***P T Babie****

# FORUM INTRODUCTION: SIMON PALK AND PROPERTY

During a conversation with Simon Palk in 2024, I mentioned to him that I was re-reading those chapters of S F C Milsom's *Historical Foundations of the Common Law*[1] on land law and equity, to which Simon replied: 'Oh yes, what Milsom does with that is genius!' Thinking back on that conversation, I have thought that much of what Simon has said to me about land law and equity over the years is, too, genius — especially his explanation of the Torrens system. Others feel the same way. In late 2023, as part of a Law Foundation of South Australia project titled 'Modernising the *Real Property Act 1886* (SA)', I met with a group of South Australian property law scholars at the Adelaide Law School. As the discussion unfolded around the esoterica of Torrens title, it turned again and again to insights which each of us had gained from Simon about the intricacies of that system of title by registration — South Australia's unique gift to those places which trace their modern common law to received English law.[2] Everyone recounted at least one story of how Simon had not only explained something that we did not know, but also did so in a way that had remained with us for years. The conversation soon turned to the impact that Simon, as a teacher, had had on us, and on his students — his lessons were so clearly explained that we could remember the details years later. In short, there was much in what he had taught us that is, simply, genius.

In my own case, I came to the Adelaide Law School as a Lecturer in 1999 and was appointed to the Property Law teaching team with Adrian Bradbrook, Simon Palk, Rob Fowler, and Janey Greene. And there began a great friendship with each of those fine scholars and teachers. I spent many hours with Simon in that first year discussing property law and the Torrens system. As things transpired, I would ultimately come to be the coordinator of the Property Law subject once the original team left the University. What I learned from Simon, though, came to structure the Property Law course when I first coordinated it, and it continues to do so today.

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1 S F C Milsom, *Historical Foundations of the Common Law* (Butterworths, 2nd ed, 1981).

2 On reception in Australia, see Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2(1) *Adelaide Law Review* 1. In Canada, see J E Cote, 'The Introduction of English Law into Alberta' (1964) 3(2) *Alberta Law Review* 262. In New Zealand, see David V Williams, 'The Pre-History of the English Laws Act 1858: *Mcliver v Macky* (1856)' (2010) 41(3) *Victoria University of Wellington Law Review* 361. See also *A-G (A) v Huggard Assets Ltd* [1951] SCR 427, revd [1953] AC 420 (Privy Council).

As those of us at that workshop in late 2023 continued to reminisce, it became obvious to each of us that we should honour Simon and his property law legacy in a more formal way. From this emerged the idea for this Forum. Enthusiasm for the project was unanimous. Simon's influence, indeed, has been nothing less than genius.

## I Simon Palk

Simon Palk was born in November 1948 in Sidmouth, Devon County, England.[3] He was educated at Kelly College, a boarding school on the edge of Dartmoor. Founded in 1877, the school had from the outset a connection to Cambridge University; its first Headmaster, Robert West Taylor, was an erstwhile Fellow of St John's College, Cambridge. And so, having excelled at Kelly, Simon gained a place at Selwyn College, Cambridge. He obtained a double first in 1972, taking the BA (Law) and the LLB. The MA and LLM, respectively, followed by right in 1978.[4]

Simon entered the academy immediately upon his graduation from Cambridge, taking his first lectureship at Leicester University, where he remained for two years, from 1973 until 1974. He taught property law for the first time at Leicester, and that would become the subject for which he was known over the course of his career. He also taught international law, as well as some related property topics. In 1975, he returned, for one year, to his alma mater, taking a fellowship at Fitzwilliam College. While he could have remained at Cambridge, the political and social climate of the time was decidedly gloomy, so Simon began looking for opportunities elsewhere. For someone of his calibre, one soon came; in late 1975, Simon took up a position at the Adelaide Law School, where he would remain for 30 years, until his retirement in 2005.

Simon's greatest influence and lasting legacy came as a teacher. He soon made his mark within the suite of property law subjects at the Adelaide Law School: Property Law, Equity, Intellectual Property, Advanced Property, and Succession in the LLB program, and Land Transactions and Equitable Remedies in the LLM program, as well as a range of allied property subjects. As I have already explained, generations of Adelaide Law School graduates can still remember what they learned in one or more of these subjects. Before I took up my own position at the Adelaide Law School, I met with two Adelaide graduates who were completing the BCL at Oxford, and Simon was one of the members of academic staff about whom they spoke as being of the very highest standard; they recounted in glowing terms what they had learned in his subjects.

But Simon's reputation was built through his scholarship as well. While the corpus of his work was perhaps smaller than others, what he wrote made a profound

3 This short biography is based upon an interview which the author conducted with Simon Palk in Adelaide on 2 December 2024.

4 'The Cambridge MA', *University of Cambridge* (Web Page) <https://www.cambridgestudents.cam.ac.uk/your-course/graduation-and-what-next/cambridge-ma#>.

impact. In the finest tradition of the scholar, Palk's contributions illuminate fine points of law that would otherwise receive little attention, revealing deep insights to the careful reader. Thus, his work on the nature of property,[5] succession,[6] planning law,[7] real property,[8] residential tenancies,[9] and intellectual property[10] continues to provide guidance today. Indeed, it might surprise Simon to know that his work continues to make an impact in one of the ways only dreamed of by most members of the legal academy — in reported decisions. In 2021, Blokland J of the Northern Territory Supreme Court, in *Re Hartung*[11] wrote

> [t]he document marked 'A' which is annexed to Herbert's affidavit is partially formatted in a pseudo-gothic style which is often seen in kits that people use to draft their own wills. Simon Palk observes 'the printed will form has ironically not made life easy for the Do-it-Yourself testator'. The format has not however been the problem here. The title states, 'This is the last Will and Testament of Me', followed by the words, 'Horst Paul Hartung of 14 Larapinta Drive, Alice Springs in the State of [the] Northern Territory.'[12]

Justice Blokland cites 'Informal Wills: From Soldiers to Citizens' — an article written by Simon in 1976.[13] This is a textbook example of the difficulty faced by legal scholars regarding the lag between output and impact in the development of law. That said, the recognition of Simon's work 46 years following its publication demonstrates the prescient quality of his research. I found Simon's 'The Residential Tenancies Act, 1978 (SA) and the Protection of Tenants against Succession to the

5 Simon N L Palk and Rebecca Bailey, '"Property" and Discretionary Trusts Under the Family Law Act, 1975–1976' (1977) 6(1) *Adelaide Law Review* 131.

6 Simon N L Palk, 'Informal Wills: From Soldiers to Citizens' (1976) 5(4) *Adelaide Law Review* 382 ('Informal Wills'); Simon N L Palk, 'Hotchpot — or Hotchpotch' (1981) 7(4) *Adelaide Law Review* 506.

7 Simon N L Palk, 'Identification of the Planning Unit — Two Contexts' (1973) 32(1) *Cambridge Law Journal* 33; Simon N L Palk, *The Law and the Social Planning Division* (Stage 1 Report, June 1976).

8 Simon Palk, 'The Disputed Strip — Yet Again' (1974) 33(1) *Cambridge Law Journal* 60; S N L Palk, 'Litigating the Contract for the Sale of Real Estate: Recent Developments' (Adelaide University Continuing Education Law Papers, 1986).

9 S N L Palk, 'The Residential Tenancies Act, 1978 (SA) and the Protection of Tenants against Succession to the Original Landlord' (1978) 6(3) *Adelaide Law Review* 458 ('Protection of Tenants'); Simon Palk, 'South Australia: New Moves in Rent Control' (1978) 3(2) *Legal Service Bulletin* 52; Simon Palk, 'The Courts v the Residential Tenancies Tribunal: Judicial Review by Any Other Name' (1987) 11(2) *Adelaide Law Review* 215.

10 Simon N L Palk, 'Copyright: Basic Structure and Basic Principles' (Adelaide University Continuing Education Law Papers, 10 July 1986).

11 [2021] NTSC 51.

12 Ibid [4].

13 Palk, 'Informal Wills' (n 6).

Original Landlord'[14] to be invaluable in writing a piece I published in 2021 on the overriding legislation exception to indefeasibility,[15] a theme to which I return in my article in this Forum. There is little doubt that Simon's legacy continues, through his teaching and his scholarship. It is that legacy which we honour in this Forum.

## II The Forum

The Forum contains seven articles. The first — Paula Zito's 'Understanding Property and Intellectual Property Laws: A Tangible and Intangible Intersection'[16] — explores an ongoing interest of Simon's: intangible property rights and intellectual property. Zito discusses how property and intellectual property law cover two distinct types of property: tangible (physical items like land) and intangible (non-physical assets like goodwill). Despite their differences, these two realms often intersect in interesting ways. For property developers, buyers and sellers, it is crucial to know what can and cannot be done with building plans. This is where copyright law comes into play, influencing property law from various perspectives. For instance, when developing a new building, the copyright implications of the building plans must be considered. Similarly, sellers and buyers need to be aware of these laws to avoid legal pitfalls. By understanding how these laws intersect, navigating the complexities of property development and transactions becomes more effective. Zito's article delivers a concise and practical summary of the legal framework related to building copyright. It offers valuable advice on the tangible and intangible intersection of property and intellectual property laws and what property developers, buyers and sellers should know in order to handle a building designer's plans appropriately.

The other six contributions deal with real property law. In 'Restrictive Covenants and the Real Property Act 1886 (SA): Time for Reform?',[17] Brendan Grigg and Hossein Esmaeili explore how the *Real Property Act 1886* (SA) ('*RPA*') does not recognise the restrictive covenant as an interest in land. This is despite the reality that for approximately the last 100 years lawyers and conveyancers have adopted a practice of attaching restrictive covenants to other registerable instruments that are registered pursuant to what is now s 128B of the *RPA*. The practice has been upheld in a number of decisions of the Supreme Court of South Australia and in one decision of the High Court of Australia.[18] In other Australian jurisdictions (other than

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14 Palk, 'Protection of Tenants' (n 9).

15 Matthew Anibal Fuentes-Jiménez and Paul Babie, 'The Residential Tenancy Agreement as an Exception to the Indefeasibility of Title' (2021) 29(1) *Australian Property Law Journal* 51.

16 See Paula Zito, 'Understanding Property and Intellectual Property Laws: A Tangible and Intangible Intersection' (2025) 46(1) *Adelaide Law Review* 28.

17 See Brendan Grigg and Hossein Esmaeili, 'Restrictive Covenants and the *Real Property Act 1886* (SA): Time for Reform?' (2025) 46(1) *Adelaide Law Review* 40.

18 See: *Blacks Ltd v Rix* [1962] SASR 161; *Clem Smith Nominees Pty Ltd v Farrelly* (1978) 20 SASR 227; *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382; *Netherby Properties Pty Ltd v Tower Trust Ltd* (1999) 76 SASR 9; *Deguisa v Lynn* (2020) 268 CLR 638; *Jaggumantri v Registrar-General* [2023] SASC 74; *Re Rayo* [2024] SASC 3.

the Australian Capital Territory), the equivalent conveyancing practice prompted legislative recognition of restrictive covenants, to varying degrees, enabling their registration or notification on the certificate of title to the burdened land. Grigg and Esmaeili's article argues for similar legislative recognition in South Australia to ensure certainty and clarity in the use of restrictive covenants. It examines the common law and equitable origins of the restrictive covenant, considers the ways Australian Torrens title systems deal with restrictive covenants, and concludes with recommendations for the reform of the law in relation to restrictive covenants in South Australia.

Teresa Somes and Eileen O'Brien's 'Housing, Older People and Abuse in Australia'[19] explores private home ownership in the context of an ageing population. Private home ownership brings advantages to the elderly because it provides a source of wealth and ontological security. Increasing home values and the accumulation of assets — however modest — over time has provided many older people with a comfortable 'nest-egg' in later life that serves as a buffer against the vagaries of financial insecurity in older age. However, an unfortunate downside to these outwardly fortunate circumstances is that older people may become vulnerable to various forms of elder abuse, often rooted in the acquisitiveness and expectations of those in a relationship of trust with them. Indeed, in an environment of declining housing affordability and constrained economic circumstances, the home can become a site of competing interests leaving the older person in conflict with family, which can make them vulnerable to abuse. Somes and O'Brien's article explores elder abuse perpetrated by family members who are associated with the older person's ownership of a private dwelling from two perspectives: (1) the home as a setting; and (2) the home as a target for abuse. The article also exposes the disconnect between prevention strategies and the implementation of meaningful legal responses to this issue — a challenge that will only intensify with our ageing population.

In my own piece, 'Judicial Federalism and *Sub Silentio* Amendment of the *Real Property Act 1886* (SA): What It Is and Why It Matters, or, How I Learned to Stop Worrying and Love the *Uniform Torrens Title Act*',[20] I continue my analysis of an issue which Simon considered in his own research: the overriding legislation exception to indefeasibility.[21] Through an examination of ss 6, 10, and 11 — three intriguing provisions found in the *RPA* — I argue that while those provisions represent the Parliament's attempt to entrench Torrens system indefeasibility of title by imposing

19 See Teresa Somes and Eileen O'Brien, 'Housing, Older People and Abuse in Australia' (2025) 46(1) *Adelaide Law Review* 63.

20 See P T Babie, 'Judicial Federalism and *Sub Silentio* Amendment of the *Real Property Act 1886* (SA): What It Is and Why It Matters, or, How I Learned to Stop Worrying and Love the *Uniform Torrens Title Act*' (2025) 46(1) *Adelaide Law Review* 93. The title of the article is adapting the title of the classic political satire 'Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb' (Stanley Kubrick (dir), Columbia Pictures (UK), 1964).

21 Palk, 'Protection of Tenants' (n 9).

'manner and form' requirements on future alterations to the *RPA*, judicial consideration, at least of s 6, means that the attempt has, to a great extent, failed.[22] The important part of the story, though, is the role that courts play in sorting out what these entrenching or 'manner and form' provisions might mean. In working that out, one must also account for the fact that the courts, in interpreting those provisions, are themselves amending the legislation *sub silentio*. Often overlooked, judicial interpretation operates in plain sight. And when it engages in the interpretation or construction of a statute for the purposes of clarifying its operation and application, a court amends, and possibly even repeals, parts of that legislation.

The final three pieces provide a view of Torrens title from other jurisdictions to which it has travelled. In 'Where Torrens Failed',[23] John V Orth outlines how the early days of the Torrens system in the United States looked promising. Its spread through the country was rapid — by the early 20th century, it had been adopted in almost half of America's states. Today, however, Torrens is all but obsolete in America. Orth's article examines what went wrong. For one thing, a workable, if cumbersome, system of title assurance — relying on recorded deeds, warranties of title, and title insurance — already existed. For title holders, the process of petitioning for Torrens registration was unfamiliar, often expensive and protracted, and invited risk from adverse claimants. Pragmatic factors such as market preferences for title insurance, lawyerly skepticism born of unfamiliarity and potential loss of business, and a characteristic American distrust of government all helped to seal its fate. Ultimately, Torrens, for all its advantages, failed to displace established systems of title assurance.

In 'Mr Frazer versus Mr Walker: Who Would Win Now?',[24] Ben France-Hudson takes a fresh look at *Frazer v Walker*.[25] This case may have established the primacy of immediate indefeasibility of title, but it is hard not to feel sorry for Mr Frazer, who because of his wife's 'irregularities' lost ownership of his farm to Mr Walker. The occasionally harsh operation of immediate indefeasibility has sat uneasily with many ever since. Recently, New Zealand has legislated for a judicial discretion to alter the land transfer register in cases of manifest injustice[26] with the desire to provide a route for people in Mr Frazer's position to get their property back, unencumbered. France-Hudson's article considers what might have happened for Mr Frazer had these provisions existed at the time he brought his case. There are considerable ambiguities in the statutory drafting, and it is unclear how the statutory guidelines informing the exercise of the discretion will be applied. It seems very unlikely, however, that the courts would have exercised the discretion to remove the forged mortgage. There is a strong argument that Mr Walker is not within the

22 See, e.g., *South-Eastern Drainage Board (South Australia) v Savings Bank of South Australia* (1939) 62 CLR 603.

23 See John V Orth, 'Where Torrens Failed' (2025) 46(1) *Adelaide Law Review* 112.

24 See Ben France-Hudson, 'Mr Frazer versus Mr Walker: Who Would Win Now?' (2025) 46(1) *Adelaide Law Review* 119.

25 [1967] 1 AC 569.

26 See *Land Transfer Act 2017* (NZ) ss 54–7.

jurisdiction of the court's discretion. Ultimately, the courts appear likely to take a conservative approach that upholds immediate indefeasibility wherever possible. Mr Walker is still likely to win his argument with Mr Frazer. However, this is likely to be very expensive for Mr Walker and our sympathies in relation to the case may become more balanced as a result. Whether this increased uncertainty is worth it remains to be seen, but it will make the policy choices underpinning New Zealand's land transfer system even more explicit.

Finally, in 'Defining Fraud in the Torrens System: A Legislative Approach',[27] Michelle Neumann writes on the statutory definition of fraud found in Canadian Torrens jurisdictions. Fraud regarding real property presents a high risk of serious harm as owner-occupied dwellings are the largest household asset and mortgages comprise the largest component of household debt. Although fraud is one of the main exceptions to indefeasibility of title under the Torrens system, the interpretation of Torrens title fraud remains riddled with uncertainty and disagreement. Neumann's article examines the meaning of Torrens title fraud developed by the courts, highlighting areas of uncertainty in the interpretation of fraud, and analyses how statutory definitions of fraud introduced in Canadian Torrens jurisdictions seek to clarify the meaning of fraud under Canada's Torrens system. Neumann then considers the subsequent adoption of a statutory definition of fraud in New Zealand under the *Land Transfer Act 2017* (NZ), contrasting the approach to defining fraud in New Zealand with the approach adopted in Canadian Torrens jurisdictions.

27 See Michelle Neumann, 'Defining Fraud in the Torrens System: A Legislative Approach' (2025) 46(1) *Adelaide Law Review* 135.