THE PROBLEM OF THE NUMERUS CLAUSUS

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ROMAN LAW AND CIVIL LAW

- Gaius and Justinian: the importance of *things*
- Personal rights and property rights
- Property rights good against third parties
- What kinds of property right? *Dominium* (ownership)
- But also some lesser real rights than ownership:
  - Right to use (*usus*)
  - Right to the fruit (*fructus*)
  - Security interest (*hypothec*)
  - Servitude
  - But not lease, and *no* trusts
- The closed list of limited rights: the *numerus clausus*

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COMMON LAW

- Feudal system: no room for Roman law
- Grants and subgrants of the use of land
- Many persons interested in the same land
- Pragmatic rather than conceptual approach: no Gaius or Justinian
- Point by point decisions by judges: the importance of precedent
- Creativity of lawyers, and the demands of their clients
- Doctrine of estates (and interests) in land
- The rise of equity, and the importance of conscience
- The *propertification* of equitable rights, good against most 3Ps
- No *dominium*, no need for closed list of lesser rights, no *numerus clausus*

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NEVERTHELESS…

- Distinction between personal rights and property rights:
- Property rights good against third parties; personal rights not
- (So personal rights can be agreed between parties as they wish)
- Property rights should be stable: have fixed, *known* characteristics
- So courts *reluctant* to allow parties to create new property rights
- See *eg Keppel v Bailey* (1834), *Hill v Tupper* (1863)
- Yet courts have sometimes allowed new property rights to emerge
  - *Eg* restrictive covenants, *ius spatiendi*
- But note the Law of Property Act 1925, section 1
- Existence of trusts lessens pressure to create new property rights, as trusts can be drafted to fit the exact case at hand (no trusts on registers)

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SO…

- When civil lawyers and common lawyers use the phrase "*numerus clausus*" they mean different things
- Common lawyers mean to refer to the need to restrict accepted property rights to ensure stability and understanding (and hence efficient marketability: *cf* Merrill & Smith) of those rights
- But new property rights *can* emerge without legislation
- And trusts make it possible to create "designer" property rights of all shapes and sizes
- Even if it is sensible to speak of a *numerus*, it is not very *clausus*.

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REFERENCES

- *Keppel v Bailey* (1834) 2 My & K 517, 42 ER 106
- *Hill v Tupper* (1863) 2 H & C 121, 159 ER 51
- *Tulk v Moxhay* (1848) 2 Ph 774
- *Re Ellenborough Park* [1956] Ch 131
- *Hunter v Canary Wharf Ltd* [1997] AC 655
- *Bucknell v Alchemy Estates (Holywell) Ltd* [2023] EWHC 683 (Ch), [79]-[81]
- Merrill & Smith (2000) 110 Yale LJ 1
- Swadling (2000) 116 LQR 354

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