INTRODUCTION OF THE REAL PROPERTY ACT IN SOUTH AUSTRALIA

By Douglas Pike*

In its beginnings South Australia was a land job. The first proposal to found a settlement on its shores promised the pick of sites to venturesome speculators[1] and a century later land was still the major sphere of investment. Of course other promises gilded the lily. A society free from the stain of convictism, early self-government and abundant supplies of labouring immigrants encouraged the growth of a yeoman proprietary. After only twenty years South Australia with 4,000 farmers in its population of 109,000, was being vaunted as the farinaceous colony and granary of Australia.

> "With perhaps the exception of France, there is no country in which the number of landed proprietors bears so large a proportion to the entire population as in South Australia. Here, however, the yeoman proprietor cultivates, not the miserable holding of 2 to 5 acres of the French peasant, but moderate farms of 80 to 100 acres."[2]

But behind the favourable geographical conditions and the lucky accident of providing bread for hungry gold diggers in adjoining colonies, South Australia was still a land job. Unlike England, its land was a common possession and a matter of daily bargain, instead of being the luxury of a few and seldom parted with except under circumstances of necessity.[3] Over 1,756,000 acres had been alienated, though many of the choicest sites were owned by absentees, whose relations, dependants and agents used and leased their lots under an infinite arrangement of contracts and agreements.

The development of ports, suburbs, secondary towns, roads, railways, copper mines and agriculture was complicated by the speculation in land to which the colony owed its origin. The seven years of discussion with the Colonial Office preceding the first settlement in 1836 were protracted by Whig suspicion that land jobbers coveted an imperial asset. During an almost unbroken half century of Tory rule, colonisation had not been encouraged, but already in 1830 the waste lands of the empire were acquiring a value to investors. Before the Whigs came to power millions of acres in Canada and Australia

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1. The First Paper c. Jan., 1831 (S.A. Archives).
2. S.A. Parliamentary Debates, 1857-8, p. 202.
3. Report from the Real Property Law Commission (S.A. Parliamentary Papers, 1861, No. 192, p. xiv).

were granted to chartered companies[4] and privileged individuals,[5] while in New South Wales the rapidly increasing flocks of squatting pastoralists had begun to trespass on crown land. In 1831 the Whigs abolished the system of free grants and substituted sales by auction[6] with the intention of using part of the land revenue to pay for emigration from the Mother Country, hoping thus to solve at one stroke the problems of unemployment at home and labour scarcity in the colonies. The major premise of Whig colonial policy – that waste land was an imperial asset and not solely the possession of the colony in which it happened to be situated – was not abandoned in Australian colonies until 1855[7] when the Mother Country reluctantly resigned her control of land sales and emigration.

The Whig argument was in many ways a carry-over from the Tory administration, but it was given popular form by Edward Gibbon Wakefield in his *"Letter from Sydney"* (1829). The first group to advocate his principles was the National Colonisation Society of 1830. Formed mostly of rich young idealists fresh from Trinity College, Cambridge,[8] this society claimed that the application of land revenue to emigration would enable a concentration of settlement (as opposed to the reckless dispersion of population in other colonies), in which all the advantages of British civilisation and culture could immediately be transplanted.[9] South Australia was selected as the site for the first experiment and steps were taken to attract capital to the new venture.[10] But the mundane details of selling real estate withered the enthusiasm of the advocates for Britain's civilising mission overseas, and the promoters turned to a group of Whig bankers. With their support the South Australian Land Company was formed for the purpose of acquiring 500,000 acres and a charter to dispose of the land at profitable terms, from the proceeds peopling the colony with emigrants of their own choice.[11] This scheme was rejected by the Colonial Office because the directors were too grasping.[12]

The mantle then fell on the South Australian Association, a group of philosophical radical members of Parliament, who proposed to act

4. e.g., Australian Agricultural Company, 5 Geo. iv c. 86; The Canada Land Company, etc.
5. Report from the Select Committee on the disposal of land in the British colonies (Parliamentary Papers, 1836, xi. 512).
6. i.e., the Ripon Regulations. Goderich to Darling, 9–i–1831. (Historical Records of Australia, Series 1, Volume XVI, pp. 19-22).
7. 18 and 19 Vic. c. 56.
8. E. G. Wakefield: *England and America* (1833), ii, 161n; E. Hodder: *The founding of South Australia* (1898), 39.
9. C. Tennant (anon): *A statement of the principles and objects of a proposed National Society for the cure and prevention of pauperism by means of systematic colonisation* (1830).
10. The First Paper c. Jan., 1831. (S.A. Archives.)
11. Plan of a company to be established for the purpose of founding a colony in South Australia, etc. (London, 1831).
12. Memorandum on above by James Stephen, 4–vii–1832 (Public Record Office, C.O. 13/1).

as trustees for both Mother Country and colony in applying the principles of land sales and emigration.[13] Under their aegis the South Australian Act was passed in 1834[14] creating a hybrid that was neither crown colony nor chartered company. Authority was vaguely divided between the Colonial Office and a Board of Colonisation Commissioners responsible among other things for land sales and emigration. Before settlement could begin, £20,000 was to be raised as a guarantee fund and £35,000 of land orders were to be sold. These conditions were fulfilled by the end of 1835 and in the following year the pioneering parties set sail.

The preliminary purchasers knew next to nothing of the territory. Few of them had any intention of leaving England, and made their investments to enable the venture to colonisation to be started. Their emigrating poor relations and agents, empowered to select their sections, were over-eager to pick the eyes out of the country. The principle of concentrated settlement was completely upset and within two years the surveyors were faced with the Herculean task of measuring more than 2,000 square miles of territory instead of the modest 150,000 acres originally planned around the new metropolis of Adelaide. When country sections did slowly become available, a fierce competition for priority developed between the holders of preliminary land orders, purchasers of subsequent land orders in London, and colonists applying in Adelaide for land. A calamitous trade in land orders led to wild speculation, which forced the price of well-situated lots to 200 times their original cost. Many suburban sections were sub-divided and sold privately, sometimes on ruinous terms, to immigrants, thereby playing havoc with the self-perpetuating principle of the systematic colonisers. Wakefield had hoped that labourers would save enough of their wages to buy minimum-sized 80 acre sections of crown land, thus providing £80 for the emigration fund and fresh supplies of labourers and land buyers ad infinitum. The sale of subdivisions, however, filled private pockets, turned labourers prematurely into land owners, and added to the speculation mania. Wakefield's principles were also sacrificed by the Colonisation Commissioners in London, who ignored the specific provisions of the South Australian Act and spent less than half of the land fund on the emigration of poor persons from the Mother Country to the colony, the balance, nearly £150,000, being frittered away in incidental expenses.[15]

Land sales in London and Adelaide came to a halt in September, 1839, as the colony raced towards bankruptcy. Disaster was made certain when Governor Gawler, to avoid widespread unemployment

13. Outline of a plan of a proposed colony to be founded on the south coast of Australia, with an account of the soil, climate, rivers, etc. (London, 1834).
14. 4 and 5 William IV, c. 95.
15. Report from the Select Committee on South Australia (P.P. 1841/394).

commenced an ambitious programme of building public offices, involving an expenditure greatly in excess of his instructions. His action momentarily stimulated private land sales, but they slumped badly, leaving speculators with valueless papers. Insolvencies, compositions and ruin faced almost every family in the colony.

For a while the depression had a cathartic effect. The irresponsible absconded, but bona fide settlers were forced to prove the grain-growing capacity of their soil.[16] The colony's second start, based on steadily increasing rural production, proved successful if undramatic. The thrills of land jobbing, however, were periodically revived. In 1845 the discovery of copper on unalienated waste land started a short lived boom during which one 80 acre section was auctioned for £10,500/1/-.[17] In the 'fifties, hundreds of diggers returned from Victorian gold fields to swell the demand for wheat lands. But by this time no land orders were being sold in London to raise problems of priority, and private sellers, particularly the agents of absentees, found themselves in competition with regular government auctions, at which newly surveyed agricultural sections were to be had for little more than 20/- an acre. This competition provided perhaps the most significant key to the Real Property Act; while South Australians were seeking to make privately owned land marketable, New South Wales and Victoria were devising means to make crown land available to the landless on easy terms of time payment.[18]

If conveyancing was the major difficulty to Adelaide speculators, it had become needlessly confused by their inexperience and cupidity. In 1857 there were said to be 40,000 titles to land in the colony; of these three-quarters of the original deeds were lost, one-third were owned by absentees, some of whom could not be traced, and at least 5,000 were seriously complicated, if not defective.[19] Government returns for the year showed some £77,000 lent on mortgage for town property and £450,000 for country lands.[20] Borrowers were alleged to live in fear of some unexpected deed coming to light making them vulnerable to charges of fraud and forfeiture of their livelihood. The charges for mortgages and conveyancing were greater than necessary in a colony only twenty years old. The legal profession was said to make £100,000 a year from arranging transfers, mortgages and leases, and though lawyers' fees were not extortionate, it was admitted that the usual cost of conveyancing was 3 to 5 per cent. of the value of the land, and of mortgaging from 10 per cent. upwards.[21] In-

16. Papers relative to South Australia, 1841-43 (Cmd. 1843/505).
17. Government Gazette, 27—xii—1849, p. 597.
18. 25 Vic. No. 1 of New South Wales; 25 Vic. No. 145 of Victoria.
19. S.A. Register 8—vii—1856; 23—vii—1856. Cf. also Report from the Real Property Law Commission, 1861. Evidence Q. 102.
20. S.A. Parliamentary Papers, 1858, No. 16, p. 28.
21. S.A. Parliamentary Debates, 1857-8, pp. 202, 647; 1861 p. 1009; Editorial in S.A. Register, 3—vii—1856.

volved titles were known to have cost as much as £39 for land worth £20.[22]

Much of the difficulty was due to the form of the original titles. While emigration was dependent on land revenue the colonial authorities had been more concerned with selling land than bringing it into production. The early titles were little more than receipts issued by the Commissioner of Public Lands and the Colonial Treasurer who "in consideration of the sum of £x sterling" granted "all that section of land numbered x and delineated in the Plan of the margin hereof, together with all timber, minerals and appurtenances, to hold unto the said (purchaser), his heirs and assigns for ever".[23] Neither the size nor the position of the section was specified and the marginal drawing was merely a rectangle around a number, which was only intelligible by reference to the original map of the district held by the Surveyor-General. On the abandonment of concentration, a running survey was adopted in place of trigonometrical measurement, so the district maps were often inaccurate in detail. To make matters worse, they were completely destroyed by fire in 1839, together with the surveyors' field books.[24] New maps, however carefully constructed, multiplied the errors, for survey marks had been obliterated and fences were erected "within a chain or so of the boundaries".[25] After 1842 district divisions were gradually replaced by counties and hundreds, resurveyed and renumbered.[26]

The problems were multiplied tenfold by private subdivisions, especially in and around Adelaide and the secondary towns. As it was not compulsory to employ a licensed surveyor[27] and sellers refused to surrender their original deeds, purchasers were committed to uncertain titles. One suburban township of 130 acres was subdivided on a rough sketchmap into numbered allotments of unspecified sizes with no angles delineated. Buyers were given receipts and the vendor covenanted to produce on demand the map and his title deed, but he left the colony and the documents disappeared. In other suburbs several alleged original but conflicting maps were produced and, even when lithographed, plans were usually devoid of scale or defaced by the use of unsuitable paper. One amateur vendor sold his township from a map that showed north pointing due south,[28] and the syndicate that subdivided the suburb of Hindmarsh into quarter acre lots followed the picturesque feudal practice of giving a spadeful of soil to each buyer as sufficient title.[29]

22. S.A. Register, 13–xi–1857; cf. S.A. Parliamentary Debates, 1860, p. 390.
23. From an original grant of 1838 in S.A. Archives.
24. Southern Australian, 23–i–1839.
25. Report from the Real Property Law Commission, 1861. Evid. Q. 243.
26. The first counties were proclaimed by Governor Grey in 1842. (Government Gazette 2–vi–1842. Cf. 6 Vic. No. 8.)
27. Report from the Real Property Law Commission, 1861. Evid. Q. 322.
28. ibid. Qs. 206; 243: 351.
29. Advertiser, 19–vii–1938.

A solicitor, newly arrived in May, 1839, was horrified by the confusion arisen within the space of twelve months. The township of Walkerville purchased by Governor Hindmarsh and his wife, was sold to a surveyor who subdivided it into acre allotments, one of which had three owners before passing to two illiterate labourers as part payment for the sinking of a well. Before leaving Adelaide they sold the acre for £20 to a clerk fresh from England, giving him a verbal account of the earlier transactions and a receipt adorned with crosses and the undecipherable signature of a witness. On the strength of this title the clerk contrived to raise a loan.[30] Not only was the retention of deeds and instruments a common practice but even when descriptions were added to receipts, they were often meaningless. One agreement was for land "about seventy paces from the N.W. corner of the Sheoak Log Hotel" (since burnt down); another, "adjoining the lot late in the possession of William Smith" (since departed for the Californian diggings).[31]. Such slipshod methods allowed people, fraudulently or through inadvertence, to mortgage or convey the same land more than once, and at least one casual buyer repurchased at auction a section that already belonged to him.[32] Other complications arose when an agent sold the property of an absentee during the interval between the revocation of his power of attorney, and the arrival of the advice in the colony. The wills of non-residents added to "the dependent nature of titles", while such encumbrances as dower and lunacy were an ever-present threat to purchasers. One original title fell into the hands of the assignees of an insolvent in India, though a bishop's palace, a chapel and a schoolhouse together with several "superior dwellings", valued in all at £10,000 had been erected on the section after its subdivision. For months the purchasers lived in fear that their titles would be challenged by the heir of the insolvent.[33] In contrast, vendors were often kept waiting and were sometimes obliged to compensate purchasers through inability to complete a satisfactory title. As one aggrieved small-holder complained "the South Australian freeman had to hold his homestead by a sort of covert imposture that would not bear exposure to daylight."[34] For these inconveniences laymen were wont to blame the intricacies of the law and to fulminate against legal fees that were measured by the amount of sheepskin spoiled. On the other hand, some of the colony's lawyers struggled valiantly for legislation to make order out of chaos.

Before they left England many South Australians had been active

30. Poulden to Cooper, 2–v–1839 (S.A. Archives).
31. Report from the Real Property Law Commission, 1861. Evid. Qs. 24: 35.
32. ibid. Q. 17: S.A. Register, 12–i–1850.
33. R. R. Torrens: *The South Australian system of conveyancing by registration of title, etc.* (1859), 26.
34. S.A. Register, 1–xii–1857.

in the agitation for parliamentary reform in 1832, and emigrated because their aims were frustrated. Their professional men never tired of quoting Lord Brougham's legal reforms of 1830, particularly the enquiries into "the law of England respecting real property". Each of the South Australian proposals stressed the exclusion of title from the new province partly for the sake of simplified titles as suggested by Brougham's Commission, phrases from whose report were actually borrowed by the Land Company of 1831.

"That a set of regulations free from unnecessary technicalities and vicious subtleties, and adapted to the transactions and comprehension of a population consisting principally of labourers and farmers transplanted into a new colony, shall be prepared. . . .

That with the exception of a few of these Regulations to be expressly designated, such as those . . . that regulate the descent of property, which will be unchangeable by the Governor, his power of legislation shall be unlimited in extent". . . .[35]

The promoters also followed the Real Property Commission in moving away from problems of inheritance to the creation of a Registry Office, "where all deeds relating to conveyance, transfer, encumbrance, and other disposition of property should be entered". This suggestion was particularly emphasised before the Commission by the London solicitor Thomas Wilson[36] who later made substantial investments in South Australian land and came himself to practice in the colony.

Early in 1836 J. H. Fisher, Commissioner of Public Lands, drafted three Bills for a general registry in Adelaide, his plan having the blessing of his lawyer friends in London and the Colonisation Commissioners. "In establishing, not only by the clearest but the most simple mode, the validity and safety of titles", he hoped to "remove one of the greatest evils attached to real property in England; as those evils must necessarily diminish in some degree the value of the property, so in an equal, if not greater degree [would] their removal . . . tend to enhance the value". By adding a "faithful secure record" of births, deaths and marriages he planned to "furnish evidence of pedigree" "essential to support the title of property".[37]

Unfortunately, the Bills virtually appointed Fisher registrar for life with a thumping salary, a monopoly of conveyancing and access

35. Plan of a company to be established for the purpose of founding a colony in South Australia, etc. (London, 1831). Cf. First Report from the Commissioners of Enquiry into the Law of England respecting real property (P.P. 1829/263, p. 9).
36. Written evidence of Thomas Wilson (ibid. p. 441).
37. J. H. Fisher: *A sketch of three colonial acts suggested for adoption in the new province of South Australia, with a view to secure the most perfect security of title to property, to simplify and facilitate the mode and moderate the expense of its transfer, with proposed forms of deeds* (1836).

to every settler's private affairs. So they were rejected by Governor Hindmarsh after being referred to the judge, Sir John Jeffcott, who "openly laughed at such crude and undigested stuff", and to the Advocate General, Charles Mann, who pronounced them preposterous and opposed to all known rules of English law and equity.[38] But when speculation in land orders ran riot after Hindmarsh's departure, some of the colony's lawyers again gave thought to a registry office.[39] As the new governor wished to facilitate the transfer of property by deed, Fisher's bills were revised by a new Advocate General. The new judge, Charles Cooper, admitted that most of the conveyances were mere agreements conferring equitable but not legal title and therefore insecure and likely to lead to litigation. While he approved of parts of Fisher's plan, he disagreed with registration by deposit of original deeds; some more flexible method of enrolment was preferable. To make "as little interference as possible with private rights and prejudices" and to minimise cost and inconvenience, he suggested registration by memorial, which would give "such information as necessary to prevent fraud without disclosing more".[40]

Accordingly an ordinance, framed on the registration system used in New South Wales and the North Riding of Yorkshire, was submitted to the Colonial Office,[41] but returned because no exemption was allowed for absentee owners. With these exceptions the Act to provide for the compulsory registration of deeds, wills, judgments, conveyances and other instruments came into operation in March, 1842.[42] A public office was opened where documents could be registered by memorial, enrolment, deposit of deed or duplicate, and certified correct whenever possible by the Registrar General. But the Act was five years too late. It was not retrospective and gave little satisfaction. Registration was no more than a record that did not supersede deeds, make titles legal or define doubtful boundaries and locations. Land owners doubted that the slight security it gave was worth the high costs entailed in the cumbrous copying and indexing, yet no change was made in the system for 10 years except an amendment of 1843 to allow deeds executed outside the province to be enrolled.[43] Another ordinance of 1843 remedied some of the evil effects of land jobbing. "Whereas great

38. S.A. Gazette and Colonial Register, 22—ix—1838.
39. "I would make it imperative that every transfer of land in this Province, be the same by conveyance, lease, assignment or mortgage, should be enrolled or registered within a certain period after the sale, etc., upon the payment of a certain fee, or else be void." (Poulden to Cooper, 2—v—1839, S.A. Archives).
40. Cooper to Gawler, 17—viii—1840 (S.A. Archives).
41. According to Governor Grey the Act was similar to that of other colonies, its only peculiarity being introduced by Judge Cooper. (Grey to Russell, No. 50 29—x—1841. Outgoing Despatches, S.A. Archives).
42. 5 Vic. No. 8.
43. No. 12 of 1843.

inconvenience and expense [had been] incurred by an adherence in deeds of conveyance to the forms in use in England" the owners of subdivided sections not in the possession of separate deeds were assured that their land might be "peaceably and quietly held and enjoyed without an eviction or interruption, free and clear. . . ."[44]

An outcrop of building societies in 1850, followed by the social upheaval of the gold rushes, revived all the old problems. The annual fees collected by the Registry Office had risen in ten years from £400 to nearly £5,000.[45] The excessive office charges and the large number of practitioners in the colony alarmed some lawyers who felt that they were not in such an impregnable position as in England because their ranks were not divided into grades of barrister, attorney, etc., but all competed for conveyancing.[46] So they joined the laymen who clamoured for the abolition of the Registry Office. Even so august a body as the Chamber of Commerce declared registration unduly circuitous and defective in that it failed to prevent fraud and to give security of title, the greatest offenders being the agents of absentees who refused to surrender their instruments because connected with several distinct titles.[47] To reduce costs and increase efficiency Governor Young wanted to revert to Fisher's plan for the deposit of original deeds, but the press warned him against the lawyers' dislike of placing too much power in the Registrar's hands.[48] He approached the subject cautiously:

> "In this plan the preposterous idea of superseding lawyers altogether in the preparation of deeds is not entertained; but in those cases in which their assistance is invoked, their charges will be limited to the act or deed itself and not be expensively extended to such mere formalities as can just as effectively be done by their clients."[49]

Judge Cooper, however, resolutely adhered to registration by enrolment as it prevented damage to deeds shelved in constantly handled bundles and enabled owners to produce their documents readily when required. He admitted the increase of costs and suggested their reduction by more orderly indexing and the opening of country registries. Other critics sought priority for deeds executed outside the province, though steam communication was beginning to lessen Adelaide's isolation.[50] These objections limited the reforming

44. No. 15 of 1843.
45. Blue Books: 1842, p. 103; 1851, p. 12. Six years later E. C. Gwynne said that the office had cost the colony £100,000 and had not done good to the extent of £2,000 (S.A. Parliamentary Debates, 1857-8, p. 22).
46. R. R. Torrens: *A handy book on the Real Property Act of South Australia* (Adelaide n.d.), 5.
47. Worthington to Cooper, 24–x–1851 (S.A. Archives).
48. S.A. Register, 2–x–1851; 9–x–1851.
49. Hanson to Young, 19–vii–1852; Memorandum by Young, 27–ix–1852 (S.A. Council Papers, 1852. Papers relative to the Registration Amendment Bill).
50. Memorandum by Charles Cooper, 7–x–1852 (loc. cit.).

zeal of the Attorney-General, Richard Davies Hanson, whose Acts to amend the laws of real property and registration did little more than reduce charges and re-organise office methods.[51] His purpose to make compulsory the enrolment of wills and the trust deeds of title companies was not realised until 1856.[52] By that time, disgruntled laymen were eager to trespass on the sacred ground of law reform.

The struggle for colonial independence had created a widespread hysteria about transplanted tradition and outmoded convention. Popular reforms such as the separation of church and state, adult male suffrage and vote by ballot preceded self government in April, 1857, and cleared the way for other changes. Leadership was assumed by the *Register*, a newspaper owned chiefly by Anthony Forster. This fanatical iconoclast, who by the adroit use of influence and land speculation had pushed his way up in the world, for years had attacked the ineptitude and extravagance of government controlled by the Colonial Office; but in June, 1856, he singled out the Registry Office for criticism, intent on making its reform the major issue of the 1857 election. Forster first suggested no more than simple and cheap conveyance and he sought the support of lawyers in "unravelling the tangled web of antiquated forms". He could see no reason why, in a young country, there should be any difference between the transfer of property in land and property in ships, mines and merchandise. Encouraged by popular applause he went on to advocate a thorough overturn of the old system and the establishment of a central tribunal empowered to make all titles good.[53] Fisher's three Bills[54] and a Victorian measure[55] were quoted at length to support the case for simplified registration.

The subject was widely discussed; Governor MacDonnell and several senior civil servants were known to favour reform.[56] At the request of the Chamber of Commerce the British Shipping Act was printed in the Government Gazette as a guide to the alteration of registration.[57] Attention was also paid to the creation of the Real Property Commission in England[58] and to the system of conveyancing used in the Hanse towns;[59] George Fife Angas, the largest individual

51. No. 19 of 1852; No. 25 of 1852; No. 22 of 1853; No. 19 of 1854.
52. No. 7 of 1855-6; No. 23 of 1855-6.
53. e.g., Editorials and correspondence in S.A. Register, 3—vii—1856; 4—vii—1856; 11—vii—1856; 12—vii—1856; 6—viii—1856.
54. ibid. 23—vii—1856.
55. Reprint from the Melbourne Argus of the outline of a bill to facilitate and simplify the transfer of land in the colony of Victoria, proposed by Charles John Dennys (S.A. Register, 31—vii—1856).
56. ibid. 31—vii—1856.
57. Government Gazette. Appendix. 31—vii—1856.
58. Report from the Royal Commission (under Lord Campbell) on the registration of title, with reference to the sale and transfer of land. Presented to the House of Commons, 15—v—1857 (P.P. 1857/2215).
59. Correspondence in S.A. Register, 31—vii—1856; 16—viii—1856.

land owner in the colony, persuaded Dr. Ulrich Hubbe to draft a Bill and write a book on the subject.[60] But few lawyers could be cajoled into committing their opinions to the press. Those who complained of meddlesome laymen did so anonymously: "We have bad titles and we shall have more which can only be dealt with by one learned in the law; you cannot have the benefit of this learning without paying for it".[61] Believing most of the profession favoured moderate reform, Hanson prepared a bill reducng the limitation of actions to six years and facilitating the settlement of disputed titles. As this seemed as far as lawyers were prepared to go, Forster declared open war. If they were going to fight to the last gasp on the hustings, then the rights of the profession would be swept away together with the wrongs of their clients.

> "People have groaned under legal inflictions and legal expenses until in sheer despair they have resolved to shake off so oppressive an incubus."[62]

Although Forster charged lawyers with a vested interest, neither he nor his landowning backers expected to lose by the reform; title to property was safe enough when there was ample wealth to protect it. Security of title and cheap conveyancing was of greater importance to men who staked all their savings on suburban allotments. By showing the electors of Adelaide that all landed proprietors had a common cause, R. R. Torrens popularised reform[63] and headed the poll.[64] The same message repeated to small holders on the plains to the north won a seat for his legal friend and adviser, R. B. Andrews, and committed Torrens to propose registration reform in the new Parliament.[65]

In opening South Australia's first Parliament Sir Richard MacDonnell recommended that law reform be given a prominent place,[66] but the first six months were frittered away with problems of privilege and changes of ministry. Hanson's bill was introduced in November. In spite of its safeguards for inheritance and its limitation of actions, it did little to make titles more marketable and was overshadowed by Torrens' measure.[67]

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60. Ulrich Hubbe: *The voice of reason and history brought to bear against the present absurd and expensive method of transferring and encumbering immovable property* (1857).
61. A Conveyancer. In S.A. Register, 18–vii–1856.
62. Editorial. ibid. 12–ii–1857.
63. "In Australia the great mass of the people are, or confidently look to become, landed proprietors. In Australia, therefore, thorough law reform is essentially the people's question." Torrens' electoral speech. S.A. Register, 2–ii–1857. Cf. R. R. Torrens: *The South Australian system of conveyancing by registration of title* (1859), 7.
64. Electoral return for Adelaide. S.A. Register, 11–iii–1857.
65. ibid 1–vi–1857; 2–vi–1857.
66. S.A. Parliamentary Debates, 1857-8, p. 9 (28–iv–1857).
67. Ibid. pp. 658, 677, 744, 751. Cf. also S.A. Parliamentary Papers, 1858, No. 51. Torrens to MacDonnell, 5–i–1858; MacDonnell to Labouchers, No. 221, 11–ii–1858; Hanson to MacDonnell, 11–ii–1858.

In June Torrens sought leave as a private member to introduce his Bill in order to have it printed.[68] It had already been published in the *Register*[69] and approved by a number of influential people such as Judge Cooper and the bankers Hector and MacDermott. J. H. Fisher also promised his aid because he believed the principle was a healthy one though he foresaw difficulties in the way of carrying it out.[70] Care had been taken, however, to withhold the draft from unfriendly lawyers through fear of provoking their "professional tyranny".[71] Nor was Torrens mistaken. Though he stated in public meetings and after dinner speeches that he would be standing alone in the house, the only opposition to the creation of a "conveyancing shop" came from lawyers and money-lenders Yet from June to November nothing was heard of the Bill even though Torrens himself formed a ministry in September, only to find cabinets were ricketty pieces of furniture in Australia. His inaction annoyed the *Register* and the Adelaide *Times* who flayed him so mercilessly[72] that he and his friends published a few numbers of their own *Peoples' Journal*[73] to assert their good faith.

On November 11 Torrens moved the second reading of his Bill which had been somewhat altered since June. With only slight opposition it was passed and for a few days made rapid progress in committee but interest languished and the lawyers were nearly successful in sending it to a select committee, the situation being saved by a hasty recall of members from the tea room.[74] In December it was rumoured that the bill was to be thrown out on its third reading as "the greatest fallacy ever put into print", but the rumour proved false. To the reputed joy of nine-tenths of the community it passed the assembly 19 to 7.[75]

In the Legislative Council it was in the charge of Anthony Forster but was postponed several times before a sixty foot petition signed by 2,700, said to represent every section of the colony, prayed that the bill be passed before the end of the session.[76] At first, opinion was evenly divided and Forster had a heavy task answering objections.[77] Debate was then delayed so that the newly arrived report of the English Commission could be circulated[78] and after that to

68. S.A. Parliamentary Debates, 1857-8, p. 209 (4–vi–1857).
69. S.A. Register, 13–iv–1857.
70. S.A. Parliamentary Debates, 1857-8, p. 760 (19–i–1858).
71. Letter from C. Fenn. ibid, 29–vi–1858.
72. S.A. Register, 2–ix–1857: Mask's letters in Adelaide Times, 28–ix–1857; 21–xii–1857.
73. No copies extant, but see S.A. Register, 8–x–1857; Adelaide Times, 7–x–1857.
74. S.A. Parliamentary Debates, 1857-8, p. 672. Cf. Torrens to Burford, 17–ix–1875 (quoted in the Evening Journal, 21–viii–1915).
75. S.A. Parliamentary Debates, 1857-8, p. 706; S.A. Register, 16–xii–1857.
76. S.A. Register, 6–i–1858.
77. S.A. Parliamentary Debates, 1857-8, p. 725.
78. Presented to the House of Commons, 15–v–1857; reached Adelaide, 11–xi–1857.

consider the modification of unconstitutional clauses. As in the assembly hostility was aroused by the clause compelling all property to be registered under the new system within six years; like Torrens, Forster had to guarantee that it would not be pressed. A second petition got the bill to committee where "morbid fear" was shown of a legislative leap in the dark.[79] John Baker, with large sums on mortgage, harped on the wickedness of compelling land holders to reveal their defects of title and wanted the Bill sent to a select committee. John Morphett objected to the unparliamentary insistence of having the Bill passed "in its integrity and its absurdity" so that a small clique might win popular applause.[80] "Like the birds that once saved Rome, trying to save South Australia from the fate likely to descend upon it as a result of this newfangled law",[81] the opposition with a majority of one struck out the unpalatable compulsory clause, but it was reinserted next day with the president's (Fisher) aid in the absence at court of one of the lawyers.[82] At last the bill was passed by a majority of 5 on 26th January, 1858, the day before Parliament was prorogued.

The Governor had already discussed the question of assent with his Executive Council. Although the Bill proposed the appropriation of a small part of public revenue as an assurance fund, the government considered it too late to obstruct the measure, especially as the ministry was pledged to recommend it. So it was decided to give assent, leaving the offensive clause inoperative until made effective by future legislation.[83]

The Act established a Lands Titles Board of the Registrar General and two Commissioners, advised by a special retained counsel. They were empowered to give indefeasible title of real property by certificate instead of by deed. The system adopted was simple and inexpensive and transformed conveyancing by bringing it within the scope of any man of ordinary intelligence. Land alienated after 1st July, 1858, had to be registered at the Lands Titles Office, the owner being given a copy of the certificate entered in the official register. All subsequent transactions affecting the land appeared on the face of the certificate so that a glance would show whether the property was encumbered or if any charges had been made on it. If an owner wished to mortgage his land he had the transaction marked on the certificate and his copy; if he wished to sell he passed his duplicate to the purchaser who had the transfer registered. The State thus assumed the responsibility for proving

79. S.A. Parliamentary Debates, 1857-8, p. 760 (19–i–1858).
80. ibid. p. 779.
81. S.A. Register, 23–i–1858.
82. S.A. Parliamentary Debates, 1857-8, pp. 773; 778.
83. Executive Council Minutes, 27–i–1858 (S.A. Archives); S.A. Parliamentary Debates, 1857-8, p. 796.

the validity of titles; if mistakes were made the assurance fund indemnified the displaced owner.

The old registry office was not closed, but land granted or conveyed prior to July, 1858, could be brought voluntarily under the Act by application and the deposit of deeds and other instruments of title. These were examined by the solicitors of the Lands Titles Office. Their report went to the Commissioners, who, if satisfied with the evidence, decided where each application was to be advertised and how long was to intervene between the advertisement and the issue of certificate if no caveat was lodged. Though retrospective examination was unnecessary the old deeds were parcelled and kept at the office. The charges were nominal; a ½d. in the £ for the assurance fund, the cost of advertisement, and a few shillings for each registration according to the value of the transaction. The act did not contemplate turning bad titles into good ones, for many applications were rejected; but it did give certainty to "holding" titles that were blistered or otherwise imperfect, making them marketable and preventing the recurrence of technical defects.[84]

The Act came into operation on 2nd July, 1858, with R. R. Torrens as Registrar. No difficulty was experienced in recruiting lawyers as Commissioners and counsel.[85] A temporary office was taken at the old Union Bank Building in Gresham Place, off King William Street.[86] At first adverse seasons and hard times reduced the volume of work giving the new officials an opportunity to find their feet.

Most of the legal profession accepted the new law graciously and many constructive suggestions were offered to the surprise of radical laymen who fancied that the Act "abolished lawyers by substituting a registrar". Even when landbrokers, for a few shillings fee, were licensed to invade the monopoly of conveyancing, the profession made few protests. In 1859 only 50 of 873 applications for title were prepared by lawyers,[87] yet an enigmatic spokesman declared they cared little about profit or loss of business; they felt hurt at the way they had been treated.[88] But a few "gentlemen of the long robe" remain intransigent. Some custodians of deeds refused to co-operate with the Lands Titles solicitors, others charged 13/4 for allowing a search.[89] E. C. Gwynne advised his clients not to advance money on properties brought under the Act.[90] Charles Fenn, boasting seventeen years' experience of conveyancing, declared

84. No. 15 of 1857-8.
85. S.A. Register, 23–vi–1858; 5–vii–1858.
86. ibid. 2–vii–1858.
87. G. A. Jessup: *Torrens of the Torrens System* (unpublished ms. in S.A. Archives), p. 22.
88. S.A. Parliamentary Debates, 1860, p. 538.
89. S.A. Parliamentary Papers, 1860, No. 192. Evid. Q. 3.
90. Editorial: "The Real Property Bill and the Legal Profession" in S.A. Register, 3–ii–1858.

the Real Property Act "foolish, unworkable and a most pernicious measure"[91] if for no other reason than the repeal in its preamble of some 1,500 clauses of 40 English acts. Another "practitioner of the Supreme Court" complained that the untaught minds of "the fiery, the factious, the positive and the dull" had united to produce "a flat, trivial, unenlightened lucubration" the disgrace of which would take years of ripened wisdom to wipe from the statute book.[92] A few hostile lawyers met to discuss ways of making the Act a dead letter[93] and J. H. Fisher pronounced its operation as premature; it had not received complete assent and if disallowed by the Queen could cause great injury. In June he published his views of the crudities of the Act;[94] the *Register* brushed his book aside as hypercritical.[95]

In spite of immense public faith in the Act, the Lands Titles Commissioners admitted its imperfections.[96] Within five months they drafted an amending Bill which was steered through the Assembly by Hanson with as much zeal as he had shown in opposing the previous measure. He explained that unanticipated difficulties had arisen over trusts and absentee owners through the non-legal phraseology of the original Act; as the law of the land it should be freed from defect.[97] In the Legislative Council Fisher declared the Bill unconstitutional and his henchmen tried to throw it out, predicting that unless the downward course was arrested lawyers would reap rich harvests in litigation and the colony would become the laughing stock of Australia.[98] But the Chief Secretary insisted that it was a government measure and that the Lands Titles Office had vindicated its value; in five months 176 applications had been made to bring land under the Act, of which 30 had been refused, 4 withdrawn and 158 approved; 80 transfers had also been effected.[99] After debates of little more than an hour, the Bill passed both houses and received the Governor's assent on Christmas eve, 1858.[100]

Sceptics were convinced that further amendments would be required because Torrens, confident of public support for his darling, was as eager to run to Parliament with his problems as he was reluctant to report on his progress.[101] As one lugubrious lawyer grumbled:

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91. Correspondence. ibid. 15–ii–1858.
92. ibid. 19–i–1858.
93. Letter from J. M. Skipper; ibid. 15–ii–1858.
94. J. H. Fisher: *The Real Property Act* (1858).
95. Review article; S.A. Register, 26–vi–1858.
96. S.A. Parliamentary Debates, 1858, p. 837.
97. ibid. pp. 791, 804, 837. Cf. ibid. 1860, p. 385.
98. ibid. p. 911 et seq. (21–xii–1858).
99. ibid. p. 925.
100. No. 16 of 1859.
101. e.g., S.A. Parliamentary Debates, 1958, p. 668; 1859, pp. 136: 368. Five simple returns asked for were not produced within three months.

> "If the house remained in session till they corrected all the defects of the Real Property Act, he was quite certain nothing would be left of it but the title and even that should undergo some modification."[102]

Some of Torrens' supporters feared defeat by English authorities under pressure from absentee landowners depicted as vultures preying with infatuated selfishness on needy, industrious colonists.[103] But no such objections were raised.[104] The largest absentee group, the South Australian Company, welcomed the Act, for they were preparing a private bill to quieten titles and "render their property marketable".[105] Their legal advisers in the colony urged them "not to bring their lands under the Act" but "to take Counsel's opinion in England".[106] In contrast the colonial manager wrote:

> Whilst this Act is in force no purchaser from the Company can object to complete his purchase on account of the title because we have only to bring the property under the act and no objections can be valid. Again the act affords so ready and economic a system of carrying out all contracts for leasing, mortgaging, etc., that our tenants are already complaining of the costs inflicted on them by the old system as contrasted with those under the new. Unless we can assign them a good reason for not adopting the latter it will soon generate discontent among the tenantry.[107]

Other absentees were assured by high authorities in England that the Act was repugnant,[108] but the Company's directors saw no need of professional advice as titles were to be made indefeasible; instructions were given that their land was to be brought under the Act, but only as it was sold, to avoid the heavy fee of £3 per section.[109]

With the passing of the Act the battleground moved to the Supreme Court. The Chief Justice, Sir Charles Cooper, mildly opposed the new system of conveyancing, but once it became law he accepted it. He was in England on sick leave when it was passed and returned on the eve of its coming into operation.[110] His office had been temporarily assumed by the second Judge, Benjamin Boothby (1803-68), who was a barrister in Yorkshire before his appointment to the South Australian Supreme Court in 1853.[111] An obstinate and

102. S.A. Parliamentary Debates, 1859, p. 497.
103. Editorial: Absenteeism. S.A. Register, 26–vi–1858. Cf. S.A. Parliamentary Debates, 1858, p. 353 et seq.
104. The Crown Law officers left the Act to its operation (Stanley to MacDonnell, No. 15, 18–v–1858).
105. Miller to Giles, 16–ii–1858 (South Australian Company: copies of letters to the colonial manager, 1855-70, p. 112, S.A. Archives).
106. Giles to Miller, 17–iii–1859 (South Australian Company: Letter from the colonial manager to the London office, 1858-60, p. 395.
107. Giles to Miller, 17–vi–1859 (ibid. p. 423).
108. S.A. Parliamentary Debates, 1860, p. 386.
109. Miller to Giles, 18–v–1859 (p. 156); 18–x–1859 (p. 174).
110. S.A. Register, 12–vi–1858.
111. An excellent detailed account of Mr. Justice Boothby is given by R. M. Hague: *History of the Law in South Australia* (unpublished ms. in S.A. Archives), ch. v.

uncompromising dogmatist, he sincerely regarded himself as the champion of English judicial standards and never mitigated his abhorrence of colonial crudities and the impertinent suggestion of those who had never eaten dinners in Inns of Court "that rules formulated by the finest English minds and buttressed by centuries of tradition should be set aside for antipodean convenience". His special bete noir was trial by jury; in a raw community a grand jury was sufficient, leaving him free to decide questions of law. As Acting Chief Justice he usually had right on his side but he was overbearing with juries, rude to his colleagues, contemptuous of the Attorney General and dictatorial to counsel and litigants. The press inveighed unrestrainedly against the judicial tyrant who usurped the function of juries;[112] Fisher made a solemn protest in the Supreme Court; a public meeting of 1,500 deplored the arbitrary administration of justice by a colonial Judge "Jeffreys";[113] in Parliament Gwynne got an Act passed to give the colony the full benefit of trial by jury;[114] but Boothby was regardless of criticism. The squabble died on Cooper's return and in February, 1859 E. C. Gwynne was appointed third judge of the Supreme Court.

Boothby and Gwynne detested the Real Property Act because it attempted to oust the jurisdiction of the Supreme Court to decide on questions of land title. The first serious test of indefeasibility of certificate of title was *Hutchinson* v. *Leeworthy* in April, 1860. Hutchinson had an original land grant but through hasty survey it included 180 acres; the government reclaimed 46 acres but by mistake took 56. The new section came into the hands of Mrs. Leeworthy who brought it under the Act, her certificate of title including ten acres of Hutchinson's, who applied to Torrens for permission to inspect the deeds on which her claim was based. Torrens refused, so Hutchinson took the case to court and was granted a mandamus. Then he sought to eject Mrs. Leeworthy. The Supreme Court decided unanimously that the certificate of title had no greater validity than the title surrendered for it and found for the plaintiff.[115]

This was a severe blow to Torrens; in reply he prepared a Bill to overcome the difficulty. As before, the government introduced the measure "exactly as it left the hands of the Registrar General" and amendments were accepted only with his approval. The opposition trod familiar ground and the only new argument was that the Bill

112. Editorials and correspondence in S.A. Register: 3–iii–1857; 28–iii–1857; 16–ix–1857; 5–x–1857; 14–v–1858; 5–xii–1857; 12–ii–1858; 22–ii–1858.
113. ibid. 15–x–1857.
114. No. 5 of 1858.
115. S.A. Register, 29–v–1860. In 1868 *Smith* v. *Bewes* (2 S.A.L.R. 149) the Full Court reversed this decision by finding against the priority of an original land grant, on the ground that the Colonisation Commission could not give title to more than 134 acres, even by mistake, without reducing the price below the statutory minimum of 12/- an acre.

should be reserved for sanction by "the highest authority", but Hanson declared it was improper to dictate to the governor.[116] The new Act was given assent[117] and came into operation in October, 1860. Before it was passed an immense public banquet celebrating the third birthday of the system was held,[118] the Chamber of Commerce protested against the secrecy and arbitrary powers of the Lands Titles Commissioners (for Torrens was suspected of trying to secure the bad title of his own property)[119] and fourteen lawyers petitioned that doubtful applications for titles be left to the jurisdiction of the Supreme Court.[120]

The Court's opinion of the new Act was given in *Payne* v. *Dench.* A contract had been made for the purchase of some land brought under the Act but Dench failed to complete his payment and when sued claimed that the Registrar's certificate was not such a sufficient title as he was bound to accept. The full court unanimously held that judgment should be entered for the defendant as the certificate was defective.[121] The plaintiff then turned to the Court of Appeals, a curious tribunal created in 1837[122] which virtually gave the Executive Council power to over-ride the Supreme Court. From time to time attempts had been made to extend its jurisdiction in order to restrict appeals to the Privy Council.[123] The Court of Appeals had heard a few cases after 1855 but the Supreme Court struck out Payne's appeal as he had become lunatic and a committee led by Torrens was pushing the case in order to defend the Real Property Act. The three judges also declared the Court of Appeals abolished by responsible government as elected ministers had joined the Executive Council and the constitution excluded judges from Parliament.[124]

A public outcry greeted the decision for it not only made certificate of title uncertain but left the law in confusion. When Parliament met four months later the correction of defects in the Real Property Act was delegated to a Commission, for in three years more than £1,500,000 of property had been given certificates of title, nearly half the 2,600 successful applications being transfers.[125] After the

116. S.A. Parliamentary Debates, 1860, pp. 249, 384, 438, 479, 535.
117. No. 6 of 1860.
118. S.A. Register, 5—vii—1860.
119. S.A. Parliamentary Debates, 1860, p. 556 (7—viii—1860). The resolution was adopted by 14 to 6.
120. MacDonnell to Newcastle, No. 448, 20—xi—1860. Enc. No. 3. At the time there were 40 legal practitioners in the colony; four of those who signed the memorial were new arrivals.
121. Judgments on *Payne* v. *Dench,* 24—xi—1860 (S.A. Parliamentary Papers, 1863, No. 100).
122. 7 William IV, No. 7.
123. No. 6 of 1844; Nos. 24 and 31 of 1855-6.
124. S.A. Register, 12—xii—1860; 18—iv—1861; S.A. Parliamentary Papers, 1861, No. 74; 1864, No. 142, p. 22.
125. S.A. Parliamentary Debates, 1861, p. 1108.

Commission reported[126] the Act was amended to overcome the adverse decision[127] and as a precaution the Court of Appeals was put on a sound footing,[128] thus setting the public at rest. But the respite was only temporary.

In an action for slander in June, 1861, Boothby, as the self-appointed defender of the rights of absentees,[129] announced that the Real Property Act of 1860 was of no legal force because the governor had exceeded his instructions in giving assent to it. Cooper demurred at discussion of the governor's actions but Boothby claimed, "It is the duty of this court to vindicate the Royal prerogative. I sit here a representative of Her Majesty as much as His Excellency does". His argument was that indefeasibility denied the Queen the power of deciding in Her Supreme Court before Her judges the ownership of land. He argued further that since the Australian Colonies Government Act (13 and 14 Vict. c.59) South Australia had come under the application of 9 Geo. iv. c.83 s.22, by which all colonial legislation had to be sent to the Supreme Court judges for approval. As the Constitution Act had not been so submitted it was invalid.[130]

He was over-ruled by his colleagues but by opposing the Real Property Act he became the scapegoat, though Gwynne went scot free. The opening of the Moonta copper mines had set off another land boom and the hostile judicial decisions stood in the way. Excited by Torrens and his supporters the community was sharply divided into pro- and anti-Boothbyites. A willing Council and reluctant Assembly each appointed a select Committee to enquire into his decisions and report on the steps to be taken, as he was supposed to have put himself above the legislature, the Governor and the Queen.[131] Both committees found Boothby well supported by Gwynne and to a lesser extent by Cooper, as well as many of the legal profession.[132] The gloomy reports on the uncertain state of the colony's law became best sellers and a "judge hunt" was started by the *Register* and the *Advertiser* in unholy alliance. At public

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126. Report from the Real Property Law Commission (S.A. Parliamentary Papers, 1861, No. 192).
127. No. 22 of 1861
128. No. 5 of 1861.
129. vide Mr. Justice Boothby in *McEllister* v. *Fenn* 17—vi—1861. (Report of the Select Committee of the Legislative Council upon recent decisions and conduct of Mr. Justice Boothby. S.A. Parliamentary Papers, 1861. No. 141. Appendix p. 16).
130. Mr. Justice Boothby's demurrer in *McEllister* v. *Fenn*, 25—vi—1861 (loc. cit. pp. 17-20).
131. In the Legislative Council, 10—vii—1861. S.A. Parliamentary Debates, 1861, pp. 385-394, public petitions compelled the Legislative Assembly to follow suit on 6—viii—1861. S.A. Parliamentary Debates, 1861, pp. 565-582.
132. S.A. Parliamentary Papers, 1861, Nos. 141 and 154. Report from the Select Committee of the House of Assembly to enquire into the recent judgments of Mr. Justice Boothby.

meetings in town and country Torrens and his clique of landjobbers raised the cry, "The Real Property Act is in danger".

The struggle was not one-sided. Even in Torrens' home district of Mitcham, where the anti-Boothby party was said to be strongest, it was found necessary to pay a man (reputed the hangman) to get signatures for a petition asking the Governor to dissolve Parliament for its failure to take action against the judge.[133] The clamour increased daily and after four rapid ministerial changes and days of acrimonious debate, both houses decided to send addresses to the Queen for Boothby's removal.[134] Meanwhile he went his way undaunted, though every fresh dictum on invalidity widened the breach between him and his colleagues.

In November, 1861, Sir Charles Cooper retired and R. D. Hanson was appointed Chief Justice—a bitter blow to Boothby, who regarded him as an unqualified upstart.[135] Not for two years did he accept Hanson's authority though at first the hostility was veiled pending the result of the addresses to the Queen. These were, of course, unsuccessful,[136] but Boothby was vindicated by the Crown Law officers who, in examining the Select Committee reports, made the amazing discovery that the entire legislation of the colony after 1856 was invalid owing to failure to reserve the Electoral Act (No. 10 of 1855-6)[137]—a fault for which Hanson was largely responsible. A validating Act was hurriedly passed by the Imperial Parliament,[138] but in 1862 when Governor Macdonnell was replaced by Sir Dominick Daly, a constitutional frolic began in earnest.

J. H. Fisher, devoting much time in semi-retirement to searching for defects in legislation, announced that the acts of an incumbent governor ceased to be valid on the appointment of his successor.[139] So another Imperial Act was passed to quieten doubts.[140] He then discovered that the Electoral Act of 1861, and with it all subsequent legislation was invalid because it should, as a constitutional amendment, have been reserved or passed by an absolute majority in both houses.[141] Boothby found a similar flaw in the act abolishing the general registry office (No. 27 of 1862) created in 1842; as no new provision was made for the registration of leaseholders, they were

133. For this petition 7,300 signatures were collected (MacDonnell to Newcastle, No. 519, 12–xii–1861), but vide speeches by F. S. Dutton and Henry Ayers, 27–vi–1861 (S.A. Parliamentary Debates, 1861, pp. 878-946).
134. In the Legislative Council ibid. p. 946; in the Legislative Assembly ibid. 1012.
135. Boothby to Newcastle, 25–xi–1861 (S.A. Parliamentary Papers, 1862. No. 86 Despatches on the appointment of Chief Justice Hanson, p. 3).
136. Atherton and Palmer to Newcastle, 12–iv–1862. Encl. in Newcastle to Daly, No. 25, 24–iv–1862.
137. Newcastle to Daly (confid.), 26–iii–1862.
138. 25 and 26 Vic. c. 11.
139. Fisher to Newcastle, 20–xii–1861 (S.A. Parliamentary Papers, 1862, No. 18).
140. 26 and 27 Vic. c. 76.
141. Fisher to Daly, 15–xi–1862 (S.A. Parliamentary Papers, 1863, No. 23).

unable to vote for the Legislative Council.[142] Throughout 1863 there seemed no limit to the laws declared invalid through careless drafting or through repugnancy. Each discovery increased public consternation and uncertainty. In defiance of his colleagues Boothby continued to upset the Real Property Act and advised litigants not to bring their land under it.[143] The radical laymen who before had clamoured for political independence, now begged for rescue by the Imperial Parliament.[144] Hope revived when the Colonial Laws Validity Bill was drafted and sent to Adelaide where it was approved and returned to London to become law on 29 June, 1865.[145]

In the meantime Boothby questioned the legality of Hanson's appointment and with Gwynne's support found that all local courts in the colony were invalid.[146] Frantic magistrates appealed to Parliament. The Governor[147] wrote despairingly to the Colonial Secretary; "no one can tell under what laws he is living or what will, in any given instance, be the decision of the Supreme Court".[148] Provisions were made to have all prisoners committed to the Supreme Court for trial and an Act indemnifying magistrates was hastily passed.[149] Month by month the position worsened. Bench, Bar, Governor and Parliament all seemed at cross purposes. The final assault on Boothby was led by the legal profession with few dissentients.[150] After consultation with the English authorities, the Executive Council held an enquiry into Boothby's behaviour and on 29th July, 1867 his "amoval" from office was ordered.[151] A year later he died.[152]

By precisely defining repugnancy the Colonial Laws Validity Act virtually established the indefeasibility of certificates of title, though Boothby and Gwynne claimed it did not extend to measures unconstitutionally passed by the colonial parliament.[153] Periodically the Real Property Act was amended,[154] but the Lands Titles Office went on from strength to strength lending a seal of respectability to a community which measured social status by landownership.

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142. *Driffield* v. *The Registrar-General* (S.A. Register, 17—xii—1862; S.A. Parliamentary Papers, 1864, No. 142, p. 33 et seq.).
143. S.A. Parliamentary Debates, 9—vii—1865 (S.A. Register, 13—vii—1865 and Supplement).
144. Address to the Queen on validity of laws. S.A. Parliamentary Papers, 1864, No. 169.
145. 28 and 29 Vic. c. 63.
146. Judgments in *Dawes* v. *Quarrell,* 18—vii—1865 (S.A. Parliamentary Papers, 1865, No. 120).
147. S.A. Parliamentary Debates, 1865, p. 795. Cf. pp. 641-2.
148. Daly to Cardwell, No. 42, 26—vii—1865.
149. No. 14 of 1865.
150. e.g., S.A. Parliamentary Debates, 1865, p. 61 et seq.
151. Deering to Boothby, 29—vii—1867 (Proceedings of the Executive Council relative to Mr. Justice Boothby. S.A. Parliamentary Papers, 1867, No. 22, p. 67).
152. Obituary, S.A. Register, 22—vi—1868.
153. Editorial: The first nibble. S.A. Register, 25—ix—1865.
154. e.g., Nos. 11 of 1869-70; 128 of 1878; 380 of 1880; 403 of 1887; 569 of 1893; 1415 of 1919; 1806 of 1927; 2246 of 1936.