

“SUBTERRANEAN LAND LAW”: RIGHTS BELOW THE SURFACE OF LAND

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INTRODUCTION

An owner of land, if asked to define the physical extent of his ownership would probably do so in two-dimensional terms: he would point to the boundaries, typically marked by some physical feature—fence or wall or river. He would, if prompted, also include sufficient space above the surface to accommodate the height of any buildings on his land. He will rarely include in his conception of ownership land below the surface. Yet it is a clear principle that the owner of the surface owns also the land below the surface. According to Blackstone ‘land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. . . downwards, whatever is in a direct line between the surface of the land and the center of the earth belongs to the owner of the surface’.¹ The principle is expressed in the statement *cuius est solum eius est usque ad coelum et ad inferos*: ‘he who owns the land owns everything reaching up to the very heavens and down to the depth of the earth.’

This is often followed by an immediate disclaimer as to its value as anything other than a ‘colourful phrase.’² The principle is however utilised in America. *Marengo Cave Co v Ross* concerned a claim for adverse possession of a cave, which lay under the land of both A and B. The opening of the cave was on the land of A who opened the whole of the cave to the public. Although B knew of the business, he was not aware until many years later that the cave ran under his land. When A claimed adverse possession of the whole cave, it was held that his possession was not open and notorious: it was implicit that both A and B as land owners had a claim to the caves under their respective pieces of surface land, a decision explained by reference to the *ad inferos* doctrine.³ In *Commissioner for the Railways v Valuer-General*, a Privy Council case from Australia, Lord Wilberforce, speaking of a number of nineteenth century cases which had considered its use in connection with mineral rights, commented that reference to the ‘doctrine’ were ‘imprecise and mainly serviceable as dispensing with analysis’ but in none of the cases was there an authoritative pronouncement that ‘land’ meant the whole of the space from the centre of the earth to the heavens: ‘so sweeping, unscientific and unpractical a doctrine is unlikely to appeal to the

¹ Blackstone, Commentaries, Book 11 (1966 ed.) p118. See also *Pountney v Clayton* (1883) 11 QBD 820, 838: ‘*Prima facie* the owner of that land has everything under the sky down to the centre of the earth’, and *Egremont Burial Board v Egremont Iron Ore Company* (1880) 14 Ch D 158,160: ‘The plaintiffs are entitled to the land down to the centre of the earth and none is entitled *prima facie* to interfere with their rights’.

² *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479, 485.

³ 212 Ind 624, 10 N E 2d 917. See J. Dukeminier and J. E. Krier, Property (3rd ed, Little Brown, Boston, 1993) p 138.

common law mind'.⁴ On the other hand there is no 'authoritative pronouncement' as to what 'land' in these circumstances may in fact mean. The 'colourful phrase remains useful as a starting point: in so far as his rights are not expressly restricted by contract, common law or statute, the surface owner's rights are without physical limits – he has full dominion of the soil to any depth. The problem for the surface owner of this aspect of his ownership is one of 'out of sight, out of mind'. He will rarely give thought to what is happening under his feet: unlike a trespass on the land which is usually easily detectable and which he will be alert to suppress, a trespass under the surface can continue for many years without his knowledge.

Yet exactly what constitutes the surface is itself not clearly defined. In *Pountney v Clayton*⁵ a grant of the surface meant, *prima facie*, not merely the plane surface, but all the land except the mines. However, land can be cut horizontally into very thin slices and what appears to be the surface, can itself be subject to conflicting rights. In *Cox v Glue*⁶ it was held that different strata of the soil could be the subject of separate and distinct rights. There, A was seized in fee of a piece of land upon which the burgesses of B had a right to depasture cattle during part of the year. Although during that period A could maintain an action in trespass against a person for digging in the subsoil, he could not do so against a person who merely rode over the land, since during that time the burgesses had exclusive possession of the surface.

In terms of general property law principles, the rights and obligations the owner has below the surface, whatever that is, are in essence the same as those he has on the surface and the space above it. The surface owner may bring an action for the intrusion of tree roots below the surface⁷ or may himself be responsible for damage caused by actions under his land.⁸ He may be entitled to compensation for compulsory purchase of his subjacent land.⁹ He may himself exploit the subsoil by building in it¹⁰ and can exercise the usual rights of ownership: he may sell it outright¹¹ or grant a lease¹² or an easement¹³ or

⁴ [1974] AC 328, 315 [PC].

⁵ (1883) 11 QBD 820, 839.

⁶ (1848) 5 CB 533.

⁷ *Delaware Mansions v Westminster City Council* [2002] 1 AC 321.

⁸ The doctrine of *Rylands v Fletcher* (1868) LR 3HL 330 starts from the presumption that a land owner is in control of the land below the surface.

⁹ Under the provisions of the Acquisition of Land Act 1981 and the Land Compensation Act 1961.

¹⁰ Although planning permission may be required: Town and Country Planning Act 1990, s 55(1) and s 57(1), and he must not remove support from adjacent land, below.

¹¹ In *Grigsby v Melville* [1974] 1 WLR 80 it was accepted that a cellar could be conveyed separately from the surface building. Such an interest will presumably be categorised as a 'subterranean' flying freehold.

¹² *R v Westminster City Council and the London Electricity Board Ex p Leicester Square Coventry Street Association Ltd* (1989) 59 P & CR 51 (lease of subsoil by Westminster City Council, the owners of Leicester Square for 999 years to the London Electricity Board to build a substation).

¹³ *Attorney-General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599; *Celsteel Ltd v Alton Holdings Ltd* [1985] 1 WLR 204.

impose covenants on sale.¹⁴ He may convey mines and minerals apart from the surface and then may have a right to have his land supported. He may extract water percolating through his land, although he has no right to water flowing in defined channels under his land.¹⁵ Others may gain a right to adverse possession under the surface¹⁶ and his land may be subject to the rights of statutory undertakers.¹⁷

Although these principles are straightforward to state, the exact extent, either physical or legal, of a particular right may be more difficult to define. There is relatively little authority on the extent of a land owner's rights below the surface.¹⁸ This is unsurprising. Until the advent of the mechanical digger, the greatest extent of exploitation of the area below the surface was what could be done by a man with a spade. For practical purposes, the question still only has significance for land relatively near the plane surface. The nearer to the surface, the easier it is to recognise that someone, whether the owner of the surface or a third party, may have identifiable and practically useable rights in that land. The further down, the less likely it is that ownership rights can be utilised. In *Bernstein of Leigh (Baron) v Skyviews & General Ltd*¹⁹ it was held the land owner's rights above his land were restricted to 'such height was necessary for the ordinary use and enjoyment of the land.' It might be argued that the same test should be used for land below the surface. But in *Bernstein* it is implicit that even above the notional height at which the land owner's useable rights stop, there is not a 'free for all' in the airspace above. The use to which it can be put is limited to that of passage and the land owner may maintain an action for nuisance to restrain greater use. Also, although technology is always advancing and the depth at which land can be exploited will increase, to characterise the surface owner's rights as 'following' technological advances would offend against all notions of 'property' whose defining quality in land is certainty.

Why does any of this matter? Firstly to the property lawyer, it is unsatisfactory to have an area of such uncertainty. Secondly, and more importantly, the exact nature of a land owner's right may have at some time to be determined: matters which are seen as of 'academic interest only'²⁰

¹⁴ *R v Westminster City Council and the London Electricity Board Ex.p Leicester Square Coventry Street Association Ltd* (1989) 59 P & CR 51.

¹⁵ *Bradford Corporation v Pickles* [1895] AC 587. Rights over flowing water are now covered by various statutes e.g., Water Resources Act 1991.

¹⁶ *Rains v Buxton* (1880)14 Ch D 537; *Marengo Cave Co v Ross* 212 Ind 624, 10 N E 2d 917 (1937).

¹⁷ Providers of electric, gas, water and sewerage services are given power by various statutes to acquire rights under the surface.

¹⁸ The courts and the legislature shy away if they can from any explicit definition of the surface owner's rights below the land. For example the Law Commission has suggested that leases entered into under Public-Private Partnership agreements under s 210 of the Greater London Authority Act 1999 to construct and run the London Underground should be overriding interests within s 70 of the Land Registration Act 1925. The Law Commission Report does not discuss directly the question of ownership but refers simply to the "difficulties and disputes" in mapping and in identifying the land subject to the lease. (*Land Registration for the Twenty-First Century* Law Comm No 271, (HC 114, 2001), p 150.)

¹⁹ [1978] QB 479.

²⁰ See the comment in *Reed v Madon* [1989] 2 WLR 553, below.

have a habit of acquiring a very practical reality.²¹ The possibility of this is now increased by the implementation of the Human Rights Act 1998. New challenges are being made in every area of law and any consideration of property rights must now look at the human rights dimension. This article will be concerned with three areas where there are particular difficulties for both surface and subsurface owner: mining rights, rights in highways and rights in graves.²² Where mining rights are granted away from the surface both the mine owner and the surface owner will have an interest in having their respective rights accurately defined but in practice such precision is often impossible. For the surface owner of land under the highway there is uncertainty as to the depth at which his ownership ceases. The owner of a grave has no problems of definition of area; his problems are of the legal nature of his right.

2 MINES

The surface owner may lease the mines and minerals under his land, or convey them away entirely but unless specifically excluded,²³ mines and minerals are included in a conveyance of the surface. Whoever owns them may exploit them, subject only to statutory or common law restrictions.²⁴ Where they are dealt with separately from the surface a number of problems arise both for the owner of the mine and the surface owner.²⁵

(a) The nature of the right granted.

²¹ There has been a flurry of cases relating to burial rights generally, below. In a different context, the mediaeval law of escheat had been considered in *Scmla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793.

²² There are problems also where objects are found in or on the soil. Where objects are found on the soil, ownership remains with the original owner, or if he cannot be found may pass to the land owner or finder: *Parker v British Airways Board* [1982] QB 1004. Objects found in the soil will normally belong to the owner of the surface, whether they are treated as part of the land or remain chattels: *Elwes v Brigg Gas Company* (1886) 33 Ch D 562, or they may be classed as 'treasure' and thus be regulated either by the old law of treasure trove or by the Treasure Act 1996.

²³ Where land is acquired for public works, the undertaker is not obliged to purchase the mines and minerals under the land, (although this can be done by agreement). Where they are not acquired, rights are usually reserved to the owner of the mines to work them but the undertaker may prevent the working if it would cause harm to the surface enterprise.

²⁴ Originally property in all mines and minerals was vested in the Crown by prerogative, the Crown only gradually ceding its rights. See *Attorney-General v Morgan* [1891] 1 Ch 432. Both gold and silver and the mines in which the ores are found still belong to the Crown. Property in unworked coal is in a statutory body, the Coal Authority, which permits coal mining activities under licence: Coal Industry Act 1994, s 7.

²⁵ Although ownership of the surface may be severed in other circumstances than for the purpose of mining, as in *Grigsby v Melville* [1974] 1 WLR 80, problems have largely arisen where the severance has been of mines from the surface.

Both the mines themselves and the minerals within the mines are 'land' within the English statutory definition.²⁶ However, there is no definitive meaning attributed to either 'mines' or 'minerals.' The popular sense is of mines as a physical space out of which minerals, usually coal, are dug. However the legal meaning is far wider than that. In *Elwes v Brigg Gas Company*, 'minerals' was held to include every substance which can be got from the soil for profit although the term did not include anything that was not part of the natural soil. 'Unquestionably coal is deemed in law a part of the natural soil..in law the natural processes by which the trees of the forest have become coal is not investigated: the result only is considered.' Under this test, a prehistoric boat embedded in the subsoil which clearly retained its separate identity was held not to be a mineral.²⁷ The fluid nature of substances such as petroleum and gas has caused difficulties in the past. American authorities until recently classed these as acquired 'by capture': escaping gas from one piece of land to another was treated as a fugitive resource by analogy with wild animals.²⁸ The ownership of methane gas was considered in *Earl of Lonsdale v Attorney-General*.²⁹ It was held that a lease of 'mines and minerals' did not pass the rights in natural gas. At the time of the leases, in 1860 and 1888, not only did the general understanding of 'mines and minerals' exclude a substance which in its natural state was fluid, but gas was seen as a positive danger and not a substance which would ever be the subject of a grant. At the present day there is no difficulty in making these substances the subject of a grant.³⁰ On the other hand, where the substance is a liquid rather than a gas, it may be held not to be mineral and thus not the proper subject of a grant of minerals. It will depend on whether the substance can be defined as something other than pure water: as, for example, as water saturated with salt, (brine) in *Lotus Ltd v British Soda Co Ltd*³¹ or running silt as wet sand (rather than dirty water) in *Jordeson v Sutton, Southcoates and Drypool Gas Co.*³² Apart from this, it would seem that *any* substance which has a clear separate physical identity will be a 'mineral' and can be the subject of a separate grant from the surface.

(b)The physical extent of mines.

²⁶ "Mines and minerals" includes any strata or seam of minerals or substance in or under the land, and powers of working and getting the same: Law of Property Act 1925, s 205(1)(ix).

²⁷ (1886) 33 Ch D 562, 566.

²⁸ *Hammonds v Central Kentucky Natural Gas Co* 255 Ky 685, 75 S W 2d 204 (1934), overturned by *Texas American Energy Corp v Citizens Fidelity Bank & Trust Co* 736 S W 2d 25 (Ky 1987): J. Dukeminier and J. E. Krier, *Property*, p 39.

²⁹ [1982] 1 WLR 887.

³⁰ Property in petroleum (which includes mineral oil, natural gas and methane gas) existing in natural strata in Great Britain or in the territorial waters adjacent to the United Kingdom is vested in the Crown and these substances may be extracted only under licence: Petroleum Act (Production) Act 1934, s 1. Ownership of coal bed methane existing in its natural state in coal strata is vested in the Crown and not in the Coal Authority: Coal Industry Act 1994, s 9; Petroleum (Production) Act 1934, s 2; Continental Shelf Act 1964, s 1(3).

³¹ [1972] Ch 123.

³² [1899] 2 Ch 217.

The uncertain nature of the thing being dealt with is repeated in the uncertainty over the physical extent of a mine. According to Blackstone the owner of land owns 'whatever is in a direct line beneath the surface of any land and the center of the earth belongs to the owner of the surface; as is every day experience in the mining companies'.³³ However, the refusal of caves or mines to be contained neatly within imaginary subterranean boundaries corresponding with those on the surface³⁴ can lead to difficulties. With the increased ability to exploit land below the surface, the exact physical extent of the subterranean land leased or sold may be a matter of considerable importance.

In *Earl of Lonsdale v Attorney General*, it was held that the expression 'to the bottom of the coal measures' in the lease referred to the bottom of the lowest identifiable seam of coal that would or might be worth mining.³⁵ This suggests that the physical extent of the land leased is limited only by the existence of the particular mineral and the ability to extract it. It is a clear rule, however, that leased premises must be sufficiently defined in extent.³⁶ Where the surface is leased or sold, boundaries are defined by the plans and the conveyance; any difficulties which arise over boundaries rarely concern more than a matter of feet.³⁷ It has been suggested³⁸ that the territorial limit of the lease can be found by reference to the surface as it exists from time to time. This would suggest that a lease or conveyance of mines which did not specify territorial limits must be taken to be identical in extent to the upper parcel, which may put an obligation on the surface owner he did not intend.³⁹

How far in practice mines keep strictly within the configuration of the upper parcel is uncertain but it would seem almost impossible for them to do so.⁴⁰ There must be many cases in which the owner of the surface will be unaware of workings under his subjacent land. In *Attorney-General v Morgan*,⁴¹ the mine (or at least the minehead) was situated on a farm. Morgan had taken a lease from the owner of the farm of the 'mines beds veins and seams of ore' on the farm. According to the evidence, the principal

³³ Blackstone *Commentaries*, vol 11 p 18.

³⁴ One can ignore for this purpose the problem that since the earth is a sphere, subterranean land parcels should be wedged-shaped.

³⁵ [1982] 1 WLR 887, 935.

³⁶ R. E. Megarry and H. W. R. Wade, *Real Property* (5th ed Stevens, London, 1984) p 635 say that there can not be a lease if no defined premises are let, citing *Interoven Stove Co Ltd v Hibbard* [1936] 1 All ER 263. Also K. Gray, *Elements of Land Law* (3rd ed Butterworths, London, 2001) p 386.

³⁷ See, for example, *Wibberley v Insley* [1998] 2 All ER 82. The common law demands that the temporal extent of an estate must be clear: for leases: *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386.

³⁸ K. Gray, *Elements of Land Law op cit* n 36 p 386, citing the Australian case of *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1972-73) 128 CLR 199.

³⁹ Mines underneath land in single ownership may be leased to different people: see *Rylands v Fletcher* (1868) LR 3HL 330.

⁴⁰ Where mining rights are granted under the seabed, the physical extent of the right is by reference to latitude and longitude. Whilst giving certainty to the rights on the surface (land under the sea being no different from dry land), the problem of the extent of the lease under the seabed would seem to remain, especially when the substance mined cannot easily be contained.

⁴¹ [1891] 1 Ch 432.

seam worked could be traced for miles through the countryside. It would seem highly unlikely that the farm itself followed the exact course of the vein and Morgan must have been mining under adjoining owners' land. Any working under the adjoining surface owner's land without his permission would be both a trespass and theft of the minerals. In practice the chance of the surface owner being aware of the encroachment is slight unless as in *Marengo Cave Co v Ross*⁴² he decides to exploit the land himself but this does not affect the principle. Apart from statutory exceptions⁴³ and where the mines have been conveyed separately, the surface owner has full ownership of any minerals under his land. If he were to find viable quantities of a substance which became of economic value, he would have the right to exploit it.⁴⁴ The difficulty of knowing the exact extent of mines and the right in them is acknowledged in the English land registration scheme which treats an interest in coal or coal mines and any rights over them as overriding interests.⁴⁵

c) Support for the surface

Quite apart from the difficulty of knowing exactly what control he has over exploitation under his land, the extent of the surface owner's right not to have his land let down by underground workings is unclear. As a general principle, the surface owner of land has a natural right of support for the surface from both adjacent and subjacent land.⁴⁶ This natural right extends only to land in its natural state but a land owner may acquire an easement of support for buildings on land⁴⁷. Once acquired the duty on the neighbouring land owner is the same whether the right arises by common law or is acquired as an easement.⁴⁸

The extent of the duty owed by the 'supporting' landowner has been considered most recently in *Holbeck Hall Hotel Ltd v Scarborough Borough Council*.⁴⁹ The Court of Appeal, following the line taken *Leakey v National Trust*⁵⁰ held that where there is a right of support the landowner has to take positive steps to continue support for a neighbour's land. Nevertheless, where there is subsidence, the extent of the liability on the landowner will depend on whether

⁴² 212 Ind 624, 10 NE 2d 917 (1937).

⁴³ In *Morgan*, the mineral being mined was gold and belonged to the Crown wherever it was found.

⁴⁴ How long he would retain the right would no doubt depend on the value of the mineral to the state. The Atomic Energy Act 1946 allows the Secretary of State to search for and compulsorily acquire substances which can be used in the production of atomic energy.

⁴⁵ Land Registration Act 1925, s 70(1)(l) and (m). To be replaced by sch 1 paras 7, 8 and 9 and sch 3 paras 7, 8 and 9 of the Land Registration Act 2002. (The legislation has received the Royal Assent but is not yet in force.) For the reasoning see *Land Registration for the Twenty-First Century, Law Comm No 271*, (HC 114, 2001), p 150.

⁴⁶ *Dalton v Angus & Co* (1881) 6 App Cas 740. See *Gale on Easements* (J. Gaunt and P. Morgan eds) (16th ed Sweet and Maxwell, London, 1997) ch 10, for a review of the law.

⁴⁷ *Dalton v Angus & Co* (1881) 6 App Cas 740.

⁴⁸ *Ibid.*

⁴⁹ [2000] 2 All ER 704.

⁵⁰ [1980] QB 485.

the damage is the result of an action on the part of the landowner or whether it arises through natural causes; whether the defect was patent or latent, whether he knew or ought to have known of it and the extent of the damage. In these cases the support claimed was from adjoining land. Any action (or inaction) by the owner was on his own land and had merely a 'knock-on' effect on the neighbouring land. It may be also that activity on neighbouring land directly removes the support under adjoining land. Whether the affected land owner in these circumstances has any remedy will depend, among other things, on the nature of the substance supporting his land. In *Popplewell v Hodkinson*⁵¹ excavations on adjacent land had drained the land under the claimant's adjoining land so that the soil subsided and cottages on the land became cracked and damaged. Although the claimant had an undoubted right of support from the soil, this natural right did not extend to support from water in the soil so he had no cause of action.⁵² It seems also that there can be no prescriptive right to support by water⁵³ although the terms of a grant may prevent the support being taken away⁵⁴.

In none of these cases did the adjacent owner physically intrude onto the neighbour's land: he simply removed his own land (whether or not deliberately) or took advantage of the 'fluid' nature of the adjoining land. The situation is different where there is a separation of ownership of surface and minerals. Until there is a separation the surface owner cannot strictly claim a 'right' of support. Provided that he does not remove his neighbour's right to support, an owner of the whole can let down his own land as much as he likes.⁵⁵ However, once the ownership of surface and subsoil is severed, this natural 'right' comes to look more like a true right of property which may be expressly or impliedly removed or reduced by agreement or statute. What the extent of the right will be, will differ depending on the circumstances of the severance. Where there is no evidence of the origin of the separation, the surface owner will *prima facie* have a full natural right of support.⁵⁶ Where the surface and the mines have been severed by deed or statute, the extent and existence of the right of support will depend on the interpretation of the agreement. In general, a conveyance of the surface separate from the mines will carry with it the right to support, in which case the owner of the mines will be prevented from mining close to the surface. In *Egremont Burial Board v Egremont Iron Ore Co*⁵⁷ the Company, in mining the ore, had let down the land below the cemetery, causing a coffin to fall into the mine shaft. The Company had been granted a right to work the minerals in the district by the surface owner, Lord Lonsdale, who had earlier conveyed the fee simple in the cemetery to the Burial Board. The liability of the Company to the Board depended on whether the conveyance to the plaintiff Board had reserved the mines to Lord

⁵¹ (1869) LR 4 Ex 248.

⁵² Similarly in *Langbrook Properties Ltd v Surrey County Council* [1970] 1 WLR 161.

⁵³ *Brace v South East Regional Housing Association Ltd* [1984] 1 EGLR 144.

⁵⁴ *Popplewell v Hodkinson* (1869) LR 4 Ex 248, under the principle of non-erogation from grant.

⁵⁵ This is subject to any restrictions imposed by planning law on excavations. Until separation the landowner can be seen as having a quasi-right to support as in the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31.

⁵⁶ *Pountney v Clayton* (1883) 11 QBD 820.

⁵⁷ (1880) 14 Ch D 158.

Lonsdale, or whether it had passed the fee simple without reservation. It was agreed that in the latter case, the Company had no right to mine under the land. However, if the minerals had not been reserved the Company claimed to be able under the terms of its agreement to mine the land, although in a manner which prevented further damage to the cemetery.

The extent of the right of support has been mainly considered where the surface has been acquired for a public undertaking. Where both parties are contracting freely, they may make whatever arrangement they wish: it is a question of construction in each case. Where the purchase is for a public enterprise, the undertakers are restrained by the terms of the statute authorising the activity. A series of cases in the nineteenth century considered the relative rights of companies constructing and operating railways, highways and canals on the one hand, and the owners of minerals on the other and the Land Clauses Consolidation Act 1845 and the Railways Clauses Consolidation Act 1845 replaced private acts with a 'mining code'. The modern code is contained in the Acquisition of Land Act 1981 which incorporates the relevant provisions of the Railways Clauses Consolidation Act 1845.⁵⁸ In fact, where the surface has been originally acquired for the purpose of an undertaking, a later purchaser of the surface may find that he has less support than he would have bargained for privately. In *Pountney v Clayton*,⁵⁹ where a railway company had purchased the land without the minerals, a purchaser from the railway company of its surplus land had no greater right than the railway had. The owner of the mines could work the mine without regard to whether the working let down the surface, providing the working was in the usual way in the district.

As can be seen the relative rights and obligations of surface and subsoil owners are surprisingly uncertain and ill-defined. Yet it would seem important that these are defined both as rights of property and as a practical matter. Both parties need to know the extent of any right of support: too much, and an underground enterprise may be made unworkable; too little and the surface may be severely damaged. Even where there is an express separation of surface and subsoil, although the immediate surface owner will be aware that there may be workings under the land which may affect its stability, the mining operations may well not be contained within the physical outlines of the surface and could extend under neighbouring land. Apart from the obvious infringement of the surface owner's property rights, there is a more practical implication. He will often not be aware that there is or has been working under his land. He may only discover this if his land collapses.⁶⁰ Many coal mines covering extensive areas have been closed over

⁵⁸ Acquisition of Land Act 1981, s 3 and sch 2, parts I, II and III. For example, the Channel Tunnel Act 1987, s 8 and s 36 give the Secretary of State powers to purchase land compulsorily or by agreement. S 4(1) of sch 5 provides that the mining code provisions of the Acquisition of Land Act 1981 are to have effect in relation to the land to be acquired.

⁵⁹ (1883) 11 QBD 820.

⁶⁰ Coal Industry Act 1994, s 38(1) permits support to be withdrawn from the surface in certain circumstances. Coal Mining (Subsidence) Act 1991, s 1 provides for compensation for subsidence caused by mining operations. The compensation may take the form of appropriate remedial action, (s 2(1)) or payment in lieu (s 13); *McAreevey v Coal Authority* (2000) P & C R D3.

the last three decades, particularly in Yorkshire and Durham. The consequent shrinkage of the land over the years may cause subsidence at a considerable distance from the scene of the operations. It is usual on a purchase of land to do a Coal Mines search⁶¹ but this will tell little more than whether there have been adjacent coal workings.

3 GRAVES⁶²

Ownership of the soil carries with it the right to be buried- or to bury another- in one's own land. No new estate or right is being created, the landowner is simply using his land as owner. Burial in private land is becoming increasingly popular. There is, it seems, no need for planning permission: there would be neither a material change of use nor an engineering operation under the relevant legislation. There is no direct English authority but the possibility was accepted in *In re Christ Church, Harwood*⁶³. But it will always be a matter of fact and degree. In a Scottish case⁶⁴, it was intended that only the owners and his immediate family would be buried in the private ground. The position would be different if the ground were to be used for a substantial number of burials, even if it did not amount to a commercial enterprise. There may also be considerations of public health and private land use restrictions which might prevent use of the land for burial.

There will also be a difficulty if the land were subsequently sold.⁶⁵ Presumably the family would wish for continued access to the grave or at least to ensure its protection. In such a case, ownership in fee of the grave and a surrounding area could be retained with an associated easement of way. If the land were sold with no such reservations, the new owner would nevertheless be unable to utilise the land fully: human remains cannot be removed without permission.⁶⁶ In property law terms, however such 'home' burials present no real problems.

⁶¹ A purchaser of land within a coal mining area should obtain a Coal Mining Report from the Coal Authority. This will tell the purchaser whether the property is within the "likely zone of influence from past mining and whether the ground movement should have ceased; whether it is within a present zone of likely physical influence or will be in the future". It will also tell the purchaser whether there is any record of any notice of the risk of land being affected by subsidence being given under s 46 of the Coal Mining Subsidence Act 1991.

⁶² See also J. A. Dowling, "Exclusive Rights of Burial and the Law of Real Property" (1998) 18 LS 438; P. W. Young, "The Exclusive Right of Burial" (1969) 39 ALJ 50.

⁶³ [2002] 1 WLR 2055, 2065. The case was concerned with suitability of a memorial in a Church of England graveyard.

⁶⁴ [1994] JPL 305. Discussed in V. Moore, *A Practical Approach to Planning Law* (5th ed, Blackstone, London, 1995) p 102.

⁶⁵ In the Scottish case, the land was in rough grazing land among birch woods in remote and secluded rural surroundings. In the perhaps unlikely event that the land was consecrated, it could not be sold other than under an Act of Parliament or a Measure of the Church of England or General Synod. For the law on alienation of consecrated ground, see L. Leeder *Ecclesiastical Law Handbook* (Sweet and Maxwell, London, 1997) para 8.7 *et seq.*

⁶⁶ See below.

(a) Burial in a graveyard or cemetery.⁶⁷

The position is different where burial is in a public burial ground. The extent and nature of the right can differ depending on whether the burial is in a church graveyard or a municipal or a privately owned cemetery.⁶⁸ There is a common law right to burial in the parish in which a person resides or in which he dies. The right exists only in an inchoate form until the person dies⁶⁹ and it is simply a right to be buried.⁷⁰ It is also possible and more usual to acquire 'exclusive' rights of burial, that is, a right to be buried in a particular plot.⁷¹ The death of a family member will often be the occasion on which a plot is acquired but it may be possible to reserve a plot at any time.⁷² Exclusive burial rights can be acquired in Church of England graveyards⁷³ and in municipal or privately owned cemeteries. Whenever the plot is acquired, the grantee has an exclusive right to decide who will be buried in the plot.⁷⁴ The exact nature of the right acquired is problematic.⁷⁵

(i) The nature of the right in the grantee

Despite the fact that the grantee has perhaps the most apparently permanent right in land it is possible to have, it is generally agreed that he has in fact only a licence, although apparently an irrevocable one. In *Re West Norwood*

⁶⁷ There seems to be no difference in law between a "graveyard" and a "cemetery." A graveyard is usually attached to a church whilst a cemetery is not, although it may contain consecrated ground and have chapels within its grounds.

⁶⁸ Burials in Church of England graveyards are governed by the canons of the Church of England. See generally, G. H. Newsom and G. L. Newsom, *Faculty Jurisdiction of the Church of England* (2nd ed Sweet and Maxwell, London, 1993). Other religious denominations have similar rules: see *Halsbury's Laws* vol 14 Ecclesiastical Law, p 788 *et seq*. Only regulations affecting Church of England graveyards will be considered here. Burials in Local Authority cemeteries are made under the Local Authorities' Cemeteries Order 1977, sch 26 of the Local Government Act 1972 and Local Authorities' Cemeteries Order 1977 S. I No 204. Private cemeteries are regulated by the Cemeteries Clauses Act 1847. The Act provides a statutory code to be applied in particular cases to special legislation authorising the making of cemeteries, and its provisions were widely incorporated into acts establishing both private and municipal cemeteries. The Act continues to apply to private cemeteries incorporated by statute.

⁶⁹ *Halsbury's Laws*, Ecclesiastical Law, para 1118. The right has been described as crystallising when a person dies: *Re West Pennard Churchyard* [1991] 4 All ER 124.

⁷⁰ *In re Christ Church, Harwood* [2002] 1 WLR 2055, where the nature of burial rights was considered generally.

⁷¹ There is provision under the Local Government Act 1972, s272 and sch 30 for the establishment of common graves, in which there are no such rights.

⁷² *In Re Blagdon Cemetery* [2002] 3 WLR 603.

⁷³ *Re Luke's, Holbeach Hurn* [1990] 2 All ER 749. Whether spaces can be reserved in Church of England graveyards before a death is a matter for the chancellor of the diocese. It is often the practice in "popular" graveyards not to allow reservation.

⁷⁴ There is no reason why only family members can be buried in a reserved plot although this will usually be the case.

⁷⁵ It is the rights of the grantee or his assignees with which we are here concerned. After burial, a body may be secure against removal but can have no rights as such.

Cemetery,⁷⁶ (a case of a cemetery incorporated by statute⁷⁷ as a private cemetery and to which the Cemeteries Clauses Act 1847 applied) the right was described as ‘an exclusive licence, either in perpetuity or for a limited period, to bury in that plot and to leave that plot by will or by assignment to members of his family or others named. What the purchaser of a plot did not acquire was any interest at all in the land as real property. Any real property remained throughout vested in the company, subject to the statutory inalienability of any part of the cemetery which was consecrated.’

Although a grant in municipal cemeteries is expressed to be for a ‘term of years’,⁷⁸ the grant cannot be interpreted as giving the grantee a lease⁷⁹ and thus an estate in land. Section 44 of the Cemeteries Clauses Act 1847 specifically provides that the right is a personal one and does not confer any interest in the land and the effect is reproduced in the Local Authorities’ Order 1977 which applies to municipal cemeteries.⁸⁰ A exclusive right to burial in a Church of England churchyard can only be acquired by faculty.⁸¹ The right thus acquired⁸² is simply a right to be buried in a particular plot and does not in any sense give an ‘interest in land’.

In a municipal cemetery or a churchyard, the grant is for a limited period. The Local Authorities’ Cemeteries Order 1977 prevents the grant of an exclusive right of burial in a municipal cemetery for more than 100 years. Where a grant was made before 1 April 1974, whether in perpetuity or for more than 100 years, if the right has not been exercised (in other words, no body has been buried in the grave) during a period of 75 years from the grant, it may be determined within 6 months unless the owner, (presumably after such a lapse of time, the original owner’s assignee) signifies his intention to retain it.⁸³ The grant of a right in a churchyard is also now limited to 100 years,⁸⁴ although there is no provision for terminating pre-existing arrangements. In contrast, in private cemeteries governed by the Cemeteries Clauses Act 1847, section 40 permits the company to sell a right to burial either in perpetuity or for a limited time but there is no time limit imposed.

⁷⁶ [1995] 1 All ER 387,393.

⁷⁷ The Southern Metropolitan Cemetery Act 1836. The cemetery had been acquired by the local authority but it was agreed that the provisions of the 1847 Act still applied.

⁷⁸ Local Authorities’ Cemeteries Order. The form of grant under the Cemeteries Clauses Act 1847 is “in perpetuity or for the period agreed upon”.

⁷⁹ It is for a certain term, although it may be terminated before the end of the term, and the grantee has exclusive possession.

⁸⁰ A cemetery company may in any case not have the power to part with any estate or interest in the land: see *London Cemetery Co Ltd v Cundey* [1953] 2 All ER 257.

⁸¹ It was stressed in *Re Luke’s, Holbeach Hurn* [1990] 2 All ER 749 that the practice of informally reserving a grave space before death without a faculty gave no legal right of any sort.

⁸² It was made clear in *Re West Pennard Churchyard* [1991] 4 All ER 126 that the sale of burial plots is and always has been impossible. This does not mean that a right of burial is free – fees are charged on reservation, and when the right to be buried is exercised.

⁸³ Art 10(1) and (8)(i) of the Local Authorities’ Cemeteries Order 1974.

⁸⁴ Faculty Jurisdiction Measure 1964, s 8(1). A right can be extended by faculty.

Once a right has been exercised, however, rights of burial in a plot whether in a Church of England, municipal or private burial ground, can not be granted to anyone else, even if, as will often be the case, all the space has not been utilised.⁸⁵ If the decision is made to close the burial ground for burials, this may prevent the exercise of the right unless the closure order permits new burials.⁸⁶ In practice, a burial ground will only be closed when there are no or virtually no spaces left unreserved.

Since the grantee does not own the land he cannot invoke the principle of *cuius est solum eius est usque ad coelum et ad inferos*. He cannot prevent grants of the land under his plot⁸⁷, either for other graves- a vault may extend under his plot-, or for any other purpose, for example, mining. It is the owner of the freehold who must bring any action for subsidence caused by activity under the plot.⁸⁸ On the other hand, the benefit of the grant may be assigned or left by will, rights which give the licensee some of the insignia of 'property'. Since 1925, it seems that succession to a exclusive right to burial will pass under the grantee's will or on intestacy.⁸⁹ In the majority of cases there will be no difficulty as to who succeeds⁹⁰. Whatever its nature, the right to burial carries with it sufficient auxiliary rights to enable the purpose of the grant to be carried out. In *Reed v Madon*⁹¹ it was held that the grantees, although only licensees, had a sufficient property right to maintain an action for trespass against the owner of an adjoining plot, whose memorial encroached on their plot. A grantee may be given an order for exhumation if the space has been used for another burial.⁹²

(ii) The effect of the 'right to burial' on purchasers of the freehold.

It was made clear in *Re West Norwood Cemetery*⁹³ that the freehold estate remains vested in the grantor who can deal with in the normal way: by a local authority within the terms of statutory power,⁹⁴ or by private cemeteries under the Cemeteries Clauses Act 1847. (It is unlikely that a Church of

⁸⁵ It is very common for only one person to be buried in a multiple grave, the grantee's family having scattered or preferring to acquire a separate plot for its own more immediate family members.

⁸⁶ Burial Act 1853, s 1; Local Government Act 1972, s 272(1) and Church of England (Miscellaneous Provisions) Measure 1992, s 1.

⁸⁷ The *physical* extent of the plot granted may vary but only slightly. The usual depth of a plot is to permit a maximum of three burials. This is a practical matter: interments at a greater depth can cause problems of excavation.

⁸⁸ *Egremont Burial Board v Egremont Iron Ore Co* (1880) 14 Ch D 158.

⁸⁹ See Dowling, *op cit* n 62, p 450 for the difficulties of who is entitled.

⁹⁰ The position is not always straightforward. In a case in 1995, both a widow and a mistress claimed the right to the deeds to a double grave in which the man was buried. The mistress paid for the funeral and asked for a double grave. The widow argued that there was an agreement that the funeral would be paid for from the husband's estate and the deeds and the right to burial therefore belonged to the estate: *The Times*, January 17 1995.

⁹¹ [1989] 2 WLR 553.

⁹² *Re Luke's, Holbeach Hurn* [1990] 2 All ER 749.

⁹³ [1995] 1 All ER 387, 393.

⁹⁴ The sale by Westminster City Council in 1987 of three of its cemeteries for 15 pence each was subsequently declared unlawful and the Council was ordered to repurchase the cemeteries and pay associated costs, amounting to £240,000: *The Times*, June 30 1992.

England graveyard will be sold as a 'going concern' and there are restrictions on dealing with consecrated land.⁹⁵) If, as is suggested, the grantee has an irrevocable licence⁹⁶, it will be enforceable against the grantor, and equity will intervene to prevent its revocation.⁹⁷ But a licence should, in strict property law terms, have no effect on a later purchaser of the land out of which the grant is given: it is accepted that a licence *per se* is not an interest in land which can affect third parties.⁹⁸ However it seems that in practice any person acquiring the freehold will be bound by the rights of burial, at least if the land is bought as a 'working' cemetery.⁹⁹

The purchaser may be under a statutory duty or be bound by the terms of the conveyance. In *Reed v Madon*¹⁰⁰ a cemetery incorporated by statute and thus regulated by the Cemeteries Clauses Act 1847, was sold to a company. The plaintiffs had purchased exclusive rights of burial in three plots prior to the transfer. It was held that the company was bound by the statutory duty under section 48 of the 1847 Act.¹⁰¹ The plaintiffs had rights which were 'equated' with a right of property, and were enforceable against anyone infringing them. The question of whether the plaintiffs has an interest in land was said to be 'of academic interest only.' In *Re West Norwood*¹⁰², the local authority had acquired a private cemetery as a 'working' cemetery. Although it was emphasised that the plot holders were only licensees, the local authority was bound by the provisions of the act of 1836 under which the cemetery company was set up¹⁰³ and so by the rights of burial already granted by the former owners. In addition, the local authority was bound by the terms of the conveyance of the cemetery to it, under which it was subject to 'the obligations under Deeds of Grant in respect of exclusive rights of burial and in respect of Deeds for the maintenance in perpetuity and lesser periods of certain graves and memorials.'¹⁰⁴ This suggests a 'constructive trust' obligation under the principles laid down in *Ashburn Anstalt v Arnold*¹⁰⁵, a

⁹⁵ G. H. Newsom and G. L. Newsom, *Faculty Jurisdiction of the Church of England* p 174–175 for the circumstances in which consecrated land can be sold.

⁹⁶ *Re West Norwood Cemetery* [1995] 1 All ER 387, 393.

⁹⁷ *Errington v Errington and Woods* [1952] 1 KB 290.

⁹⁸ *Ashburn Anstalt v Arnold* [1989] Ch 1.

⁹⁹ It is also possible for disused burial grounds to be sold: if they are acquired by the local authority under the Open Spaces Act 1906, they must be retained as an open space. The owner of burial rights affected by the acquisition is entitled to compensation: Open Spaces Act 1906, s 13.

¹⁰⁰ [1989] 2 WLR 553.

¹⁰¹ [1989] 2 WLR 553, s 60. S 48 provides that "No body shall be buried in any place wherein the exclusive right of burial shall have been granted by the company, except with the consent of the owner for the time being of such exclusive right of burial".

¹⁰² [1995] 1 All ER 387.

¹⁰³ "An Act for establishing a cemetery for the interment of the Dead southward of the Metropolis" 6 & 7 Will 4 cxxix. S 8 empowered the company to grant licences.

¹⁰⁴ [1995] 1 All ER 387, 394.

¹⁰⁵ [1989] Ch 1.

principle which could be used if a working cemetery were sold in circumstances where a statutory obligation could not be imposed.¹⁰⁶

Nevertheless to classify such rights as ‘licences’ seems inappropriate. Few would argue that rights of this kind should be honoured. Perhaps like unincorporated associations, which also exist despite a difficulty in fitting them into existing categories, exclusive rights of burial are in that most malleable of classes, that of *sui generis*, and the law must bend to accommodate them¹⁰⁷.

(b) Resting in peace?

Where rights of burial have been exercised, the deceased rests more securely than the personal nature of the original grant would suggest. Since the scandals of the nineteenth century when bodies buried in graveyards would often be dug up within a very short time to permit new burials, the law has been meticulous in ensuring that bodies once committed to the earth, remain there.¹⁰⁸ In general, exhumation is allowed only for the most pressing reasons.¹⁰⁹ In *Re St Michael and All Angels, Tettenhall Regis*,¹¹⁰ it was stressed that the disturbance of human remains in consecrated ground should be avoided if at all possible. It may be, however, that in future exhumation will be granted more readily. In *Re Durrington Cemetery*¹¹¹ a petition requesting exhumation from ground consecrated according to the rites of the Church of England for reinterment in a Jewish cemetery was granted both on its merits and because the Chancellor considered that refusal might amount to a denial of the right to freedom of religious practice and observance under Article 9 of the European Convention on Human Rights, since incorporated in the Human Rights Act 1998.¹¹²

In practice, in graveyards the ground is often ‘buried over’ several times before it will be closed for burials.¹¹³ The often controversial practice

¹⁰⁶ In the Westminster City Council case, above n 94, the cemeteries were sold to a private company.

¹⁰⁷ There is no provision for their registration under the English land registration legislation scheme, nor are they included in the Law of Property Act 1925, s 1, which defines the classes of legal and equitable interests.

¹⁰⁸ See the comments of Chancellor Gray in *Re West Norwood Cemetery* [1995] 1 All ER 387, 390.

¹⁰⁹ Permission may be granted by the Coroner, the Home Office or the Diocesan registrar depending on the circumstances; see *Halsbury’s Laws* (1994 ed) vol 10, Cremation and Burial pp 1196–1206. The most usual reasons for a request are to remove remains from the wrong grave to the correct one; to move remains from a common grave to an identified grave; to have a body cremated; to recover jewellery or documents; and to enable road schemes to take place.

¹¹⁰ [1996] 1 All ER 231. The principle applies equally to cremated remains: *Re Atkins* [1989] 1 All ER 14 where Chancellor Edwards warned in an age of increasing mobility against treating buried cremated remains as “portable”. See also *in re Blagdon Cemetery* [2002] 3 WLR 603.

¹¹¹ [2000] 3 WLR 1322.

¹¹² For the general effect of the Human Rights Act 1998, see below.

¹¹³ Provision has to be made for the proper reburial of any remains: Newsom and Newsom, *Faculty Jurisdiction of the Church of England*, p 153. The lack of space in London cemeteries has led the Home Office to consider the possibility of reusing old graves. Those buried over a century ago would be exhumed, put in a

of ‘lawning’ graveyards attached to a church does not involve any removal of bodies. Any monuments are, it seems, personal property and permission must be obtained from the present owners to remove them.¹¹⁴ It is possible in limited circumstances to build on a disused burial ground¹¹⁵. Generally consecrated ground cannot be built on¹¹⁶ but a planning authority has wide powers under the Town and Country Planning Act 1990 to acquire burial grounds for any purpose.¹¹⁷ The acquisition is subject to restrictions¹¹⁸ but consecrated land can be acquired and ecclesiastical restrictions on use can be overridden.¹¹⁹

4 HIGHWAYS¹²⁰.

The owner of a house bordering a suburban street will think of his property as ending at his front gate but this will usually not be the case. There is a presumption that where there are properties on each side of a street, adjoining landowners own the land to the middle of the street. Thus the owner of Mon Repos will own the land up to the centre point on Acacia Avenue where the land of his opposite neighbour in Chez Nous will begin. The presumption gives way to any express provisions in a grant¹²¹. If the street is a highway (and whether it is will depend on whether it has been adopted as a highway), there is an overriding presumption that a surface owner retains his full fee simple ownership of the land¹²², subject only to the right of passage.¹²³ If the land

new coffin and reburied at a deeper level: Sunday Telegraph, September 5 1999. In a letter to *The Times* in 1899, the then Duke of Westminster suggested that the purchasing of plots in perpetuity was undesirable. Graves should be reused once the remains become part of the earth. Reprinted in *The Times*, 9 December 1995.

¹¹⁴ See Dowling, *op cit* n 62, for a discussion of the ownership of gravestones and monuments.

¹¹⁵ Disused Burial Grounds Act 1884 and Disused Burial Grounds (Amendment) Act 1981.

¹¹⁶ *Re St Michael, Tettenhall Regis* [1996] 1 All ER 231.

¹¹⁷ Town and Country Planning Act 1990, s 226.

¹¹⁸ Disused burial grounds may be acquired if only a small area is needed or if the land is required for road widening or drainage: Acquisition of Land Act 1981, s 19 and Town and Country Planning Act 1990, s 228.

¹¹⁹ Town and Country Planning Act 1990, s 238.

¹²⁰ A highway is a way over a defined route which the public at large are permitted to use, as of right, for the purposes of passage. There may be a highway over water: only the position where the right is over land is considered here. Railways are not highways, since the right to passage is a matter of contract. For the law generally on highways, see S J Sauvain, *Highway Law* (Sweet and Maxwell, London, 1989).

¹²¹ Any grant will have to be interpreted with care. Deeds often do not show precise boundaries, being concerned more to show the position of the land in relation to another piece. The English land registration legislation does not require accurate boundaries. It is in any case almost impossible to show a boundary on paper – any line, no matter how fine, is bound to be out of scale. Boundaries have to be defined by a physical inspection and the use of various presumptions. *Wibberley v Insley* [1998] 2 All ER 82, *Hale v Norfolk County Council* (2001) 82 P & CR 26.

¹²² Although there are suggestions that the presumption does not apply in the towns: *Beckett v Leeds Corporation* (1872) 7 Ch App 421, or in building schemes and estates: *Mappin Bros v Livery & Company Ltd* [1903] 1 Ch 118.

ceases in law to be a highway, the landowner will get back full dominion over the land. The most usual case in which the presumption of ownership is displaced is where the whole of the fee simple in the land is acquired by the body making the highway. Whether the whole fee simple has been acquired is a matter for interpretation of the particular legislation authorising the scheme.¹²⁴

At the present day, the power to create highways and the responsibility for them are vested in the local highway authority.¹²⁵ Land for the construction of new highways may be acquired either by compulsory purchase or by agreement with the landowner.¹²⁶ Section 150 of the Highways Act 1980 permits the highway authority to acquire only a limited interest in the land,¹²⁷ although the landowner may require the authority to acquire the full interest.¹²⁸ Every highway maintainable at the public expense, as the majority are,¹²⁹ vests in the highway authority.¹³⁰ Where the highway authority acquires less than the full fee simple, as again will usually be the case, the exact nature of the interest it acquires is difficult to define. It has been described as an 'unusual property right' which will be interpreted restrictively since statute takes away without compensation part of the interest of the landowner.¹³¹ The nature of the right was considered in *Tithe Redemption Commission v Runcorn UDC*¹³² where it was described as a legal fee simple determinable,¹³³ the determining event being the road's ceasing to be a highway. As with exclusive rights of burial, any difficulties in definition are glossed over: a right exists by virtue of statute if nothing else.

A more difficult question is the physical extent of the interest acquired by the local authority and, as a necessary corollary, the extent of the surface owner's remaining rights. It is clear that apart from statutory¹³⁴ or contractual restraints, he has full rights in the subsoil. In *Tithe Redemption Commission v Runcorn UDC*,¹³⁵ Lord Denning said that the 'top two spits' - the depth of earth

¹²³ The surface owner may not obstruct the way but he can maintain actions for trespass: *Goodtitle ex d Chester v Alker Elmes* (1757) 1 Burr 231.

¹²⁴ *Marquis of Salisbury v Great Northern Railway Co* (1858) 5 CB (NS) 69.

¹²⁵ Highways Act 1980, Part III.

¹²⁶ Under Highways Act 1980, Part XII and the Acquisition of Land Act 1981.

¹²⁷ For example, under the Channel Tunnel Act 1987, s 8(3) the highway authority, Kent County Council, is given power to acquire land for extending the A20. Under Part III of sch 5. It need acquire only so much of the land, whether the surface, the subsoil or the under the surface, as is required for its purposes, or to create and acquire easements, without being required to acquire a greater interest.

¹²⁸ Highways Act 1980, s 252.

¹²⁹ Highways Act 1980, s 36. Until the Highways Act 1835, the maintenance of highways fell in general on the parish. See *Gulliksen v Pembrokeshire County Council* [2002] 2 WLR 1124 for a case where the highway authority was not responsible for maintenance of a highway.

¹³⁰ Highways Act 1980, s 236(3).

¹³¹ S J Sauvain, *Highway Law*, p 46.

¹³² [1954] 1 Ch 383.

¹³³ It is a legal fee simple even though it is a conditional fee: Law of Property Act 1925, s 7(1).

¹³⁴ Highways Act 1980, s176-279. Many statutory bodies have powers to put pipes or cables under the land.

¹³⁵ [1954] 1 Ch 383.

cut by a spade- vests in the authority and in *Coverdale v Charlton*,¹³⁶ the surface of a street was held to mean a surface of such thickness as the local board required for the purpose of ‘doing to the street that which is necessary for it as a street’. How much is needed will vary. In *Schweder v Worthington Gas Light and Coke Company (No 2)*,¹³⁷ eighteen inches was sufficient and *vis a vis* the highway authority, the plaintiff could prevent any use at a lower depth. This was agreed as being a reasonable amount given the fact that it was a country road. The opinion has been expressed¹³⁸ that as the highway authority’s need changes with increases in user, the depth to which its interest extends may also change. It is doubtful if this is correct. Such a conclusion would be highly unsatisfactory for the landowner who may find his rights diminishing without his knowledge, and without compensation.¹³⁹ Whilst in the majority of cases, the landowner will have no requirement to use the land under the highway, this does not affect the principle.

5 CONCLUSION.

It has been shown that the extent of a landowner’s rights below the surface is both more complex and less certain than may be supposed. The reason for the relatively small number of disputes on rights under land is not because such rights do not exist, but because their existence is often not appreciated. Any intrusion into land which is not sanctioned by some countervailing property right in the intruder, such as an easement, lease or licence, will be a trespass. It is true that the surface owner will not usually wish to or be able to utilise the ground below the surface, but he has rights in the land which could be valuable.¹⁴⁰

Since the incorporation of the European Convention on Human Rights into English law under the Human Rights Act 1998 these issues have a new resonance: the public, and their advisors, are becoming more ‘rights conscious’ and old presumptions as to the legality of an action can no longer be taken for granted. In property law, the judges are feeling their way to a correct interpretation of the Act, some adopting an approach based on the perceived underlying principles of the legislation, rather than a robust property law approach.¹⁴¹ Whatever balance is finally reached, the courts are very aware of the human rights factor and are seeking to reach decisions in a way which could not give rise to a challenge under legislation.¹⁴² Whether this will lead to an undesirable uncertainty in the law of property cannot be considered here.¹⁴³

¹³⁶ (1878) 4 QBD 104, 118.

¹³⁷ [1913] 1 Ch 118.

¹³⁸ S J Sauvain *Highway Law* p 47.

¹³⁹ In *Schweder v Worthington Gas Light and Coke Company (No 2)* [1913] 1 Ch 118, the plaintiff had (legally) constructed a tunnel under the road connecting his two pieces of land below the agreed eighteen inches. To later hold that the highway authority’s rights extended further down would interfere with his rights.

¹⁴⁰ *Marengo Cave Co v Ross* 212 Ind 624, 10 N E 2d 917 (1937) shows that land under the surface can be exploited commercially.

¹⁴¹ Compare the Court of Appeal approach in *Wallbank v Parochial Church Council of Aston Cantlow and Wilmcote* [2002] 1 P & CR 5 to the first instance judgment of Ferris, J, *The Times* 30 March 2000.

¹⁴² See the approach in *Re Durrington* [2000] 3 WLR 1322 above.

¹⁴³ Much will depend on whether the legislation is held to apply only to public authorities however defined or whether it applies more generally. For a

A number of the provisions may have relevance to land and rights under it. In *Re Durrington Cemetery*¹⁴⁴ it was considered that a refusal of exhumation might be an denial of the freedom to religious practice and observance under Article 9. This was not the primary reason for the decision and the court was careful not to make too much of it but it is likely that this will be pleaded in future in all such cases.¹⁴⁵ The provision which has the most obvious application¹⁴⁶ is Article 1 of the First Protocol which states that ‘every natural or legal person is entitled to the peaceful enjoyment of his possessions’ and no one is to be deprived of his property ‘except in the public interest and subject to the conditions provided for by the law and by the general principles of international law’. Moreover the State has the right to enforce such law as it deems necessary to control the use of property ‘in the general interest or to secure the payment of taxes or other contributions or penalties.’ The fact that the owner of the right may not have an ‘interest in land’, as that is commonly understood in land law terms, does not prevent his being protected by Article 1. A person is protected in peaceful enjoyment of his ‘possessions’ which seems to include rights which do not fall with the traditional category of interests in land¹⁴⁷. Thus the licence held by the owner of an exclusive right of burial¹⁴⁸ will be within Article 1, as well as the more obviously ‘proprietary’ rights, that can exist below the surface.

A vital factor in deciding whether rights have been infringed under the legislation is whether compensation has been paid. Although a right to compensation is not set out in Article 1, in *James v UK*,¹⁴⁹ it was said that:

‘The Court observes that under the legal systems of the Contracting States the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances. . . As far as Article 1 is concerned, the protection of the right

discussion of human rights and land more generally see Howell, “Land and Human Rights” [1999] *Conv* 287; “The Protection of Property Rights in Land under the Human Rights Act 1998” in L. Betten (ed.) *The Impact of the Incorporation of the ECHR into the British Domestic Order* (Kluwer Law International, 1998); “The Human Rights Act 1998: the “Horizontal effect” on Land Law” in Cooke (ed.) *Modern Studies in Property Law Volume 1: Property 2000*, (Hart Publishing, Oxford 2001).

¹⁴⁴ [2000] 3 WLR 1322.

¹⁴⁵ The court will have to be persuaded that the exhumation should be ordered primarily on other grounds. In the case itself, despite a long delay and the fact that the reinterment would be in ground unconsecrated in the Christian rite, there were ‘exceptional factors’. In a case without exceptional factors, the human rights point may not have sufficient weight. In *in Re Blagdon Cemetery* [2002] 3 WLR 603, exhumation was allowed but art 8 although raised was held to be irrelevant.

¹⁴⁶ Art 6 (a right to a fair trial) and art 8 (the right to a home and family life), (as in *Re Blagdon Cemetery* [2002] 3 WLR 603, above) may have a marginal relevance, as may art 14 which prevents discrimination.

¹⁴⁷ See D.J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention* (Butterworths, London, 1995), p 517, for examples of rights held to be “possessions”.

¹⁴⁸ *Reed v Madon* [1989] 2 WLR 553.

¹⁴⁹ (1986) 8 EHRR 123, 147.

of property it affords would be largely illusory and ineffective in the absence of any equivalent principle’.

Although there need not be full compensation, a failure to pay any at all may be a violation of the statute. Thus any taking of land under the surface by a public authority is an expropriation and in principle requires compensation. In most cases where there is some action by the State which takes away property rights, compensation will be provided for under the relevant legislation¹⁵⁰. This is not however always the case¹⁵¹: the owner of the land over which a highway passes is deprived without compensation of his full dominion of the land during the continuance of the highway and apparently to an uncertain depth.

In any case where a public authority is interfering in some way with property rights, a challenge could be made under the relevant legislation.¹⁵² It is true that in most cases the challenge could be met by the argument that the appropriation is in the public interest. Nevertheless it could be useful as an irritant factor: the onus would be on the public authority to prove that the surface owner had no interest in the land, which given the presumption of ownership to the centre of the earth, would need express statutory provision in each particular case.

It is unlikely that subterranean land will be exploited on a large scale in the near future, other than for minerals. Although England is crowded there are no plans to build housing estates underground. Nevertheless the principles that have been considered here are of a general importance. Unauthorised incursions on the surface can result in substantial awards for the owner: in *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd*¹⁵³ £375,000 was awarded for an encroachment of 3.9m over a building line. The same principles should apply to incursions under the surface. There is no reason why, if someone else wishes to utilise ground below the surface he should equally not pay the full economic value, either in rent or compensation, to the surface owner.

¹⁵⁰ The owners of coal mines were compensated at the time of nationalisation: Coal Industry Nationalisation Act 1946. There is no compensation for gold and silver found on land since the land owner has never had any interest in it.

¹⁵¹ The closure of a burial ground gives no right to compensation for rights which can no longer be exercised, Burial Act 1853, s 1; Local Government Act 1972, s 272(1) and Church of England (Miscellaneous Provisions) Measure 1992, s 3(I).

¹⁵² The Greater London Authority Act 1999 which provides for leases entered into under Public-Private Partnership agreements does not seem to contemplate the payment of compensation to the land owners under whose land the railways passes. Such a scheme would be complex to administer. Nevertheless a challenge to the legislation could be made on this ground.

¹⁵³ (20001) EG 163.