

LAND LAW POLICY QUESTION

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Numerus Clausus Principle

Definition	<ul style="list-style-type: none"> Parties deal in finite, default bundles of property rights that they are not free to reconstruct according to their own preferences <ul style="list-style-type: none"> "any new rights must fit within firmly established pigeonholes, of which the law only permits a small and finite number" (Edgeworth) Courts refuse to recognise novel interests in land (e.g. covenant to use an existing railway in exchange for payment of a toll, life estate with power to devise the fee simple) "property law is highly prescriptive: the system of rights <i>in rem</i> is a <u>strictly circumscribed</u> one, with a <u>tight regulatory regime</u> governing the range and form of available rights over land" (Edgeworth) The principle applies regardless of the terms of any agreement that parties might reach for the purpose of creating such an interest <ul style="list-style-type: none"> irrelevant that a specific contractual arrangement to create a wholly novel interest might be free and fair Irrelevant that the objectives expressed in that agreement might be mutually convenient, highly desirable or economically efficient
Function	<ul style="list-style-type: none"> <u>Economic efficiency</u> <u>Decreased certainty</u> if parties were allowed to invent new modes of holding and enjoying real property, as it would become permanent (<i>Keppell v Bailey</i>) It will become impossible to know what rights the acquisition of any parcel conferred or what obligations it imposed (<i>Keppell v Bailey</i>) Prevents <u>rights that are not consented to</u> and that are <u>idiosyncratic</u> from binding the world
Examples of its utility	<p>Advantages:</p> <ul style="list-style-type: none"> Certainty Dramatically reduces transaction costs and time by relieving purchasers of the burden of having to discover the interests in the land they wish to acquire Maximises the uses to which land can be used – preventing the shackling of land usage seen in the feudal system Security in purchasing interests in land Limits the economically stultifying effect of 'dead hand' control - prevents current owners from impairing/sterilising the uses that the land can be put to by future gens (Edgeworth) Stagnation results from excessive amounts of interest and interest-holders in the one parcel of land <ul style="list-style-type: none"> Risk of anticommons - "When there are too many owners holding rights of exclusion, the resource is prone to underuse" (Heller) <i>Reflects</i> and has helped to <i>constitute</i> modern, capitalist land markets Re-aggregation of property rights is more difficult than fragmentation (e.g. covenants are created easily, but re-aggregation requires many owners to negotiate and pay for release) <p><u>CASES</u></p> <ul style="list-style-type: none"> <i>Clos Farming Estates v Easton</i> – easement to operate a vineyard <i>Re Ellenborough Park</i> – <i>jus spatiandi</i> <i>Hill v Tupper</i> – easement purporting to grant the sole and exclusive right of hiring boats for use on a canal <ul style="list-style-type: none"> Rejected as '[t]o admit the right would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates' <i>Cf Tulk v Moxhay</i>
Principles that are adverse	<ul style="list-style-type: none"> Complex strata, community title and stratum subdivision schemes may run adverse to this principle Freehold covenants, novel easements

MORTGAGES

Equitable duty → must act in good faith and “take reasonable precautions to obtain a proper price” (test of recklessness)

- cannot fraudulently, willfully or recklessly sacrifice mortgagor’s interests or look after his own interests alone

Statutory duty → must take reasonable care to ensure that the land is sold for not less than its market price or otherwise the best price that may reasonably be obtained in the circumstances (seems to be a test of negligence)

According to s58(3), mortgagees must use the proceeds to pay out in this order:

1. the costs of the sale
2. all money due under their own mortgage
3. any money due under other mortgages, in order of priority,
4. any remaining money to the mortgagor.

Inherent Tensions between parties

- a first mortgagee's interest is to sell the property for enough to cover the costs of the sale and their own debt;
- subsequent mortgagees have an interest in the property selling for enough to cover their debts as well;
- the mortgagor's guarantor will have an interest in the property selling for enough to cover all of the mortgagor's debts, because if it does not, the mortgagor will be sued for the shortfall and if they cannot pay, the guarantor will have to pay; and
- the mortgagor has an interest in the property selling for *as much as possible*, because they get any money that is left over after all of their debts have been paid.

Is the current equitable and statutory duty imposed on mortgagees when exercising a power of sale appropriate and sufficiently protective?

The current standard is sufficient	The current standard is excessive
<ul style="list-style-type: none"> • It properly protects mortgagees’ interests in a situation where they need the money most • It is appropriate as they must take reasonable care, but if it is unreasonable to obtain the market price in that situation, there is no liability • Mortgagor’s loss is substantial already 	<ul style="list-style-type: none"> • It was the mortgagor that defaulted in the first place • It is legitimate for the bank to act in its own interests (which are in conflict with the mortgagor's interest) as they are trying to recover the amount of the loan that could not be repaid • Blurs distinction between common law 'duty of care' and equitable duty (which is owed here to mortgagors) • Legitimate self-interest in maximising its own interests (Pendlebury) • There is no duty on mortgagee re expenditure to fulfil their duty, but a higher duty may indirectly give rise to an obligation to expend money, time, effort

The Place Of Idiosyncratic Rights In Property Law

Private property is an institution that fosters individualized, if not eccentric, preferences; it does not stamp them out. We may not understand why property owners want certain obligations to run with the land, but as it is *their* land, not ours, some very strong reason should be advanced before our intentions are allowed to control.

Richard A Epstein, 'Notice and Freedom of Contract in the Law of Servitudes: Comments', (1981)
55 *Southern California Law Review* 1353, 1359.

- Owners should have absolute control over their property as it is theirs - liberty in dealing with the land
- Strong registration system makes **idiosyncratic rights** (that are intended to be enforceable against third parties) **easily discoverable**
- The rights agreed to might be mutually convenient, highly desirable or economically efficient

Examples of principles in land law that embody this position:

- novel easements (to some extent) – still has to benefit the *land*
- Freehold covenants (agreement that binds future proprietors)
- Leasehold covenants – RPA s51 (arguable)

AGAINST – fragmentation of property rights runs adverse to modern property law values and objectives

Free market:

- Adverse to a free market and stunts economic growth
- Affects the alienability (marketability) of land

Certainty of land law:

- Increases transaction costs and the risk of obtaining interests in land
- Disrupts predictability and certainty of property law (and violates *numerus clausus*)
- Fragmentation of interest should not be done without care as re-aggregation is a much more strenuous process

Autonomy/freedom:

- Affects the liberty of future proprietors
- There can be freedom in the property owner's *use* of the property, but given the absolute control that each proprietor has over their property, the current owner should not be able to bind future owners

Implications for Society:

- Disturbs the social order - it denies the opportunity to scrutinise whether those individualised preferences are acceptable in a liberal democracy

Examples of principles in land law that embody this position:

- TOUCH AND CONCERN THE LAND principle in leases and freehold covenants
- *Numerus clausus*
- Alienability of land as fundamental to property

ESSAY PLANS

IDIOSYNCRATIC RIGHTS

“Modern Land Law has come to embrace idiosyncratic rights more and this is a welcome change”

Introduction

- “**Property narrowly limits the kinds of rights that may attach to the land so as to bind successors in title**”
- “property law is **highly prescriptive**: the system of rights *in rem* is a strictly circumscribed one, with a tight regulatory regime governing the range and form of available rights over land” (Edgeworth)
- Parties deal in finite, default bundles of property rights that they are not free to reconstruct according to their own preferences

Development

- Freehold covenants (contractual promises between proprietors to regulate permissible conduct on or use of the land that become tied to the land)
- Novel easements
- Potential enforceability of personal leasehold covenants on assignees

(1) Freehold Covenants

- Demerits (see page 9 – section on FC)
 - Stultifies land use; sterilizes the land; impedes free development of the land
 - Potentially impedes its marketability and the free market
 - Against fundamental property law principle established by *Keppell v Bailey* that contractual rights should not be turned into property rights at the “fancy of any owner”
- Counter-argument (see page 9-10 – section on FC)
 - there are protections against freehold covenants going too far – e.g. it has to benefit the land
 - it is of utility and was a welcome development in its time
 - some of the risks associated with accepting and acknowledging idiosyncratic rights have been cured by Torrens register

(2) Novel Easements

- Easements that in substance are quite similar to *jus spatiandi* rights etc have been acknowledged as valid easements – *Re Ellenborough Park*
- However, the courts have not been too liberal with allowing new types of rights to become permanently tied to the land by recognizing them as easements:
 - *Clos Farming Estates v Easton* – easement to operate a vineyard
 - *Re Ellenborough Park* – *jus spatiandi*
 - *Hill v Tupper* – easement purporting to grant the sole and exclusive right of hiring boats for use on a canal
- The *Re Ellenborough Park* requirements still require that the easement must benefit the land (e.g. reasonably necessary for the better enjoyment of the dominant tenement)

(3) Section 51 – potentially making covenants that do not “touch and concern” the land binding on successors in title

(4) General Arguments on the disadvantages of such a system (summarised on pg 18)

Conclusion

- Despite the risks of acknowledging more idiosyncratic rights as valid proprietary interests, the law needs to develop
- Some risks posed are already arguably cured by other developments in land law such as Torrens register