristic elements of such a principle, a principle of environmental
consideration perhaps, are already present in the system and it seems only a matter of
time before the German Civil Courts innovate with respect to the civil law concept of
property just as they did with respect to the environmental obligation immanent in the
public law concept of property.

In an era of privatisation especially, it is sensible to maximise private avenues of
environmental protection, and thus permit citizens in the locality to utilise the judicial
systems of civil society to challenge neglect by others to honour their environmental
obligations to present and future society within the boundaries of their own land. At the
very least, there should be an enforceable obligation to undertake scientific investigation
which will reveal the possibility of damage to the ongoing value of the resource. One
conventional argument against allowing the crystallisation of these principles through

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479 Contrast Fascist Freeway Construction Case, above n 251.
480 See above n 342.
481 The Cathedral of Beech Trees Case, above n 279, was decided by the Bundesgerichtshof (German
High Court for Civil Cases).
482 In the Genetic Modification Case (1997) 50 NJW 1860 the LG at Stuttgart Claim held in a case
brought by a neighbour with respect to the planned introduction of genetically modified organisms that
investigation and precautions [die Gefahrvorsorge] could be required without evidence of harm.
recognition of an environmental responsibility in dealing with the object immanent in the
civil law concept of property is that the civil law concept knows no obligations apart from
those expressly reserved in § 903. We have already seen that the jurisprudential
conceptualisations of Gierke483 and lhering484 departed from this. Also, when § 903 was
being drafted the express limitation of the owner's discretion in use of the thing "so far it
is as not contrary to law" was considered to embrace the limitations implicit in the nature
of the thing itself, consistently with a modern natural law perspective.485

Additionally, it simply cannot be said that there is no civil law obligation inherent in the
ownership of land. As we shall see below, the very recognition and enforcement of
proprietary interests by public institutions is dependent upon registration in the Land Title
Register. This obligation or responsibility was considered in the course of framing the
Bürgerliche Gesetzbuch to be necessary in the wider social interest of certainty in
transactions with land.486 Further, the substance of a proprietary interest in land was
regarded as shaped by its inherent nature.487 The contemporary German civil law, and
particularly the land title registration system, thus recognises a civil concept of property
which is subject to at least one immanent social responsibility, and social responsibility
was the seed of the public law environmental responsibility, as well as a formative
influence in the application of the doctrine of Treu und Glauben to neighbourhood
relationships. Development through ongoing exchanges between academic commentary
and judicial decision making of a pervasive civil law environmental obligation, shaped by

483 See above n 146.

484 See above n 47.

485 See above n 62.

486 See text above following n 66.

487 See above around n 61.
E The Land Title Register

The main objective of this section is to examine the obligation of a person who is granted a proprietary interest to register that interest before it can receive institutional recognition and protection. This will be pursued by examining the principles surrounding the registration of title and the protection which is available for unregistered rights. Review of the debates in drafting the Bürgerliches Gesetzbuch and the Grundbuchordnung showed that the legislative intention was to create a conclusive register. This was based not only on jurisprudential principle, with considerable idealism, but also the experience of centuries of land title registration in the northern cities. It is particularly relevant to consider the actual experience of the system, with special reference to how courts have interpreted and applied the provisions in the century since the BGB was enacted.

The German Federal land title registration system is maintained according to the Grundbuchordnung [Land Title Register Statute], and regulations. The Register is

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488 Situationsgebundenheit: see above n 274.
489 UGB - see above n 314.
490 See above, following n 54.
491 See above Part II.
493 Die Verordnung zur Durchführung der Grundbuchordnung, often referred to as die Grundbuchverfügung, or simply GBVerf, originally made on 8 August 1935. For this work the most recent edition available is that consolidated on 24 January 1995 (BGBl I, 114 and BGBl III, 315-11-8).
decentralised. It is maintained by officials of the local courts\textsuperscript{494} as a registry of that court.\textsuperscript{495} Each registry thus administers the titles to land parcels within the local court district.\textsuperscript{496} By administrative arrangement the local court districts coincide with the local municipal districts.\textsuperscript{497} The Registrar of Titles\textsuperscript{498} is a judge of the local court and the business of registration is considered judicial rather than administrative. In practice, many of these tasks are performed by a judicial officer\textsuperscript{499} who exercises an independent authority\textsuperscript{500} but whose decisions are also subject to review, first by him or herself and then by the judge of the local court with responsibility over the matter. If both maintain the original decision following review the matter becomes an appeal to the regional court.\textsuperscript{501}

There is an appeal from decisions of the judicial officers of the registry to the local court with respect to issues of fact and the correct exercise of registry discretions, although they are very uncommon.\textsuperscript{502} This appeal does not extend to a challenge to a registration entry which has already been made; in view of the principle of public faith in the Register a full action for correction of the Register must be maintained under § 894 \textit{BGB}. There is an appeal to a Civil Chamber of three judges of the regional court from decisions made in

\textsuperscript{494} des Amtsgericht; in Victoria courts at this level are called the Magistrates Court, and in other parts of Australia the Local Court or Court of Petty Sessions.

\textsuperscript{495} des Grundbuchamts.

\textsuperscript{496} der Grundbuchbezirk: § 1 GBBO.

\textsuperscript{497} die Gemeinde: § 1 GBVerf - die Gemeinde also lends itself to translation as Parish or Community.

\textsuperscript{498} der Grundbuchbeamter.

\textsuperscript{499} der Rechtspfleger.

\textsuperscript{500} § 9 Rechtspflegegesetz (RPfG) of 5.11.1969 (BGBl I, 2055).

\textsuperscript{501} das Landgericht - in Victoria this corresponds to the County Court.

the local court, with a further appeal to the Civil Senate of the Supreme Court\textsuperscript{503} with respect to errors of law, or following the discovery of new facts. There is a further appeal to the German High Court for Civil Cases.\textsuperscript{504}

There is no compensation scheme equivalent to those which exist in most Torrens systems. The person whose error is in question bears the loss. This could be a party to the transaction, a solicitor or notary, or an official of the registry. The State is liable for the activities of its officials,\textsuperscript{505} but may also claim recompense from the responsible officer. Judges may not claim judicial privilege with respect to registration tasks because they do not involve reaching judgment and the issues are not contentious. Notaries and judicial officers have personal insurance. In 1995 the premiums for notaries were in the order of 10,000 Marks per annum and for judicial officers 180 Marks.\textsuperscript{506} The view has been expressed that the level of insurance held by registry officials would prove insufficient to meet the size of claim one might reasonably anticipate. On the other hand there is not even anecdotal evidence of this ever occurring. It is interesting to speculate why this is the case.\textsuperscript{507} The regionalised structure of the Land Title Register is one possible explanation - with each Registry responsible for the titles in its immediate municipal area the manual archival systems appear to operate at their highest possible efficiency. As examples, the North Bremen registry administers some 60,000 titles, and in the City of Hamburg there are five registries.

\textsuperscript{503} \textit{das Oberlandesgericht.}

\textsuperscript{504} \textit{der Bundesgerichtshof.}

\textsuperscript{505} Art 34 \textit{Grundgesetz.}

\textsuperscript{506} Herr Mixner, above n 502.

The Register and the Cadastre

The Hamburg Land Title Register was maintained in conjunction with a City Plan from the 17th century. A Senate decision of 1845 was the foundation of public planning for the reconstruction of Hamburg following the Great Fire of 1842. The desirability of integrating the Register with a cadastral information system - "a rational land title register system" - was discussed in the Motivations for the BGB. Following further discussion and groundwork for a national cadastre in the 1920s, the integrated system was implemented in 1940, following general reform of the land title system. In Hamburg particularly, the development of an electronic Cadastre based on a Geographic Information System database, with the capacity to integrate Land Title Register functions, is at a very sophisticated state, and advancing rapidly. One difficulty in integrating an electronic Cadastre and the Land Title Register is the restriction of access to view the Register to those with a legitimate interest in doing so. This interest must be more than an idle curiosity, and embraces the media when legitimately exercising...
constitutional freedom of the press.⁵¹⁷

2  Legal Concept of a Land Parcel

The duality of Land Title Register and Cadastre brings with it a distinction between the land parcel⁵¹⁸ of the Land Title Register on one hand, each of which generally has a separate certificate of title,⁵¹⁹ and is the object of civil law ownership and transactions,⁵²⁰ and the cadastral unit⁵²¹ on the other hand. The entire area of Germany has been surveyed into cadastral units which are recorded in the land information cadastre according to identification codes. Land parcels are spatially conceived according to the dimensions recorded in the cadastre and the certificate of title displays the corresponding number of the cadastral unit.⁵²² The distinction between the land parcel and the cadastral unit, according to Baur and Stürner, is that a registered land parcel must have its own certificate of title unless it is an individually numbered lot on a common certificate of title⁵²³ and can comprise one or more cadastral units, but a cadastral unit may not comprise more than one land parcel. They thus arrive at this definition -

A land parcel, in the legal sense, is therefore a cadastrally surveyed and indexed part of the Earth which is represented in the Land Title Register as a "land parcel" by a particular Certificate of Title, or by a specific number on a

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⁵¹⁸ das Grundstück.

⁵¹⁹ das Grundbuchblatt: § 3 GBO.

⁵²⁰§ 873 BGB.

⁵²¹ die Katasterparzelle.

⁵²²§ 2 GBO.

⁵²³ das gemeinschaftliche Grundbuchblatt.
common Certificate of Title.\footnote{524} Plainly the distinction between a cadastral unit and a land parcel is not completely clear, and this highlights the level of interconnection between the Land Title Register and the cadastre. On further relevant aspect is the extent to which the principle of public faith guarantees the content of the Register and how far this protection extends into the contents of the cadastre. In the \textit{Bavarian Diluvion Case}\footnote{525} a natural change in the course of a stream had reduced the area of the relevant land parcel from 2178 to 107 square metres through inundation.\footnote{526} The surveying authority adjusted the stream bank boundary in the cadastral documents and advised the Land Title Registry. The Registry questioned whether such a change could be made simply through administrative procedures and, in view of the change of title to the land,\footnote{527} suggested that a formal amendment of the Land Title Register should be sought, involving notification of the respective owners and other interest holders, such as mortgagees.\footnote{528} By the terms of § 894 \textit{BGB} amendment of the Register involves evaluation of the "true situation" in terms of § 892. A critical issue in the case was thus whether a stream boundary recorded in the cadastre is a part of the Land Title Register to which public faith attaches. The Bavarian Oberlandesgericht drew a distinction between purely factual issues and issues with a legal element. A certificate of title states the reference number of the corresponding cadastral record, which in turn incorporates cadastral plans of the land,\footnote{529} and the representation of the boundaries on the cadastral charts is without doubt to be considered a part of the Land Title Register content which attracts the presumption of

\footnote{524}{See above n 502, 133.}
\footnote{525}{(1987) 37 BayObLG 410.}
\footnote{526}{\textit{die Oberflutung}.}
\footnote{527}{\textsection 7 \& 8 \textit{Bayerisches Wassergesetz}.}
\footnote{528}{\textsection 22 \textit{Grundbuchordnung}.}
\footnote{529}{\textit{die Katasterkarte} or \textit{die Flurkarte}.}
correctness in § 891\textsuperscript{530} and the protection of public faith in § 892.\textsuperscript{531} An alteration of the boundaries through a notarised legal transaction, an act of state or technical cadastral processes is one thing, but with respect to alluvion and diluvion the change takes place by virtue of natural forces with respect to which public faith in the Land Title Register has no effect.\textsuperscript{532} The relevant change of title therefore stands outside the protection of §§ 891 and 892 with respect to both the correct procedure for amendment of the cadastre and legal positions with respect to the land before the alteration is made. It simply was not sensible to treat a good faith acquisition of inundated land as protected by § 892 when a consequent change was to be made to the cadastre. One could say that the title boundaries of later inundated land were to be retained as at the date of purchase, but then if the water rose further during that owner’s proprietorship the title to the next strip of land would be lost. Changes to boundaries in consequence of natural changes to the course of a stream were therefore not to be treated as alterations of the title to land for the purposes of public faith in the Register.

3 Divisions of the Certificate of Title

The Certificates of Title of the German system are divided into three divisions. In Division I, details of the owners of the land are entered.\textsuperscript{533} In Division II the details of burdens of the title, apart from fiscal securities,\textsuperscript{534} are recorded, as well as caveats,

\textsuperscript{530} See below following n 542.

\textsuperscript{531} See below following n 618.

\textsuperscript{532} See above n 525, 413.

\textsuperscript{533} § 9 GBVerf. The official format of the Certificate of Title, with examples of entries, and other forms used in land title registration are set out in appendices to the GBVerf. See also E Harber and J Demhanter, Grundbuchordnung, 19th ed, C H Beck, München, 1991, appended to their reproduction of the GBVerf.

\textsuperscript{534} Mortgages, land debts and rentcharges.
Contradictions and marginal remarks relevant to priority order.\textsuperscript{535} In Division III the fiscal securities are registered with Contradictions and caveats relevant to them.\textsuperscript{536}

4. What May Be Registered

The \textit{BGB} and the \textit{GBO} do not expressly list which rights and legal relationships are registrable. The registrable rights are thus ascertained through consideration of the purpose of the Land Title Register - to display as accurately as possible the legal relationships surrounding a land parcel. On one hand there is a policy consideration that the Register should not be overfilled with rights which are largely irrelevant to the transactions which might take place with the relevant land. For Baur and Stümmer leases are an example of these.\textsuperscript{537} On the other hand, the intentions in drafting Book Three of the \textit{BGB} can be gleaned from provisions such as § 892 which refer to certain interests as though assuming that they are registrable - "[f]or the benefit of a person who acquires a right over a land parcel, or a right over such a right, through a legal transaction ..." When the \textit{BGB} is analysed, the following clearly registrable rights are identified:

1. all proprietary rights over land parcels and all land-related rights,\textsuperscript{538}
2. all real proprietary rights over rights held over land parcels - restricted to usufructs\textsuperscript{539} and pledges\textsuperscript{540} over a transferable right held over a land parcel, such as a usufruct held over a Mortgage,
3. relative limitations of power of disposition,
4. a Contradiction against the correctness of the Land Title Register,

\textsuperscript{535} § 10 GBVerf.
\textsuperscript{536} § 11 GBVerf.
\textsuperscript{537} See above n 502, 135.
\textsuperscript{538} \textit{die grundstücksgleichen Rechte}.
\textsuperscript{539} \textit{der Nief3brauch}.
\textsuperscript{540} \textit{das Pfandrecht}.
5 a caveat.

The following rights are considered unregistrable -

1 rights not acknowledged as proprietary rights over land parcels,

2 obligatory or contractual rights even when they have a real impact, such as leases,

3 personal relations which, even if they were to be registered, would not enjoy public faith, such as legal incompetence or marriage,

4 absolute limitations of power of disposition,

5 transactional limitations of power of disposition which do not have proprietary effects,

6 public law legal relations and burdens, such as limitations through building lines, street construction rates and public rights of pre-emption,

7 claim for discharge of remoter rights pursuant to § 1179a BGB.

Rights capable of registration are distinguished from rights which may be registered. A right capable of registration follows a proprietary legal transaction which alters legal rights and must be registered to gain effectiveness vis-à-vis third parties. An alteration of proprietary rights by process of law, such as civil execution or succession upon death, need not be registered in order to be effective but may be registered as a correction of the Register.\footnote{Baur & Stümer, above n 502, 136-7.}
F Protection of Public Faith in the Register

The Indefeasibility Provisions

The principle of public faith in the Register is underpinned by §§ 891 - 893 of the Bürgerlichen Gesetzbuch. This principle is regarded as vital to fulfilment of the objective of the Land Title Register as a record upon which legal transactions may be entered with confidence. This is the real meaning of the principle of public faith.\(^{542}\)

\[\text{§ 891 BGB - The Legal Presumption of Correctness}\]

The legal presumption created by § 891 has two aspects - that entries recorded in the Register are correct, and that the Register is a complete record of proprietary rights over the land. The presumption is, however, rebuttable. It may be raised to support the correctness of the registration of a range of interests -

- ownership, including part ownership,
- limited proprietary rights\(^ {543}\) with respect to proprietorship, the object of the right and the content of the right, and
- further rights granted over such rights, such as pledges\(^ {544}\) and usufructs\(^ {545}\).

The presumption can also apply in favour of rights such as security mortgages acquired in the enforcement of a pledge pursuant to § 1287, usufructs acquired pursuant to § 1075, and rights in existence before 1900 under pre-existing provincial land law.


\(^{543}\) das beschränkte dingliche Recht.

\(^{544}\) das Pfandrecht.

\(^{545}\) der Niveaubrauch.
systems. It is also presumed that the content of a caveat is correct if the person enjoying its protection can prove the right, which is not without logical difficulties.

The presumption in § 891 does not apply to the following, even if for some reason they have been noted in the Land Title Register -

- an objection raised by a mortgagor when the mortgage is assigned,
- a Contradiction registered against the correctness of the Register,
- limitations of the power of disposition,
- public rights and burdens, unless they may be registered pursuant to specific legislation,
- rights which are not capable of registration, and
- rights which on their own terms have no effect against third parties even when registered.

The presumption operates in favour of legally effective register entries. This requirement of effectiveness is generally stated in a narrow context of so-called "double bookings" where contradictory entries are apparent from the face of the Register, and similarly where rights with respect to the same land are entered on different Certificates of Title in the registries of two different districts. Moreover, an entry challenged by a Contradiction registered against the correctness of the Register does not obtain the benefit of the presumption of correctness.

546 Discussed in the Church School Case (1930) 127 RGZ 251, 261-3.
547 See Palandt, above n 542.
548 § 1157 BGB.
549 § 899 BGB.
551 Such as certain servitudes which existed before 1900: § 187 EGBGB.
The presumption does not extend beyond the Land Title Register, and is confined to the Certificate of Title for the relevant land parcel. For example, when a pre-nuptial marriage settlement extends to a number of land parcels and the status of one parcel as marital property is registered in the co-ownership of the couple, the presumption applies only to that land parcel. In relation to that parcel, in one case, the presumption extended to the correctness of its registered status as marital property, although the couple had not yet married. The presumption extends to the entire Certificate of Title and not just the relevant of its Divisions.

With respect to subjective proprietary rights the registration of the right as a burden on the Certificate of Title of the servient tenement attracts the presumption. For this reason the purchaser of a dominant tenement, on the title of which the benefit of an easement is registered, might not acquire the easement in good faith if the burden of the easement is not registered on the title of the servient tenement. In the Dissolved Easement Case, the easement had been extinguished and removed from the servient title. The description of the right did not correspond to the "reality on the ground" and the purchaser was found by the court to have been aware of this.

553 See above n 533.
554 das subjective dingliche Recht.
555 Bavarian Oberlandesgericht - (1987) 95 Pfleger 101, 102. The Frankfurt Oberlandesgericht made a slightly different interpretation in an earlier case when it held that an easement [incorrectly] registered on the title of the dominant tenement alone could be the subject of good faith acquisition with the dominant tenement, and an easement registered on the title of the servient tenement alone is nevertheless valid because with respect to easements essentially attention is to be directed to the title to the servient tenement: Personal Right of Way Case (1979) 87 Pfleger 418. The Bavarian court adopted only the second point. Concerning awareness of the error see also discussion of § 892 BGB below, following n 888.
The presumption of correctness of the Register must be observed by public officials, including the Land Title Registry, who are thus required to presume that a person registered as owner is in fact the owner, and not subject to other interests which would in the general course be registered. If they would not in the general course be registered, then the state of the Register can raise no presumption of their absence.

(a) Invoking the Presumption and Rebuttal

The presumption of correctness is rebuttable, and it is rebutted when facts come to the attention of the Registry which reveal incorrectness in the relevant registration entry. Mere possibilities or assumptions are insufficient. These observations were affirmed in the Conditional Inheritance Case. A widow had inherited the relevant land from her husband. His will included a proviso that upon remarriage she would be entitled only to a life-long usufruct and the two sons of the marriage would become entitled in remainder. The Inheritance Court had issued a Certificate of Inheritance stating that the widow was entitled unconditionally as sole beneficiary. Subsequently she obtained registration as sole owner of the land without condition. The widow later remarried. The Inheritance Court withdrew its Certificate and issued a new one stating the interests of the sons. The widow had already sold the land and settled the transaction. The purchaser entered a caveat. Application was made for transfer of the land to the purchaser. The Land Title Registry required the agreement of the sons to the

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557 der lebenslängliche Nießbrauch.

558 die Nacherbin - der Nacherbe [beneficiaries in remainder]; die Nachberfolge [further inheritance]; die Erbanswartschaft [expectation of remainder].

559 das Nachlaßgericht - at least at first instance, this is a role of the local court.

560 der Erbschein - equivalent functionally to Grant of Probate.

561 die Alleinerbin - der Alleinerbe.
transfer, and this was later confirmed by the Frankfurt Oberlandesgericht when it held that the presumption of correctness had been rebutted -

In the context of this examination [of the transaction for formal regularity] the Land Title Registry is permitted to dismiss the legal presumption in § 891 I BGB in view of the particularities of the case. This presumption, that the person for whom a right is registered in the Land Title Register is also entitled to it, is certainly to be observed by the Land Title Registry ... [extensive citation] ... The presumption applies to all effective registered rights, which are also permissible with respect to their substance, regardless of whether the registered entry should derive from acquisition through a juristic act\(^{562}\) or - as here - is consequent upon inheritance ...\(^{563}\)

The presumption does not apply to facts, but only to the existence or non-existence of legal rights. Anybody for whom existence of the registered right has legal significance can invoke it; including the parties to contracts\(^{564}\) and mortgagees in relation to mortgagors.\(^{565}\)

(b) The Burden of Proving Rebuttal

The burden of proving that a registered interest does not exist - or that the content of the Register is not in harmony with the actual legal situation\(^{566}\) - rests clearly with the party alleging it. As noted above,\(^{567}\) registration of an interest in land on the basis of inheritance does not attract the presumption in favour of correctness, and thus the person relying on the will is obliged to prove their entitlement if it is called into question.\(^{568}\)

\(^{562}\) der rechtsgeschäftliche Rechtserwerb.

\(^{563}\) See above, n 556.


\(^{565}\) *Family Mortgage Case* (1972) 26 WM 384.

\(^{566}\) "... so stand der Inhalt des Grundbuchs ... mit der wirklichen Rechtslage nicht in Einklang ...": *Family Mortgage Case*, above n 565, 385.

\(^{567}\) See above in text before n 541.

\(^{568}\) *Challenged Will Case* (1966) NJW 1660, 1661.
(c) **Effect of the Presumption**

The person registered at the relevant time with respect to a certain right is presumed entitled to that right, subject to registered burdens, and that it was obtained in the manner stated. The strength of the presumption was tested by the Bundesgerichtshof in the Fraudulent Solicitor Case.559 The plaintiff had given her solicitor a power of attorney to deal with land on her behalf, with the object of raising a loan. The solicitor arranged one for 250,000 Marks from another client to be secured by first registered mortgage. A first mortgage could not be arranged immediately, and a Book Mortgage570 was given by the solicitor under power of attorney pending rearrangement of the order of securities registered over the land. The loan capital was then received. A first mortgage was registered, but the solicitor then arranged payment of the money into his personal bank account and disappeared. The plaintiff alleged that the power of attorney had been forged and she had not received the loan capital. The defendant sought to enforce the mortgage.

Considerable discussion was devoted to the uncertain evidentiary weight to be accorded a certified photocopy of the allegedly forged power of attorney which appeared to be the only surviving evidence of it. In view of this, the presumption in favour of the Register had a decisive bearing. The BGH considered that in view of §§ 891 and 1138 it was to be presumed that the registered proprietor of the mortgage was entitled to it. It is to be presumed that a registered right has been correctly obtained, concluded the court, and in order to displace the presumption proof of incorrectness must be made out - it is not sufficient simply "to shake the presumption". There was no reason to consider reviewing these principles which the BGH considered firmly established in cases and the

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559 (1980) 33 NJW 1047.

570 die Buchhypothek.
There is support for the proposition that the presumption of correctness does not extend to the assumption that the registered proprietor also holds economic property in the land, or, in other words, is beneficially entitled to the registered right. In the *Hamburg Trust Case*\(^{572}\) land was held by the defendant in trust for the plaintiff. The court considered the argument that the defendant might be presumed under § 891 to be the complete owner of the land, and held -

... the legal presumption provides ... only that the person registered in the Land Title Register as owner should also be regarded at law as the owner. It provides, however, nothing in support of the proposition that the property also belongs to him economically, and thus, specifically, that a trust relationship is excluded. Further, the presumption serves only those legitimately registered when asserting a claim stemming from this registered right, and those who assert claims against a registered party, the foundation of which is a registered right, in order to overturn the evidence that the right of the registered party really belongs to him. In that respect the legal presumption cannot be employed in order to support a fraudulent deception.\(^{573}\)

It should be recalled that the concept of economic property was most popular in the inter-war period and that its primary significance was in taxation.\(^{574}\) One object of the trust in this case appears to have been the minimisation of capital gains tax. However, the quoted passage goes beyond this to embrace trust relationships more generally.

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\(^{571}\) See above n 569, 1048.

\(^{572}\) (1929) 58 JW 2592.

\(^{573}\) Ibid 2593.

\(^{574}\) See Economic Property above following n 172.
In an implicitly critical case note,\textsuperscript{575} Dr Lauffer of Hamburg explained the relevant trust transaction as one which was particularly prevalent in Hamburg during the staggering hyper-inflation period of the 1920s\textsuperscript{576} with the object of securing foreign investment transactions without the need to obtain official approval. The judgment could thus be seen as an attempt to preserve the security of these transactions, which was vital to Germany's economic interests at the time. He drew attention to the statement of the powers of the owner in § 903 of the BGB and reasserted the conventional understanding that the "ownership" to be presumed pursuant to § 891 was to deal with the thing at discretion, and this implicitly included the right to enjoy it economically. In view of these considerations, it does seem doubtful that the decision could be read as a general statement that a person who wishes to search a title must establish, in addition to interests revealed by the Land Title Register, who holds the economic or beneficial ownership of the land. However, the quoted passage also sets out who may rely upon the presumption, and it certainly may not be relied upon to support a fraudulent deception by the person who is in the position to gain from it. In this respect the status of the decision could be confined to a statement about rebuttal of the presumption.

(ii) Letter Securities

With respect to a Letter Land Debt\textsuperscript{577} the presumption applies to the benefit of a secured creditor who also holds the Letter issued, and it can be rebutted by clear written evidence

\textsuperscript{575} Dr S Lauffer, Case Note to Hamburg Trust Case (1929) 58 JW 2592-3.

\textsuperscript{576} See D Raff, Deutsche Geschichte, 4th ed, Wilhelm Heyne Verlag, München, 1992, 294-5; J P Dawson "Effects of Inflation on Private Contracts: Germany, 1914-1924" (1934) 33 Michigan Law Review 171. On the predictability of economic anarchy in wake of the Versailles peace terms, and the probable rise of totalitarianism as a consequence, see J M Keynes, The Economic Consequences of the Peace, MacMillan & Co, London, 1920 (reprinted twice in 1919 and again in 1920) - "Men will have nothing to look forward to or to nourish hopes on... who can say how much is endurable, or in what direction men will seek at last to escape from their misfortunes?": ibid, 233-5.

\textsuperscript{577} die Briefgrundschuld - see Glossary, die Grundschuld.
that the security has been assigned.578

(iii) Legal Capacity

The presumption of correctness does not extend to legal capacity579 or transactional capability.580 In the Langgässer Community Case581 the Land Title Registry required evidence that the Community possessed legal personality when it sought to transfer land to a purchaser. The purchaser maintained that the Community's registered title should be presumed correct in view of § 891. The court declined to do this. The "person" referred to in § 891 is a legally competent person and the existence of competence had to be established by other means. In this case the relevant registers revealed that the Langgässer Community had never been legally formed, and the Register had to be corrected by registration in the name of a legal person or persons with relevant rights to the land before it could be transferred to the purchaser.

(iv) Incorrect Removal

A formerly registered, or noted, limitation of power of disposition must still be observed, in favour of the beneficiaries of the limitation, by the Land Title Registry when it is aware that the limitation has been incorrectly dissolved. This is an exception to the general presumption of correctness, and follows from the underlying principle that so far as possible the Land Title Register must reflect the true legal relations with respect to the

578 Apartment Building Subdivision Case (1990) DNotZ 739.

579 die Rechtsfähigkeit - which is generally a citizen's legal personality, beginning with birth and ending at death.

580 die Handlungsfähigkeit or die Geschäftsfähigkeit - grounds for the lack of which include minority and ill-health.

581 (1929) 5 JR-HRR Nr 1996.
relevant land. A mere possibility or suspicion of incorrectness is, however, insufficient. There is a continuation of protection at least until a third party acquires a right with respect to the land in good faith, in accordance with § 892.582 This is not the case when the beneficiaries of the limitation of power of disposition have joined in an express and formally correct agreement to removal of the registration entry, or note of their interest, from the Land Title Register, and it has been so removed, in order to permit a transaction to proceed.583

(v) Co-ownership

When several proprietors are registered the nature of their community of ownership must be stated if the presumption is to be applied in favour of them.

(vi) Assigned Interests

A theoretically peculiar matrix of registered and assigned interests emerged in the Double-Dipping Mortgagor Case.584 In this case a transferee of the land had acquired his interest subject to two existing registered mortgages to the same mortgagee, and thus had paid a commensurately reduced purchase price. At the same time the mortgagee assigned the mortgages into the form of one consolidated mortgage and all documents were lodged together for registration. The purchaser formulated a rather clever argument that at the time he lodged his transfer for registration the Land Title

582 Executor’s Powers Case (1910) 40 KGJ 196, 199.
583 Life Tenant’s Transaction Case (1920) 52 KGJ 156, 169-70.
584 (1927) 116 RGZ 177.
Register disclosed two mortgages in favour of the original assignor mortgagee, which were then dissolved, but his title was now subject to a different mortgage.

Ultimately the Reichsgericht decided that the purchaser took the title subject to the assigned mortgage - the personality of the mortgagee was not the factor which attracted the presumption of correctness and the principle of public faith, but rather the content of the registered right. It was not a new mortgage; rather, it was an assigned mortgage, the roots of which reached into the mortgages which were registered at the time when ownership was acquired. The assignee of the mortgages was also entitled to the protection implicit in acquiring registered mortgages, and again not with respect to the personality of the earlier creditor, but with respect to the content of the registered right.\(^{585}\)

In reaching this conclusion the Reichsgericht made extensive comments on the nature and interconnections of the indefeasibility provisions in §§ 891, 892 and 893 BGB when approving the principles applied by the Dresden Supreme Court. Most relevantly -

Pursuant to § 892 BGB it is deemed in favour of one who acquires through a juristic act\(^{586}\) a right over a land parcel, or a right over such a right, that the content of the Land Title Register is correct, unless a Contradiction against the correctness has been registered or the incorrectness is known to that grantee. The content of the Land Title Register is the totality of registration entries authorised within the land title registration system which have relevance to the legal position of the land parcel. Since the correctness of the content of the Land Title Register also embraces its completeness, it is guaranteed to the good faith assignee that the registered party from whom his right derives was the true proprietor of it, and that this right is consistent with the content of the Land Title Register, and further, that a purchaser acquires ownership burdened only by the registered rights, that deleted rights are also really dissolved, and that, putting to one side unforeseeable exceptions which are not relevant here, no rights exist outside the Land Title Register which could stand in the way of the title or limit it. ...  

Pursuant to § 891, when a right is registered for someone in the Land Title Register it is to be presumed that he is entitled to the right. It follows from

\(^{585}\) ibid 183.

\(^{586}\) das Rechtsgeschäft.
the presumption that, until the contrary is proved, the person registered is to be considered the truly entitled proprietor and that the right, in the form in which it is registered, is to be considered to have material existence. This rebuttable presumption is, to the benefit of the good faith assignee who has acquired the right from the registered proprietor of it, through § 892 elevated to an irrebuttable fiction.

§ 893 extends the protection of § 892 to anyone who effects performance to a registered proprietor on the basis of the registered status of the relevant right, just as it does to the benefit of anyone who effects a juristic act of a type which does not fall under § 892 with the registered proprietor of a right, in view of that right, and which amounts to a disposition of it.587

(vii) Correctness of Priority Ranking

The presumption of correctness also applies with respect to the relative priority of registered rights. The first rule of priority in the German system is, of course, that priority follows the order of registration,588 but agreements may be made between relevant parties to alter the priority which registered rights would otherwise have.589 In the Deutsche Bank Subsidiary Case590 not all of the required parties had joined in a Priority Agreement which raised the priority of a mortgage, but a notation was nevertheless made on the relevant title in the Land Title Register altering the priority of the mortgage relative to other registered securities. The mortgage was subsequently assigned when the Deutsche Bank acquired the entire business of the bank which held it. Examination of the original documents, including the Priority Agreement, would have disclosed the defect in the title notation and these documents also constituted content of the Register.591 However, the Bavarian Supreme Court held that the notation of priority in the Register would have been sufficiently relied upon to ground a good faith acquisition by

587 Double-Dipping Mortgagor Case, above n 584, 180-181.
588 § 879 BGB.
589 § 880 BGB.
the assignee of the apparently prior mortgage. The element of doubt hinged on the inadequacy of the facts established by the lower court. The case was referred back for further fact finding on the question of whether the assignee was aware of the incorrectness of the notation in the Land Title Register and, thus, whether the acquisition was indeed made in good faith.

In its extensive judgment the court also referred to a number of other issues. For one thing, even if the Deutsche Bank had acquired the mortgage in good faith, it was argued that it was a misuse of legal power for the Bank to assert it in view of the inadequacy of the Priority Agreement. To resolve this question would have required relevant findings of fact to satisfy § 226 or § 826 BGB, and this was another inquiry which had not been concluded in the court below. Secondly, it was vital for the application of § 892 that the real security had been assigned in a specific proprietary legal transaction to the assignee, and not in a consolidated assignment of the entire business. As this was the case here § 892 could apply, and the issue received no further consideration.

(viii) Extinguishment of a Registered Right

The effect of the extinguishment of a registered right had been extensively disputed in cases and scholarly legal writing before the Forest Sale Case. The plaintiffs and the defendant had been registered as the co-owners in thirds of a forest land parcel since 1904 when the Land Title Register was established for the area. They sold the land parcel, and the purchaser was registered as the new owner. The defendant disputed the

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591 Ibid 908 and 909.

592 des Spezialitätsprinzip: see Glossary.

593 Ibid 909.

594 (1968) 52 BGHZ 355; 23 WM 1352.
proportions of the proceeds of sale to which they were respectively entitled. The BGH noted the diversity of views in the cases and literature concerning the operation of the presumption when the relevant right has been removed from the Register. It returned to the text of § 891 and restated the basic principles. While a right is registered, for the period of its registration the right is presumed to exist. After a right has been removed from the Register it is presumed not to exist for the period in which it is absent. A literal reading of § 891 did not, however, answer the further question concerning the status of the right during the period of its registration when viewed in retrospect after it had been removed. In addressing this, reasoned the BGH, the reason for removal of the right would be critical. If the right was removed in the process of correction of an error in the Land Title Register, then the presumption of correctness could not apply to it and the state of the Register as it would otherwise have been, in retrospect, enjoyed the benefit of the presumption. If the relevant registration of the right had been dissolved because the right had been transferred or assigned, then the right was presumed to have existed for the period of its registration under § 891.595

(d) Weight of Evidence for Rebuttal

The presumption may be rebutted through proof that the true situation is contrary to the state of the Land Title Register. It is not sufficient merely to "shake the presumption"; 596 the possibility of the existence or non-existence of the relevant rights must be made clear by the party challenging the state of the Register. What is sufficient to "shake the presumption" is influenced by the dynamics of particular transactions.

595 ibid (1969) 52 BGHZ 355, 358.

596 Fraudulent Solicitor Case, above n 569.
Registered Easements

In the Service Easement Case\textsuperscript{597} the defendant and his father had acquired the dominant tenement in 1951. Their electricity, water and telephone connections ran across land on which a cable factory was situated. When the cable manufacturer sold the land in 1952 a formal easement was made and registered. Part of the servient tenement was sold to the plaintiff in 1975. The plaintiff subdivided this land into 33 residential blocks. It appeared that use had not been made of the easement for some years. The water connection had been interrupted in the 1960s and never restored. The other connections were destroyed in the course of building work on the plaintiff's land.

By the time of litigation all services were provided or available from direct connections at a public street. The plaintiff therefore sought dissolution of the easement on the ground that it was not used, and rectification of the titles to those subdivided parcels of the servient tenement which lay outside the possible practical area of use.\textsuperscript{598} The plaintiff had already undertaken to purchasers of the residential parcels that dissolution of the easement would be obtained.

If the easement was to remain,\textsuperscript{599} it would be necessary to decide which of the subdivided residential parcels were no longer affected by it. The titles of these could be rectified to omit any reference to it. In this connection it was necessary for the plaintiff to prove the precise route of the registered easement across the original parcel, which was some 40,000 square metres in size, with sufficient certainty to rebut the presumption

\textsuperscript{597} (1984) 37 NJW 2157.

\textsuperscript{598} See § 1026 BGB.

\textsuperscript{599} The BGH clarified the test to be applied under § 1019 BGB in deciding whether the easement no longer afforded an advantage to the dominant tenement, including future advantages, and pointed out defects in the evidence which had been accepted by the court below in this respect: ibid 2158.
stemming from § 891 that any particular title remained burdened. With respect to the strength of proof required, the BGH considered it well established that the plaintiff need not rebut every conceivable possibility for employment of the easement for the advantage of the dominant tenement, but rather, only those revealed by the Land Title Register and those proposed by the registered owner of the dominant tenement.\(^{600}\) The registered owner of the dominant tenement remained, without doubt, protected by the presumption in § 891 and the burden of proof remained with the plaintiff, but, although the precise area of the easement could be inferred from the Land Title Register, and the actual route of the services offered only a presumptive value, the registered defendant could be obliged to identify with some precision the route to which he or she laid claim. Otherwise, through silence the defendant could maintain a claim to all of the servient tenement although exercise of the easement required only a portion. In this case the defendant had provided a sketch of the earlier route of the services, and in conjunction with the subdivision plans, this could be used to specify the parcels freed from the easement, but there was conflicting evidence about the correctness of the sketch. The case was therefore returned to the lower court for further factual findings in this regard, as well as for correct application of the test of whether the easement still afforded utility to the dominant tenement.

(ii) Securities

With respect to a security over land\(^{601}\) the presumption in favour of a registered creditor can be rebutted if a third party produces the relevant Security Letter\(^{602}\) and a written declaration of assignment. The benefit of the presumption is regained when the creditor

\(^{600}\) Ibid 2157.

\(^{601}\) das Grundpfandrecht - this term is used generally to refer to securities over land.

\(^{602}\) der Pfandbrief - Mortgage Letter or Land Debt Letter.
obtains possession of the Letter and produces a declaration of reassignment. It should be noted that the status of a Letter of Security forms an exception to general rules of registration and priority.\(^{603}\) The rules with respect to mortgages also apply to the Land Debt\(^{604}\) and the Rentcharge.\(^{605}\) In the *Case of the Assigned Land Debt* \(^{2}\) the Bavarian Oberlandesgericht discussed more general principles. Particularly, what is required to rebut the presumption of correctness of the Register need not coincide precisely with the preconditions for recognition of the competing rights which are asserted to truly exist. In other words, it is one thing to rebut the presumption of the Register's correctness; it is another to obtain registration of the competing picture of legal rights. The second is not a necessary precondition for achievement of the first. Echoing the discussion of the requirement that the Land Titles Office also recognise the presumption,\(^{607}\) the court stated that the rebutting facts need not take any particular form.\(^{608}\) Rather, the essential issue is that the Land Title Register must reflect legal and economic reality affecting the property and it is the vital task of the Land Titles Office to ensure that this is so.\(^{609}\) In the *Case of the Assigned Land Debt* \(^{1} \) the Frankfurt Oberlandesgericht had decided that a presumption arising from the Land Title Register that one party held a Letter Land Debt was "simply shaken",\(^{611}\) that is, disturbed but not rebutted, by evidence that an assignment of it to another party had been effective to pass an interest but not sufficiently

\(^{603}\) See §§ 1117, 1140ff and 1155 BGB.

\(^{604}\) *die Grundschuld* - see § 1192 BGB.

\(^{605}\) *die Rentenrecht* - § 1200 BGB.

\(^{606}\) (1992) 100 Rpflegar 56.

\(^{607}\) See above in text at n 556.

\(^{608}\) Specifically § 29 GEO.

\(^{609}\) See above n 607, 59-7.

\(^{610}\) (1983) RhNK 52.

\(^{611}\) See above n 571.
formal to obtain registration; the declaration of assignment was in writing but had not been notarised.

In both cases the same principle was applied. If the Land Titles Office acquires sufficient knowledge to rebut the presumption, it must not proceed to register a transaction which depends on the Register's correctness. The existence of an unregistered transfer of the relevant interest to a party other than the registered proprietor of the interest is sufficient to rebut the presumption. In the second case it was decided that the unregistered transaction need not be registered; in the first that the transaction had to have sufficient formality to be capable of registration, although possession of the Letter of Security with a declaration of assignment is sufficient to assign it off the Register. The cases can be differentiated on the basis that the second concerned a reassignment to the original holder of the security by the same means as it had been assigned in the first place. That seems unduly technical in view of the stress placed by the Bavarian court on the sufficiency of the existence of material legal rights to rebut the presumption.  

(iii) Formalities

It is not sufficient to rebut the presumption of correctness to show that procedural provisions were infringed when registration of the relevant interest was obtained. Similarly, the presumption is not rebutted by doubts that the document which founded the relevant registration was capable of creating the underlying right.

612 Case of the Assigned Land Debt 2, above n 606.
613 Case of the Assigned Land Debt 1, above n 610.
614 Case of the Assigned Land Debt 2, above n 606, 57.
(iv) Possession

Factual presumptions, such as the factual presumption that a person in proprietary possession\(^{616}\) of land is the owner of it, do not alone rebut the legal presumption created by § 891 BGB. They can, however, raise a presumption in favour of the rights asserted to the contrary.\(^{617}\)

(v) Registered Contradiction

The fact that a Contradiction is registered on the relevant title does not rebut or weaken the presumption in favour of correctness.\(^{618}\) The real power of a Contradiction with respect to priorities is provided by § 892.

2 § 892 - Protection of Good Faith Acquisition

Pursuant to § 892 the Land Title Register is to be deemed correct in favour of a grantee unless a Contradiction was registered on the title or the grantee knew that the Register was incorrect. It is thus conventionally described as a legal deeming provision\(^{619}\) which operates in the event of incorrectness or incompleteness of the Land Title Register. By virtue of the fiction of the correctness of the Register,\(^{620}\) a person registered as proprietor of an interest has the legal power to make dispositions which are as effective as the true

\(^{616}\) der Eigenbesitz.

\(^{617}\) Starkenmoor Case (1936) 65 JW 2399, 2400.


\(^{619}\) die Rechtsscheinwirkung.

\(^{620}\) die Fiktion der Richtigkeit.
owner could make if registered. The benefit of the fiction of § 892 inures to the transferee.\textsuperscript{621} This legitimating effect\textsuperscript{622} of registration is excluded if a Contradiction was registered, or if the transferee was aware of the incorrectness of the Register.

The fiction has positive and negative aspects. The positive fiction is that the relevant right belongs to the person registered as proprietor of it, including its registered content and priority. Thus the content of the Register is deemed to be correct. The negative fiction is that unregistered rights do not exist, and rights removed from the Register incorrectly no longer exist. Thus the content of the Register is deemed to be complete. § 892 also supplements § 891 in that the latter expressly deals with dissolved rights, but is silent concerning rights which have never been registered.

\textbf{(a) Threshold Factors}

A number of issues must be satisfied before § 892 can operate to deem a good faith acquisition as effective as if made by the true proprietor.

\textbf{(i) The Principle of Impermissible Content - Credibility and Consistency of the Registration Entry}

Registration entries with impermissible content\textsuperscript{623} do not obtain the protection of public faith.\textsuperscript{624} Thus the following are not protected:

\textsuperscript{621} Palandt, above n 542, 1079.

\textsuperscript{622} \textit{die Legitimationswirkung}.

\textsuperscript{623} The concept of "impermissible content" \textit{[die inhaltliche Unzulassigkeit einer Eintragung]} is used in, and probably originates from § 53 GBO.

\textsuperscript{624} \textit{der Gutglaubenschutz}.
statements of legally impossible situations, and

unrectifiable inconsistencies which are apparent through interpretation of the registration entry or its registered documentation, such as the Registration Consent.625

An example of such an inconsistency, is provided by the Common Stairwell Case.626 The colouring of different areas on a plan of building subdivision indicated that the ground level of a common stairwell was reserved as "special ownership" for the owners of shops on the ground floor. Other factors, such as intended use of the stairwell as a fire escape, the position of electricity meters and access to the cellar, suggested that the stairwell was for common use. An area in a subdivided building set aside for common use cannot be the object of particular ownership, but remains in common ownership.627 The court noted the principles behind the concept of "impermissible content" and the sources from which one might be expected to ascertain such a state of the Register -

A registration entry with impermissible content is one which states a legal situation which it cannot fulfil. The impermissibility must be apparent from the registration entry and those sources of the registration entry to which reference may legitimately be made. One may not fall back upon the legal materials which underlie the entry in a general sense or other evidentiary material.628

The Registration Consent and the plan of subdivision to which it referred were legitimate sources in this sense.629 The location of the electricity meters and use of the stairwell as a fire escape did not appear from these documents and thus could not cast doubt on the status of the registration entry.630

625 die Eintragungsbewilligung.
626 (1993) OLGZ 43.
627 § 5 Wohnungseigentumsgesetz.
628 See above n 626, 45.
629 ibid 46.
630 ibid 47.
These issues were examined in the heat of dispute in the Personal Right of Way Case. In 1958 a firm had acquired and obtained registration of a limited personal servitude in the nature of a right of way. In 1959 the parties set about transforming the right into a real servitude which would inure to the benefit of the successors in title to the dominant tenement. This transaction was registered as an alteration. The court noted that a real servitude could be created through agreement and registration as required by § 873 BGB. It is however, as a matter of law, virtually impossible to transform a personal limited servitude into a real servitude, and in the situation an entirely new right should have been created. It had been an error to register a real servitude. The owner of the dominant tenement had nevertheless acquired it in good faith in the circumstances contemplated by § 892 BGB. When weighing the correctness of the Register one must however be clear about what constitutes it. Reference may be made to the totality of the entries relevant to the right, and to the Registration Consent. The content of the Consent is to be regarded as though recorded in the Land Title Register so that the registration entry and the Registration Consent form a unity.

The court noted that a self-contradictory registration entry cannot attract the protection of good faith in § 892, but found no contradiction in the relevant legal sense. The text of the Registration Consent has legal significance only so far as there is a permissible reference to it in the registration entry. The general rule is that the right and its content must be apparent from the Register itself and generally references to the Consent are not permitted. In this case the registration entry was clear that a real servitude has been registered. Although reference to the Consent revealed that it was only a limited personal servitude, this was legally insignificant because such reference was

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632 die beschränkte persönliche Dienstbarkeit - § 1090 BGB.

633 die Grunddienstbarkeit - § 1018 BGB.
impermissible in the circumstances. It followed that the registration entry did not contradict itself and a good faith acquisition was possible. No Contradiction against the correctness of the Register had been registered, and the transferee was not aware of the error in the Register, so the preconditions of a good faith acquisition pursuant to § 892 BGB had been fulfilled.

In the *Unauthorised Erasure Case* an unauthorised attempt was made to correct a mistake in the Register by erasing an incorrect land parcel number referring to the dominant tenement in the record of an easement on the certificate of title to the servient tenement. The erasure was not authenticated by signature, and the original numbers remained visible beneath the erasure marks. The court concluded that the alteration had no legal effect - it was a void administrative act in the public law sense -

The legal effect of the original registration entry remained despite the erasure. The registration entry is not made void by the erasure - the easement is neither altered nor dissolved by it. An unauthorised alteration of an entry such as this does not facilitate the acquisition of a legal position by virtue of good faith. The presumption of the correctness of the Register merely comes to the aid of entries which indeed make the Land Title Register incorrect, but not those which are void pursuant to public law.

The obviousness of the unauthorised status of the alteration to a person searching the Register was not the focus of the court's conclusion. However, the erasure marks were discernible, and it is possible that the official illegitimacy of the correct information which it sought to communicate might have been regarded as relative, rather than absolutely void, if the issue had been sharpened by a dispute. The marks could have been seen as a signal of unreliability which should have alerted the transferee to the likelihood of incorrectness.

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635 Ibid 56-7.
(ii) Rights Which Attract Public Faith

The basic principle is that public faith is attracted by only those registered rights which must be registered in order to obtain protection against third parties.

Some rights do not attract both the positive and negative effects\textsuperscript{636} of public faith when registered. Registered limitations of the power of disposition, for example, attract only the negative effects of public faith, and this is the effect also of a registered Contradiction. In other words, the registration rebuts the presumption that the Register is complete but does not bolster the status of the right actually recorded. A caveat\textsuperscript{637} does not obtain public faith for the right which it protects, but a good faith acquisition of the interest against which the caveat is registered would not be possible.

Public faith does not apply to so-called register-free\textsuperscript{638} land parcels, such as public land and watercourses, if they are not actually registered. The registration of a person who acquires such land attracts § 892 only if the transferor had obtained the compilation of a certificate of title for the Land Title Register with respect to the land, and registration as owner on that certificate, before making the transfer. Public faith is not obtained if the transferee initiates compilation of a certificate on the basis of a conveyance made outside the registration system because § 892 contemplates acquisition of a registered

\textsuperscript{636} See above following n 622.

\textsuperscript{637} die Vormerkung - § 885 BGB.

\textsuperscript{638} das buchungsfreie Grundstück.
interest. 639

A good faith acquisition is not protected against public burdens and limitations. This was tested in the Social Housing Case. 640 Under a German social housing scheme 641 private landowners could obtain loans at favourable rates of interest to build or restore apartments. These socially sponsored apartments were then reserved for tenants in social need at a lower rent. The apartments were bound to this use for ten years after repayment of the loan. The landlord in the Social Housing Case was penalised for charging rent above the level calculated. He claimed that he had acquired the apartment in a good faith acquisition without knowledge of the limitations under the scheme. This argument was rejected. The court observed that the protective scope of §§ 892 and 893 BGB extends to three classes of interest -

1. the existence of a real right registered in the Land Title Register,

2. the non-existence of unregistered or deleted real rights which are capable of registration, and

3. the non-existence of unregistered, or deleted, relative limitations of the power

639 Right of Way Acquisition Case (1940) 164 RGZ 365, 369. The Lake Acquisition Case (1937) 155 RGZ 122, 125-7, is also cited for this proposition. An interesting difference of approaches by the Reichsgericht with respect to unregistered rights is discernible. In the earlier case, the public had conveyed the unregistered lake to the defendant before obtaining compilation of a certificate of title for the lake and registration as owner. It then transferred the new registered title to the defendant. The plaintiffs claimed a riparian interest [medium filum aqua] from the shore of their land to the middle of the lake. They argued that the defendant could not claim a good faith acquisition because she knew the public authority was not the owner - she already was by virtue of the conveyance. The court appears to have acknowledged this but supported the procedure adopted, while not ideal, on the basis that it placed the register in the correct position and there was no evidence of some other knowledge held by the defendant which would prevent a good faith acquisition. In the Right of Way Acquisition Case, the court gave unusually high respect to following earlier court decisions and the value adhering to formal procedures. It considered that the same procedure was in order because the conveyance of the right of way from the public authority could not make the conveyee the owner of the land - one acquires ownership of land upon registration: § 873 BGB. However, compilation of a certificate of title had been initiated by the conveyee, and subsequent registration as owner could not attract § 892 because that provision contemplates acquisition of a registered interest.

640 (1979) 32 NJW 1843.

641 Maintained under the Wohnungsbindungsgesetz.
of disposition which are capable of registration.

However, its protective scope does not extend to unregistrable rights, burdens or limitations. The court considered it unimportant whether obligations under the social housing scheme are to be counted among the unregistrable personal rights to which a purchaser is subjected by law, as with a tenancy, or whether they should be assigned to a further category, according to the general view, of unregistrable public law limitations.\textsuperscript{642}

interests arising by law

In addition to interests which are registrable immediately, some further interests arise by law out of registered interests. A number of these also attract the protection of public faith in the Register, such as the assignment of a mortgage by delivery of the Mortgage Letter and assignment of the secured claim.\textsuperscript{643}

personal relationships and characteristics

As one might expect, the personal relationships and characteristics of a registered party are not protected. A number of matters relating to the identity of the registered party with whom the party claiming a good faith acquisition has transacted are covered by this exclusion. First, the Register does not guarantee the capacity of the registered proprietor to transact. Second, it does not guarantee the authority of the party with whom a

\textsuperscript{642} See above n 640, 1843-4.

\textsuperscript{643} §§ 1117 and 1154 BGB. Also, the conversion of ownership of the object of a claim which is subject to a usufruct, from the obligated party to the creditor, and consequent conversion of the usufructuary's interest from a usufruct over the claim to a usufruct over the object, pursuant to § 1075 BGB, and conversion of ownership of the object of a pledged right from the debtor to the creditor, and consequent conversion of the pledge from a pledge of the right to a pledge of the object, pursuant to § 1287 BGB. See also § 848 Zivilprozeßordnung.
transaction is entered. Third, claims in contract are not protected. Fourth, it does not protect rights under a clause which embody a confession of judgment. Fifth, acquisition of a claim for compensation is not protected.

The sixth point is that matters concerning the identity of the registered proprietor are not protected. In some situations this can give rise to a limited form of deferred indefeasibility which applies to the first acquisition of a right, in firm contrast to assignment of it. In the Forged Priority Alteration Case the plaintiff had held two registered mortgages over the relevant land since 1923. The defendants obtained registration of a mortgage to secure an advance of 75,000 Marks and an alteration of priority under § 880 BGB, pursuant to which their mortgage was to take priority ahead of the plaintiff's mortgages. The plaintiff's signature on the documentation of the alteration of priority had been forged. The defendants had made the advance and been issued with a Mortgage Letter. The plaintiff required the defendants to join in rectification of the Register to restore her mortgage to first priority. The defendants claimed a good faith acquisition in the terms of § 892.

The problem for the defendants was that they were party to creation of the alteration of priority. They were thus the "founders" or the "first acquirers" of the right and could not call upon § 892 to protect them from a material defect in their own "foundation legal transaction". Original acquisition of an interest from a person who falsely maintains that they are the person entitled to make the disposition is such a defect. The court pointed

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644 Note however, the express authorisation of Land Title Agents in § 1189 BGB.

645 Note that § 1038 allows the protection of §§ 891-99 to the contractual claims of a mortgagor based on a mortgage loan agreement.

646 die Unterwerfungsklausel.

647 (1930) 128 RGZ 276.
to the minutes of the Second Drafting Committee in support of this position\textsuperscript{648} and described it as "acknowledged law".\textsuperscript{648} However, a party who takes an assignment of the mortgage from the defendants in good faith can invoke § 892 for protection against a material defect in the first transaction. The defendants had not relied upon the correctness of the Register but rather upon their belief that the person who falsely joined in the creation, notarial certification and registration of the alteration of priority was in fact the same person as the registered party entitled to make the disposition - that is, the plaintiff.\textsuperscript{650} The plaintiff's mortgages therefore retained their priority and the defendants were obliged to join in rectification of the Register pursuant to § 894 BGB.

This reasoning is also supported by the Dissolved Partnership Case.\textsuperscript{651} A limited partnership\textsuperscript{652} named D & Co was founded in 1888 and became registered owner of the relevant land in 1905. It was dissolved in 1925 but the business was continued by the plaintiff's husband alone under the same firm name until 1927 when he died. The plaintiff then inherited the land from her husband but the registered owner remained the old partnership. The plaintiff founded a new limited partnership, adopting the old firm name D & Co. The events were recorded directly in Trade Register.\textsuperscript{653} In 1928, in the name of D & Co, a partner gave a mortgage over the land to the defendants to secure 30,000 Marks which was registered. The security was later in part, so far as it secured 18,000 Marks, assigned to new creditors. The plaintiff lodged a Contradiction against the remaining unassigned part of the original mortgage, viz security for an amount of 12,000

\begin{footnotes}
\item[649] See above n 647, 279.
\item[650] Ibid 280.
\item[651] (1932) 87 SeuffA Nr 28 (p 50).
\item[652] die Kommanditgesellschaft.
\item[653] das Handelsregister, which is somewhat equivalent to the Australian Company Register.
\end{footnotes}
Marks, and required that the defendant join in rectification of the Register on the ground that she owned the land and the security was ineffective against her. The defendants claimed a good faith acquisition protected by § 892. The Reichsgericht noted that this was not a case of insufficient authority in the business partner to transact on behalf of the new firm D. & Co. It was simply a case of the defendants relying on the identity of the two firms being the same. In reality, the registered owner had been dissolved in 1925, the true owner was the plaintiff, and the new firm had never been registered as owner.

Citing the Forged Priority Alteration Case, the court concluded that this was a material defect in the underlying transaction which the principle of public faith in the Register would not protect.

consolidated transactions

The Principle of Speciality also applies in the application of § 892. An essential distinction is thus drawn between the assignment of a Land Debt as an independent transaction and the assignment of a real security as one of the undivided assets of the corporate registered proprietor of it, upon sale of the company and its business. In the latter case, registration does not afford protection against defects in the general assignment transaction, but with respect to the former it does. This principle also applies to the assets of deceased estates which have been inherited in shares. Schmidt notes the application of the principle in cases of corporate reconstructions and mergers, inclining to the view that it is a legal-technical application of the Specialty Principle which

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654 See above n 647.
655 See above n 651, 51.
656 das Spezialitätsprinzip.
657 Deutsche Bank Subsidiary Case, above n 590.
generates practical inconsistencies which are difficult to reconcile.\textsuperscript{658} The real assets of the corporations merging or undergoing reconstruction are of enormous importance, and yet the state of the Land Title Register will play a very minor role in the transaction. This lack of reliance on the Register could be a justification of the rule, but then this, and other considerations, also apply to liquidation and the rule does not apply there by virtue of other legislation.\textsuperscript{659}

\textbf{(iii) Express Invocation of § 892}

The application of § 892 is expressly invoked in the following situations -

\begin{itemize}
  \item legal transactions with the holder of a registered right not covered by § 892 \textit{BGB},\textsuperscript{660}
  \item claims which a mortgagor is entitled under § 1137 \textit{BGB} to raise against a mortgagee,\textsuperscript{661}
  \item the rights of the holder of a Mortgage Letter have the status of registered rights so far as they ensue from a chain of notarised Assignment Declarations which reach back to a creditor whose mortgage security is actually registered,\textsuperscript{662}
  \item the continuity of objections which a mortgagor may make against a mortgagee in the relationship of the mortgagor with an assignee of the mortgage,\textsuperscript{663}
  \item the rights of a person entitled to the remainder of a deceased estate as against dispositions of estate assets made by a temporary beneficiary of the deceased estate which frustrate or detract from the rights of the remainder
\end{itemize}

\begin{thebibliography}
\bibitem{659}Ibid 519; § 305 \textit{Handelsgesetzbuch}.
\bibitem{660}§ 893 \textit{BGB}, which is examined in detail be below, commencing around n 956.
\bibitem{661}§ 1138 \textit{BGB}.
\bibitem{662}§ 1155 \textit{BGB}.
\bibitem{663}§ 1157 \textit{BGB}.
\end{thebibliography}
beneficiary,\textsuperscript{664} the assignment or burdening of an object of restricted family inheritance\textsuperscript{665} persisting under state law by virtue of § 59 EGBGB is subject to analogical application of the principles of good faith acquisition,\textsuperscript{666} real securities which existed in 1900 under state law to secure public financial assistance given for improvement of land, which were preserved and expressly subjected to §§ 892 and 893 BGB,\textsuperscript{667} real servitudes\textsuperscript{668} existing at the time when the Land Title Register was compiled for the relevant district. These did not have to be registered in order to maintain effect against interests acquired in good faith through the Register, but the states retained the power to enact legislation to the contrary.\textsuperscript{669}

(iv) \textit{Express Exclusion of § 892}

The application of § 892 is expressly excluded in the following situations -

- extinguishment of a real servitude by prescription,\textsuperscript{670}
- defences raised by mortgagees who have obtained their securities by assignment against objections which the mortgagor had, \textit{inter alia}, against the assignor of the mortgage,\textsuperscript{671}
- claims for arrears of interest, other mortgage obligations, and costs incurred in enforcing the mortgage, as between the mortgagor and a mortgagee who holds the mortgage by way of assignment,\textsuperscript{672}
- annuities and other real burdens subsisting under state law as a consequence of the dissolution of feudal social and property relations, which

\textsuperscript{664}§ 2113 BGB.

\textsuperscript{665}das \textit{Familienfideikommiß} - the usual translation of this term as \textit{entailed estate} is not necessarily accurate.

\textsuperscript{666}§ 61 EGBGB.

\textsuperscript{667}§ 118 EGBGB.

\textsuperscript{668}die Grunddienstbarkeit.

\textsuperscript{669}§ 2113 BGB.

\textsuperscript{670}§ 2113 BGB.

\textsuperscript{671}§ 1157 and 1158 BGB.

\textsuperscript{672}§ 1159 BGB.
do not have to be registered in order to be effective against public faith in the Land Title Register.\textsuperscript{673}

A real servitude existing at the time when the Land Title Register was compiled for the relevant district, which did not have to be registered in order to maintain effect against interests acquired in good faith through the Register, but the states retained the power to enact legislation to the contrary.\textsuperscript{674}

certain (feudal) rights of pledge and leasehold which under state law could persist as interests in land for ten years after the Bürgerliches Gesetzbuch took effect, and which did not need to be registered in order to defeat the principles of public faith in the Land Title Register.\textsuperscript{675}

An interesting situation concerning the express exclusion of good faith protection arose in the War Compensation Case.\textsuperscript{676} Early postwar legislation created a right to restitution\textsuperscript{677} of land taken by the NAZIs. The legislation excluded the priority which would otherwise be obtained through good faith acquisition of ownership. The plaintiff had purchased land in 1939 from Dr G, a Minister in the NAZI government, for 185,000 Marks, of which he paid 85,000 Marks in cash and the balance was secured by a mortgage in favour of the vendor. Dr G. assigned the mortgage to the defendant for payment of 100,000 Marks. By early 1940 these transactions were registered. Dr G. had obtained the land from Frau H. In 1950 she demanded restitution of it, and in 1954 the Landgericht at Berlin gave judgment in her favour.

With respect to ownership of the land, the war compensation legislation excluded the possibility of a defence based upon good faith acquisition. However, while restoring

\textsuperscript{673}§ 114 EGBGB.

\textsuperscript{674}§ 187 EGBGB.

\textsuperscript{675}§ 188 EGBGB.

\textsuperscript{676}1957) 25 BGHZ 27.

\textsuperscript{677}In this context called das Rückerstattungsrecht.
rights of ownership in the land, the legislation did not effectively abrogate mortgages because it did not exclude assertion that such an interest was obtained in good faith within § 892 BGB. The BGH saw a number of difficulties in challenging the good faith of the assignee of the mortgage. It is not enough that such assignees have a general knowledge of contrary claims, they must be aware of the manner and probable legitimacy of the relevant challenge to the interest secured by the mortgage. Further, despite knowledge of the facts, good faith can still be made out if the assignee concluded in legal error that the challenge to the interest being acquired could not be substantiated.

More evidence was needed about the defendant's knowledge of the transaction by which Frau H lost her land, its connection to assignment of the mortgage, and particularly about the defendant's beliefs concerning later claims for redress. The case thus had to be returned to the lower court at Berlin for findings of fact on these points. Even so, there were further difficulties, including the effect of the compensation legislation in "remaking" the mortgage as a new right. This decision was handed down on 26 June 1957. Perhaps not coincidentally, new war compensation legislation took effect a year later.

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678 In this respect § 1138 BGB applies § 892 to the claim itself.

679 War Compensation Case, above n 676, 32-3.

680 Bundesrückerstattungsgesetz of 19.7.1957 (BGBI I 734) which effectively converted claims for restitution of property to money claims against the West German government. Many similar issues have emerged with respect to land in former East Germany. Resulting problems were discussed by the BVerfG in the Compensation of Victims of National Socialism Case (1995) 48 NJW 1884. The court pointed out that in former West Germany restitution of property confiscated from Jewish citizens was made where possible straight after the war, and where not, compensation was paid. There was a defence of honest acquisition through juristic act, and if this was made out then compensation was available. In the case before it the land owner's father had acquired the land in 1937 from a Jewish citizen leaving under duress, and he inherited it. The lower courts would not extend the concept of honest acquisition through juristic act to inheritance. It was argued that the evidentiary presumption in favour of citizens forced into exile was unconstitutional, but the BVerfG concluded that no constitutional issue was raised. With respect to citizens forced into exile from former East Germany, the defence of honest acquisition has also been held not to contravene Art 14 GG, because it is a specification of the content and limits of ownership, and knowledge on the part of the purchaser of the compulsion to leave the DDR did not prevent an honest acquisition: BVerfG Exiled Couple Case (1993) 6 DIZ 239, (1995) 48 NJW 2281. See also Gesetz zur Regelung offener Vermögensfragen (Vermögensgesetz) von 23.9.1990 BGBI II, 889, 1159 [VermG]. See also War Crime Confiscations Case (1997) 50 NJW 446.
The Need for a Juristic Act

Only an acquisition made by a juristic act\(^{681}\) in the course of a real transfer transaction\(^{682}\) is protected by § 892. Therefore, registration of the transaction must follow from settlement of the transaction before a notary, in the course of which a joint declaration of the willingness of the parties to proceed to transfer of the relevant proprietary interest is made.\(^{683}\) As we saw with respect to the Hamburg system,\(^{684}\) there is good reason for this ceremony in a system of title by registration - it has the practical value of identifying the parties and ensuring that they understand the transaction in the presence of a public functionary who can ensure its formal validity. In the Impersonation Case\(^{685}\) a notary had been sued under § 839 BGB for negligent discharge of his task by not confirming the identity of the assignor of a mortgage. The Reichsgericht outlined the function of a notary in the land title registration process. The defendant notary was obliged by virtue of his office to ensure that the assignment was legally effective.\(^{686}\) This official duty made him responsible to anyone who was entitled to rely on the transaction, including the assignee.

A mortgage can only be assigned by the true mortgagee, and thus the notary must ensure that the person for whom he is documenting the transaction really is entitled to make the relevant disposition. Without some particular reason, the notary is not obliged to undertake an extensive inquiry, but must at least carefully examine instruments such as the Mortgage Letter with this in mind, and be alert to inconsistencies with the registered title. The court found that if the host of notes on the Mortgage Letter had been

\(^{681}\) der rechtsgeschäftliche Erwerb.

\(^{682}\) das Verkehrsgeschäft.

\(^{683}\) die Auflassung.


\(^{685}\) (1936) 150 RGZ 348
read the mistake of identity between the purported assignor and his deceased father would have become apparent. The notary should also have investigated how much remained secured by the mortgage, and from this inquiry the true position of the relationships would have emerged.687

The notary's role in the Auflassung, when verifying the parties' declarations of will and authenticating the juristic act, is yet more public. When registered, such a transaction will attract the good faith protection of § 892. A transaction which fails in this respect will not attract protection. Some relevant failures include defects in a power of attorney, or other authority to transact, and a failure with respect to the intention to assign. Even constructive knowledge of the defect will deny the party the protection of public faith.688 Subsequent reliance upon the Register by a party in good faith is nevertheless protected.

Acquisition by Operation of Law

The requirement of a juristic act implicitly excludes transactions which take effect by operation of law. In the Co-Owner's Mortgage Liability Case689 the Bundesgerichtshof concluded that the right of a second ranking mortgagee to satisfy the claim held by a first ranking mortgagee and step into its shoes is a transaction which takes effect by operation of law.690 Thus the transaction is not an assignment pursuant to a juristic act691 within the meaning of § 892, and public faith in the Register was not available to protect

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686 See § 839 BGB.

687 Ibid 353-4.

688 § 142 BGB. See below at n 927.


690 §§ 268 III, 1192 and 1150 BGB effect this.

691 die Rechtsgeschäft.
the second mortgagee from unregistered interests in the land.

Professor Dr Canaris has severely criticised this decision. In his view there is no unambiguous principle that a good faith acquisition of a registered interest is excluded when it takes effect by process of law. He drew attention to a number of similar assignments which are not completed by a juristic act, such as the acquisition of an interest in land protected by caveat, and charges available under company law, but which do attract the protection of good faith. Indeed, in a Civil Code based system where all proprietary interests are defined, and the method of assignment is specified by legislation, it is difficult to discern what takes effect by law and what is achieved by assignment. Canaris argued that the intention behind § 892 is to protect reliance on the Register, and thus an acquisition consequent upon a registered legal transaction should suffice. In other words, once an interest is on the Register by virtue of a legal transaction further dealings with it should be according to its registered form.

The acquisition of virtually all forms of property, real and personal, are subject to the protection of the principle of good faith acquisition. A transaction which falls all the way down through the multifariously interlocking web of the Civil Code to the fundamental rule, that one cannot assign what one does not have, has indeed fallen a long way. Such a result, argued Canaris, is to be avoided wherever possible, and in the Co-Owner's Mortgage Liability Case could have been avoided had § 892 not been so narrowly

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692 Case Commentary at (1986) 39 NJW 1488.
693 die Vormerkung.
694 § 366 Handelsgesetzbuch [HGB].
695 § 892 BGB.
696 § 932 BGB.
697 See above n 689.
interpreted. Further, § 893 could have been applied.

Another similar transaction which is not concluded by a juristic act is an acquisition by an act of state, including a court order. A Compulsory Mortgage does not attract the protection of good faith acquisition because it is created by court order. Nevertheless, when registered, and so long as the claim underlying the security continues, it could be acquired in good faith by a third party by a juristic act and thus obtain protection.

Unsuccessful Juristic Acts

The registration of transactions completed by Auflassung is not protected where the ceremony has been defective for the following reasons:

- defects in authority

The protection of the principle of faith in the Register does not extend to a power of attorney by which a relevant transaction is concluded. This extends to the instant transaction which is ultimately registered. Thus, in the Defective Power of Attorney

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698 See below following n 955.
699 die Zwangshypothek.
700 der Begründungsakt.
701 Compulsory Mortgage Case (1975) 28 NJW 1282. It was not necessary to reach a final decision on this issue because a Contradiction had been registered by the Land Title Registry itself, and this prevented good faith acquisition within the express terms of § 892. In the Hopeful Creditor Case (1908) 68 RGZ 150 a mortgage registered to the disadvantage of creditors in bankruptcy had been ordered by a court in the course of judgment debt execution; it therefore was not acquired by a juristic act.
702 die Vollmacht.
Case the defendant had obtained registration of a Land Debt. Because the assignor's power of attorney was defective, the Land Debt could not obtain protection by registration. There were other factors which also undermined the transaction. Primarily, it was found to be a transaction of appearances for minimal consideration, and good faith could not be claimed in aid of it.

The exception also applies to defects in the authority of other agents.

ambiguous intention to assign

The assignor's declaration of intention in the Auflassung ceremony must clearly relate to the property which is the object of the transaction. In the Forest Lane Case confusion on this point led to invalidity of the juristic act vis à vis the other party to it, and this was not remedied by § 892. The facts were that an uncle had in 1933 transferred one of his two neighbouring farms to each of his nephews, who were the parties to the litigation. Between the farms was a forest land parcel which belonged to the farm obtained by the plaintiff, and of which he became registered proprietor. However, some time before the transaction the uncle had a lane constructed through the forest. It appeared that the uncle intended this lane to be the boundary between the farms. The uncle died in 1939 and the defendant was his sole beneficiary. The Bundesgerichtshof concluded that there was a failure in the intention to assign to the plaintiff in the declaration at Auflassung.

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703(1931) 134 RGZ 283.
704 die Grundschuld. The facts are unclear whether it was obtained by assignment (ibid 290) or whether it was created in the relevant transaction (ibid 284) - one would presume the former.
705 ibid 288.
706 ibid 287.
The transaction was thus invalid and the plaintiff could not call upon the protection of § 892. A third party who had acquired registered title to the land from the plaintiff could claim the benefit of § 892. The result of failure of the transaction was that title to the entire forest land parcel fell into the uncle's unassigned residuary property, and thus was inherited by the defendant.

An Arms-length Legal Transaction

A transaction will be protected as a good faith transaction only if the juristic act was a valid event with at least one assignee who was not a straw man and who was at arms length from the assignor - that is, a regular third party acquisition. In the Case of Four Straw Men the registered proprietor of land, Paula G, was one of the transferee company's five shareholders. The company had been formed on the day that she offered to sell the land to it. Thus it was argued by a mortgagee which had been disadvantaged by the transaction, in view of revaluation legislation passed to stabilise the Mark, that the company could not claim a good faith acquisition under § 892.

The Reichsgericht considered that there was sufficient identity of the transferor and the transferee to prevent the transferee relying upon § 892. In addition, the lower courts had accepted that at the time of the sale the other four co-shareholders were mere straw men, or place holders, for the transferor Paula G. The sale transaction was merely one of appearance, only the legal form of holding the land had changed and the same natural person was still "in charge". Economically, the transferor could still deal with the land as

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708 der Dritterwerb.

709 (1930) 130 RGZ 390.

710 Aufwertungsgesetz: see Glossary.
she wished, but one of the requirements necessary to attract the protection of public faith in the Land Title Register, namely a valuable and real transaction, was not present.\footnote{711}

Economic identity of the assignor and assignee is thus sufficient to prevent the application of § 892 even if they are distinct juristic persons. This can also apply in family transactions. In the Hamburg Inheritance Case\footnote{712} title to family land had been registered in the name of the father, Heinrich R, alone. Pursuant to Hamburg law the land had been in fact owned by Heinrich and his wife as part of a general community of assets.\footnote{713} When his wife died Heinrich owned the land in a continuing community of property\footnote{714} with the two children of the marriage, the respondent and the applicant. Unfortunately, Heinrich did not realise that Hamburg law applied and imagined that he had owned the land in a legislative state of assets\footnote{715} pursuant to Book 4 of the BGB. If this had been the case, Heinrich would have been the sole beneficiary of the estate of his deceased wife - the situation which the Register portrayed. He attempted to transfer the land by way of gift to one of the children, the respondent. The applicant entered a caveat on the title. Heinrich died before the case was concluded, so it was not possible to re-establish the pre-existing position if § 892 was held not to apply. The transfer was not valid as the father lacked actual authority to execute it.

\footnote{711} A further issue arose from sale of the rights in the shares held by the straw men at a later point in the overall transaction. Naturally, the protection of § 892 applies only to acquisition of the title to land and not to the acquisition of shares. The interesting point, however, is that the Reichsgericht classified the right of the purchaser as a right to obtain assignment of the shares from the straw men \textit{(der Verschaffungsanspruch)}. On the other hand, Paula G was a beneficiary of the straw men. Both rights were merely obligatory \textit{(schuldrechtlich)}, but between them the right of the beneficiary was considered to be superior to that of the purchasers.

\footnote{712} (1959) 13 MDR 759

\footnote{713} \textit{die allgemeine Gütergemeinschaft}.

\footnote{714} \textit{die fortgesetzte Gütergemeinschaft}.

\footnote{715} \textit{der gesetzliche Güterstand}.
It was argued for the respondent that she had acquired the title by a good faith acquisition from her father who was the sole registered proprietor, and thus the transaction was protected by § 892. The Hamburg Oberlandesgericht noted that there was sufficient identity between the assignor and the assignee to preclude the protection of public faith in the Register. Even if the father and the respondent were unaware of the true legal situation, on the assignor side the land was in truth owned by the three family members collectively, and on the assignee side was one of the three. The assignee was thus a party to the right which had been assigned by the father acting alone. The court explained, however, that in all previous cases upholding this rule the assignee had been aware of the interest previously held and the underlying principle was that in such situations the assignee depends on this knowledge, and not on the legal situation revealed by the Land Title Register. To apply this principle where the assignee is unaware of the interest held as assignor would place her in a worse situation than that enjoyed by a complete stranger. The court concluded that the protection of § 892 should be available.\footnote{This disposed of the issue on appeal. However there were other issues to be disposed of by the court below. For one thing, the transaction was not supported by consideration. As the assignee had indeed acquired sole registered ownership, although the father was not in truth able to assign it, the most appropriate remedy was by applying the doctrine of unjust enrichment: see below following n 717. It was considered appropriate for the caveat to remain in place to protect this claim while consideration of the matter was concluded in the court below.}

identity of juristic personality

The principle that the assignor and the assignee must have distinct identity before the protection of § 892 can apply has an interesting application to the German practice of land owners granting to themselves Land Debt securities\footnote{\emph{die Grundschuld}.} and then assigning them to creditors when money is advanced, or handing over the Land Debt Letter and pledging...
the security. In the Restored Mortgage Case\textsuperscript{718} a registered mortgage for 20,000 Marks was discharged. The land owner granted himself a Land Debt for 30,000 Marks which he then pledged\textsuperscript{719} to a bank to secure an advance and handed over the Letter. This pledge was registered. Later the discharged mortgage was restored to the Register as security for 5000 Marks with a priority remark made in the Register that it was to rank before the pledged Land Debt. The bank challenged the priority remark. Although the land owner could not claim the benefit of § 892, as both grantor and grantee of the Land Debt, it was held that the bank was protected as registered pledgee of the security.

... a good faith assignee acquires, on the basis of the content of the Land Title Register when it deviates from the true legal position, something which to that point was absent from the material legal position, so long as the Land Title Register states it to be available. To the benefit of the good faith assignee the situation is to be as it appears from the Land Title Register.\textsuperscript{720}

The discharged mortgage could not, when restored, take priority ahead of the pledge of the Land Debt.

When a registered owner transfers ownership while reserving to him or herself a lesser proprietary interest such as a mortgage, the rule excluding the operation of the good faith principle from transactions between identical parties applies to the reserved lesser interest.

The rule also applies to the conversion of collective ownership into ownership in common between the same people. In the Revalued Mortgage Case\textsuperscript{721} the protection of § 892 was held not to apply to a transfer which converted the husband's share from a share in

\textsuperscript{718} (1926) 46 OLG 61.

\textsuperscript{719} On pledges of rights see §§ 1273 ff BGB.

\textsuperscript{720} Ibid 62.

\textsuperscript{721} (1929) 34 DJZ 918
a marital community of property to ownership in common. Thus half of the half share was burdened by a currency revaluation obligation which was restored to the Register. § 892 does not apply to a share in co-ownership created by the former sole proprietor, and therefore the share is burdened by unregistered interests which exist at the time of conversion to co-ownership. A purchase in good faith by a third party frees the shares in co-ownership of these interests. 722

identity of economic interest

As mentioned briefly above in relation to the Case of Four Straw Men, 723 separate legal personality does not lead to application of § 892 if economically there has been no real transaction. In the Javan Shareholder Case 724 the defendant held a mortgage over the relevant land to secure a loan of 30,000 Marks. The loan was repaid in paper Marks on 30 June 1922 and the mortgage was discharged on 28 September 1922. The land was owned in half shares by a businessman B and his acquaintance K. On 6 January 1923 they sold the land to a company which had been registered only two days before, and the Auflassung ceremony was conducted on the same day. The transfer was registered only three weeks later. B and K were the only shareholders of the company. They sold their shares to W of Java, but retained executive positions in the company on his behalf. On 30 June 1924 B reacquired all shares from W of Java.

The defendant entered a caveat on the title which was challenged by the plaintiff company. The Reichsgericht concluded that the separate juristic personalities of the co-

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722 The conclusion in Palandt that § 892 cannot protect the converted share of the original title holder even when acquired in good faith by a third party is not justified by the terms of the judgment, and explanation of that result could well lie in the terms of the Aufwertungsgesetz - the legislation which affected the revaluation: see Palandt, above n 542, 1080.

723 See above n 709.
owners of the land who sold it and the company which purchased it could not obscure
the identity of economic interest between the vendors and the shareholders of the
purchaser. In reaching this conclusion the court examined the underlying purposes of §
892, the first of which is the security of transactions for assignees who depend upon the
correctness of the Register. For this reason, the application of the provision is excluded
where the assignee has knowledge of the incorrectness of the Register. The principle of
public faith in the Register "... should not be absolute dogma." The protection is not
available when the assignor and the assignee are effectively the same person,
regardless of the legal form in which that person holds the relevant interests. Such a
person does not rely on the correctness of the Register. Further, the court pointed out,
the executive personnel of a company are its organs and in this case they were aware
that the unburdened title to the land being acquired was open to challenge for revaluation
of the mortgage discharged with paper Marks.

In the later cases, the exclusion from the protection of § 892 of a transaction between
two juristic persons with economic identity was justified not so much by the access of the
parties to information beyond the Register, and thus the absence of reliance upon it, as
the requirement of acquiring the interest through a juristic act which was a real arms-
length transaction. Although the reasoning in some cases employs both justifications,
employment of the awareness of the true situation implicit in the close relationship, and

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724 (1927) 11 RGZ 126.

725 Ibid 130.

726 A similar conclusion was reached in the Incorporated Chemical Firm Case (1927) 56 JW 1431 with
respect to a revalued mortgage and a transfer of land by a partnership [die offene Handelsgesellschaft -
oHG] to a newly formed limited liability private company [die Gesellschaft mit beschränkter Haftung - GmbH],
the shareholders of which were the former partners. Similarly, a transfer by a company [die Hausgesellschaft]
to one of its directors could not attract the protection of § 892 in competition with a revalued mortgage in the
Director Transaction Case (1929) 126 RGZ 45, esp 48, and, at least in principle, with respect to a transfer by
a man to a newly formed private company in which he held 29 out of 30 shares, and the other share was held
by his infant son, in the Infant Shareholder Case (1934) 143 RGZ 202 (a considerable part of this case is
devoted to interpreting a 1927 amendment of the Revaluation Statute.

727 As seen above in the Javan Shareholder Case, above n 724.
thus absence of reliance, seems to lead to outcomes favourable to success of the
registered transactions. Changing the basis of the exclusion seems to have reflected the
change of the Reichgericht’s attitude to the 1920s economic crisis, first enforcing the
transaction, and then allowing revision to counter speculation and real hardship. In the
Solitary Straw Man Case the relevant land title was transferred to a company, the
shares of which were held by the transferor (75%) and another (25%). In principle the
company would not have benefited from § 892 because the identity of the parties would
have precluded a real legal transaction, but it was not firmly established that the minority
shareholder was a mere straw man of the other. However, in view of the assignor’s
participation in the purchase, it seemed likely that the company would have been aware
of the former mortgagee’s claim arising from the currency revaluation, so the outcome of
the case depended on issues of knowledge and good faith acquisition.

The competing explanations, on one hand, entitlement to rely on the correctness of the
Register, and on the other, the need for an arms-length juristic act, were raised by the
facts of the Dissolved Mortgage Case. The former explanation was employed in order
to distinguish the earlier decisions on the economic identity of assignor. The case
involved the familiar transaction between co-owners. The mortgage securing rights
which arose from the currency revaluation was, however, registered. It was then
incorrectly dissolved before the transfer between the co-owners. The court concluded
that allowing the transfer the protection of § 892 in this situation would not contradict the
objective of § 892 any more than if the transferee had been a completely unconnected

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728 See generally J P Dawson, “Effects of Inflation on Private Contracts: Germany, 1914-1924” (1934) 33

729 (1930) 59 JW 3740.

730 (1927) 58 JW 2521.
third party.\textsuperscript{731} In other words, the co-owners were entitled to rely on the correctness of the removal of the mortgage from the Register, in which they played no part, although they would have been obliged to join in the reinstatement of it. Only four months later the opposite conclusion was reached with respect to virtually identical facts in the \textit{Dissolved Mortgage Case 2},\textsuperscript{732} perhaps without reference to the earlier case.\textsuperscript{733} The acquisition of ownership from former co-owners by one or more of the same co-owners could not be compared with an acquisition by a completely unconnected third party, the court concluded in terms which virtually echo the words of the earlier judgment. The critical point of disagreement seems to be that the second court interpreted the legislation\textsuperscript{734} which created mortgages for securing rights stemming from the currency revaluation as creating obligations on the registered owners when the registered mortgage was incorrectly dissolved. In this controversy the court concluded that the likelihood of personal knowledge on the part of the transferee, and thus absence of reliance on the Register, was not such an important factor as the requirement of a real arms-length legal transaction.

(b) \textit{Operation of the Basic Principle of the Protection of Good Faith Acquisition}

When the preliminary factors are satisfied, § 892 accords the status of correctness and completeness to the content of the Land Title Register in order to secure certainty in the acquisition of proprietary interest in land.\textsuperscript{735} This status is accorded to ensure the validity of a good faith acquisition: where an assignee is not aware of the true state of affairs not

\textsuperscript{731} Ibid 2522.
\textsuperscript{732} (1928) 57 JW 522.
\textsuperscript{733} The report of the second case is a brief abstract.
\textsuperscript{734} Aufwertungsgesetz - Revaluation Statute.
\textsuperscript{735} Palandt, above n 542, 1080.
revealed by the Register, and where no Contradiction is registered on the title. If the registered proprietor was, for the benefit of a particular person, limited in his or her power of disposition then the assignee is also affected by the limitation only if aware of it or it was discernible from the Register.

Operation of the principle is illustrated by the Dissolved Right of Pre-Emption Case.736 The plaintiff had apparently concurred in the dissolution of her registered right of pre-emption. The notary lodged her dissolution consent at the registry with the contract of sale of the land to the defendant, and the dissolution was registered along with a caveat to protect the contract. Title to the land was later registered in the name of the defendant. The plaintiff demanded reinstatement of the pre-emption because, she claimed, the consent documents had been completed without her concurrence. The defendant succeeded, in the end before the BGH, because on the day when she was registered as owner the pre-emption had already been removed from the Register. The ownership had been acquired unburdened and in good faith. The BGH took issue with the lower court's statement that § 892 offered concrete trust in the state of the Register, emphasising somewhat cryptically, that for a good faith acquisition within the meaning of § 892 there is as little need to have knowledge of the state of the Register as there is to have actual trust in it, or to demonstrate causality between the state of the Register and the acquisition. In other words, so long as the Register did portray a state of affairs upon which, if accurate, the acquisition would have been well grounded, the portrayal is to be deemed accurate even if the transferee never even searched the register. In the case before it, the plaintiff could not establish that the defendant or her representative had positive knowledge of any incorrectness in the Register, and that was the crucial issue.
(i) Content of the Register Accorded the Status of Correctness

The content of the Land Title Register for the purposes of good faith acquisition, and thus which is accorded the status of correctness includes -

- the totality of rights and limitations of powers of disposition which are capable of registration disclosed by the registration entry on the relevant certificate of title, which for these purposes includes the documents provided for in § 874, namely the registration consent.
- relevant Mortgage Letters pursuant to § 1155.
- details concerning the existence of the land stated in cadastral records also attract the protection of § 892.

(ii) Interpretation of the Register Entry

The meaning of registration entries upon which the good faith assignee has relied is important in deciding what "state of the Register" is to be deemed correct in his or her favour. Legitimate interpretations of the entries, and the relevance of the circumstances surrounding both the initial registration and the interpretation of the entry, are thus issues open to dispute.

Ascertainment of the incidents of an easement, for example, involves interpretation of its foundation documents, the registration entry and the original registration consent in the light of surrounding circumstances. The question of whether the nature of an easement, objectively ascertained at the time when the dominant tenement was purchased, is to be protected by the principles of good faith acquisition was considered in the Incidents of

738 der Hypothekenbrief.
739 The connection of the land information Cadastre to the Land Title Register has been dealt with above in text at n 519.
In 1913 an easement for passage on foot and by vehicle had been created over the plaintiff's land. It passed from a court area, through a passage in the plaintiff's building and there was a gate where it emerged at the street. The easement was registered on the title to the servient tenement with an express reference to the registration consent for the allowed volume of use. In World War 2 the buildings on both the dominant and servient tenements were destroyed. The plaintiff's property had been rebuilt by 1965, whereas the defendant's had already been rebuilt in the immediate post-war years, but with some differences. The main door to the residential area of the defendant's property was built facing the easement, and not in the street as it had originally been.

The plaintiff successfully challenged this use of the easement, arguing that it exceeded the agreed use. The BGH confirmed that the content and extent of an easement is to be ascertained from the text and the sense, as it would appear to an impartial observer as the most obvious meaning. The primary material of this interpretation is to be the register entry and the registration consent. The circumstances of the grant may also be drawn upon, so far as they are visible to everyone, in construing it. The relevant circumstances are those of the time when the easement was registered and in 1913 it was clear to anyone that the easement was granted in order to connect the rear court area with the street. Economic and technological changes can lead to an expansion of the extent of the easement, but only within the manner of use originally conceived, and only so far as would have been foreseeable at the time when it was created.

The defendant's claim to have acquired the land in good faith without knowledge of the limitation of use of the easement was also rejected. § 892 protects good faith reliance upon the content of the Land Title Register and the connected registration consent, and

thus guarantees the existence of the right, but so far as the circumstances apparent to all may be drawn upon when ascertaining permissible use of the right, the relevant time is the registration of the easement and not the time when the defendant acquired it with the dominant tenement in good faith.

Incorporation by Reference

interpretation of the relevant registration entry in the light of the circumstances of its making also raises the question of the status of other sources of information referred to in it.\(^{741}\) In the *Disputed Islands Case*\(^{742}\) the status of land tax records was considered. It concerned a Knight's Manor, an old tenure which appears to have corresponded to Knight Service,\(^{743}\) in the formerly Prussian region of Königsberg. Ownership of the manor was recorded in the Land Title Register, along with some other information which included the total area of the lands which comprised the manor, and a reference to the land tax records which listed the land parcels comprising the manor, including two islands in the Daddensee. The defendant contended that he had acquired the islands by adverse possession up to 1872. The plaintiff asserted that the reference on the certificate of title to the land tax record incorporated it into the Land Title Register for the purposes of good faith acquisition. The Reichsgericht stated -

... the content of the Land Title Register only comes into consideration with respect to an acquisition in good faith, ..., so far as it concerns a legal relationship, and therefore the particulars in the Land Title Register concerning purely factual circumstances of the land parcel, particularly the area of the land parcel, do not partake of public faith in the Land Title Register. However, the record establishing that a particular area of land belongs to a particular land parcel serves to specify the object of the right.

\(^{741}\) The status of cadastral information has already been dealt with above following n 519.

\(^{742}\) (1927) 56 JW 44.

\(^{743}\) *das Rittergut*. 
registered in the Land Title Register ... If the Land Title Register therefore reveals to which defined part of the Earth's surface the registered right relates, then this content is within public faith in the Land Title Register.744

Any other conclusion would thwart one of the greater objectives of the Land Title Register in providing a guarantee of real securities upon which the security of trade depends. Here the reference to the land tax record on the certificate of title served the same purpose as an equivalent reference to the cadastral records. The record thus constituted part of the Register and the protection of public faith in § 892 extended to it.745

Shared Intentions

The issue of the shared intentions of the parties to a contract of sale with respect to the boundaries of the right being acquired forms an interesting exception, and almost raises a presumption in favour of the possessory boundaries. In the Frankenthal Triangle Case746 the sale transaction was about to be completed by Auflassung and Registration when the purchaser consulted the cadastral maps and discovered that they included with the land parcel which he was purchasing a triangular area of land which had been occupied by neighbours since 1857.747 He claimed a good faith acquisition of the title to the triangle by virtue of § 892. The Landgericht at Frankenthal made a very masterful summary of the principles discussed above. It noted that a purchaser was not prevented, through awareness of doubts about the correctness of the cadastral plan,
from asserting a claim for rectification of a boundary which the vendor could have made. However, with respect to the triangle, at the time of sale, objectively construed, the vendor and purchaser both had in mind the land bounded by its "natural" possessory boundaries, and not the parcel described in the cadastral plans, and this was the only object of purchase with respect to which a valid Auffassung could have taken place. If, on the other hand, the plaintiff had intended the whole time to acquire the title as described in the cadastral documents, while the vendor according to the evidence had intended to sell the land in its possession, then there was no meeting of minds, and a valid contract could have been concluded only if the parties would have gone ahead even without agreement on the point. 748

Purely Factual Information

Purely factual information which is not protected in a good faith acquisition includes -

the land use and location set out in column 3e of the index of properties in the Land Title Register, 749

the area of the land set out in column 4 of the index of properties in the Land Title Register,

essential component parts, or fixtures, to land or buildings 750 which might be described, for example, in building records. These can be used to establish "the factual circumstances recognisable by anyone" when ascertaining the content of registered rights. 751

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748 § 155 BGB. Note that actual possession of land is the final determinant of the location of a disputed boundary, if all other methods fail: § 920 BGB.

749 das Bestandsverzeichnis - generally pages 2 and 3 of the standard certificate of title.

750 §§ 93-95 BGB.

(iii) *Deeming the Registered Party to be Truly Entitled*

The effect of § 892 is that the person registered as entitled to a right in good faith is to be deemed truly entitled to that right. As already noted, the text of the provision itself creates a number of exceptions to this. For example, as with § 891, if the grantor was not registered with respect to the right, then a registered grant must rest upon the strength of the right itself and for the purposes of § 892 is not assisted by registration. This leads to a distinction between the original creation of a right and the transfer of a right. Also, § 892 (2) specifies the lodgement of a transaction for registration as the relevant time at which the transferee must be in good faith.

These issues were explored by the BGH in the *Discovered Will Case*. Before she died in 1945 Maria H was the registered owner of the relevant land. A Certificate of Inheritance was issued naming 28 beneficiaries of her apparently intestate estate. Together they sold an area of the land to the plaintiff and this was documented notarially on 27 January 1958. Possession had been given on 31 December 1957 and the purchase price paid. The vendors were to remain liable for any defect in title. The plaintiff entered a caveat in anticipation of settlement and this was registered on 7 March 1958. In July 1960 the Maria H's will of 29 November 1927 was discovered, and it appointed the City of Nuremberg as the beneficiary. The Certificate of Inheritance was revoked on 12 August 1960 and this was communicated to the plaintiff in a letter dated

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752 With respect to mortgages, § 1155 BGB places the unregistered assignee of a mortgage in the same position as a registered assignee when its preconditions are met.

753 As noted above, this aspect was the subject of considerable debate and division during the drafting of the Bürgerliches Gesetzbuch: text above following n 110.


756 die Auflassungsvormerkung.
16 September 1960. The plaintiff was registered as owner on 11 October 1960. The City obtained registration of a Contradiction on 24 March 1961 on the basis of an injunction. The plaintiff commenced litigation against the vendors for damages for failure to perform the contract of sale in view of third party interests in the land. They argued that the plaintiff had made a good faith acquisition of the land in the terms of § 892 BGB before being made aware of the revocation of the Certificate of Inheritance which underlay the vendors' title.

The BGH quickly confirmed that a good faith acquisition could not have occurred within the terms of § 892 BGB because the vendors were not registered proprietors of the proprietary right which they sought to assign. However, § 2366 allowed a valid disposition of an estate asset on the basis of a Certificate of Inheritance. The issue was that a proprietary right to the asset appeared not to have been acquired before the plaintiff became aware of the defect, and thus could no longer be considered in good faith. The nature of the registration of a caveat was thus placed squarely in the spotlight, the court accepting that consideration of the issue under both § 893 and § 2367 posed largely the same question. The caveat, the court concluded, is not a proprietary right over a land parcel, but is a security instrument of a special nature, especially suitable to lend proprietary effects to protected claims within certain limitations. The caveat achieves a proprietary restriction of the land parcel which it affects, and therefore the approval of a caveat by the other party to the transaction, when it is followed by registration, is to be seen as a disposition in the sense of § 893. Therefore, through the application of § 892, the caveator obtains the protection of good faith, not merely for the existence of a contractual claim, but from the proprietary restriction of the title to the land affected by the caveat. The plaintiff's good faith acquisition of the caveat remained decisive for the later acquisition of the proprietary right. It was thus insignificant that the

757 See above n 754, 435.
plaintiff became aware of the incorrectness of the Certificate of Inheritance before registration as owner.⁷⁵⁸

The correctness and completeness of the Land Title Register are deemed by § 892. An assignee who has not in fact considered the content of an inaccurate register, and thus could not have relied upon it, is as much entitled to protection as any assignee who relies on the content of an accurate Register.⁷⁵⁹ Although knowledge of the incorrectness undoes a good faith acquisition when the assignor is not truly entitled to assign, knowledge of an earlier error in the Register does not prevent acquisition from an assignor who is truly entitled to assign.⁷⁶⁰ An example of this is provided by § 313 BGB. Although a transaction concerning an interest in land must be documented by a notary, an error in this regard does not prevent the entire content of the contract being deemed correct if the Auflassung ceremony and registration are completed. Knowledge of such an error thus could not exclude good faith, so long as § 892 is engaged in all other respects.

The good faith acquisition of a right over a registered right, such as the pledge of a registered security, enjoys the priority which the Register reveals. Registered interests incorrectly deleted at the relevant time, when later restored, must be restored to a priority position behind the right acquired in good faith.⁷⁶¹

The effect of § 892 on the relationship between parties to an impermissible transaction, and their relationship to a third party, is illustrated by the Case of the Guardian without

⁷⁵⁸ ibid 436.

⁷⁵⁹ Dissolved Right of Pre-Empition Case, above n 736.


⁷⁶¹ See Restored Mortgage Case, above n 718.
The first party was the guardian appointed to assist the second party with her affairs in view of her disability. The second party was the registered owner of the relevant land. In 1965 she granted to her guardian a Hereditary Building Right and, for the benefit of the proprietor of the Building Right from time to time, a right of pre-emption over her ownership remaining in the land. The guardian granted to her, as the owner, a right of pre-emption and a real security over the Building Right. The Guardianship Court gave permission for the transactions and they were registered in the Land Title Register and the Register of Hereditary Building Rights. In 1967 and 1968, the guardian granted four more real securities over the Building Right in favour of third parties. The guardian executed the relevant documents also on behalf of the owner.

In 1986 the Local Court had an Office Contradiction registered in the Land Title Register, for the benefit of the owner, against the registration entries of the Building Right and the right of pre-emption. The entry of these Contradictions was also noted in the Register of Hereditary Building Rights, where Office Contradictions were also entered against the real securities which the guardian had granted to third parties. The guardian appealed against the entry of the Office Contradictions.

Two preconditions for the entry of an Office Contradiction were, first, that the instruments were originally registered in legal error, and second, that the Land Title Register was still in error at the time when the Contradiction was entered. An incorrect Land Title Register

763 das Erbbaurecht.
764 das Erbbaugrundbuch.
765 Grundpfandrechte.
766 das Amtsgericht.
767 der Amtswiderspruch.
can be made correct by the registration of a good faith acquisition in the mean time. This was not to be the case with respect to the Hereditary Building Right and the right of pre-emption, although the former at least, had in the mean time been burdened by the real securities. To the benefit of the proprietor of the real securities over the Building Right, the Land Title Register was to be deemed correct unless he was aware of the incorrectness, otherwise a good faith acquisition of the securities would not be recognised. Nevertheless, the Building Right did not exist absolutely, because § 892 operates only to the benefit of the assignee, and not to the benefit of third parties generally. Thus the Land Title Register did not attain an unrestricted correctness through good faith acquisition of the real securities. In the relationship between the land owner and the guardian it remained incorrect. The Office Contradiction had to remain for the benefit of the land owner in order to protect her against further loss of rights through further burdens or assignments in favour of good faith third parties. The Contradiction was thus correctly entered.

(iv) The Position of an Unregistered Proprietor - absolute and relative priority relationships

The position of one who has been registered as the proprietor of a registered right, but has lost registration, is, as against a good faith assignee, also relative. The unregistered proprietor loses the right or it is diminished to a relative extent. For example, consider the situation if the mortgage held by Party A for 2000 Marks is incorrectly removed, and afterwards a mortgage for 5000 Marks is registered in favour of Party B who is not in

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768 der Rechtsverlust.

769 See above n 762, 300-1.

770 This example is taken from Palandt, above n 542, 1081. The principle that a good faith acquisition must be an assignment, and not an original creation of rights, is not so important in the creation of securities in practice, first because of the common practice of the owner creating a security and then assigning it to the
good faith, but then a further mortgage for 3000 Marks is granted to Party C who is in
good faith. Party A loses priority to Party C, but not to Party B, and this is described as a
relative priority relationship.\textsuperscript{771}

The distinction between relative priority and absolute priority was explored in the
\textit{Disappointed Savings Bank Case}.\textsuperscript{772} On 10 November 1924 a Land Debt for 25,000
Gold Marks was registered in favour of D Ltd in the tenth position in the securities section
of the Certificate of Title to the relevant land. At that time there was only one other
registered security which remained outstanding, a mortgage securing 38,000 Marks
which had been registered in ninth position on 9 January 1919. The mortgages
registered in second, fifth and seventh positions had been discharged before World War
1. The mortgage registered in sixth position had been discharged on 9 January 1919.

However, four mortgages in favour of a Savings Bank had been discharged on 12
December 1922 with devalued currency. They had been registered in the first [10,200
Marks], third [3000 Marks], fourth [3300 Marks] and eighth [12,500 Marks] positions.
They were reinstated pursuant to the Revaluation Statute into positions eleven [2550
Gold Marks], twelve [1500 Gold Marks], thirteen [825 Gold Marks] and fourteen [3103,25
Gold Marks]. The mortgage registered in position nine was revalued at the same time to
7600 Gold Marks. Beside these entries the Land Title Registry entered remarks to the
effect that the mortgages in favour of the Savings Bank had better priority than that
registered in position nine. A remark was also entered beside the Land Debt entered in
position ten to the effect that, by virtue of the Revaluation Statute, with respect to 8000
Gold Marks the Land Debt (10) was to rank behind the Savings Bank mortgages (11, 12,
\textendash

\textsuperscript{771} \textit{das relative Rangverhältnis}.

\textsuperscript{772} (1927) 5 JFG 397.
D Ltd sought amendment of these entries, arguing that the same priority should be accorded as, analogically, would have ensued if there had been a reservation of priority. The registry refused to make the amendment and the company appealed. In the meantime the mortgage registered in position nine was discharged. In view of this discharge, the court noted, the appeal question was effectively settled. The Land Debt in position ten was entitled to first absolute priority. The court noted, however, that if the Land Debt had remained registered the appeal would have failed and undertook a very extensive analysis of the situation.

The court noted that the Land Debt had been acquired in good faith at a time when there was only one prior registered right. When the Savings Bank mortgages were restored to the Register they had to rank behind it in view of § 892. The priority ranking of the mortgage registered in position nine, lower than the Savings Bank mortgages, would however remain the same, and the Land Debt ranked behind this mortgage. Between real securities, the court noted, the priority is to be determined as though the proceeds of compulsory sale had to be divided.

The court stated the principle of absolute priority relationships which, it said, is the only system of priority expressly referred to in the BGB. Pursuant to § 879 (1) BGB several

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774 The court expressed the finding that the holder of the Land Debt (10) was not aware of the removed mortgage very tentatively - "... der Grundschuld Nr. 10, deren Inhaberin von den Vorinstanzen bis zu dem bisher nicht erbrachten Nachweise der Bösigläubigkeit mit recht als gutgläubig angesehen worden ist,..." - in other words, bad faith not having been established, the company is to be viewed as in good faith. Such doubts, which are common in the currency crisis cases, reflect the suspicion that general knowledge of the worthlessness of the paper Mark must challenge good faith acquisition, and were fully discussed by v. der Trenck in "Zum Problem der Bösigläubigkeit im Aufwertungsrecht" (1928) 55 JW 2661 and P Ratz "Die Aufwertung und der öffentliche Glaube des Grundbuchs" (1928) 28 AcP 309.

775 See above n 772, 400.
rights in a land parcel are ranked in serial order. Each right has a specified priority position before and after the other rights. For rights registered in the same section of the Certificate, the time of registration determines the order of priority. The priority order can be changed, but only in an absolute sense, pursuant to § 880 for example which provides for a priority exchange in which the priority of the other existing registered rights must remain unaffected, confirming their absolute priority. There is also provision in § 881 for priority reservation and exchanges, and these also lead to the formation of absolute priority relationships. The registration of a mortgage which reserves superior priority, pursuant to § 881, has the consequence of establishing absolute priority relations. The extent of the superior priority of the superior mortgage is reduced, in favour of the mortgage which held the reservation, to the total amount of the rights registered without reserved priority registered in between pursuant to § 881 (4).

This idea is clarified by consideration of §§ 880 and 881. Both § 880 (5) and § 881 (4) seek to confine the impact on third party rights of priority arrangements which deviate from the norm. So far as § 881(4) is concerned, this confinement is expressed inversely as a restriction on the advantage to be gained by making a reservation of priority. If we think of the common German practice when seeking credit on the security of land the repercussions are clearer. Imagine that a land owner registers on his or her own title a mortgage which reserves priority for 100,000 Marks. Two other real securities are then granted for 20,000 Marks each, without lending them the reserved priority. These

776 *der Rangtausch.*
777 *die Vorrangshypothek.*
778 *die Vorbehaltshypothek.*
779 *die Zwischenrechte.*
780 See above n 772, 402.
781 *die Vorbehaltshypothek* or "reservation mortgage".
are registered as "in-between rights"\textsuperscript{782} behind the "reservation mortgage". The land owner then obtains a loan for 150,000 Marks which is to be secured by a mortgage which will take the superior priority which has been reserved. Although in order of time this mortgage is registered after the "in-between rights", it is the superior mortgage.\textsuperscript{783} The effect of § 881 (4) is that the superior mortgage can enjoy the reserved priority only to the extent of the reservation - 100,000 Marks. The enjoyment of the reserved priority is reduced by the amount to which it exceeds the total amount of the in-between rights, which total 40,000 Marks. The order of priority would thus be - (1) superior mortgage - 100,000 Marks (2) in-between rights - 40,000 Marks (3) balance of superior mortgage 50,000 Marks.

Although the BGB speaks only of absolute priority relations, the court noted that the civil law also recognises relative priority relations.\textsuperscript{784} A right over land follows in priority another right which, for its part, has a priority behind the first-mentioned inferior right - such as, when a superior registered mortgage is incorrectly removed from the Register, and then, after removal but before reinstatement, a new right is registered which is protected by the principle of public faith in the Register. There is no exchange of priority between the newly re-registered mortgage and the new right which was registered after the removal of the first. The proprietor of the new right is only protected by § 892 so far as he or she saw the Register as correct, and thus the removed mortgage as non-existent. In the case of a compulsory sale he would have a claim to be assessed as though the restored mortgage was not present. His claim does not extend to the acquisition of a priority position ahead of other rights which were already registered when his right was registered. On the other hand, the restored mortgage has priority before

\textsuperscript{782} \textit{das Zwischenrecht}

\textsuperscript{783} \textit{die Vorranghypothek.}

\textsuperscript{784} See above n 772, 402-3.
those rights which it formerly preceded, since, irrespective of the removal, it continued in existence with its former rank outside the Land Title Register. It need defer only to the newly registered right on account of § 892, and then only when and in so far as the newly registered right is to be satisfied from the proceeds of a compulsory sale, after satisfaction of the interests which preceded it when it was registered - in other words when the total amount of the proceeds of sale exceed the total amount of the rights which precede it. If that were not the case, then the restored mortgage could succeed to priority before the right newly registered in good faith, and so far as the proceeds of sale do not exceed the extent of the restored right, also before the other later rights. This follows from the observation that the BGB nowhere requires that a right acquired in good faith reliance on the non-existence of a removed right should take the place in priority of the removed right, nor that it can maintain a superior right. § 892 is the only applicable provision supporting a better right than the restored right. § 880 is not applicable because it contemplates a legally executed agreement for alteration of priority, while the situation under consideration is the effect of a legislative protection of public faith in the Land Title Register. The position of the new right, acquired in good faith, behind those already registered, has a only a conditional superiority over the restored right - it is not a superior priority in the sense of § 880. As against the restored right, it is not an absolute but a relative priority.785

The Revaluation Statute did not alter this position of the civil law. § 7 of the Statute effected a statutory reservation of priority for the revalued savings bank mortgages, ahead of the mortgage in position nine, but only for the amount of 8000 Gold Marks.786 There was no justification for the analogical application of § 880 BGB to the problem, as though there were an exchange of priority positions. For one thing, such an

785 See above n 772, 404.

786 25 per cent of the pre-revaluation value of the pre-war mortgages according to a statutory formula.
interpretation would ignore the distinction between relative priority relations, by virtue of good faith acquisition, and absolute priority relations effected by a priority agreement in the sense of §880. It would also lead to the Savings Bank mortgages absorbing the full impact of the revaluation. How far an analogical application of §881 BGB was justified by the creation of a statutory reservation of priority, and the consequent restriction of the superior mortgage in favour of the in-between rights, would not have to be considered until a compulsory sale were completed and it would be clear how much was available and which rights remained in competition.

In conclusion, the court considered that the order of registration and the marginal priority remarks made by the Land Title Registry were correct and would have remained so if the mortgage in position nine had not been discharged in the course of the case. In other words, the restored Savings Bank mortgages enjoyed first absolute priority for the amount of 8000 Gold Marks because of the statutory reservation of priority. However, the holder of the Land Debt in position ten had a better relative priority to this amount through its good faith acquisition. Next ranked the balance of the Savings Bank mortgages which had preceded the mortgage in position nine before removal, and thus were entitled to this position on reinstatement. Then ranked the mortgage in position nine, which had absolute superiority over the Land Debt in position ten. Finally ranked the balance of the Land Debt in position ten. With the mortgage discharged from position nine, the Land Debt in position ten could advance to first position.

(v) Claims for Damages and Possession

Upon loss of a registered proprietary interest through a good faith acquisition, the claims of the party formerly entitled against the good faith assignee of the proprietary interest

787 See above n 772, 407.
itself are limited.

Unjust Enrichment

§ 816 (1)(ii) provides a claim in unjust enrichment against one who obtains a legal advantage to which they are not entitled. The difficulty in employing unjust enrichment is that a person who has obtained registration in good faith is entitled to the right, unless the transaction was gratuitous. The object of the unjust enrichment claim is primarily to recover the benefit, rather than the property itself, where the property is no longer available to satisfy the claim of the former owner for its return because of good faith acquisition.

The possibility of a claim in unjust enrichment is particularly relevant when the true proprietor of an interest in land loses it or suffers a diminution of it through operation of the principles of good faith acquisition. Specific provision is made in § 816 with respect to dispositions of property by a person without title or authority to make them. The application of the principles to a simple sale and transfer transaction is relatively straightforward. The good faith transferee obtains title. The true owner then has a claim in unjust enrichment against the "book owner" who made the transfer for the proceeds of sale or other value obtained. The proceeds are regarded as the "surrogate" property of the true owner, and thus extend to profits which the true owner might otherwise have made. If the book owner gives the proceeds to another third party, without value, that third party is obliged to return them to the true owner of the lost title. This relatively simple equation of direct claims becomes more complex in less straightforward...
transactions, such as the grant of a real security in a loan transaction. In this case there is controversy over what is to be regarded as the enrichment or valuta. Schuler maintains that the "book owner" has obtained the advantage of being able to offer a security over the land, and the only claim of the true owner is for elimination of the security, presumably through repayment of the loan or the substitution of another security. If the security was obtained in the course of a security-swap the true owner should be entitled to the former security. Not surprisingly, the clumsiness of this approach has drawn criticism. Pütz maintained that the actual valuta in such a transaction is the advance of money itself, and the true owner should be entitled to it.\textsuperscript{791} Applying principles of trust and faith \textit{[Treu und Glauben]},\textsuperscript{792} which would require reciprocity, the now compensated true owner would then be required to assume obligations to the security holder to repay the advance. If the security holder would accept another security, then this should be the better option.\textsuperscript{793} Far less certain is the relationship of the true owner to other property of the "book owner" which might have been obtained with the advance of money. As the value of the enrichment is viewed as "surrogate property" of the true owner it seems entirely logical to allow recovery from the acquired property, permitting the notation of a caveat, or at least a litigation remark, on the relevant certificate of title in order to secure the claim.

Morally Dubious Transactions

\S\ 826\textsuperscript{794} provides a head of claim where the defendant has caused a loss to the plaintiff through behaviour contrary to good morals. This cause of action was unsuccessfully

\textsuperscript{791} Commentary of J Pütz at (1962) 15 NJW 1842, 2332.

\textsuperscript{792} \S\ 242 BGB.

\textsuperscript{793} See the rejoinder of Prof Dr Schuler at (1962) 15 NJW 2332-3.

\textsuperscript{794} Set out in Appendix III.
pursued in the *Disgruntled Mortgage Bank Case*.\(^{795}\) The plaintiff, a mortgage bank, had held an instalment mortgage\(^{796}\) over land in Berlin since 1895, initially securing 800,000 Marks. By 28 June 1923 this amount had been reduced to 648,593.30 Marks. In March 1922 the land owner, the Charlotten- and Markgrafenstraße Land Holding Co Pty Ltd, which was a subsidiary\(^{797}\) of the Union Building Co Ltd, gave notice that it wished to pay out the mortgage. The plaintiff wrote back twice protesting against repayment in paper Marks. Eventually in June 1923 the plaintiff executed a document acknowledging receipt of the repayment "... in present day paper Marks to the nominal amount ..." and consenting to discharge of the registered mortgage. This document was dispatched to the mortgagor with a letter explaining that the plaintiff did not consider itself satisfied and reserved to itself all available claims.

Soon the first revaluation legislation was passed and the plaintiff wrote on 17 March 1924 asserting its new statutory claim to revaluation and reinstatement of the mortgage. Nevertheless, the mortgage was removed from the Register on 25 April 1924. Through a contract of sale dated 15 May 1924 the defendant, another public company, was registered as owner of the land on 2 June 1924. The plaintiff obtained an injunction, on the basis of which a Contradiction was entered, and pursued its claim for reinstatement of the mortgage against the defendant.

Most of the Reichgericht's judgment was devoted to weighing up the evidence gathered in the lower courts as to whether the plaintiff's protests could amount to a reservation of its title to the mortgage, generally and according to the terms of the Revaluation Statute;

\(^{795}\) (1927) 117 RGZ 181.

\(^{796}\) Die *Tilgungshypothek* is equivalent to the usual Australian home loan mortgage, under which the periodic payments comprise both interest and a principal repayment instalment.

\(^{797}\) *Die Tochtergesellschaft*. 
whether in view of the generally known facts about the plaintiff's plight in the currency crisis and the revaluation the defendant had a duty to consult the plaintiff about the discharge of its mortgage, and whether the defendant was aware of the plaintiff's protests and thus could not be considered to be in good faith within the terms of § 892. The plaintiff was unsuccessful on all these grounds, although the court clearly agonised over the evidence found below. While it seemed highly unlikely that the defendant was unaware of the plaintiff's protests there was insufficient evidence to discharge the burden of proof on the plaintiff. Further, even if the defendant was aware of the protest in the public mortgage discharge document, "... in present day paper Marks to the nominal amount ...", it was a reasonable legal error to conclude that they had no legal substance, especially as the Land Title Registry was prepared to register the discharge with the same knowledge.

Having concluded that the defendant was not particularly in bad faith, but on the other hand not in any way particularly in good faith, the way was open for consideration of § 826. The issue was that, if there was no legal error which was justifiable in the circumstances, then it could be that the defendant was consciously exploiting an actual subjective state of legal uncertainty in such a way that a breach of good morals had to be perceived in the damage which it had thus intentionally caused to the plaintiff.

The Reichsgericht concluded that the factual findings did not justify this conclusion. For one thing, the defendant's legal assessment of the situation was reasonable at the time, that the plaintiff retained no reservation of a proprietary interest. The earlier

798 See above n 795, 188-9.
799 See above n 795, 188.
800 See above n 795, 189. This construction adheres closely to the elements of § 826 - see Appendix III.
801 If only a personal right to revaluation of the amount owed under the mortgage was retained by the
revaluation legislation,\textsuperscript{802} which took effect during the transaction, did not recognise the reservation of proprietary interests in mortgages, and it was yet to be seen how the courts would deal with the later legislation. The defendant was entitled to act on its view of the law, just as the Land Title Registry had in removing the mortgage. On the other hand, the opposite conclusion could be reached about the defendant's conduct if it knew of the exchange of letters between its predecessor in title and the plaintiff - particularly of the letter which accompanied the discharge documents. For the purposes of § 892 this was not sufficiently established. The fact was also important for the application of § 826 because,

... a deliberate injury of the plaintiff which contravened good morals, and defeated an appeal to public faith in the Land Title Register, could be found particularly if it were established that the defendant in full awareness of the declarations made by the plaintiff, if it remained legally doubtful whether the mortgage would continue, had bided its time while the discharge of mortgage passed through, or even had been pressed through an, as it knew, inadequately advised Land Title Registry, before it moved to acquire the land, in order that it soon would be able to rely upon that discharge\textsuperscript{803}

and then the claim under § 826 could have been made out.

Negligence

§ 823 is the general head of damage for negligence and breach of statute in German civil law.\textsuperscript{804} Its applicability in the situation of a good faith acquisition was examined in the Lucky Pensioner Case.\textsuperscript{805} Under pressure from creditors, in September 1896 the plaintiff

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{802} Specifically the 3. Steuernotverordnung (Third Tax Emergency Regulation).
\item \textsuperscript{803} See above n 795, 191.
\item \textsuperscript{804} § 823 is set out in Appendix III.
\item \textsuperscript{805} (1917) 60 RGZ 395.
\end{itemize}
\end{footnotesize}
transferred two of his land parcels to a pensioner, August L. In 1903 L instructed the firm A & B to subdivide both land parcels. The defendant, A, was a member of the firm and managed it at the time of the legal action. The firm completed its task by selling the land parcels registered in L’s name and transferring the lots to the purchasers. In 1905 the plaintiff commenced legal action against the estate of the pensioner L to obtain their participation in the reinstatement of the plaintiff as registered owner of the land parcels, establishing that he had transferred them to L in a straw transaction.

The plaintiff then commenced action against the purchasers for restitution of the subdivided lots. In this action against A the plaintiff sought damages for profits foregone through the sale and transfer of the subdivided lots, maintaining that the members of the firm were aware that he was the owner of the subdivided land parcels and that L had neither the right nor the authority to make dispositions with respect to them. In consequence the firm, on L’s instructions, had taken possession of the land, subdivided it and transferred it to others, intentionally, in bad faith and against good morals, and had at least negligently injured his property.

The Reichsgericht considered the action misconceived - it is simply not possible to sue for damages for injury to property on the basis that the firm remained in ignorance of the straw nature of the transaction between the plaintiff and L through negligence. Where a person, in any of the cases contemplated by §§ 892 or 893, has with faith in the Land Title Register engaged in a relevant transaction with the person registered as entitled to the relevant right, that person is also protected against personal claims by unregistered holders of interests in the relevant land, unless a Contradiction was registered against
the accuracy of the Register or the person was aware of its inaccuracy. Negligent unawareness of the incorrectness is not the same as awareness of it. If the firm was to obtain the protection of §§ 882 or 893 it had to establish that between L and the firm, for the purposes of § 892, a relevant juristic act had taken place, or for the purposes of § 893 a relevant disposition had been made. The real question was thus whether granting the authority to subdivide, sell and transfer the subdivided lots was such a disposition. The Reichsgericht considered that it was. §§ 892 and 893 therefore applied to the transaction, and any allegation of negligently being unaware of the sham nature of the transaction, and thereby negligently injuring the true owner's property in terms of § 823 was answered by the fact that the defendant was entitled to rely on the Land Title Register.

Action to Regain Possession

§ 1004 BGB provides a general right of action against the impairment of ownership, and thus to obtain or regain possession. It does not apply where there has been a good faith acquisition within the terms of § 892, which also for this purpose deems the acquisition legally proper. In the Dissolved Caveat Case a land owner could not maintain a claim based on § 1004 against the defendants' good faith acquisition of the Land Debt because the extent of any property interests she held was limited by the extent of other lawful proprietary interests in the land, and the interest of the defendants was protected by §§

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806 See above n 805, 397-8.
807 die Verfügung.
808 The concept of disposition in § 893 BGB is examined below, following n 973.
809 (1972) 60 BGHZ 46.
(c) Exclusion of Good Faith

It is clear from the text of § 892 that registration affords no possibility of a good faith acquisition when -

- a Contradiction against the accuracy of the title has been registered, or
- the Assignee is aware that the Register does not reflect the true situation and is thus inaccurate.

(i) Blocks and Blots on the Register - Contradictions, Caveats and Litigation Remarks

The German system provides three instruments which may be entered on the Register with the object of alerting those who might enter later transactions of the existence of an earlier unregistered interest, or a dispute concerning the title.

Registered Contradiction

Contradictions of the accuracy of the Land Title Register may be registered pursuant to § 899 BGB with the consent of the person whose right will be affected by correction, or pursuant to an injunction. On general principle, if a Contradiction has been registered with respect to a land parcel, then one deals with the land at one's own peril. To this general principle there are a number of qualifications.
a credible and well founded Contradiction

§ 892 I presupposes a credible and well-founded Contradiction. In the Daughter's Mortgage Case the purchaser of land was to take over any liability arising from revaluation of a mortgage which was discharged at settlement. With passage of the first Revaluation Legislation the defendants notified their claim for revaluation of the discharged mortgage.

On 10 March 1926 a Contradiction of the discharge of the mortgage was noted in the Land Title Register. On 4 March 1927 the plaintiff had two mortgages registered. The defendants required registration of liability for the revalued mortgage debt of 17,487 Gold Marks in priority before both of the plaintiff's mortgages.

The Reichsgericht noted that the object of a Contradiction is to preclude reliance upon the public faith of the Register. However, § 892 I contemplates a well-founded Contradiction. The defendants' Contradiction had anticipated the later passage of § 14 of the Revaluation Amendment, which did not have retrospective effect, but on 4 March 1927 when the plaintiff's mortgages were lodged for registration, the defendant's Contradiction did not describe a credible legal situation, and therefore the plaintiff was entitled to invoke the protection of public faith in the Register.

811 (1930) 128 RGZ 52, 55.
812 ibid 54-5.
813 die Aufwertungs-Novelle.
814 ibid 55-6.
nature of the contradiction and the concept of error in the Register

In the Dissolved Contradiction Case\(^{815}\) a judgment of the district court\(^{816}\) directed Mr and Mrs R to transfer relevant land to Mr and Mrs K. The judgment was carried out. A number of further interests were then created by Mr and Mrs K. A Contradiction was registered because of a formal error, but then later dissolved also in error. Two compulsory mortgages\(^{817}\) were registered to secure indebtedness before the later error was corrected. A compulsory mortgage does not obtain the protection of good faith in any case.\(^{818}\)

The court considered whether, following incorrect dissolution, the Contradiction continued to exist off the Register, and thus possibly forestall a good faith acquisition by a person who knew of it by other means. It concluded that a Contradiction is not a proprietary interest in itself. It is a protective or security entry for a proprietary right, to be entered when the Register appears to be incorrect because an entry has been made contrary to law.\(^{819}\) The concept of "incorrectness" is that laid down in § 894 BGB as the precondition for correction of the Register - that in view of the lack or manner of registration of a right over the relevant land parcel the content of the Land Title Register is not in harmony with the true legal position.\(^{820}\) The Contradiction ensures that the valuable proprietary right at stake is not lost or interfered with through a good faith acquisition of the registered interest which is alleged to be out of harmony. Nevertheless, its

\(^{815}\) (1916) 49 KGJ 179.

\(^{816}\) Landgericht.

\(^{817}\) die Zwangshypothek.

\(^{818}\) See above n 815, 184. See also above n 699.

\(^{819}\) See above n 815, 182.

\(^{820}\) See above n 815, 181.
effectiveness depends on registration, and this ceases when the Contradiction is dissolved whether correctly or incorrectly. It is thus impossible for the Register to be made incorrect by the erroneous dissolution of a Contradiction, and thus a Contradiction may not be registered against the dissolution of a Contradiction.\textsuperscript{821}

Contradictions and later transactions

In order to preclude reliance on the Register in a later transaction, the right which is secured by the Contradiction must appear as an obstacle to the right which is being acquired. If there is no inconsistency between the rights, then the second right may be acquired in good faith. A Contradiction lodged against registered ownership of the land affects all dispositions by the person who is not the true owner. For example, it hinders not only the initial registration of a mortgage, but also subsequent assignment of it unless the Contradiction against registered ownership was entered after registration of the mortgage and the assignee has not acquired the mortgage because of bad faith.

In the Case of the Late Contradiction,\textsuperscript{822} the defendant had sold and transferred the land to J, who was registered as owner. The transaction was, however, illegal and the defendant sought reinstatement. The first Contradiction was registered on 27 July 1925 pursuant to an injunction. The injunction, and then the Contradiction, were later lifted, and J granted a mortgage over the land on 4 January 1926. On the same day however, a new second Contradiction was entered with remarks beside the mortgage entry and on the Mortgage Letter that the Contradiction had priority. This Contradiction was dissolved on 14 July 1926, but, effectively, the first Contradiction on the basis of injunction had been renewed on 24 June 1926 and was registered on 9 August 1926. The mortgage

\textsuperscript{821}See above n 815, 182.

\textsuperscript{822}(1930) 129 RGZ 124.
was assigned to the plaintiff on 19 November 1926.

The Reichsgericht made an extensive review of the role and effect of a Contradiction\textsuperscript{823} in deciding that in this case the assignee took the mortgage subject to the defendant's claim to regain registered ownership, secured by Contradictions, even if the mortgage itself had attracted priority pursuant to § 892 through registration before reinstatement of the first Contradiction. A Contradiction does not fall under the provisions with respect to priority in § 879 \textit{BGB}. It was therefore incorrect to argue that initial registration of the mortgage was unaffected by the first registered Contradiction and thus that the plaintiff could take the mortgage by assignment free of the interests protected by it. A Contradiction takes the priority which the interest protected by it has in view of the earlier legal relationships. In this case the Contradictions secured the defendant's claim to regain registered ownership. When the plaintiff's assignment was registered the Contradiction on the title at this time warned her of the defendant's claim. Any disposition with respect to the land which could be made only by a land owner, and not simply a transfer of ownership, could thus be called into question so far as it could detract from the interest claimed in the Contradiction. The fact that the mortgagee had obtained registration of the mortgage did not assist the assignee of it with respect to good faith, because at the same time she could see in the Contradiction that the supposed interest of the registered mortgagee possibly rested on the disposition of someone not entitled to make it. The court conceded that it would have been possible\textsuperscript{824} to make an unimpeded acquisition despite reinstatement of the Contradiction if the registered mortgagee had acquired the security in good faith and then sought to pass on such an interest, valid in his own hands. If the mortgage had initially gained unimpeachable registration in consequence of § 892 \textit{BGB}, then bad faith on the part of

\textsuperscript{823} See above n 822, 127-8.

\textsuperscript{824} See above n 822, 128.
the initial mortgagor would not detract from the interest acquired by successors-in-title to
the mortgage. The plaintiff could not, however, advance these grounds, not least
because she was aware that the mortgagee had not made a complete good faith
acquisition of the mortgage; in addition, the initial mortgagee had not made the advance
to be secured by the mortgage - this was first done by the plaintiff after acquisition of the
security by assignment.

Office Contradictions

In the Case of the Guardian Without Authority,825 after dealing with the guardian’s right of
appeal against the Contradictions,826 the court turned to examine the power of the Land
Title Registry to register an Office Contradiction, first, in the Register of Building Rights,827
and second in the Land Title Register. Pursuant to § 53 GBO an Office Contradiction is
to be entered when the registry has made a registration entry contrary to law, through
which the Land Title Register has become incorrect. While the error of law must be
clear, the incorrectness of the Register need only be credible. The Land Title Register
must remain in error at the time when the Contradiction is entered.

With respect to the Register of Hereditary Building Rights, there was no apparent error in
registering the real securities over the Building Right because it was registered on
application by the person registered as its proprietor in the Land Title Register, the
guardian. The presumption of correctness828 therefore operated for him, just as the
presumption was to be observed by the Registry. Also, there was no doubt that the

825 See above n 762.
826 See above n 762, 295-7.
827 See above 762, 297.
828 § 891 BGB.
Guardian had authority to convey the consent of the land owner. For these reasons, there was no legal error in registering the real security, and it was not necessary to examine issues of incorrectness which might have arisen in view of a good faith acquisition of the real securities in term of § 892. The Office Contradiction was in any case to be removed.\textsuperscript{829}

With respect to the Land Title Register, consideration of the Office Contradictions entered against registration of the Hereditary Building Right itself, and the right of pre-emption, brought a different result. The authority of the guardian to sell the land was not the same as an authority to burden it with a Building Right and a pre-emption, and the permission of the Guardianship Court obtained in 1965 could not have cured this defect. One of the preconditions for entry of an Office Contradiction was present because the Building Right and the pre-emption were registered in legal error.

Caveats

The role of the caveat\textsuperscript{830} was examined in context of the use of § 1004 BGB to defeat interests gained in good faith in the Dissolved Caveat Case.\textsuperscript{831} The plaintiff was the registered owner of the relevant land until 1963, and again after 1968 following the failure of a contract of sale. During this period her interest in regaining title was protected by a caveat. In 1970, with her consent, the caveat was dissolved as she had regained registered ownership. In 1964, however, the then registered owner had granted a Land

\textsuperscript{829} See above n 762, 298.

\textsuperscript{830} die Vormerkung.

\textsuperscript{831} See above n 809.
Debt\textsuperscript{832} to secure 100,000 Marks. After the caveat was removed the defendants took an assignment of a quarter share (25,000 Marks) of the Land Debt. The good faith of the assignees was not questioned.

The BGH held that the plaintiff's title to the land was burdened by the defendants' Land Debt. The Land Debt as originally granted remained subject to the plaintiff's interest so long as it was protected by caveat. However, the effect of the caveat disappeared when it was removed. No question would arise in anyone's mind concerning the transaction because the caveat was to secure the right of the plaintiff to regain the title, and she had done so.\textsuperscript{833}

In reaching its decision the BGH considered the legal status of caveats. A caveat is not a proprietary right, but rather a special security instrument which protects personal obligatory claims\textsuperscript{834} widely defined. It does this by lending them proprietary effects, in the sense of a proprietary restriction of the land parcel. In particular, it ensures a \textit{relative ineffectiveness} in later registered interests.\textsuperscript{835} It also secures to the eventual registered proprietary right which it foreshadows the priority it would have had if it had been registered at the time when the caveat was entered on the title.\textsuperscript{836} This characteristic of the caveat, which in many respects it resembles a proprietary right, has resulted in the extension to the caveat of many provisions applicable to proprietary interests.\textsuperscript{837}

\textsuperscript{832}\textit{die Grundschuld}.

\textsuperscript{833} See above n 809, 53.

\textsuperscript{834} In this case the claim for retransfer of registered ownership.

\textsuperscript{835} So-called \textit{in-between rights - die Zwischenrechte} - see § 883 (2) BGB.

\textsuperscript{836} See above n 809, 49-50.

\textsuperscript{837} Such as - § 878 BGB, priority between a caveat and a limitation of power of disposition; §§ 882 and 893 BGB, good faith acquisition and incorrectness of the register; §§ 894 and 899 BGB and § 53 GBO, use of claims for correction of register, and Office Contradictions to challenge incorrect caveats.
Because the caveat has the status of a security instrument, and not that of a formal Land Title Register entry, it dissolves with the claim which it secures. When that occurs the Land Title Register becomes incorrect and the caveat can be removed with the consent of the caveator or upon application by a party with an interest in clearing the Register. On the other hand, removal of the caveat while the claim remains in existence still allows the right to exist off the Register. This also leads to incorrectness in the Register and the possibility of applications to correct it, or to lodge Contradictions of its accuracy, or to re-register the caveat. Further, because the relevant claim or right remains in existence, the principles of good faith acquisition continue to apply to it, although notification of it has been expunged from the Register.\textsuperscript{536}

Where the formerly caveated claim for registration has merged with the registered ownership which has been acquired, as in the present case, registered owners may preserve their relative priority by obtaining the entry of a priority notation beside the in-between rights\textsuperscript{839} over which priority is enjoyed, or, upon registration of their ownership, a notation of its superiority above the in-between rights.\textsuperscript{840}

In conclusion, although in principle it remained possible for the now uncaveated superiority of the plaintiff's ownership above the Land Debt to descend in priority beside an assignment of the Land Debt, much depended upon the date of acquisition, which in turn depended upon the date upon which the Land Debt Letter was delivered.\textsuperscript{841} Further, although the plaintiff's claim for retransfer of the land had merged with her ownership when this was done, persistence of the caveat on the Register could have informed an

\textsuperscript{838} See above n 809, 51.
\textsuperscript{839} See above n 782 and n 835.
\textsuperscript{840} Apparently the latter is the measure usually adopted in practice: ibid.
\textsuperscript{841} § 1154 BGB.
assignee of the Land Debts of their status as in-between rights.\textsuperscript{842} The case was returned below to establish these issues.

Litigation Remarks

The existence of a legal dispute concerning the land\textsuperscript{843} also raises difficult issues in connection with what knowledge will defeat a good faith acquisition,\textsuperscript{844} the methods by which claims may be notified to potential assignees, and the status of those methods. The contemporary German system affords three methods of noting on the Register the existence of a right or claim which alters the legal status of registered rights: the caveat,\textsuperscript{845} the Contradiction,\textsuperscript{846} and the Litigation Remark.\textsuperscript{847} The last of these has been developed through a course of fairly pragmatic and deliberate judicial innovation which could not yet be described as completed. Considerable attention has been devoted to this development process as an example of the capacity of the so-called "inquisitorial system" to effect such innovations.

In the \textit{Family Inheritance Case}\textsuperscript{848} the Oberlandesgericht in Munich considered the situation of a wife who was the sole beneficiary of her husband's estate. The husband had transferred the disputed land to their son. The wife claimed a transfer of the land to

\begin{itemize}
\item \textsuperscript{842} See above n 782 and n 835.
\item \textsuperscript{843} On \textit{sub judice} [\textit{die Rechtshängigkeit}] see § 325 II of the Civil Procedure Statute [\textit{Zivilprozeßordnung - ZPO}] set out in Appendix III.
\item \textsuperscript{844} Exclusion of good faith through knowledge of incorrectness in the Register is dealt with below following n 888.
\item \textsuperscript{845} \textit{die Vormerkung}.
\item \textsuperscript{846} \textit{der Widerspruch}.
\item \textsuperscript{847} \textit{der Rechtshängigkeitsvermerk}.
\item \textsuperscript{848} (1966) \textit{19 NJW} 1030.
\end{itemize}
her in satisfaction of a claim secured by a right over it in the nature of an unregistered mortgage. She also claimed an order for sale of the land in satisfaction of personal debts. She sought registration of her claim to the land in the Land Title Register. The court examined the nature of a registrable right and concluded that in this case entry in the Register of a remark that the title was subject to competing claims pursuant to § 325 of the Civil Procedure Statute was the only possible method of publicising her rights and thus protecting them from the possibility of a good faith acquisition by a third party. Thus publicised, the existence of the claim in litigation would deny the possibility of a good faith acquisition by a third party because they would have sufficient knowledge of her claim for the purposes of § 892 BGB. However, the court concluded that notation of the litigated claim under § 325 ZPO could only follow the award of an interlocutory injunction by the court, and could not be achieved simply by presenting relevant material to the Land Title Registry. When considering the award of an injunction the court had to be satisfied about a number of issues -

- the claim had to be related to the title to the land, so claims in debt and for civil execution of the debts against the land were insufficient.
- a claim based on an unregistered mortgage was entitled to registration in its own right. An application for an injunction on the basis of a claim subject to litigation was therefore inappropriate.
- the issues which justify an injunction for a claim with respect to real property were -
  - preservation of the status quo against a likelihood that the land could be assigned to a third party good faith assignee, which was the case here, and
  - the applicant had to establish that the title to the land was indeed in dispute - it was not necessary to show that the claim would succeed, but only that there was an effective claim.

The application for an injunction to maintain the status quo, pending a possible
rectification of the Land Title Register or an order to compel completion of the security in the nature of a mortgage, was made out and registrable within the terms of § 325 ZPO. The registration entry needed only to note the fact of an existing litigated claim against the title and did not have to provide extensive details of it.

One point raised in the Family Inheritance Case 851 was the question of whether the subject of litigation itself had to be registrable, if other justifications for the award of an injunction were not present, such as danger to the asset. In this regard, the court adopted some conclusions of an earlier decision of the Oberlandesgericht in Stuttgart - the Unproven Risk Case 852 - specifically that there are two methods to obtain a notation in the Land Title Register in order to secure the object of litigation against possible transactions in favour of a good faith assignee.

The first method is to apply for registration of a Contradiction pursuant to § 899 BGB. To do this the applicant must make out a credible chance of establishing in the primary case that the Land Title Register is incorrect, and then may have the Contradiction registered without credible evidence that the object is at risk of further burdens or assignment. Registration of a note of the plaintiff's claim could be seen as an interference with the defendant's rights to the title, and thus a credible entitlement should be established to it. On the other hand the rights of the defendant are not gravely interfered with if the Register is indeed incorrect and the Contradiction will give a clearer view of the limitation on the defendant's powers posed by the litigation. Nevertheless, it seemed to follow from the express text of § 899 that a Contradiction could only be registered with the consent of registered parties or by obtaining a preliminary injunction. 853

851 See above n 848.
852 (1960) 13 NJW 1109.
853 die einstweilige Verfügung.
The second method, explained the Stuttgart court in its earlier decision, is to demonstrate a risk to the object of litigation, without having to show a credible likelihood of success in the main case. An injunction could be obtained, on the basis of which the party may have a remark noted on the ground that the state of the Register is sub judice. This is achieved on the basis of § 325 ZPO to prevent the defendant transacting with the relevant land in a way which could defeat the legal action. While the existence of the litigation is in itself something of a limitation of the power of disposition, the court considered that it does not, within the terms of § 325 ZPO have effect against a good faith assignee, since knowledge of the litigation does not amount to knowledge of a defect in the right of the assignor. A means had therefore to be provided to exclude a good faith acquisition. § 892 refers to registered relative limitations of the power of disposition having this effect, thus, there must be a method of recording the existence of litigation on the Register in analogical situations. The caveat is a more desirable form because it is a form of definitive registration, but it should not be the only method.

By either method, concluded the Munich court, notation of the disputed state of the Register would at least limit the possibility of a good faith acquisition. In the present case it was sufficient to indicate the nature of the plaintiff's claim in the Register.

In his commentary on the case, Josef Wächter was concerned to protect the registered proprietor against the possibility of dubious cases being initiated in order to obtain a notation on the Register which would effectively block it. He acknowledged that
regression of the existence of litigation does not prevent dispositions and could at best only exclude good faith in the acquisition, but such a blot, if not a block, on the Register would no doubt afford considerable leverage in negotiations with a registered proprietor eager to conclude a transaction with the land. Wächter pointed out that although the preconditions for grant of an injunction remained unclear, the Unproven Risk Case and the Family Inheritance Case both held that an injunction under the ZPO could be obtained merely with evidence of risk to the land title at the centre of the litigation, and this was to be approved. However, he suggested, the established legal institution of the Contradiction could well lose its rationale because in order to register one it is necessary to show credibly that the Land Title Register is incorrect, and therefore plaintiffs would naturally follow the easier course of seeking an injunction and notation of a Litigation Remark under the ZPO. This procedure, he noted, is barely contemplated by the legislation, and indeed one might note in this respect that the reasoning in the Unproven Risk Case very much depended on analogy and necessity stemming from an interpretation praeter legem. Wächter concluded that both procedures for injunction, and for consequent notation in the Land Title Register should require establishment of a credible claim in the primary litigation.

Ten years later, in Stuttgart, Wächter’s concerns went unheeded, and the award of an injunction was considered unnecessary. Twenty years later, in Zweibrücken, the innovation was confirmed and the legal footing for the procedure of noting a Litigation Remark was changed, further obviating the necessity to obtain an injunction. Over this

859 See above n 852.
860 See above n 848.
861 See above n 852.
862 Delayed Carriageway Decision (1979) OLGZ 300. Explained below following n 864.
863 Incapacitated Transferor Case (1989) 42 NJW 1098. Explained below following n 876.
period, the knowledge of litigation possessed by a third party acquiring an interest in a
disputed title had moved in judicial eyes from being unlike knowledge of a defect in title to
being described as virtually equivalent to such knowledge for the purposes of § 325 ZPO
and § 892 BGB. Consequently, a third party who acquired an interest in the land with
such knowledge would also be bound by the final judgment in the case. Judicial
justification of the Litigation Remark had moved, from the object of securing the plaintiff's
interest in the property at the centre of the action, to the goal of protecting honest third
parties who might have some knowledge of the existence of litigation but, to their peril,
be persuaded to proceed with a transaction concerning it.

In the Delayed Carriageway Decision\textsuperscript{864} the applicants claimed a right of carriageway
over neighbouring land, the benefit of which was registered on the title to their land, but
the burden of which was not registered on the title to the servient tenement owned by the
appellants. The applicants claimed that it had existed and been exercised from a time
preceding compilation of the Land Title Register for the area in 1901. The appellants
denied this and asserted that in any case it could have been only a mere right of way to
pass by foot. The applicants sought registration of an easement on the title of the
appellants, who refused consent to registration. The issue was removed to court for an
order that the appellants must consent.\textsuperscript{865} In a procedural hearing the court decided to
delay trial of the matter pending completion of a public procedure for the rationalisation of
land parcels\textsuperscript{866} which had been commenced in the area. In the meantime the plaintiff
could continue to use the carriageway. The applicants sought registration of a
Contradiction on the appellants' title to protect the interest which they claimed in the
servient tenement.

\textsuperscript{864} See above n 862.

\textsuperscript{865} § 894 BGB.

\textsuperscript{866} die Flurbereinigung.
The Oberlandesgericht at Stuttgart acknowledged that the device of the Litigation Remark is not specifically provided for in the legislation, but it also recognised its value. It does not prevent transactions with the disputed title.\textsuperscript{867} However, by virtue of § 325 ZPO the final judgment in the litigation would have effect against those who became the successors in title of the parties after legal action was commenced. The effect of § 325 ZPO is that a final judgment has effect against a litigant’s successor in title when he or she knew of the litigation, because it expressly applies the general civil law to the benefit of one whose rights derive from a person with no entitlement, and thus knowledge of the litigation is placed on a par with knowledge of a defect in title. For this reason it must be possible by some formal method to exclude the possibility of a good faith acquisition where litigation relates to a title. Examining § 892 BGB analogically, this is the reason why limitations of the power of disposition are protected by registration. The Litigation Remark similarly eliminates the possibility that an honest person could acquire the relevant right by virtue of § 892.\textsuperscript{868} Knowledge of the litigation, continued the Stuttgart appeal court, is thus the vital issue, but factually this is insufficient to guard against a good faith acquisition during the dispute. It follows that the precondition to notation of a Litigation Remark is proof that the state of the title is sub judice. The litigation must concern an existing registration entry and a legally possible further entry which would be executed as a result of the litigation, in such a manner that one may truly say a right over a land parcel is prejudiced by the dispute. If these preconditions are satisfied, it is unnecessary to test whether the litigation has a prospect of success.

The Litigation Remark, surmised the court, would thus represent a procedural limitation which is already brought about substantively through legislation when the litigation is

\textsuperscript{867} § 265 ZPO.

\textsuperscript{868} Delayed Carriageway Decision, above n 862, 303.
commenced. It is to be distinguished from the caveat and from the Contradiction. The object of the caveat is not the correction of the Land Title Register, but rather to secure a claim for the grant or the dissolution of a right or burden over a land parcel, or a claim for alteration of the content or priority of such a right. A future or conditioned claim is sufficient. It supports a claim for alteration of the legal position portrayed by the Land Title Register. The Contradiction draws attention to a claim for rectification of the Land Title Register and has the object of securing the proprietary right lying at the heart of the claim and for which rectification is required pursuant to § 894 BGB.

The Stuttgart court stated that it is not a precondition for the registration of a Litigation Remark that the claim which is asserted in the litigation be made credible. Only the existence of litigation concerning the land title need be shown. In contrast, the existence of litigation is not required for the notation of a caveat or a Contradiction. The evidence must be in the form contemplated by § 29 GBO. In the context of litigation, this means the public documentation of the case which has been deposited with the court and is held in court files. Further, it is not necessary to show a credible risk to obtain registration of the Remark. The need for legal protection generally follows from the initiation of legal action and its effects. Nevertheless, it is conceivable that in some cases there would be no need for legal protection of the object of litigation. When this is obvious, and only then, the application for registration of a Litigation Remark is to be refused.

The Litigation Remark should not be understood as a Contradiction, although they share a certain corrective effect, and point out the possibility of future alteration of the

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869 die Vormerkung: § 883 BGB.
870 der Widerspruch: §§ 899 and 894 BGB, and § 53 GBO.
871 der Anspruch.
872 See above n 862, 304.
registered legal situation as a consequence of the connected litigation. The rectification itself can be made only following judgment requiring alteration. Further, the Remark is not a prohibition of alienation. Nor is it a legal limitation on the power of disposition, such as is contemplated in § 265 ZPO, although it can have that effect in an economic or transactional sense. The argument that the land owner would be defenceless against maliciously initiated dubious actions did not convince the Stuttgart court. No one is immune from such actions, but the burden of legal costs makes them very rare in practice.

The Stuttgart court reasoned that a purpose of the Litigation Remark is to protect the plaintiff, that is, the opponent of registered proprietor of the relevant interest in the land, against possible loss of interest to a successor-in-title by ensuring that the effect of judgment obtained in the litigation extends to the successor-in-title. It therefore preserves the ability to alter the Register. The Litigation Remark may be entered, when the preconditions set out above are fulfilled, pursuant to § 22 GBO. This means that, an injunction need not be obtained. The preconditions for entry of a Litigation Remark are narrower than those for registration of caveats and Contradictions. This was justified by the following consequences. First, if at the time of initiating litigation plaintiffs cannot establish the credibility of their claims, they can still protect their rights in the land against a threatening successor in title by entering a Litigation Remark. Second, the Litigation Remark affords sufficient protection of the plaintiff, so there is no need for an injunction in addition. The prevailing view that an injunction must be granted was

873 das Veräußerungsverbot.
874 die Veräußerungsbeschränkung.
875 § 325 ZPO.
876 § 29 GBO.
Almost identical reasoning was adopted in Zweibrücken in the *Incapacitated Transferor* Case.\textsuperscript{878} The plaintiff sold and transferred land to the defendant. He later commenced action for a direction for rectification of the Register on the basis that his legal capacity in the transaction was impaired through his problems with alcohol. He applied to the Land Title Registry, with evidence of the existence of the litigation, for the entry of a Litigation Remark in order to preserve his rights in the land. This was refused with the direction that the only available course was to obtain an injunction, on the basis of which a Contradiction could be entered. The Oberlandesgericht acknowledged that legislation did not foresee the entry of Litigation Remarks, as the cases and the literature had tended to agree, but the fact that a land title is subject to litigation does not prevent transactions with it,\textsuperscript{879} and judgment in the litigation would take effect against anyone who becomes a successor-in-title to a party in the case.\textsuperscript{880} The provisions of the civil law operate for the benefit of a person who obtains title from someone who is not entitled to it,\textsuperscript{881} and therefore a person who had no knowledge of the litigation could make a good faith acquisition of the title within the terms of § 892 *BGB*. It must therefore be possible to exclude the possibility of a good faith acquisition, and this would be achieved by an entry in the Land Title Register. The Litigation Remark thus eliminates the possibility of an honest person acquiring an interest in land which is subject to litigation.

\textsuperscript{877} See above n 862, 305.
\textsuperscript{878} See above n 863.
\textsuperscript{879} § 265 ZPO.
\textsuperscript{880} § 325 I ZPO.
\textsuperscript{881} § 325 II ZPO.
It had been advocated that an extension of the range of Land Title Register instruments would be possible only if insufficient legal protection was afforded by the methods already provided. § 894 provides for correction of the Register and § 899 provides the Contradiction to preserve the situation while the correction is considered. This protection refers to all rights which are capable of registration and is therefore comprehensive, in contrast to the status of a Litigation Remark in view of § 325 III ZPO. Registration of a Contradiction requires either the consent of the registered proprietor or an interlocutory injunction, and to obtain one the credibility of the case for correction of the Register must be established. If one were to agree with a section of juristic opinion on this, as the lower court had, then one would conclude that an injunction must also be obtained for a Litigation Remark to be entered, if indeed such a procedure is required at all, because the Contradiction affords the same preliminary protection.

However, the court considered, the applicant might not be able to establish the credibility of the case at the outset for good reasons, such as awaiting the completion of a specialist report.882 The Litigation Remark must be available in such situations on proof of nothing more than the existence of the litigation. It is true that this establishes a factual register block which may be set up even when the litigation has little prospect of success. However, this danger is not decisive when it is considered in the context of balancing the competing interests. On one hand, the risk of legal costs makes the danger a rare occurrence, while on the other hand the risk to the applicant of losing proprietary rights is to be more highly regarded. In any case, registration of a Litigation Remark also protects the defendant to a certain extent against possible claims for damages.

882 das Sachverständigengutachten.
If the possibility of entering a Litigation Remark purely on the basis of evidence of the existence of litigation is to be approved, the next question is how the entry is to be made. The applicant argued that the procedure for correction of the Register in § 22 GBO could be used. Because the existence of litigation can have proprietary consequences by virtue of § 325 ZPO, in that the knowledge of dispute about a title is placed beside positive knowledge of a defect in title, the Register is incorrect so far as it does not reveal the existence of the litigation. The Register is presumed correct in a positive sense with respect to the rights registered in it, and in a negative sense with respect to completeness.\(^{883}\) The Register is incomplete if it does not reveal the existence of a dispute concerning the title. Entry of a Litigation Remark therefore corrects the Register.

The registration of the Litigation Remark can thus be achieved through § 22 GBO when the applicant establishes the existence of litigation, in pursuit of the proprietary interest which he or she claims to exist, supported by public documents as required by § 29 GBO. These include the court documents concerning the litigation. The appeal court thus directed the Land Title Registry to enter a Litigation Remark on the basis of the court documents. The court at Zweibrücken noted that this conclusion departed from the view of the law articulated in other decisions of other courts at the same level,\(^{884}\) but concluded that the matter did not have to be referred on to further appeal because those other cases were applications for injunctions, whereas the case at hand was not. Passing up this opportunity to have the innovation confirmed by the BGH left the status of the Litigation Remark in uncertainty.

\(^{883}\) § 891 BGB.

\(^{884}\) Specifically, the Unproven Risk Case, above n 852 (Stuttgart), and the Family Inheritance Case, above n 848 (Munich).
One case following this era of innovation suggests that the tide might be turning against the simple and effective Litigation Remark. In the Claim for Retransfer Case\textsuperscript{885} the court noted that §§ 265 and 325 of the ZPO permit the entry of a Litigation Remark on the title to land which is subject to litigation, where the existence of one would prevent a good faith acquisition of the land by virtue of § 892 BGB. But it concluded that such Remarks are limited to litigation directly concerning the title to the relevant land, such as a claim for rectification of the Land Title Register pursuant to § 894 BGB. A claim based upon personal obligation was considered insufficient. The claim for retransfer of the title was considered to be a matter of personal obligation. Passing references in the case report suggest that the retransfer sought was to be a form of compensation. The court noted\textsuperscript{888} that it was departing from the Family Inheritance Case of the Oberlandesgericht in Munich,\textsuperscript{887} but considered that the matter did not have to be raised as a case stated to the BGH.\textsuperscript{888}

**(ii) Assignee’s Awareness of the True Situation**

§ 892 expressly provides that the Land Title Register is not to be deemed correct in favour of a grantee who was aware of its incorrectness. This has raised many issues and especially -

- whether a state of ignorance maintained through neglect can be equivalent to awareness,
- what knowledge of the facts underlying an error amounts to awareness of the error itself, and

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\textsuperscript{885} Oberlandesgericht in Braunschweig: (1992) 46 MDR 74.

\textsuperscript{886} See above n 885, 75.

\textsuperscript{887} See above n 648.

\textsuperscript{888} § 79 II GBO.
the burden and weight of evidence required to establish awareness.

The practical operation of this exclusion was explored in the relatively recent Building Development Case. The parties were co-owners in shares of a mixed residential and commercial building development. § 746 BGB provides that an agreement between co-owners can bind successors in title, however § 10 of the building subdivision legislation provided that such agreements had to be registered in order to have this effect. In 1978 an agreement between the original developers, a trust company and a construction company was registered, containing a provision that the owners from time to time would not impair the commercial establishments already in the building, inter alia through competition. In 1981 the owners made a re-subdivision of the units comprising the development, and this required the creation of new register pages. In the course of this the Land Title Registry overlooked the need to transcribe registration of the 1978 agreement.

In 1984 many of the units were sold. A group of four titles was sold and transferred to the first party in the action. In 1985 the trust company wrote a letter to the first party pointing out that the 1978 agreement had not been transcribed into the new pages of the Land Title Register and requesting that the first party agree to the late transcription of it. The first party declined, stating that it had searched the title before its purchase in March 1984 and decided to purchase on the basis of what it found. There was evidence that the first party had been informed of the fact that notation of the 1978 agreement was missing, but had concluded that the absence of registration prevented the agreement from having binding effect on it. On this analysis it perceived a commercial advantage in proceeding with the purchase.

889 Oberlandesgericht at Hamm: (1993) RhNK 159.

890 Wohnungseigentumsgesetz.
The court recounted that § 892 is not concerned merely with knowledge of the essential facts which underlie the incorrectness of the Register - rather, it requires a positive awareness of its incorrectness. It is therefore a question of the circumstances in each case whether actual knowledge of the facts which caused the incorrectness amounts to awareness of a deficiency of the record of rights in the Register. A recognition of deficiency in the record will occur when the transferee has been informed about the incorrectness in such a way that an "honest thinking person", without the influence of his or her own advantage, would be convinced of the incorrectness.\textsuperscript{891} A transferee in this situation is then expected to behave in the way that such an objective person would act. This does not, however, indirectly require a transferee to undertake inquiries which § 892 does not impose.

On the basis of these principles, one might think, a grossly negligent lack of awareness could equate to positive awareness of incorrectness. However, a positive awareness can only be assumed when the transferee is so thoroughly informed that - relative to the transferee’s own subjective capabilities of recognition - the conviction that the Register is incorrect must have "imposed itself", or in other words, "the recognition must have been within hands reach".\textsuperscript{892} When transferees in such a situation, and to their own advantage, shut out this recognition in order to act in supposed good faith, they cannot rely upon the protection which good faith would bring to their acquisition. Applying these criteria to the facts of the case, the court concluded that the first party had positive knowledge of the incorrectness of the Register.

\textsuperscript{891} See above n 889, 162.

\textsuperscript{892} Ibid.
Facts of Life and Lack of Capacity

The consequences of lack of capacity to enter transactions are taken as known from life experience. The BGH concluded this in the Case of the Incapacitated Husband. In 1961 the plaintiff and her husband entered into an arrangement for the division of their assets. On the same day that the family home was transferred to the plaintiff, she transferred it to the defendants. The husband died in 1964. The plaintiff sought to regain registration as owner of the house on the ground that her husband was under an incapacity. The Oberlandesgericht in Nürnberg had concluded that the husband was indeed incapable of entering transactions at the relevant time and the defendants were aware of this, and thus were in bad faith within the meaning of § 892.

The BGH recounted that § 892 requires positive awareness of the incorrectness of the Register. It depends on the circumstances of each case how far knowledge of the facts which underlie the incorrectness can be equated to awareness of the absence of a legal right. When equating knowledge of a disability with awareness of the legal consequences of the disabled person entering into the transaction, the connection is provided by the general life experience of all citizens, which instructs us that the legal transactions of a person under a legal disability are void. This connection is not to be complained about on account of the difficulties connected with lay application of legal principle. A more subtle legal issue might raise doubts, but that was not the case before the BGH. Consequently, the legal incapacity of the husband led to invalidity of the separation agreement between the married couple, and of settlement of the transfer to her on the same day. She therefore never became sole owner, and when she was registered as such, an error was created in the Register. The transaction with the

transferees could not proceed in good faith because they were aware of sufficient facts indicating that the Register was incorrect, when they were combined with everyday life.

Matters Not Forming Part of the Register

A matter which it is not the role of the Land Title Register to record does not attract the presumption of correctness or the possibility of good faith acquisition even if it is discernible from the Register.

factual preconditions

The facts which herald the existence of a registered interest which is subject to a factual condition precedent do not form part of the Land Title Register, and therefore the reliability of knowledge about their existence or non-existence is not protected. The plaintiff in the Insolvent Insurance Company Case had made a life insurance contract with Fides Ltd. The premiums were to be paid in advance, and were secured by a mortgage over the plaintiff's land to the extent of 8000 Gold Marks. Fides pledged the mortgage to one of its creditors by delivery of the Mortgage Letter. Two months later Fides was insolvent and nine months later was liquidated. The plaintiff sought to recover the Mortgage Letter. The Reichsgericht concluded that the plaintiff had never been liable under the mortgage because the premiums had been paid regularly and thus no "advance" had ever been made. A precondition of the existence of the security had thus never been fulfilled and a mortgage with respect to which no advance has been made remains an Owner's Mortgage. The Mortgage Letter therefore belonged to the

894 (1934) 144 RGZ 26.
895 § 1113 BGB.
896 die Eigentumerhypothek - § 1163 BGB.
plaintiff who could maintain an action to recover it. The defendants claimed that they had made a good faith acquisition and were entitled to rely upon the Land Title Register and the Mortgage Letter. The court concluded that Fides Ltd had no title to the mortgage which it could pledge. The defendants were aware that the mortgage was conditional on liability, but were unaware of the failure of this precondition. The occurrence or non-occurrence of a condition precedent for a registered but conditional secured advance, or a registered conditional right, is not part of the Land Title Register, so there is no fact which could fall within the protection of public faith in the Register. Whether the interest is actually conditional or not is a different matter, but the occurrence or non-occurrence of the facts upon which the right is preconditioned are not matters to which public faith attaches. The mortgage had thus always remained with the plaintiff. The defendant had not acquired it in good faith and in reliance upon the Register.

bankruptcy

The Land Title Register was not intended to publicise bankruptcy proceedings. This has two consequences. First, neither their existence nor non-existence can have implications for the accuracy of the Register. Second, for the purposes of § 892 knowledge of bankruptcy proceedings is not relevant when assessing incorrectness or incompleteness of the Register. It is coincidental if they are discernible from it. Transactions to the

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897 § 952 BGB.
898 § 985 BGB.
899 § 892 BGB.
900 § 1138 BGB.
901 The case was referred back to the Oberlandesgericht at Munich to establish whether the life insurance contract was conditional, and whether the defendant was aware that it was conditional: above n 894, 28.
prejudice of creditors and the bankruptcy administration are of course another matter.\textsuperscript{902}

Mere Doubts

In the \textit{Disgruntled Mortgage Bank Case}\textsuperscript{903} the court suggested that mere doubts about the correctness of the Register could be sufficient to exclude good faith, but not in the case before it. The Reichsgericht was considering whether, in view of generally known facts about the plaintiff's plight in the 1920s currency crisis and revaluation, the defendant had a duty to consult the plaintiff about the discharge of its mortgage,\textsuperscript{904} and whether the defendant was aware of the plaintiff's protests and thus could not be considered to be in good faith within the terms of § 892. The plaintiff was unsuccessful on these grounds, although the court clearly agonised over the evidence found below, and while it seemed highly unlikely that the defendant was unaware of the plaintiff's protests there was insufficient evidence to discharge the burden of proof on the plaintiff. Further, even if the defendant was aware of the protest in the public mortgage discharge document, "... in present day paper Marks to the nominal amount ...", it was a reasonable legal error to conclude that they had no legal substance, especially as the Land Title Registry was prepared to register the discharge with the same knowledge.

When it considered the position of doubts about unregistered contrary claims the court concluded that they did not amount to knowledge of error in the Register. Doubtful claims made by a formerly registered mortgage creditor, to be recognised in this or that manner, before one acquires registration could not be perceived by anyone to raise a duty of compliance. Also, consciousness of the possibility that one might cause another

\textsuperscript{902} \textit{Hopeful Creditor Case} (1908) 68 RGZ 150, 153.

\textsuperscript{903} See above n 795, 189.

\textsuperscript{904} See above n 795, 188-9.
legal disadvantage through acquisition of the land parcel does not alone suffice to render the principle of public faith in the Land Title Register ineffective. It could not be a fraud to invoke the principle. Fundamentally, the legal order does not prohibit measures to one's own advantage where another might suffer disadvantage as a consequence.\footnote{905}

It is difficult to imagine a state of facts where mere doubts entertained by a transferee could exclude good faith, especially when a grossly negligent state of ignorance cannot amount to awareness of incorrectness.\footnote{905}

No Duty of Inquiry

\$892$ does not impose a duty of inquiry. The \textit{Deutsche Bank Subsidiary Case}\footnote{907} was referred back to the lower court for further fact finding on the question of whether the assignee, or its agent, were aware of the incorrectness of a notation in the Land Title Register and, thus, whether the acquisition had been made in good faith. Whether a good faith acquisition had been made depended upon the terms of \$892$. In the circumstances this led to the question of whether the acquiring parties had such knowledge of the correct priority order in the Register as to remove the protection afforded by reliance on the Register. The court expounded in great detail the attributes of such knowledge.\footnote{908} It must be a positive awareness of incorrectness. Mere doubts about the correctness, and a grossly negligent state of ignorance, are both insufficient. The transferee is not under a duty of inquiry.\footnote{909} While \$892$ requires good faith as a

\footnote{905}{See above n 795, 189.} \footnote{906}{Palandt, above n 542, 1082.} \footnote{907}{See above n 590.} \footnote{908}{See above n 590, 908 and 909.} \footnote{909}{See above n 590, 908.}
precondition for protection of the acquisition, bad faith must be positively established in order to exclude it. In this case it had to be established that the assignee had knowledge that the Land Debts in reality had lower priority than the priority accorded by the time order of their registration. Doubts about the correctness of the legal situation revealed by the Land Title Register are insufficient, just as a gross negligence is, to destroy good faith. It is not inimical to good faith that the correct priority relationships could have been inferred from the basic registry records underlying the registration entries. Whether there is good or bad faith is a question of fact to be answered by the trial judge according to the concrete circumstances of the individual case.

Knowledge of the Facts and Errors of Law

One of the most difficult questions on this point is whether an assignee can, through an incorrect legal appraisal of the situation, make a good faith acquisition. In the Hereditary Leasehold Case a 100 year Hereditary Lease had been granted in 1833 by Anna Maria U to D J at an annual rent of 10 Taler. In 1837 it was registered in the Mortgage Book for the city and region of Paderborn. It was later carried over into the Land Title Register of the local court. D J went into possession and erected a residence, stables and a barn within the terms of the lease. The defendant inherited from him the right of possession and use pursuant to the lease. Katherina Theresia U became the registered

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910 In this respect, the provision protecting good faith acquisition of goods - § 932 - differs from § 892.

911 die Grundakten.

912 See above n 590, 909.

913 (1920) 98 RGZ 215.

914 die Erbpacht - in its original form was a proprietary interest in the land under the terms of the lease instrument. The contemporary meaning is a long term lease with contractual status.

915 das Hypothekenbuch was the critical register for areas under the earlier Prussian registration legislation - see text above following n 54.
owner in 1874. In 1901 she sold the land to the businessman Ignatz N who was registered as owner. In 1907 N sold part of the land to the plaintiff. A new certificate of title was created for the plaintiff's part. The plaintiff alleged that it was incomplete and commenced proceedings for confirmation that his title extended to the area upon which the buildings stood. The defendant counterclaimed. § 2 of the Prussian Feudal Relief Statute of 1850\(^\text{916}\) had dissolved Hereditary Leases and installed the Hereditary Lessee as owner.

The Oberlandesgericht at Hamm had concluded that the defendant's Hereditary Lease indeed fell within the terms of the legislation, but it was his responsibility to ensure that the Land Title Register was amended to reveal this, and the plaintiff had made a good faith acquisition in reliance upon the Register. The Reichsgericht disagreed. It certainly was the responsibility of the defendant to obtain amendment of the title to ensure that it reflected the true legal situation. However, it did not follow that the unamended title could serve as a foundation for a good faith acquisition within § 892 BGB.

For one thing, the content of the Register could not lead to the supposition that the plaintiff would obtain full unburdened ownership, but on the other hand acquisition of ownership burdened by a Hereditary Lease was at law impossible. It was completely out of the question that the plaintiff had obtained ownership burdened by a fixed term lease, in the contemporary sense,\(^\text{917}\) because the Land Title Register gave no reason to believe that. The correct legal meaning of the register entries was that the owner landlord had lost his ownership and the tenant was now owner. This significance was visible to one acquainted with the legislation. Whether this meant that the Land Title Register was incorrect did not have to be decided. The protection of a good faith acquisition in § 892

\(^{916}\) Preußisches Ablösungsgesetz vom 2. März 1850.

\(^{917}\) See above n 914.
is not excluded where there is ignorance of the circumstances which underlie the
incorrectness of the Register,

... and thus it is not refused when the assignee, in consequence of a legal
error, has not recognised the intervening legal course of events outside the
Land Title Register which have led to the incorrectness of the Register.
Nevertheless, the protection of good faith does not in any case extend to a
failure to recognise the true legal meaning of a registration entry which in its
form reveals a legal relationship which has become legally impossible by
virtue of legislative amendment.918

The possibility was plainly left open for an assignee to claim good faith reliance on the
Register despite failure through legal error to appreciate the significance for the accuracy
of the Land Title Register of the surrounding circumstances.

In the Legal Certainty Case919 the court confirmed that a legal error could be recognised
as a legitimate obstacle to actual awareness of incorrectness. The actual problem in the
case was the rapid change in prevailing legal opinion concerning the effect of mortgage
revaluation and reinstatement in the period of hyper-inflation. At one end of the spectrum
of opinion, the Reichsgericht had made tentative suggestions as early as 1923920 that a
new view could be taken of the status of a revalued and reinstated mortgage vis-à-vis
public faith in the Register. At the other end, one could accept with complete certainty
that the new view had passed into public consciousness when the Revaluation Statute
was passed. If in the intervening period the assignee wished to show that he had no
actual awareness of incorrectness in the Land Title Register because he analysed its
contents in accordance with the prevailing legal view, which later proved to be incorrect,
then the prevalence of that view had to be ascertained. When isolated challenges were

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918 See above n 913, 220.
919 (1928) 57 JW 102.
920 (1923) 107 RGZ 78, which was accepted as the turning point of change within legal circles in (1927)
116 RGZ 147.
being made to the prevailing view in lower courts and by recognised scholars, this was
too soon, but when the new view had been so disseminated as to enter common opinion
and be employed in the courts, then the knowledge could not be shut out, particularly
when the relevant party is a firm acting under advice and the emergent view had been
noted in the daily papers and in the publications of professional bodies. With respect to
the point in question, the court settled on Reichsgericht decisions of 13 March 1925\textsuperscript{921} as
the point at which the new view had been sufficiently confirmed and disseminated to be
part of the legal knowledge, in the light of which the assignee would assess registered
interests and the circumstances surrounding them. The court noted that an assignee
who held to an outdated view of the law might well be seeking to exploit apparent legal
uncertainty, and thereby cause harm to the unregistered interest holder contrary to good
morals.\textsuperscript{922}

The transferee has the appropriate knowledge when he or she, in the concrete
circumstances, has been so informed about the facts underlying the error that conviction
about the incorrectness would not be shut out. In the \textit{Submarine Base Case}\textsuperscript{923} the
German Navy had planned in 1943 to build a submarine base on the North Sea coast.
Acquisition of the relevant land and resettlement of affected population became the task
of the official Resettlement Corporation. The Hereditary Estate\textsuperscript{924} of the plaintiff was
within the project area. He declared himself ready and willing to accept the defendants’
land in substitution for his own. The defendants refused to sell and their land was

\begin{footnotes}
\textsuperscript{921} (1925) 110 RGZ 70 and (1925) 110 RGZ 90.

\textsuperscript{922} § 826 BGB - see above following n 793. The court seems to suggest an unreported Reichsgericht
decision of 1 June 1927 (V362/28) as the turning point in this respect.

\textsuperscript{923} \textit{Submarine Base Case} (1961) 18 [BGB §892] BGH LM Nr 5.

\textsuperscript{924} \textit{der Erbhof} - an estate the inheritance of which can be restricted to family members. Persistence of
such and similar interests in Hamburg, Niedersachsen, Nordrhein-Westfalen, Schleswig-Holstein, Rheinland-
Pfalz, Baden-Württemberg, Hessen and Bremen from before enactment of the BGB was maintained by § 94
EGBGB. They are now regulated under the Hufeordnung of 1976 (BGB I 1976) with procedural regulations
in BGBI 1976 I 885.
\end{footnotes}
expropriated. The plaintiff took over management of the land on 1 May 1944. Transfer of the land to the Resettlement Corporation was registered in the Land Title Register on 8 July 1944. The defendants refused the compensation and it was deposited in an account for them. The plaintiff sold his own Hereditary Estate to the Navy by a notarised contract dated 29 November 1944, and on the same day purchased the land in dispute from the Resettlement Corporation. The documentation of both transactions was then lost in the chaos of war.

In June 1945 the plaintiff was, on authority of the Military Governor, ordered to vacate the land. The defendants unsuccessfully sought restitution, but the Trustee of Compulsorily Acquired Land was directed to release it to the plaintiff. In 1957 the transactions of 29 November 1944 were completed, the plaintiff and the West German Government being registered as the owners of the respective land parcels. Because the defendants still refused to abandon their claim to the expropriated land, the plaintiff commenced proceedings to establish that they had no claim for registration as owner, and that the first defendant had no claim for restitution of the land.

The BGH concluded that the plaintiff had acquired the disputed land by a juristic act in good faith reliance on the correctness of the Register. The major issue was whether the plaintiff was aware of a deficiency in the expropriation procedure by which the Resettlement Corporation became the registered owner, and thus whether he had knowledge of the incorrectness of the Land Title Register. The invalidity of the procedure alleged by the defendant did not flow from the legislation itself, but rather depended upon the basic principles of Administrative Law, the application of which in particular cases was always surrounded by significant doubt. It was not to be expected of a layperson

928 The court concluded that the plaintiff acquired through a juristic act and thus § 862 could apply. Although the transaction took place in a process of expropriation and resettlement, individually it was to be characterised as an agreement far more than an official act.
that he or she could be capable of correctly assessing a fact situation in the light of these principles. Knowledge of the incorrectness of the Register is to be found when the incorrectness of the Register has been brought to the transferee's attention in such a way that an honest thinking person would not shut out the conviction of it. That was not the case here. The plaintiff had been advised from a number of quarters, including the transitional postwar government, that ownership of the disputed land had passed to the Resettlement Corporation. It was reasonable for the plaintiff to adopt that view. On the other hand, the defendants had not acted to regain registration in the Land Title Register pursuant to the applicable regulations of the transitional government, nor had they even entered a Contradiction. This passive attitude of the defendant could only strengthen the plaintiff in his reliance on the correctness of the Register.

Express Provision for Constructive and Imputed Knowledge

Although § 892 is excluded, we might say, "by a believable sort of actual awareness of incorrectness in the Register on the part of the transferee," there are express to allow constructive knowledge as a ground to challenge an otherwise indefeasible transaction provisions. These apply in tightly defined circumstances.

defective juristic acts

§ 142 EGB invokes constructive knowledge of defective juristic acts. Where it applies, generally to other parties to the transaction, it prevails over § 892, requiring only a constructive state of knowledge - what ought to have been known.

vicarious responsibility for agents

926 See above n 923, 591.

927 The text of § 142 is set out in Appendix III.
Knowledge held by an agent is decisive, and § 166 BGB applies a principle of constructive knowledge in agency relationships. Knowledge acquired constructively by a solicitor or notary can thus be imputed to the client. In the Repaid Mortgage Case the applicant had taken an assignment of a mortgage securing a loan which had already been repaid. When a secured loan is satisfied the mortgage passes by process of law to the owner of the land as an owner's mortgage. The court concluded that the notary acting for the assignee of the mortgage, as a person versed in law, must have drawn the correct legal conclusion that repayment of the loan, and issue of a receipt, would have the consequence that the land owner would acquire the mortgage, and therefore the assignor had no title to pass. When the assignee engages an agent, then the critical question is the agent's knowledge. A notary can also be such an agent. Only when the notary acts merely in relation to the documents is his knowledge not to be attributed to the client. The court reached the further conclusion that it would contradict the principles of trust and faith if the assignee could, by completing the assignment of the mortgage through a legally qualified representative, create a situation where discharge of the personal obligation secured by the mortgage had come to nothing. On this ground alone the assignee could not claim a good faith acquisition.

With respect to a company, knowledge possessed by its executive organs is its knowledge. It is sufficient for one of the company's agents to have the requisite knowledge. It is not necessary that this individual be involved directly in the relevant

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928 The text of § 166 is set out in Appendix III.


930 § 1163 BGB.

931 See above n 929, 58-9.

932 Treu und Glauben § 242 BGB.
transaction. Otherwise it would be very easy for a company to rid itself, at its pleasure or by coincidence, of existing knowledge with respect to a particular transaction.\textsuperscript{933}

Burden of Proof

The party challenging the acquisition has the burden of proving the assignee's disentitlement to the protection of a good faith acquisition afforded by § 892, and thus, in appropriate circumstances, the assignee's actual subjective awareness of contrary interests.

Relevant Time to Hold Knowledge

The relevant time when knowledge of the incorrectness of the Register must be held, in order to exclude the protection provided by § 892, is completion of the acquisition. With respect to transactions which are completed by lodging the transaction at the Land Title Registry for registration, this is the point at which the good faith of the transferee is critical.\textsuperscript{934} Where something further has yet to be done, such as the delivery of a Mortgage Letter, completion of that act is the critical time.

A group of transactions lodged together, such as a discharge of mortgage with a transfer of the now unburdened ownership, is treated as a unified transaction, but because all transactions are interdependent the relevant time is registration. Although the transactions are considered unified with respect to knowledge held at the time they are lodged together for registration, they retain independent status for the purpose of

\textsuperscript{933} Juristische Person Case (1935) 64 JW 2044.

\textsuperscript{934} § 892 (2) BGB.
protection under § 892. In the Converted Mortgage Case\textsuperscript{935} the plaintiff had granted a mortgage limited to 10,000 Marks\textsuperscript{936} in order to secure the claims which F might have against K. In one transaction this security was converted to an ordinary mortgage securing a current balance, and assigned to the defendant. This transaction was lodged for registration and one consolidated remark was entered beside the original mortgage entry. The plaintiff sought correction of the entry, and it emerged that the amount of claims against K were in dispute, as well as the liability of the plaintiff's land to secure the defendant's claims, which were in the order of 9850 Marks. The defendant claimed a good faith acquisition of the appropriate security, protected by § 892.

The Reichsgericht concluded that the defendant's acquisition was a secondary transaction, although integrated with the mortgage conversion. If the defendant had been the first party to establish the mortgage, then § 892 would not have extended to it. However, in legal conception the transaction had three parts. Relevantly, the mortgage had been converted in the hands of the assignor, and then it was assigned to the defendant. The assignment would thus be protected by § 892 so long as the defendant was not aware of the alleged incorrectness of the Register\textsuperscript{937}. The case was returned to the lower court to establish whether it was incorrect and the defendant's knowledge on this point.

First Acquisition and Assignments

At many places in this study of issues raised by the interpretation of §§ 891 and 892 a distinction has been drawn between a first or "founding" acquisition on one hand, and the

\textsuperscript{935}(1935) 147 RGZ 298.

\textsuperscript{936} die Höchstbetragshypothek.

\textsuperscript{937} See above n 935, 301 and 302.
assignment of an existing right on the other, the first of which does not attract the protection of public faith so far as the ability of the grantor to make the grant is concerned.\textsuperscript{938} In other words, the first proprietor of a registered interest cannot claim by virtue of registration alone a greater validity for the interest than it would otherwise hold. This principle is illustrated by the \textit{Original Mortgage Case}.\textsuperscript{939} The defendant husband acquired ownership of the land in 1922, which had been subject to a mortgage securing 160,000 Marks in favour of the plaintiff life insurance company since 1917. During the hyper-inflation of 1923 he paid 480,000 Marks (later valued at 98.88 Gold Marks) in discharge of obligations under it and received a discharge of mortgage document and the Mortgage Letter. The Land Title Registry rejected the discharge document and it was replaced with one which stated that the discharge was made without reservation. At this point it was decided not to register the discharge. Instead, the husband assigned to his wife the Owner Mortgage which he obtained by operation of law through discharge of the obligation which the mortgage secured,\textsuperscript{940} and this was lodged for registration. The plaintiff's mortgage for 160,000 Marks was revalued at 24,000 Gold Marks, and the Land Title Registry raised questions about this, as well as about the nature of the assigned security in the wife's hands. It was believed that the plaintiff's mortgage had been effectively discharged, and its value of 24,000 Gold Marks became the value of the wife's security, which was characterised as a mortgage securing a loan of that amount, with priority ahead of later mortgages, and this was registered. Following passage of the Revaluation Statute\textsuperscript{941} it was assessed that the plaintiff life insurance company was entitled to have its mortgage reinstated for 39,901.12 Gold Marks and the value of the defendant's discharge sum of 480,000 Marks was only 98.88 Gold Marks. The plaintiff

\textsuperscript{938} See for example the \textit{Forged Priority Alteration Case}, above n 647.

\textsuperscript{939} (1930) 128 RGZ 280.

\textsuperscript{940} § 1163 BGB.

\textsuperscript{941} Aufwertungsgesetz.
claimed reinstatement of the revalued mortgage and removal of the wife's mortgage.

The Reichsgericht concluded that the value of the husband's Owner Mortgage was only 98.88 Gold Marks and that was all he could assign to his wife. Could the wife rely on a good faith acquisition and thus the protection of § 892? The court pointed out that the plaintiff's unconditional discharge of mortgage had not been registered, so with respect to it the wife had not taken her interest in reliance upon the correctness of the Register. She had not taken an assignment of the mortgage from the plaintiff, and could not be the proprietor of an Owner Mortgage because she was not the registered owner of the land. Her registered security interest could only be characterised as an original mortgage. Her husband was the creator of the right, so she had not made a relevant acquisition, whether it was in good faith or not. The only registration entry upon which she could rely was her own.

So far as the application of § 892 BGB is in question, the wife can only rely upon the state of the Register which immediately preceded her acquisition. She cannot raise against it that very registration entry through which her acquisition itself was first officially publicised ...

(iii) Good Faith Acquisition and Possession

One might observe that the presence of the holder of the unregistered right in possession of the land has played no role in ascertaining whether the person acquiring registration was aware of the incorrect status of the Register. In the Submarine Base

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942 der Rechtsurheber.

943 See above n 939, 284.

944 With respect to rebuttal of the presumption of correctness, see the Sterkenmoor Case, above n 617.
Case,\textsuperscript{945} for example, the defendants retained possession of the residence on the land for many years and the point of the plaintiff's case had been to obtain possession. The possibility that the defendants' retention of possession might have alerted the plaintiff to a claim which the defendants might have made, and thus strengthened the circumstances in which an "honest thinking person" might reach some conviction that the Land Title Register did not reflect the true legal situation, was not even considered by the court. In the Hereditary Lease Case\textsuperscript{946} the status of the defendant in possession was not seen to affect his legal situation although a presumption of ownership, which could have arisen under English common law,\textsuperscript{947} would have reflected the truth that he was the owner.

Contrasting Movable Property

§ 1006 \textit{BGB} provides that the person in possession of movable property is presumed to be the owner of it. This presumption does not operate with respect to land. Instead, the presumption in § 891 in favour of registered interests operates. § 932 provides that the transferee of goods acquires good title to them, even if they did not belong to the transferor, unless the transferee was not in good faith. The transferee is not in good faith if he or she knew, or, unlike the acquisition of land, through gross negligence was ignorant of the fact, that the goods did not belong to the transferor. Although transfer of title to goods is made by delivery of the thing with agreement that ownership should pass,\textsuperscript{948} physical delivery may be substituted by assignment to the transferee of the claim for return of the goods which can be asserted against a third party in possession.\textsuperscript{949} §

\textsuperscript{945} See above n 923.

\textsuperscript{946} See above n 913.

\textsuperscript{947} Certainly, being in possession would be a ground for finding constructive knowledge on the part of the transferee of the other claims: \textit{Smith v Jones} [1954] 2 All ER 923.

\textsuperscript{948} § 929 \textit{BGB}.

\textsuperscript{949} § 831 \textit{BGB}. 
provides that persons who were not in good faith when they acquired possession of goods are liable to the owner from the time of taking possession. If they discover later that they are holding possession without entitlement, they become liable from the time of acquisition of that knowledge. Possession is actual power or control of the thing.\textsuperscript{950}

The good faith acquisition of movable property, in the context of these principles, was explored by the Bundesgerichtshof in the \textit{Bulldozer Case}.\textsuperscript{951} The discussion in that case of the knowledge of other interests required to defeat a claim of good faith acquisition has been applied in many cases concerning land.\textsuperscript{952} The plaintiff was engaged in 1944 by OT to develop oil-shale extraction sites. In this work it used a bulldozer which had belonged to OT, but which the plaintiff purchased early in 1945. Following the collapse of Germany, the plaintiff left the bulldozer on the land. In March 1948 the administrator appointed over the oil-shale works allowed the administrative predecessor of the defendant State government to take the machine and it was put to use. At the instigation of the plaintiff, the State office for asset control in the British Occupation Zone issued a certificate acknowledging that the plaintiff owned the bulldozer, on the basis of which its return was demanded. The administrative predecessor of the defendant refused, claiming that the certificate was insufficient evidence of ownership in the plaintiff. Nevertheless, some ten months later in 1950, the predecessor purchased the bulldozer from the plaintiff. The plaintiff later sued the State government successfully for 36,000 Marks in damages for use of the machine between presentation of the certificate and purchase. The State government appealed.

\textsuperscript{950}§ 854 I BGB.

\textsuperscript{951} (1958) 26 BGHZ 256.

\textsuperscript{952} See \textit{Submarine Base Case}, above n 923, 591; \textit{Case of the Incapacitated Husband}, above n 893; \textit{Building Development Case}, above n 888, 162.
The BGH applied the criteria for ascertaining awareness of lack of right, which establish whether the transferee was in good faith, and which have been discussed above, in assessing the plaintiff's claim under § 990 BGB. Mere doubts were certainly held to be insufficient, and on some legal questions concerning property in the hands of receivers and administrators a fact situation may legitimately lead to different conclusions without challenging good faith, but sufficient knowledge is acquired when an honest thinking person could not close out the conviction that there was a defect in the right to possession. Far from a transferee's good faith being reinforced by the presumption of ownership which follows from possession, the BGH considered that the transferee's ability to form an objective view is actually slanted by the advantages to be gained through use of the thing, and this is a factor which the transferee must work against in striving to place him- or herself in the position of an honest thinking person who disregards the advantages when assessing the evidence. In the face of mere doubts a person in possession generally has no general duty of inquiry, but when presented with the certificate issued by the appropriate authority the defendant could have taken advantage of its access to governmental records and ascertained the true position. In the final analysis, the objections to the plaintiff's title to the bulldozer could not have been serious as the machine had been purchased from the plaintiff ten months later. From the treatment in this case of possession as a possible factor in the "good faith equation", and the complete absence of it as a consideration from the cases concerning land, one might conclude that it is, at best, merely one of the circumstances, among others, which might prompt the honest thinking person to conclude that the Land Title Register is incorrect.

953 § 1006 BGB.

954 Bulldozer Case, above n 951, 260.

955 ibid 261.
A related issue is the credibility attributed by courts to evidence of the transferee's state of mind. Unless an agent is involved, constructive knowledge does not play a role in attributing bad faith to a transferee in land transactions, and this most probably explains the very limited role which possession plays.

When the threshold issues are satisfied and § 892 is thus engaged, the transferee must subjectively be aware of the transferor's lack of rights, or the failure of title, or the existence of other unregistered interests, if a good faith acquisition is to be excluded through knowledge that the Register is incorrect, that it is not in harmony with the true location of legal rights. The test of the honest thinking person is applied to the knowledge of circumstances of which the transferee was actually aware, in order to test whether "the penny had dropped". This is supported by the disbelief which the courts have frequently expressed when finding that sufficient doubts must have accumulated in the assignee's mind to exclude good faith, and the great "latitude of ignorance" allowed by the courts, particularly with respect to errors of law.

This investigation thus appears to be more closely related to weighing the balance of probabilities bearing upon the difficulty of establishing the transferee's actual state of mind, and to assessing whether the assignee's own advantage was the only factor which could have closed out the abstract conclusion of a defect in title, than it is to applying a test of liability based on constructive knowledge. The courts have consistently denied the existence of such a test, while confirming that gross ignorance negligently maintained is insufficient, and that the burden of proving the transferee's awareness lies with the party asserting it.
§ 893 BGB - Transactions Completed with Faith in the Register

Whereas the application of § 892 BGB is restricted to a transferee who actually acquires a right by a juristic act, § 893\textsuperscript{956} extends the principle of public faith in the Land Title Register in two important respects to protect -

- performance\textsuperscript{957} rendered to a registered proprietor who is later revealed to have had no actual entitlement to accept it, and
- a disposition of a right by a juristic act which is not embraced by § 892.

Both aspects must rest upon a registered proprietary right, and not upon an obligatory personal relationship. Because the provision is an extension of § 892 similar factors of exclusion can apply. For example, the application of both § 892 and § 893 would be excluded if inaccuracy in the Land Title Register appeared from a Mortgage Letter, a notation made on the Letter or from possession of it by someone other than the registered mortgagee. In these cases repayment of the mortgage to the wrong person would not be protected by those provisions.\textsuperscript{958} When this occurred in the \textit{Impersonation} Case,\textsuperscript{959} the Reichsgericht summed up the application of the provision thus -

\begin{quote}
§ 893 BGB indeed protects the good faith of those who render, to the person whose entitlement to it is revealed by the Land Title Register, some performance on the basis of that entitlement. This provision does not however apply to payments - at least payments of capital - made with respect to a Letter Mortgage (or Letter Land Debt), when the registered party
\end{quote}

\textsuperscript{956} The text of § 893 is set out in Appendix III.

\textsuperscript{957} \textit{die Leistung} is frequently translated merely as "payment" but, although in practice this might well ring true in many transactions, an "act of performance" is the fulfillment of obligations in an obligatory relationship. This is one significant departure of my translations in Appendix III from translations which have preceded them. The over-simplification obscures the range of "personal" transactions which may be entered with the "personal" rights of \textit{Claim} (der Anspruch) and \textit{Demand} (die Forderung), and no doubt has contributed to the widely encountered perception that unregistered rights with respect to land do not exist in the German system.

\textsuperscript{958} § 1155 BGB accords the protection of public faith to transactions concluded on the basis of the Mortgage Letter if the rights of the holder of it are connected to a registered mortgagee by correct formal assignments.

\textsuperscript{959} See above n 885.
is not in possession of the Mortgage Letter.\textsuperscript{560}

(a) What Amounts to Performance?

The actions undertaken in reliance upon the Land Title Register which amount to performance for the purpose of § 893 include -

\begin{itemize}
  \item benefits in kind and in services\textsuperscript{561} such as -
    \begin{itemize}
      \item granting a right of pre-emption\textsuperscript{562}
      \item recurrent acts of performance,\textsuperscript{563} and
    \end{itemize}
  \item financial payments for discharge of a proprietary claim, such as -
    \begin{itemize}
      \item recurrent acts of performance,\textsuperscript{564}
      \item discharge of a mortgage,\textsuperscript{565}
      \item discharge of a Land Debt,\textsuperscript{566}
      \item payment of an annuity or the capital sum to discharge a rentcharge.\textsuperscript{567}
    \end{itemize}
\end{itemize}

Whether performance is made by a third party or by the party obliged to make it\textsuperscript{568} is immaterial so long as it is made with respect to the proprietary right. With respect to securities for which further documentation is issued, reliance upon the Land Title

\textsuperscript{560} See above n 685, 356.

\textsuperscript{561} \textit{die Sachleistung}.

\textsuperscript{562} § 1084 \textit{BGB}.

\textsuperscript{563} § 1105 \textit{BGB}.

\textsuperscript{564} § 1105 \textit{BGB}.

\textsuperscript{565} § 1113 \textit{BGB}.

\textsuperscript{566} § 1101 \textit{BGB}.

\textsuperscript{567} § 1199 \textit{BGB}.

\textsuperscript{568} See for example § 268 \textit{BGB} - satisfaction of obligation by a third party to prevent exercise of power of sale or execution - and § 1143 \textit{BGB} - satisfaction by land owners of third party obligations secured by their land.
Register alone might not be sufficient, and possession of the further documentation must be inquired after, at least when making payments of capital.  

This can be relevant to the following transactions -

- delivery of documentation following satisfaction of a real security, including the relevant Letter.  
- creation of new documents following part discharge of a real security.  
- production of relevant documents before realisation of a real security.  

If a registered party acquires possession of relevant documents after effective assignment, then this performance of obligation to that party in reliance upon the Register is also protected. Protection of the Register is not available when performance is rendered to a caveator, unless the person is also the creditor. It is also unavailable to a tenant who pays rent to the supposed purchaser of the leased land.  

(b) Which Dispositions are Protected?  

While § 892 protects acquisition of proprietary rights, § 893 protects other types of disposition, including -

- alteration of the content of a right,  
- alteration of priority,  

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969 As seen in the Impersonation Case concerning a Letter Mortgage: above n 959.  
970 § 1144 BGB.  
971 § 1145 BGB.  
972 § 1160 BGB.  
973 Palandt, above n 542, 1083.  
974 § 877 BGB.
A relevant disposition, made in reliance upon the Land Title Register, must be a juristic act entered into with the immediate objective of altering proprietary rights. In the *Lucky Pensioner Case* the court concluded, in the light of intentions when the *BGB* was drafted, that a *disposition* for the purposes of § 893 is —

... an alteration of a right in a land parcel, or of a right over such a right, directly effected or intended.

The essential point about a disposition is the *direct* effect which it has on the proprietor's right, with respect to its existence or to the relationship of the proprietor to it. This contrasts with plain obligatory transactions through which only the legal relations between two people are affected. There are some transactions in the nature of a disposition which do not fall within § 892, and § 893 potentially applies the protection of public faith to these. They include relinquishment, notice of termination, and agreement to entry of a caveat. Transactions which have been regarded as relevant dispositions for the purposes of § 893 include the consent and approval of a proprietor to a disposition, including that of a person not entitled to give it, which affects the relevant object. They also include transactions through which the power to make a disposition is conferred. Granting a power of attorney with authority to make dispositions with respect to rights

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975 § 880 *BGB*.

976 § 875 *BGB*.

977 § 1168 *BGB*.

978 *das Rechtsgeschäft*.

979 See above n 805, where the facts are set out in detail.

980 *die Verfügung*.

981 *Lucky Pensioner Case*, above n 805, 399.
over land changes the relationship of the principal to the relevant rights in land - they
may be altered at any time by the attorney until the power is revoked. Arguably there are
grants of authority to agents which do not sufficiently affect the relationship between the
proprietor and his or her real right to be termed a "disposition" of the right.

The Reichsgericht had no doubts in the Lucky Pensioner Case, however, that the act
of clothing an agent with the authority to enter into possession, and to subdivide and
grant possessory and use rights in the land, which are components of ownership, was a
disposition with respect to the registered ownership of the land. Thus, on the facts of that
case, §§ 892 and 893 applied to the transaction, and the allegation of negligently
harming the true owner's property in terms of § 823 was answered by the fact that the
defendant was entitled to rely on the Land Title Register.

(i) Litigation

Undertaking litigation does not fall within the concept of "disposition". One exception
appears to be pursuit of the rights arising from a real security, also by way of litigation.

(ii) Personal Obligations and Leases

The completion of personal obligatory contracts does not fall within the concept of
disposition. This excludes lease agreements which are also personal obligations. This
was explored in the Case of the Stubborn Tenant. In April 1920, the plaintiff and his

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982 ibid 400.
983 See above n 805.
964 § 1148 BGB.
985 (1922) 106 RGZ 109.
wife had acquired ownership of a house from Frau L and given to the defendant, who was residing there, notice to vacate by 1 January 1921. The plaintiff sued to retain possession. The defendant disputed the effectiveness of the notice, relying on a five year lease contract\textsuperscript{986} which he had concluded with D in 1919. D had held a usufruct\textsuperscript{987} and two mortgages over the land to secure indebtedness of the L Family to him. The first mortgage was paid out in 1910. The instrument containing the Usufruct was removed from the Register in 1920 pursuant to a declaration of surrender. The balance of all secured indebtedness was in any case paid out in 1921. In this situation, the entitlement of D to grant the lease was in dispute in view of the terms of the instruments and part satisfaction in 1910.

The Reichsgericht dealt with the question of whether entry into possession under a lease contract made with a registered usufructuary constituted an acquisition or a disposition for the purposes of §§ 892 or 893, and concluded that the protection of public faith in the Register could not assist the defendant. § 892 could not apply because a lessee gains no proprietary right over the land. § 893 could not protect the lease because a lease is not a disposition made in reliance upon the Register. A transferee of land takes the place of the lessor-transferor in the tenancy relationship where the tenant has gone into possession before ownership passes.\textsuperscript{988} Some commentators had contended that a tenancy relationship, comprising a lease contract and the delivery of the right of use, was accordingly to be seen as a disposition in the sense used in § 893. The Reichsgericht could not agree.\textsuperscript{989} A disposition in the sense used in the BGB is a legal transaction directly effecting a transfer or assignment, burdening, altering or dissolution of a right.

\textsuperscript{986} \textit{der Mietvertrag}.

\textsuperscript{987} \textit{der Nieußbrauch: §§ 1030 - 1089 BGB}.

\textsuperscript{988} § 571 BGB.

\textsuperscript{989} See above n 985, 111.
and this, it enunciated, is the sense of the word used in § 893. Neither the conclusion of a lease contract nor the letting into possession, taken individually or in combination, are encompassed by the concept. This conclusion was not altered by the fact that a caveat can protect the holder of the unregistered interest, and in particular a purchaser from further leases granted by the registered owner/vendor.990

In any event the court considered that the issue was largely hypothetical. If the lease had been validly granted, the interests of the tenant would have been protected against the purchaser by § 1056 BGB, which applies the protection in § 571 directly to lease contracts made by usufructuaries, but also allows the purchaser to give notice to terminate the lease. This had eventually been done and the notice period had expired, so the only relevance of the issue was for the sole purpose of ascertaining legal costs.991

The question was squarely presented to the Bundesgerichtshof in the Disappointed Caveator Case.992 The plaintiff was the tenant of an area of a building in which he had a delicatessen. The lease was granted in 1947 and would expire in 1956. The first defendant was sole registered owner until 1948 when the second defendant acquired a share. In 1949 the third defendant also purchased a share and registered a caveat to protect the agreement, which was completed in 1950 when a transfer was registered. However, during this purchase period the plaintiff and the first defendant had made a written contract in which yet a larger area of the building was let to the plaintiff until 1975, and upon expiration of the existing lease the area of his present shop would be added to that under the extended lease. At the time when co-ownership passed to the third defendant in 1950, the plaintiff was in possession of the entire area.

990 § 883 II BGB.

991 See above n 985, 114.

The BGH concluded that § 571 BGB was satisfied, so the third defendant had stepped into the contractual lease relationship which the first defendant had entered. Registration of the caveat did not shut out the legal consequences. A caveat, noted the BGH, protects the relevant claim against frustration or impairment by other dispositions - in other words, legal transactions calculated directly to assign, burden, alter or dissolve a right over land. Thus, neither the lease contract, nor letting the tenant into possession, nor a combination of those events, amounts to a disposition. The BGH noted the argument that pursuant to § 883 Ill a right protected by caveat is to be treated as though registered at the time when the caveat was registered. This, however, applies to priority and does not imply that the purchaser of land is to be considered retrospectively the owner of the land from the time the caveat was entered.993

The BGH noted considerable support for the view that a caveator is protected against personal obligatory transactions with possessory interests, including leases, as well as the not inconsiderable support for the view against this interpretation of § 883. In the end the court fell back upon the Case of the Stubborn Tenant,994 in which the Reichsgericht had "doubtingly touched the question without reaching a decision."995 In fundamental principle the provisions of the BGB concerning proprietary rights are not to be expansively construed. According to the system established by the legislation, leases and dispositions cannot be regarded in the same way. The caveat guarantees protection against dispositions which would frustrate or impair the unregistered right. By § 571 BGB the transferees of land are bound in their ownership in such a manner that they cannot take direct possession and deal with it in their discretion, and the effect of this is, plainly, not to be understated. Nevertheless, their obligations to tenants are only personal

993 See above n 992, 3.
994 See above n 995.
995 See above n 992, 4.
obligatory basis, and their acquisition of ownership is not prevented. Transferees acquire the rights, as well as the obligations, arising from a contract of sale. Transferees will not always be bothered by tenancy obligations. Inability to take the land in direct possession would hardly be a problem for a purchaser seeking only a capital investment, and indeed the tenancy could be an advantage. A person acquiring an interest in co-ownership could hardly expect to acquire direct possession. The interests of the transferee therefore do not always require an expanded application of the caveat provisions in § 883 to leases.

The court saw no obvious reason why the purchaser should take priority over the tenant.

Both have only personal obligatory relations with the vendor/landlord. It would appear to all on the point of acquiring land, or a share as co-owner in it, from the obvious fact that someone other than the vendor is in possession, that they have to reckon with the existence of a tenancy relationship to which they will be bound. On the other hand, it is not a warning in the same order to someone who wishes to lease land that a purchaser's caveat has been entered in the Land Title Register. Only persons acquiring proprietary rights over land through registration in the Land Titel Register would be investigate a claim which has been caveated in the Register. Most prospective tenants would not consider such an investigation necessary. in general prospective tenants do not have reason before concluding lease contracts to consult the Land Titel Register, and usually would not consider themselves obliged to do so. It would therefore go too far to allow the effect of a caveat to gain ground in relation to tenants.

Leases of residential property can be terminated according to § 565 BGB, generally according to the recurrence of rental payments.

See above n 992, 4-5.
(iii) Caveats as Dispositions

The lodgement of a caveat for registration is itself a disposition in the relevant sense, and good faith attending this disposition extends to later registration of the protected right, so long as the claim was not purely contractual at the time when the caveat was lodged. In the _Discovered Will Case_ the BGH considered that the decision turned on whether the plaintiff had made a good faith acquisition when his purchaser’s caveat was registered before being alerted to the interest of the City. Because the defendant vendors were not registered owners, the acquisition could not depend upon §§ 892 or 893 BGB. §§ 2366 and 2367 BGB provide similar protection for acquisitions from parties appearing from a Certificate of Inheritance to be entitled. § 2367 specifically applies this protection to dispositions made in reliance upon the Certificate of Inheritance. The fundamental principles applicable to § 893 were considered equally applicable to § 2367. A caveat is not a proprietary right over the land parcel, but rather a security instrument which, within a certain circumference, lends a proprietary effect to the protected right. It follows that a caveat effects a proprietary restriction of the affected land parcel. When an affected party consents to a caveat, if registration follows, a disposition has been made in the sense used in § 893, with the consequence that § 892 applies by analogical application. Thus, the caveator has the protection of good faith, not for the existence of a personal obligatory claim, but rather for the proprietary restriction of the affected land.

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998 See above n 754, where the facts are set out in more detail. Page references which follow are to the report at (1971) 57 BGHZ 341.

999 _die Auflassungsvormerkung._

1000 Beneficiaries upon the apparent intestacy of the deceased registered owner Maria H.

1001 See above n 998, 342.

1002 Ibid 343.
At the time when the plaintiff lodged the caveat and when it was registered, he had no knowledge of the incorrectness of the Certificate of Inheritance and thus made a good faith acquisition of a purchasers' caveat. Consequently, his good faith remained effective for his later acquisition of the proprietary right which corresponded to the personal obligatory claim protected by the caveat. It was therefore immaterial that the plaintiff was aware of the error in the Certificate of Inheritance when he was registered as owner. The plaintiff's caveat would have proven ineffective if the claim secured by it had not existed. However, he had an effective claim for transfer of ownership of the disputed land because a sale had been concluded and the purchase price was documented.

(iv) Unilateral Declarations and Notices

The characterisation of these as dispositions again depends on whether, as a matter of principle, they will directly affect proprietary interests in land. In the Mortgage Discharge Notice Case the defendant had acquired registered ownership of a family farm through his father, who had shared in a family community of assets. As a result of an irregularity in this transaction, in 1924 the plaintiff was allowed the right to live on the farm for as long as he liked, enjoying advantages as a family member. A Land Debt was registered in his favour for 20,000 Gold Marks at 4 per cent interest, upon the repayment of which his right to live on the farm would end. The defendant's son was entitled to terminate the Land Debt on six months' notice. In 1944 the plaintiff found himself in a Swiss sanatorium in view of a lung complaint. The defendant spent the war in captivity, and an administrator had been appointed to his assets. In 1948 the administrator gave

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1003 Ibid 343-4.
1004 This was required for an effective sale by § 4 Grundstückspreis Verordnung.
1005 (1951) 1 BGHZ 294.
1006 die Gütergemeinschaft.
notice of termination in the name of the defendant. This was confirmed by the plaintiff. The post-war currency reform followed, upon which the administrator had to inform the plaintiff that the defendant could not pay the first instalment of 4000 Marks which was due in November 1948. The plaintiff took action to obtain satisfaction from the land. The defendant raised a number of defences - inter alia that the secured debt was not due, and that the plaintiff's assets remained blockaded under military occupation regulations in view of his political activity for the NAZIs and absence from the country.

The relevant aspect of the appeal concerned the question of whether the defendant's administrator had the power to give notice of termination to the plaintiff without permission of the Guardianship Court\textsuperscript{1007} in view of § 1821 (1) \textit{BGB}. In turn this depended upon whether the notice of termination could be considered a \textit{disposition}\textsuperscript{1008} within the meaning of that provision.

The BGH considered the concept of disposition in great detail, drawing upon the \textit{Lucky Pensioner Case}\textsuperscript{1009}. It recalled that in essence a disposition is a legal transaction through which a proprietary right is \textit{directly} affected, by assigning it to a third party, or burdening it, or dissolving it, or by altering its substance. The effect made upon a right by a unilateral declaration in the course of challenge or giving notice can amount to a disposition, and its character is not at all altered by whether it is the person entitled, or an authorised third party makes it. A third party can effect dispositions whether the power of disposition has been obtained through legislation or by a juristic act.\textsuperscript{1010}

\textsuperscript{1007} \textit{das Vormundschaftsgericht.}
\textsuperscript{1008} \textit{die Verfügung.}
\textsuperscript{1009} See above n 805, 399.
\textsuperscript{1010} \textit{Mortgage Discharge Notice Case}, above n 1005, 304.
Unfortunately for the defendant, § 1821 (1) BGB required the court's permission for a "disposition with respect to land or a right over land" and, in the view of the BGH, the notice to terminate the Land Debt only *indirectly* affected the defendant's ownership of the land by ending the possibility of intervention by the secured creditor. The notice did not affect any other right of the defendant in the land. Other alterations of a mortgagor's rights under a mortgage, which would require registration in the Land Title Register, such as alteration of the due date for repayment, could be regarded as dispositions and thus would require the court's permission.\textsuperscript{1011} The BGH drew attention\textsuperscript{1012} to the fact that the Reichsgericht had actually used a notice of termination as an example of a disposition within the meaning of § 893. It had noted, however, that the consequence of the notice must be registrable -

Examples referred to in the literature of transactions in the nature of a disposition of a right over land which do not fall under § 892 are a surrender or a notice by which some right over the land is registered, or, by which someone is registered as owner.\textsuperscript{1013}

This was not the case with the notice given by the defendant's administrator. The notice was the exercise of a right contained in the Land Debt and it did not lead directly to any alteration of the Register. If it had been carried through, and the principal repaid, then a right would have been dissolved and removed from the Register, but the notice itself did not directly achieve this. It was not therefore a *disposition*, and thus the administrator was not required to obtain the permission of the Guardianship Court before issuing it. It was legally sufficient and irrevocable. The principal sum of the Land Debt had thus fallen due, and the defendant was entitled to use the remedies available to a secured creditor to recover the debt from the land.

\textsuperscript{1011} Ibid 305.
\textsuperscript{1012} Ibid 306.
\textsuperscript{1013} See above n 805, 399.
(c) The Effect of Extending the Scope of Protection

The effect of § 893 is that registered parties who receive acts of performance in view of their registered rights, or with whom juristic acts are made which amount to dispositions with respect to registered rights, are to be deemed not to have done so in vain. This leads to a brief reconsideration of the Double-Dipping Mortgagor Case.\textsuperscript{1014} A transferee of the ownership of land had acquired his interest subject to two existing registered mortgages to the same mortgagee. At the same time the mortgagee assigned the mortgages into the form of one consolidated mortgage, and all documents were lodged together for registration. The transferee formulated a clever argument that at the time he lodged his transfer for registration the Land Title Register disclosed two mortgages which were dissolved, but his title was then subject to a different mortgage. The price paid by the purchaser had been calculated in view of the continuation of the security or, in other words, in view of the understanding that he took the land subject to a mortgage. Ultimately the Reichsgericht decided that the purchaser took the title subject to the assigned mortgage. The identity of the mortgagee was not the factor which attracted the presumption of correctness and the principle of public faith, but rather the substance of the registered right. It was not a new mortgage - it was an assigned mortgage, the roots of which reached into the mortgages which were registered at the time when ownership was acquired. The assignee of the mortgages was as much as the transferee entitled to the protection of the Register. This did not depend on the identity of the earlier creditor, but on the content of the registered right.\textsuperscript{1015}

In reaching this conclusion the Reichsgericht made extensive comments on the combined effect of the German indefeasibility provisions in §§ 891, 892 and 893. Most of

\textsuperscript{1014} See above n 584.

\textsuperscript{1015} Ibid 183.
the passage is set out above, but it is appropriate here to set out the court's treatment of § 893.

§ 893 extends the protection of § 892 to anyone who renders performance to a registered proprietor on the basis of the registered status of the relevant right, just as it does to the benefit of anyone who effects a juristic act of a type which does not fall under § 892 with the registered proprietor of a right, in view of that right, and which amounts to a disposition of it. The consequence of applying § 892 analogically is, chiefly, that in this respect also the content [of the register] is to be taken as correct - that is, the person to whom performance is rendered, or who makes a disposition of the specified type, is to be treated as truly entitled.

The person rendering performance is relieved, and the disposition is deemed effective in favour of the person who made it. The alternative conclusion could follow only if a Contradiction, or a limitation of the power of disposition, had been registered, or if the relevant person was aware of the register's failure to reveal the true legal situation.

4 Conclusion

Discussions of the German land title registration system are frequently conducted in terms of a duality of apparent right and the true position of right. The "indefeasibility question" is often framed as a question as to whether a party was entitled to rely upon the appearance of right in the Register, or whether awareness of the true position disentitles the party to protection. Disentitlement is said to follow because

1016 See above n 587.
1017 See above n 584, 180-181.
1018 § 892 BGB.
1019 der Rechtsschein.
1020 die wirkliche Rechtslage.
1021 § 892 BGB.
1022 H Westermann's discussion in "Die Grundlagen des Gutglaubensschutzes" (1963) 3 Juristische Schulung 1 is deliberately organised along these lines.
transacting so as to defeat a right of which one is aware is a question of conscience, or good faith. A proprietary right is acquired by transfer in such a way as to obtain the protection of the principle of public faith when the co-requisites of a juristic act and registration are both satisfied. Third parties are entitled to rely on the Register even if there has been a defect in the juristic act, unless they ought to have been aware of it.

Whether a right is proprietary or personal obligatory is primarily a question of its enforceability against third parties. The proprietary quality of a right with respect to land is therefore dependent upon registration. Thus, in order to obtain institutional recognition and enforcement of a real property interest, the right holder is obliged to register his or her rights. This obligation is the expressed in the principle of compulsory registration.

Where the portrayal of rights in the Land Title Register does not accurately represent the true position, it is the responsibility of the person whose rights require amendment to take the necessary steps, and to register a Contradiction while doing so, on pain of losing their interest or the priority to which it would otherwise be entitled, through a transaction entered by a third party without knowledge of the true situation.

The Land Title Register is presumed to be correct. This presumption is not absolute, but it must be observed by all, including the Land Title Registry, until it is rebutted and not simply "shaken". It is acknowledged by all commentators that the conclusive Land Title Register is maintained in order to provide transparency with respect to the position of rights concerning land. This is considered crucial for the security of all transactions concerning land. That this is a social objective is not doubted, and the very term for "indefeasibility of registered title", namely the principle of public faith, expresses this. The obligation to register a proprietary interest is thus a social obligation. The German civil

\[1023\] das Abstraktionsprinzip.
\[1024\] der Grundbuchzwang.
\[1025\] See above n 571.
law concept of a proprietary interest in land is thus subject to at least one social obligation — indeed, institutional recognition of its existence is preconditioned by fulfilment of it, and a failure to observe it can lead to total loss of the asset. It is thus difficult to imagine a more serious civil law obligation.

Although the Register is, in favour of all transacting in good conscience, a conclusive statement of those rights affecting land which it records, a range of information about a land parcel is not registered. These aspects are largely those which are classified as factual characteristics. They include cadastral information which does not have an impact on proprietary rights. The legal effects of natural events, such as diluvion, on proprietary rights are allowed to proceed regardless of the conclusive status of the Register. Possession of the land can also be regarded as a factual aspect of use of the land which is not protected. It can, nevertheless, contribute to rebutting the presumption of correctness. The absence of leases, which belong to the law of obligations, is not in principle guaranteed by the Register, regardless of express protection against purchasers. Personal relationships and the "facts of life" concerning disabilities are also factual matters concerning a transaction with land which the Register does not guarantee. An absolute limitation on the owner's power to transact with the land is not a characteristic which the Land Title Register records, and thus is not protected by the principle of public faith. A purchaser may have acquired sufficient facts with respect to a transaction that he or she will be taken to have been aware of their implications, if "the penny would have dropped" for an honest thinking person not seduced by the prospect of their own advantage, and thus be denied the advantages of a good faith acquisition.

In practice this test operates more like a shift of the burden of proof, or a guideline for credibility, than a serious exception to the requirement of actual subjective awareness.

1026 Such as one created in a marital community of assets, for which there is separate register. §§ 1408 ff BGB.
Although the German Land Title Register does not record or guarantee such factual matters, it is clear that they still have tremendous importance for the existence or qualities of rights with respect to a particular piece of land.

The existence of such facts off the Register, which may significantly affect registered rights, does not detract from the notion of a conclusive Register. On the contrary, such facts simply illustrate the factual realities for which all systems of registered title must provide. In fact the German system deals with them in very realistic ways. Caveats, Contradictions and Litigation Remarks are widely available to protect a person holding an unregistered right concerning land, or litigating to establish the existence of one, as well as unknown members of the public who might otherwise find that they have acquired an interest in a lawsuit, even if through good faith acquisition they might well ultimately prevail. The abstract German land title system is also very practical when it comes to maintaining the certainty and viability of rights which are not classified as proprietary. This underscores the higher status accorded to personal Claims and Demands in the German legal system, without which many material claims to justice would not succeed.
CONCLUSION

In the nineteenth century many views were aired about the registration of title to land as a general concept. Many of the discussions, in the English inquiries for example, are conducted at such a general level that it is sometimes difficult even to discern whether deeds registration or title by registration is being discussed. Of course this is quite to be expected in a formative period, especially when viewed in hindsight with knowledge of the form into which the ideas crystallised. Robert Torrens was a politician and advocated very general ideas about title by registration. The jurisprudence and legal detail of the Australian system of land title registration which emerged in Adelaide in the 1850s, and was enthusiastically adopted throughout most of the British Empire, was largely developed by Dr juris Ulrich Hübbe, who was inspired by the system which operated at that time in his home city, the mercantile Free and Hanseatic City of Hamburg, and which had a distinct lineage back to 1270.

Among the extensive similarities, the concepts most obviously transplanted in toto were the Hamburg Hypothek, or Torrens Mortgage, and the concept of the conclusive land title register, or indefeasibility of title, under which the acquisition of a legal estate or proprietary interest in land is conditional upon registration. In both systems, registration would ensure security of the title against third parties, subject to fraud and some exceptions which generally relate to factual possession and use, because the systems accord the Register the highest evidentiary value. One is obliged to register the acquisition of a proprietary interest in order to attain legal institutional recognition for it, ahead of a party who might otherwise obtain earlier and thus superior registration of even a later acquisition, even with notice of one's own unregistered interest.
This concept of property in land is quite distinct from the English general law concept which preceded it, according to which legal estates and proprietary interests passed with the delivery of an appropriate deed executed in a completely private transaction. A defect in that private deed, or the chain of title behind it, could destroy the relevant estate or interest. In addition, the English principles of equity subjected a legal acquisition by deed to interests of the most informal kind, acquired in the most amorphous social relations around land, of which one had or should have had notice.

The Hanseatic concepts were transplanted in order to secure transparency and certainty in real estate transactions, with the particular objectives of eliminating widespread fraud and reducing transaction costs. These social objectives were widely recognised at the time, and thus one might truly say that the obligation to register, in order, on one hand, to obtain legal recognition and priority of the relevant estate or interest, and on the other hand, to inform others in wider society of its existence, is a social obligation. If the English concept of property has ever been a "sole and despotic dominion,"¹ which is unlikely,² then this, along with private conveyances and so forth, was also supplanted by transplantation of the Hanseatic concept of the conclusive land title register, maintained to achieve wider social good.

One aspect of the social function of land title registration in Hamburg was the planning and environmental function implicit in the characterisation of estates \( \text{[das Erbe]} \) according to land use. Facility for this was created in the Torrens system by subjecting private title to reservations and conditions in the original Crown Grant; a capacity which has in fact been exercised in ways which suggest urban planning. It could therefore be said that the


social function of the Register, and thus the social obligation of those who hold proprietary interests in land under the system, also embraces an environmental obligation. Even if this had not been the case, and also with respect to grants of Torrens land which have not been subjected to planning and environmental reservations or conditions, social obligation is never static. In the long history of land title registration, making public acquisition of the custody, the care, or the safekeeping of land has always been part and parcel of the social connections of proprietorship. The substance of the obligation implicit in proprietorship is not frozen in time just because we are no longer concerned for the safety of the city in case fire escapes from the places where horses are shod, and have the skills to build abattoirs which do not contaminate the soil and thus threaten ground water. The property law obligations to neighbours, to wider society and with respect to the land itself, remain.

We have seen that some principles of Hamburg law, which could be described as juristic companion principles and with which the land title registration system enjoyed a symbiotic relationship in Hamburg, were not transplanted into the Torrens system. The absence of these principles, classified within other fields of law in Hamburg, has resulted in the Torrens system resting on uncertain social foundations. Specifically, silence with respect to the claims of single women for support from former partners, and an effective method of attaching those and other claims to the other party’s registered assets, has led to accusations that the Torrens system has an inbuilt gender bias. In fact, it appears that the intention of at least Hübbe was actually to improve the lot of vulnerable members of society. The Hamburg system actually boasted a set of principles to deal with the situation, which was for the times highly developed, and effective methods for sheeting...

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3 *die rechte Gewere* or *seisin.*

compensatory awards back to assets. The problem, perhaps not foreseen by Hübbe the property lawyer, was the absence of equivalent family law principles from the transplanted English legal system.

Another example of companion principles not carried over concerns the availability of damages or compensation when a proprietary entitlement is lost through operation of principles of public faith or indefeasibility - a claim enabling the value of the proprietary interest to be recovered even though the title had been lost. The intention here was to refocus the legal analysis from competing entitlements to the land itself, which is very much the case in English real property law, to claims for lost value, as it was in Hamburg. In South Australia, the transplanted English legal landscape did not have such a species of claim, and the Torrens compensation scheme was developed instead.

The Torrens group was also quite capable of innovating with the Hanseatic model. The system of caveats adopted is a practical and intelligent resolution of the confusion experienced in the Hamburg system following abolition of the Impugnation in 1802. Although in South Australia many of the more administrative aspects of the Hamburg system were also carried over, such as a form of notarisation of the land transfer, this was not done in other jurisdictions, such as Victoria. This is one reason why the implications of fraud have been of perennial concern in these jurisdictions. The establishment of a system for verification of transactions and the identity of the parties to them, would limit opportunities for fraud. Interestingly, this has been occurring in Victoria through judicial innovation with respect to a common law obligation on solicitors to establish the identity of parties and their understanding of the nature of the transaction.5

The contemporary German land title registration system also owes much to the Hamburg-Hanseatic system. The main difference is the limitation of the security of registration by the principle of good faith acquisition,\(^6\) pursuant to which a transferee who is aware of an unregistered interest cannot claim the benefit of the presumption of correctness. The contemporary system also recognises social and environmental obligation arising from property.\(^7\) This is certainly the case in public law. Recognition of the obligation in civil law has not been unanimous, with some objections that the essence of the private law concept of ownership is that it is free of obligation.

We have seen that a large number of social and environmental obligations already restrict the German civil law concept of property. Although enactment of the Bürgerlichen Gesetzbuch was opposed by the Social Democrats, their reasons did not include the absence of a social concept of property, nor a national codification project per se. Commentators of the time, such as Gierke and Ihering, had no doubts that the freedom of the property owner to deal with the thing at discretion is relative to the other concepts of proprietary rights which are expressly defined and limited. Relative to society, the civil law concept is also subject to obligations. The concept of property in § 903 is subject to law and the rights of others. It is well established that a limitation on the powers of ownership with respect to a particular thing which is imposed by a law in the sense of § 903 then becomes an immanent restriction.\(^8\) In the application of § 903 with respect to the rights of others, along with the Neighbour Law provisions, the doctrine of Trust and Faith\(^9\) has been applied creatively -

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\(^6\) § 892 BGB.

\(^7\) Art 14 GG.

\(^8\) Gravel Extraction Case 1 (1981) 58 BVerfGE 300.

\(^9\) Treu und Glauben.
Neighbours stand in a particular neighbourly community relationship toward each other, which in accordance with Treu und Glauben requires from them particular consideration toward each other. It obligates them to cooperate through a reasonably active communication, to prevent economic damage...

All of this is widely acknowledged.

The remaining critical question in the contemporary system is whether there are immanent responsibilities within the civil law concept with respect to the object of ownership itself. No clear answer has been given because the issue is rarely confronted in a practical setting. There are volumes of public regulations limiting the use of things while they remain valuable to the owner and requiring that they be recycled when they no longer are. It is almost impossible legally to abandon anything, anywhere. With respect to land, planning forums remove other disputes which have the potential to raise the issue squarely, and they are resolved within a public law planning framework which has plainly acknowledged environmental obligation since the 1950s. However, the answer to the question with respect to civil law and the Law of Things has great symbolic importance, and is very important if we are to find value in the contemporary German system for further development of our legal transplant, the Torrens system.

Böhmer drew an interesting illustration of the distinction, between an immanent obligation which pervades the civil concept, and a complete freedom subject only to external public constraint, when he asked whether the complete freedom theory meant that the owner of a motor car is at complete freedom to steer however or wherever he or she likes, limited only by the "exceptions" in the public traffic regulations. The answer is so obvious that

10 das nachbarliche Gemeinschaftsverhältnis.


he did not even provide it - of course the owner has such obligations in use of the object that one would say it must be used at discretion, and not just as he or she pleases.

However, this does not conclude the issue of a responsibility, or at least the presumption of a responsibility, to maintain it and dispose of it properly for recycling when it reaches the end of its life.

As we have seen, it cannot be said with respect to land at least - and real property has been the focus of this study - that there is no civil law obligation immanent in proprietary interests in it. The drafters of the BGB drew a fundamental distinction between movable and immovable things and provided a set of provisions especially for immovable property. They acknowledged that this set of responsibilities and rights was relative to the nature of the thing. This same relativity appears throughout Book 3, also with respect to the distinction between consumable and non-consumable things for example. The Law of Things has now been expressly accorded a relative application with respect to animals. In the provisions concerning land, there is at least an obligation to register one’s interest in it, at the risk of total loss of the right. This precondition for the institutional recognition and enforceability of the right is an aspect of the traditional German concept of property in land with a very long lineage. As Gierke pointed out, the German concept of property is pervaded by responsibility. The obligation to register is just one such responsibility. The conclusive land title register is maintained to secure transparency and certainty in real property transactions, which is a benefit to wider society. The obligation to register is thus a social responsibility. The substance of social responsibility is never static; it is relative to the nature of the thing and its social and environmental situation. The drafters of the BGB acknowledged that the power of the owner to deal with the thing at discretion is limited to the physical capacity of the thing.

What has changed over the twentieth century is our understanding of the nature of land and its physical capacities for exploitation, not the obligation. The social and environmental context of the land requires, as a matter of civil law, that the owner exercise discretion in its use which is appropriate to the use of the land as a sustainable resource.

This understanding of the powers of the owner thus coincides with the first principle of the new Natural Law called for by the internationally renowned jurist, His Excellency Judge Nagendra Singh, President of the International Court of Justice, in his Forward to the Report of the Expert Group on Environmental Law of the World Commission on Environment and Development -

Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature. There is at the present time an urgent need:

. to strengthen and extend the application of existing laws and international agreements in support of sustainable development;

. to recognize and respect the reciprocal rights and responsibilities of individuals and States regarding sustainable development, ...

We have seen that the civil law social obligation with respect to registered land title is at least latent in all three systems analysed in this study as an inherent aspect of land title by registration, including the system which on historical analysis appears to be the essential mother law of all registered title systems. It thus seems logical to presume that the principle is latent in all systems of title by registration.

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15 das Mutterrecht.

16 For an extensive list of jurisdictions which have adopted the Torrens system, see S R Simpson, Land Law and Registration, Cambridge University Press, 1976, 77.
The possible practical applications of this principle are generally illustrated by the German cases which apply Art 14 of the German Constitution, which have been explored above. Primarily, it is not to be presumed that the owner of land has the power to use it in ways which challenge its sustainability as a resource, whether an economic or conservation resource, according to its social and environmental context. Such a land use could only be permitted by positive law. As a civil law obligation, however, a range of other ramifications could follow. For example, a private arrangement under which the land is to be exploited unsustainably would be unenforceable. By subjecting the owner’s dispositions to the social and environmental obligation, opportunities are created for other private parties to take advantage of the inherent limitation of the owner’s powers. Even if the adequacy of social self-regulation through private law relationships in the face of the environmental challenge is questionable, without parallel public regulation, it would be made at least feasible by according the civil law obligation such pervasiveness within the whole system of private rights and remedies. In this way, in the economic language of the times, environmental risk could be internalised in the concept of property itself.17

A secondary purpose of this study has been to take advantage of such a detailed study of a discrete field within a system of European Civil Law to observe “the texture” of the system, particularly with respect to judicial method and the use of cases. This has revealed that the similarities between the use of judicial authorities in German Civil Law and Common Law are far greater than the dissimilarities, and certainly these similarities are far greater than is generally thought in the Common Law world.18 We have seen that

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at least as much respect is paid to judicial opinions in earlier cases, and far greater
respect is paid to the judgments of the lower courts - even the local courts. The
German courts are also prepared to innovate where a need is identified, and to invoke
the spectre of floodgates when innovation is thought undesirable. Probably because
the written text of legislation is considered to clothe a principle, which is the real object of
legal reasoning, innovation is not generally constrained by black letter analysis where it is
called for. An excellent example of this is the attempt to establish a new procedure for
notation in the Register of the sub judice status of a title - the Litigation Remark.
What really distinguishes the styles is the candid approach of the German Courts when
undertaking innovation.

In the common law world, by virtue of the declaratory theory, pursuant to which the
common law resides in the breasts of judges awaiting the opportunity to be expressed,
the time-honoured method of reform is through rediscovery of the past and correction of
present errors accordingly. This is actually illustrated most sharply by the Mabo Case which is the most innovative judgment of the Australian High Court in recent times, and is
reputed in some quarters to be revolutionary. Yet even in this case the High Court,
relying on material retrieved from the seventeenth century, felt compelled to
demonstrate that the Australian colonies had laboured under a legal error since 1788
rather than simply stating the inadequacy of the interpretation of the law to date and
reconceptualising it for the future.

19 das Amtsgericht.
20 die uferlose Ausweitung.
23 Case of Tanistry (1608) Davis 28; 80 ER 516.
This Common Law method has drawbacks for the use of critical method in scholarly analysis. By demonstrating a case of injustice through lack of rights, one is actually disproving one's case for the enforcement of rights. By pointing out the historical defects in the legal principles upon which one's case depends, in the Common Law one is effectively conceding one's case by demonstrating that the common law makes no provision in the circumstances. The games of charades and shadow plays which must be undertaken in order to prove that the common law has always provided a remedy in the relevant circumstances of injustice, or would have if an identifiable mistake had not been made some time in a lower court, casts a difficult role for critical scholarly commentary in the Common Law.

While the German courts will candidly weigh the need for innovation and the different opportunities in the law to make it, the Common Law system advances backwards into the future, recabling the past as it proceeds, with little awareness of what lies further down the path. Naturally this method has a number of serious disadvantages. For one thing, in a social world where rapid and unprecedented change is the only constant state, the system provides very limited opportunities rationally and openly to evaluate a problem and its likely course into the future, and to weigh alternative solutions to anticipated obstacles. For another thing, the available legal material from which innovation may be fashioned is restricted to what has been produced in the past. This has particularly serious repercussions for legal fields such as environmental law, where the technical powers of humans radically to transform an environment were recently developed, and thus the ensuing problems are unprecedented.

This difference in approach to judicial innovation, and critical scholarly commentary, is the remarkable distinction between the Common Law and the German Civil Law systems. On the threshold of a new century and with transition to a Republic in view,
there should be a serious debate in Australia as to whether the continued maintenance of
a Common Law system will in the future serve the administration of justice as we desire
it, or whether we should be considering the compilation of our own constitutional
statement of fundamental rights and an Australian Civil Code.
The citation method for cases and articles is different in Australia and Germany. In consideration of the Australian audience to which this work is primarily directed, the German method has been adapted, with some necessary creativity, to resemble an Australian style. German cases are not known by the names of the parties, as in Rylands v Fletcher for example. Instead, landmark cases are named for the purposes of discussion according to some feature in the case. Again with the audience in mind, I have named many cases in this way. Thus, the Alsterchausee Case (1967) DVB! 917 will not be known to German jurists by that name, or precisely that citation method, but can be located by all readers and at the same time maximise accessibility for common lawyers.

German Abbreviations Used in References

A vast range of abbreviations of the titles of law reports and journals, and for other purposes, are used in the German system. Set out below are many general abbreviations frequently encountered, as well as those used in the citations made in this work.

AcP Archiv für civilistisches Praxis
BayObLG Entscheidungen des Bayerischen Obersten Landesgerichts in Zivilsachen
BBauG Bundesbaugesetz
BGBI. Bundesgesetzblatt
BGB Bürgerliches Gesetzbuch - German Civil Code - cited Paragraph [§ in Arabic numerals], Sub-paragraph [usually in Roman numerals], Sentence [S. in Arabic numerals]
BGH Bundesgerichtshof
BGH LM Lindenmaier-Möhring, Nachschlagewerk des Bundesgerichtshofs, C H Beck, München, Loose-leaf
BGHZ Entscheidungen des Bundesgerichtshofs in Zivilsachen - Decisions of the Federal High Court in Civil Cases - cited Volume, Page.
BVerfGE Entscheidungen des Bundesverfassungsgericht - Decisions of the Federal Constitutional Court
BVerwGE Entscheidungen des Bundesverwaltungsgerichts - Decisions of the Federal Administrative Court
BWNotZ Zeitschrift für das Notariat in Baden-Württemberg
Creif C Creifelds & H Kauffmann, Rechtswörterbuch, 12th ed, C H Beck'sche, München, 1994
DDR-ZGB Deutsche Demokratische Republik - Zivil Gesetzbuch - Civil Code of the German Democratic Republic
DJust Deutsche Justiz
DJZ Deutsche Juristen-Zeitung
DNotZ Deutsche Notar-Zeitschrift
DtZ Deutsche Rechts-Zeitschrift
DVBI  Deutsches Verwaltungsblatt
EEG  Gesetz über den Eigentumserwerb und die dingliche Belastung der Grundstücke, Bergwerke und selbständigen Gerechtigkeiten, 5 May 1872, in Gesetz-Sammlung für die Königlich Preußischen Staaten [G S Pr St]
EGBGB  Einführungsgezet zu den Bürgerlichen Gesetzbuch [the legislation introducing the German Civil Code]
GBO  Grundbuchordnung - Land Title Register Statute
GBVerfGrundbuchverfügung - Land Title Registration Regulations
GrundE  Grund Eigentum
G S Pr St  Gesetz-Sammlung für die Königlich Preußischen Staaten
HRR  Höchstrichterliche Rechtsprechung
JFG  Jahrbuch für Entscheidungen der freiwillige Gerichtsbarkeit
JR  Juristische Rundschau
JW  Juristische Wochenschrift - forerunner of NJW
JZ  Juristenzeitung
KGJ  Jahrbuch für Entscheidungen des Kammergerichts
MDR  Monatschrift für Deutsches Recht
NJW  Neue Juristische Wochenschrift
NJW-RR  Neue Juristische Wochenschrift - Höchst Richterliche-Rechtssprechenung
NVwZ  Neue Zeitschrift für Verwaltungsrecht
OLG  Oberlandesgericht - effectively a State Supreme Court
OLGZ  Oberlandesgericht Entscheidungen in Zivilsachen
RGBI  Reichsgesetzblatt
RGZ  Reichsgericht Entscheidungen in Zivilsachen
RhNK  Mitteilungen der Rheinischen Notarkammer
RMBI  Reichsministerialblatt
SeuffA  Seufferts Archiv für Entscheidungen
WM  [also WoM] - Wohnungswirtschaft und Mietrecht
WPM  Wertpapiermitteilungen - Zeitschrift für Wirtschaft und Bankrecht
ZPO  Zivilprozeßordnung - Civil Procedure Statute
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A Eigentum
- s18 Vorbemerkung, Ziff 1-3
- s19 Erwerb und Verlust des Eigentums an Grundstücken, Ziff 1-8
B Eigentumsbelastungen
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- s22 Gesetzliche Beschränkungen
- s23 Grunddienstbarkeiten, Ziff 1-3

III Das Grundbuchwesen im Landgebiet
- s24 Eine kurze vergleichende Übersicht

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