EXCLUSIVE BURIAL RIGHTS

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A distressing example of double conveyancing came to light in *Reed v Madon*[1]. A family had purchased exclusive rights of burial in a private burial ground[2], but one of the plots was resold, and a burial under this second title occurred before the original grantees had time to object. On the facts, the loss of the exclusive burial right could be effectively compensated in damages[3]. This removed the need for Morritt J. to rule on some of the interesting points of law raised by exclusive burial rights. There was no authority concerned solely with a private burial ground. It was necessary therefore to argue by analogy from corresponding rights granted in other burial places, especially churchyards. It is now proposed to explore these issues.

THE SCOPE OF AN EXCLUSIVE BURIAL RIGHT[4]

A right of burial confers only a limited right in the site of the tomb. It gives the right to inter one or more corpses in the ground, but no more[5]. An analogy can be drawn with the right to a pew i.e. to an enclosed seat in a church[6]. Such a right was limited in that it conceded only the right to use the pew "to sit, stand or kneel in and hear and perform divine service".[7] One could not, for example, live and sleep in the pew.

No more could one live in a vault. In *Hoskins-Abrahall* v *Paignton U.D.C.*,[8] the plaintiff had bought an exclusive burial right, including the right to erect a vault, from the defendants acting as a burial board. After her mother had been interred in the vault, the plaintiff began to visit her mother's corpse in the vault, to leave food and to perform private rites there. It was held that the right granted did not extend to opening or entering the vault, nor did it permit articles to be deposited in the tomb without the consent of the burial board.

Rights genuinely ancillary to the use of the tomb, such as the right to plant the grave, are included.[9] The right of burial may be associated with the right to erect a tombstone or monument, above the site of the interment, but that right has to be acquired separately. This applies whether the tomb is in a churchyard or a cemetery. Decency clearly requires that gravestones and other monuments should be sanctioned by appropriate authorities to ensure their suitability. In

1. [1989] 2 All E.R. 431.
2. Under ss. 40-48 Cemetery Clauses Act 1847 discussed below.
3. Particularly damages for distress: see at p.442b. Most of the damages fell on the cemetery company, which was basically at fault, Mr Madon having issued a third party notice: p.442e-h.
4. Repeated reference will be made to M.R. Russell Davies, *The Law of Burial, Cremation and Exhumation* (5th ed. 1982); G. H. Newson *Faculty Jurisdiction of the Church of England* (1988); Phillimore's *The Ecclesiastical Law of the Church of England* (2nd ed. 1895); and C.J. Polson & T.K. Marshall, *The Disposal of the Dead* (3rd ed. 1975).
5. *Hoskins-Abrahall v Paignton U.D.C.* [1929] 1 Ch. 375, 386 Greer L.J.
6. 14 Halsbury's Laws of England (4th ed.) at pp. 581-582.
7. *Harris v Drewe* (1831) 2 B. & Ad. 164, 164; 109 E.R. 1104, 1104; See per Holroyd J. in *Bryan v Whistler* (1828) 8 B. & C. 288, 294; 108 E.R. 1050, 1052-3 (burial and pew rights equated).
8. [1929] 1 Ch. 375.
9. *Ashby v Harris* (1868) L.R. 3 C.P. 523 (right to plant, but nothing offensive or unsightly) Bovill C.J. drawing the analogy of a pew (at p.528).

churchyards this supervision is exercised through the grant or refusal of a faculty. In cemeteries it occurs through regulations made under statutory powers. Thus in *McGough v Lancaster Burial Board*[10] the court held that the removal of a glass shade covering a wreath on a tombstone was lawful: the right to erect a tombstone conferring only rights in accordance with the burial board's regulations.

NOT USUALLY FREEHOLD GRANTS

A grant of an exclusive burial right will almost never transfer a freehold estate in the burial plot. The precise reasoning will depend upon the particular legal background, because in the case of the churchyard the grantor of the right (the incumbent) may not have a legal estate to grant[11]. But even where capacity is not an issue, as where the right is granted by statute,[12] nevertheless the courts have been reluctant to allow a freehold estate to pass.

Even where an enabling Act is drafted in terms of a conveyance of the fee, the courts have been reluctant to construe the Act as passing more than a right in the nature of an easement.[13] This is a general policy not restricted to burial rights.[14] Willes J. in *Hinde v Chorlton* considered specifically the nature of a right to a pew in a parish church, but his reasoning was much wider:[15]

> "[T]here is a whole series of authorities in which words which in terms vested the freehold in persons appointed to perform some public duties such as canal companies and boards of health have been held to be satisfied by giving to such persons the control over the soil which was necessary to the carrying out of the objects of the act without giving them the freehold."

The inconvenience of dividing a church into numerous freehold seats or the soil of a burial ground into numerous small freehold plots is obvious.

Rating cases follow this principle. An incumbent (in the case of a churchyard)[16] or a cemetery company retain sufficient occupation to be in rateable occupation of the ground.[17] Thus in *R. v Inhabitants of St Mary Abbot's, Kensington*[18] the owners of Kensal Green Cemetery in London were rated even in respect of vaults and catacombs which had been sold in perpetuity, even though the company had ceased all acts of ownership, and had delivered the keys of particular vaults to the purchasers. This was despite the fact that the grants were described in the enabling Act as conveyances and were expressed to be good at law and in equity.[19]

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10. (1888) 21 Q.B.D. 323.
11. Re St. Martin le Grand, York [1989] 2 All E.R. 711, 731-2 per Thomas Coningsby Q.C. Ch.
12. *Hinde v Chorlton* (1866) L.R. 2 C.P. 104 (pews).
13. Consider the right created under the Consecration of Churchyards Act 1867, s.9 1868; *ibid* s.1 whereby the donor of the site of a churchyard may reserve exclusive burial rights to the extent of 1/6th.
14. This is supported by decisions that case was the appropriate action for disturbing a burial right in a churchyard. Trespass was available for a direct injury to the land of the plaintiff. Case was appropriate for the protection of rights akin to easements. Comyn's Digest (1792) title Cemetery (B) Burial vol. 2 p.179 says that if a right of burial be disturbed he may have an action on the case; see also Holyroyd J. in *Bryan v Whistler* (1828) 8 B. & C. 288, 294, 108 E.R. 1050, 1052.
15. *Hinde v Chorlton* (1866) L.R. 2 C.P. 104, 116; *Brumfitt v Roberts* (1870) L.R. 5 C.P. 224 (an even stronger case where there had been a confirmatory Act in emphatic terms); *Greenway v Hockin* (1870) L.R. 5 C.P. 235; *Re St. Mary's, Banbury* [1986] Fam. 24, 32G-36E.
16. *Winstanley v North Manchester Overseers* [1910] A.C. 7.
17. Ryde on *Rating* (13th ed.) ch. 29 pp. 588-94; Russell Davies op. cit. pp. 93-95.
18. (1840) 12 Ad. & EL. 824, 113 E.R. 1026.
19. 2 & 3 W. 4 c. cx. s.43. See also *R. v Abney Park Cemetery Co.* (1873) L.R. 8 Q.B. 515 (conveyance of plots by release).

PRESCRIPTIVE RIGHT OF BURIAL IN A CHURCH OR CHURCHYARD

Usually the ecclesiastical courts had control over the church and churchyard, including rights of burial.[20] However it was possible to acquire rights of burial by common law prescription, which had the effect of giving a title superior to that of the ecclesiastical authorities.[21] A common law claim to a right of burial would be likely to relate to a vault *inside* the church.[22] As such they will be of limited utility today, because sanitary considerations usually prohibit interment within a church.[23] Nevertheless such rights are of interest because they show that a true easement of burial was prescribed for.

The right could only be acquired in an ancient church for the benefit of an ancient messuage.[24] Any proved interruption after 1189 prevented the prescription. Evidence had to be shown that the responsibility to repair had been adopted. "[T]he constant sitting and burying there without using to repair it doth not gain any peculiar property or preeminence therein."[25] The right was attached to that particular dwelling and passed on a conveyance of the land. The annexation of the benefit to a dominant tenement could be seen from the principle that when the house was divided, an apportioned part of the benefit passed to each purchaser.[26] If it is a true easement then it should not be competent for the holder of the right to sever it from the dominant messuage, converting it then into a right in gross.

BURIAL IN CHURCHYARDS

The English[27] churchyard, usually surrounding the parish church, was the traditional place of burial of the parishioners.[28] The freehold in the church and churchyard (including extensions) is usually vested in the incumbent.[29] However, in ancient parishes the legal title might be vested in a lay rector. The incumbent had possession of the church and churchyard for ecclesiastical purposes, particularly to give effect to the right of sepulture of the inhabitants of the parish.[30] Hence, the right of burial in a parish churchyard depends upon the incumbent's

20. In a private chapel or aisle a vault might be held in fee by the owner of the chapel or aisle: *St Botolph without Aldgate, Vicar and Churchwarden* v *Parishioners* [1892] P. 161, 167 Con. Ct. But a purported conveyance of a portion of the chancel *inter alia* for the provision of sepulchres was void: *Clifford* v *Wicks* (1818) 1 B. & Ald. 498; 106 E.R. 183 when not attached as an easement to an ancient messuage.
21. The right could be removed by Act of Parliament, but not by faculty: *Crisp* v *Martin* (1876) 2 P.D. 15, 24 per Lord Penzance.
22. 10 Halsbury's Laws of England (4th ed.) at 524, para 1118. 524, para 1118 note 8; *Harvey* v *Percivall* (1606) cited *Dawney* v *Dee* (1620) Cro. Jac. 605, 606; 79 E.R. 517, 518.
23. Prohibited in relation to urban churches and those constructed after 1848: Public Health Act 1848 s.83; Local Government Act 1972, s.214(7), sch. 26 para. 17. Burial within a church may still be possible in an old rural church. In many cases churches and churchyards have been closed by Order in Council: Halsbury op. cit. para 1077. The Secretary of State had power to order disinterment of remains interred in a vault if injurious to health: Burial Act 1857 s.23; see *Foster* v *Dodd* (1866) L.R. 1 Q.B. 475, (1867) L.R. 3 Q.B. 67.
24. On pews see: *Rogers* v *Brook* (1783) 1 Term Rep. 431n; 99 E.R. 1179n; *Mainwaring* v *Giles* (1822) 5 B. & Ald. 356; 106 E.R. 1221; *Lousley* v *Hayward* (1827) 1 Y. & J. 583; 148 E.R. 804.
25. *Frances* v *Ley* (1614) Cro. Jac. 366; 366, 79 E.R. 314, 314. Note the equation of the rights to the pew and the vault.
26. *Harris* v *Drewe* (1831) 2 B. & Ad. 164; 109 E.R. 1104.
27. The discussion concerns mainly English churchyards. The Welsh church was disestablished, but principles of ecclesiastical law that were enforced in common law courts may still apply there: A.T. Denning (1944) 60 L.Q.R. 235, 240.
28. Russell Davies op. cit. pp.49-60; G. H. Newsom *op. cit.* pp. 143-145 Phillimore op. cit. p. 650; Polson & Marshall op. cit. ch. XIV; *Winstanley* v *North Manchester Overseers* [1910] A.C. 7, 15.
29. 14 Halsbury's Laws of England (4th ed.) at 1079, 1081; Phillimore op. cit. pp. 1405-1415. The fee was suspended and the freehold estate passed to successive incumbents as a corporation sole. For new parishes see s.16 New Parishes Measure 1943.
30. *Winstanley* v *North Manchester Overseers* [1910] A.C. 7, 14 per Lord Atkinson; *Greenslade* v *Darby* (1868) L.R. 3 Q.B. 421.

right to possession for the purposes of his office and not upon freehold ownership. The ultimate ecclesiastical authority which ensures that ownership of rights in the church was exercised in accordance with ecclesiastical principles was the Ordinary. Most consecrated ground is under the jurisdiction of the Diocesan Bishop, who acts by the Chancellor of the Consistory Court.[31]

Every parishioner has a right of burial in the churchyard while it remains open for burials.[32] This may extend to all people who die within the parish.[33] The incumbent may grant permission for the burial of a stranger.[34] This assumes that the person is entitled to a Christian burial.[35] However, the location of a particular grave[36] is within the discretion of the incumbent and the parochial church council.[37] An unreserved grave in a parish churchyard could be granted by the incumbent. Different principles applied to exclusive grants as must now be considered.

FACULTY BURIAL RIGHTS IN CHURCHYARDS

A faculty from the Ordinary was necessary to confirm a grant by the incumbent of an exclusive right of burial in a churchyard.[38] This appeared from *Maidman* v *Malpas*[39] where a rector proceeded successfully for the erection of a monument without a faculty, and is confirmed by dicta in the *Perivale Faculty* case. [40] A non-parishioner required a faculty to validate an exclusive burial right granted by the incumbent. The confirmation of the grant was coupled with an order that the incumbent should make no further reservations of grave spaces for non-parishioners.

Very often the person who has infringed the right is the incumbent himself. Precisely this happened in the leading case, *Bryan* v *Whistler*.[41] The plaintiff was granted by parol an exclusive right to make a vault and erect a monument near it by the rector of St Clement Hastings. Afterwards the rector opened the vault and interred the body of another person in the vault. The action was for this alleged wrong.

The ground for decision adopted by Littledale J., that the grant by the incumbent alone was of no effect, was most unjust, allowing the incumbent to derogate from his own grant.[42] Where the exclusive burial right has been acted

31. Ecclesiastical Jurisdiction Measure 1963. ss.2, 6; 14 Halsbury's Laws of England (4th ed.) at 1075; *De Romana* v *Roberts* [1906] P. 332. The Bishop personally should not act. *Re St Mary's, Barnes* [1982] 1 W.L.R. 531. There is an appeal from the Ordinary to the Court of Arches (s.7 of the 1963 Measure) and so on to the Privy Council (s.8). "Peculiars" are exempt from diocesan control; examples are Westminster Abbey, the royal chapels and Stamford. See generally Newsom *op. cit.* ch. 2.
32. *Winstanley* v *Manchester Overseers* [1910] A.C. 7, 15. Strangers should seek the permission of the incumbent *Neville* v *Bridger* (1874) 30 L.T. 690 and a faculty *De Romana* v *Roberts* [1906] P. 332. For closure see below "Termination of Burial Rights."
33. *Winstanley* v *North Manchester Overseers* [1910] A.C. 7, 17 per Lord Atkinson.
34. Phillimore *op cit.* p. 654.
35. Commonly parts of the churchyard were not consecrated. Those not entitled to a Christian burial, formerly including suicides, could be interred there. The faculty jurisdiction of the ecclesiastical courts extends to unconsecrated parts of the churchyard: *Re St Mary Magdalene's Paddington* [1980] Fam. 99.
36. *Fryer* v *Johnson* (1755) 2 Wils. K.B. 28; 95 E.R. 667 (custom to bury as near as possible to ancestors bad); *Ex p. Blackmore* (1830) 1 B & Ad. 122, 109 E.R. 732 (rector could not be compelled to bury body in particular vault, but was obliged to bury body somewhere); *Preston Corporation* v *Pyke* [1929] 2 Ch. 338.
37. Transferred from the churchwardens by the Parochial Church Councils (Powers) Measure 1956 s.4.
38. Russell Davies op. cit, pp. 52-53; Polson & Marshall op. cit. pp. 213-17; G. H. Newsom *op. cit.* pp. 163-165; 14 Halsbury's Laws of England (4th ed.) paras 1315-1317 pp. 732-736.
39. (1794) 1 Hagg. Cons. 205; 161 E.R. 526.
40. *De Romana* v *Roberts* [1906] P. 332; *Rosher* v *Vicar of Northfleet* (1825) 3 Add. 14; 162 E.R. 386.
41. (1828) 8 B. & C. 288, 108 E.R. 1050.
42. At p. 295, 1053. The lack of formalilities provide a better ground for the decision (see infra "Formalities").

upon, as by expending money on the purchase of a gravestone, then principles of estoppel should operate to prevent infringement of the exclusivity of the grant.[43] Even without expenditure, the incumbent should not be allowed to deny the validity of his own grant in the Consistory Court.[44]

These cases show the danger of relying upon "informal reservations", which apart from estoppel are of no legal effect.[45]

THE NATURE OF AN EXCLUSIVE FACULTY GRANT

An exclusive burial right might be claimed under an express grant of faculty, or by prescription on the basis of a lost modern faculty.[46] The nature of an exclusive burial right arising under a faculty was considered obiter and inconclusively in *Bryan v Whistler*[47]. The court likened an exclusive right of burial in a churchyard to the right to a pew.[48] The right was, as Bayley J. said[49] in *Bryan* v *Whistler,* "for the most part limited to a house, a removal from which destroys the right to the pew."[50] If the right was not claimed to be attached to any ancient messuage nor indeed to any land, it would seem to follow that it was not an easement. Littledale J. appears clearly to reject the possibility that an easement has been created, because of the lack of a dominant tenement.[51]

However, a faculty for a pew could be conditional upon habitation in a parish rather than in a particular house. Precisely analogous rules apply to a right to burial. A faculty could grant exclusive rights based upon membership of a family, rather than on property ownership.[52] There is no necessity for a residential qualification or limitation. The faculty right can be, and often is, personal to the grantee, as was the right considered in *Re St Luke's, Holbeach Hurn.*[53]

Bryan v *Whistler* does not require that the privilege granted by a faculty is an easement, nor that it must follow the limitations of an easement.[54] The limitations to be imposed in decreeing a faculty "are not necessarily those of an ordinary easement, but are to be determined by the practice and usage and precedents binding on the ecclesiastical courts."[55] Where a right of burial exists in gross, it can be seen as an invalid attempt to create an easement without a dominant

43. *Re Hendon Churchyard* (1910) 27 T.L.R. 1, explained in this way in *Re St Nicholas's, Baddesley Ensor* [1983] Fam. 1, 5G.
44. The Courts should refuse a faculty if the grant is against the interests of parishioners: *Rich* v *Bushnell* (1827) 4 Hag, Eccl. 164; 162 E.R. 1407.
45. *Re St Luke's Holbeach Hurn, Watson* v *Howard* Lincoln Consistory Ct. [1990] 2 All E.R. 749, 758 Judge Goodman Ch.
46. In *Re St Martin le Grand, York* [1989] 2 All E.R. 711 it was held (at pp. 731-2) that a prescriptive right of way arising by lost modern faculty could only create a perpetual licence and not an easement. The reasoning does not appear to exclude the creation of an easement for non-secular purposes, such as burial.
47. (1828) 8 B. & C. 288; 108 E.R. 1050.
48. *Phillipps* v *Halliday* [1891] A.C. 228; *Griffith* v *Matthews* (1793) 5 Term Rep; 296, 101 E.R. 166; *Rogers* v *Brooks* (1783) 1 Term. Rep. 431n; 99 E.R. 1179n. *Re St Mary's, Banbury* [1986] Fam. 24.
49. At p. 293, 1052.
50. *Fuller* v *Lane* (1825) 2 Add. 419; 162 E.R. 348; *Byerley* v *Windus* (1826) 5 B. & C. 1; 108 E.R. 1 (prohibition to stop the grant of a faculty to the extra-parochial members of Staples Inn (an old Inn of Chancery) for exclusive rights to seven pews in absence of a prescriptive title at common law). *Brabin & Tradum's case* (1618) Popham 140; 79 E.R. 1241; Phillimore op. cit. p. 695.
51. Irish cases decide that a right of burial does not create an easement, but an irrevocable licence in perpetuity: *Reid* v *Belfast Corporation* 44 I.L.T. 107; *Smith* v *Hogg* [1953-4] Ir. Jur. Rep. 58. See *Re St Martin le Grand, York* [1989] 2 All E.R. 711, 731-2.
52. The Perivale Faculty, *De Romana* v *Roberts* [1906] P. 332; granting exclusive right of a vault to the grantee "her executors, administrators, and assigns". Phillimore op. cit. p. 655 n.(b); *Magnay* v *United Parishes of St Michael, Paternoster Royal and St Martin Vintry* (1827) 1 Hagg. Ecc. 48; 162 E.R. 502 (grant to family while inhabitants).
53. [1990] 2 All E.R. 749, 754h. 27th December 1989, Lincoln Consist. Ct. Judge Michael Goodman Ch. contrasted a grant "to AB his heirs and family" in 2 Oughton's *Ordo Judicorum* (1738) 297, No. 323.
54. *Kellett* v *All of St. John's Burscough Bridge* (1916) 32 T.L.R. 571, 572 Dowdall Ch. Con. Ct.
55. *Ibid.*

tenement. Alternatively, it could be a true incorporeal hereditament,[56] capable of existing and being assignable separately from land.[57] Faculties for secular purposes cannot be viewed as legal easements, because of the difficulty that the legal estate cannot be alienated for secular purposes; they are best seen as licences of indefinite duration.[58] The same objection should not prevent a faculty for ecclesiastical purposes creating a legal property right. Whatever its legal form, a faculty does not create a *revocable* licence.[59]

The pew right pre-dates the formulation of the requirements for the existence of an easement, and it is not surprising therefore to find that it does not fit neatly into the modern cateogories. It is submitted that a right of burial under faculty may be seen as a true incorporeal hereditament, capable of existing in gross.

COMMERCIAL BURIAL PLACES[60]

A place of burial could be established by any person without statutory authority in private ground, provided only that no nuisance was occasioned.[61] Some old burial places were completely unregulated. However, burial grounds belonging to religious sects that did not conform to the established Anglican church generally operated under trust deeds, relying on the recognition of public burial as a charitable purpose.[62] Most commercial concerns sought statutory powers. Pere-Lachaise was established in Paris in 1804, the Liverpool Necropolis in 1825, but it was not until 1832 that statutory powers were obtained[63] for the first cemetery in London, Kensal Green. The early Acts were free standing, though no doubt drafted with reference to each other. Later Acts incorporated standard clauses contained in the Cemetery Clauses Act 1847.[64]

RIGHTS UNDER THE CEMETERY CLAUSES ACT 1847

Reed v *Madon*[65] concerned a cemetery near Woking regulated in this way. It was founded under statutory powers[66] by the London Necropolis and

56. Strictly an easement was not an incorporeal hereditament, though it has come to be seen as the exemplar of that category.
57. *Re Hendon Churchyard* (1910) 27 T.L.R. 1 Con. Ct. (Husband endorsed transfer to wife on back of receipt from parish clerk, acting for incumbent and churchwardens).
58. *Re St Martin le Grand, York* [1989] 2 All E. R. 711, 731-2 *per* Thomas Coningsby Q.C. Ch.; *Re St Peter's, Bushey Heath* [1971] 1 W.L.R. 357, 360A per G. H. Newsom Q.C. Ch.; Newsom *op. cit.* pp.168-172.
59. *L.C.C.* v *Dundas* [1904] P. 1 32 Sir Lewis Dibdin, Dean of Arches.
60. Russell Davies *op. cit.* ch. 6; Polson & Marshall *op. cit.* ch. XV.
61. Assuming that burial was not prevented by a restrictive covenant. Consider for example private mausoleums such as that at Castle Howard, Yorkshire. See 10 Halsbury's Laws of England (4th ed.) P. 504 para. 1066. (see esp. n.3. on whether there was any requirement that interments should take place at least 100 yards away from dwellings). Planning permission would now be required: query if consent would be needed for a single tomb on private land. The Independent reported on 5th January 1990 that planning permission had been granted for a private cemetery in a 19 acre estate at Tideswell, Derbyshire.
62. *Re Manser A. G.* v *Lucas* [1905] 1 Ch. 68 (Quaker ground); Sheridan & Keeton, *The Modern Law of Charities* (3rd ed. pp.64-65 by Spencer G. Maurice and David B. Parker); Tudor on *Charities* (7th ed.) Russell Davies op. cit. ch.8. An early example in the City of London was Bunhill Fields, founded around 1665: Hugh Meller, *London Cemeteries* (1981) p.88ff.
63. 2 & 3 W. 4 c. cx. See *R.* v *Inhabitants of St Mary Abbot's, Kensington* (1840) 12 Ad. & El. 824; 113 E.R. 1026.
64. Part was usually consecrated and part unconsecrated. Some aspects of ecclesiastical jurisdiction (especially over exhumation) applied to the consecrated part.
65. [1989] 2 All E.R. 431.
66. 15 & 16 Vict. c. cxlix.

Mausoleum Co. Hence the Cemeteries Clauses Act 1847 applied. Section 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."

Morritt J. had to decide the nature of the exclusive burial right granted. The common law of burial is derived from the peculiar position of the English parish churchyard, and many cases show a willingness to argue by analogy from the rights in a churchyard.[67] However, Morritt J. considered that he had only to construe the relevant statutory provisions.[68] Some remedy had to be implied or, as Morritt J. said,[69] the rights would be nugatory. But were the rights proprietary? Or were they enforceable only against the cemetery company?

Looking at the situation apart from authority an exclusive burial right could be expected to confer a proprietary interest on the grantee. If a tombstone is defaced the family of the deceased who have paid for the erection of the tombstone should have an action, as well as the incumbent or cemetery company.[70] Personal rights could have been substantially protected by a series of personal actions, though at the expense of circuity of action. It was argued that the exclusive burial right could be adequately protected if the company sued in trespass to enforce it. However, this would have provided inadequate protection for a number of reasons. The company might, as in *Reed* v *Madon*,[71] be precluded by the second contract from suing in trespass. The physical infringer might be authorised by the second grantee, so that it was neither a trespass nor a breach of contract as against the cemetery company. The denial of a cause of action would inhibit the remedy in damages against the actual infringer as, for example, if upset and anguish were caused by the acts of the third party and not the cemetery company. It was for precisely this reason that Mr Madon argued, unsuccessfully, that he was liable only to an action brought by the cemetery company. Finally, the company might not have a duty to institute a trespass action.

Morritt J. held that the right of exclusive burial was equated to a property right because the rights "may exist in perpetuity and by devolution and assignment pass through a number of hands."[72] As a consequence, the owner of such a right can protect it by action against any infringer. Exactly the same principles should, it is submitted, apply to exclusive rights granted under other powers. The rights are only really meaningful if enforceable in rem.

Assuming that a burial right does create some sort of proprietary interest, the question arises as to the form of proprietary right.

67. *Preston Corporation* v *Pyke* [1929] 2 Ch. 338; *Matthews* v *Jeffrey* (1880) 6 Q.B.D. 290; *McGough* v *Lancaster Burial Board* (1888) 21 Q.B.D. 323, 327 Bowen L.J. ("[T]he general purpose of the [Burial] Act [1852] is to provide cemeteries in substitution for parish churchyards.") Commonwealth authorities are naturally more likely to insist upon a difference: *Hubbs* v *Black* (Alberta Supreme Court) (1918) 46 D.L.R. 583, 589 Riddell J.
68. The analogy was denied by Sankey L.J. in *Hoskins-Abrahall* v *Paignton U.D.C.* [1929] 1 Ch. 375, 387; in *Reed* v *Madon* [1989] 2 All E.R. 431, 437c the issue was said to be simply construction of the Cemetery Clauses Act 1847.
69. At p.436h citing Lord Simonds in *Cutler* v *Wandsworth Stadium Ltd.* [1949] A.C. 398, 407 as authority for permitting a right of civil action.
70. *Spooner* v *Brewster* (1825) 3 Bing. 136; 130 E.R. 465 decided that an action in trespass was permitted. This suggests that a property can pass in the materials of the gravestone sufficient to found an action in trespass. See Phillimore *op. cit.* p.694.
71. [1989] 2 All E.R. 431, 437a.
72. At pp.436j-437a.

WHO CAN ENFORCE THE RIGHT?

In *Matthews* v *Jeffrey*,[73] Eliza Matthews had purchased two grave spaces from Hanley Corporation. They had been granted by deed to her "her heirs and assigns for ever". Her son, the plaintiff, who was her heir at law claimed to be entitled to control the grave spaces. Fry J. upheld this contention. It followed that a burial of an infant child by his sister's husband was a trespass. Fry J. in *Matthews* v *Jeffrey* considered that it was far better that the right should be vested in one person than "that there should be a roving right for any member of a family to bury any other member of the family in them."[74] So a burial right in a churchyard has been treated as realty.[75] Most enabling Acts relating to cemeteries provide that a burial right is to be personal property.[76]

THE BURDEN

Bryan v *Whistler*[77] suggested that a right of burial in a churchyard was not a true interest in land if it was not attached to a dominant tenement. It is suggested that there is no analogy between rights to burial in a churchyard and rights in a private burial ground. The parish naturally surrounds the parish church and churchyard, and it may be natural to see a right to burial there as appendant to a property within the parish. It can form an incorporeal hereditament annexed to a dwelling within the parish. Burial grounds provided by burial boards, or now by the district council, were a statutory substitute for the parish churchyard but were available also to outsiders. With a private burial ground any proximity between the burial plot and the owner's dwelling is purely coincidental.

There is little English authority on the effect of an exclusive burial right outside a parish church. Commonwealth authorities do provide some assistance. In *Hubbs* v *Black*[78] various opinions were expressed in the Alberta Supreme Court. Clute J. took the view that an exclusive burial right was a grant of the land, but Riddell J. considered that it was an easement. He said that the rule preventing an easement existing in gross appeared to apply to a right in a parish churchyard in England, but did not apply to rights in a burial ground.[79] It followed that in this exceptional situation, the right could exist in gross. In *Strathcona Cemetery Co. v Taylor*[80] Beck J.A. favoured the easement line, though as he observed it could be viewed better as an ordinary privilege or licence.

The issue was left rather unsatisfactorily in *Reed* v *Madon*,[81] with Morritt J. declining to deal with submissions about the nature of the rights in land created by the Cemetery Clauses Act 1847.

73. (1880) 6 Q.B.D. 290.
74. (1880) 6 Q.B.D. 290, 293. *Crisp* v *Martin* (1876) 2 P.D. 15 (the male representative was in fact one of the petitioners for alterations in the church; Edward Crisp who objected was the grandson of the grantee); *St Nicholas's, Baddesley Ensor* [1983] Fam. 1 (petitioner who was not the personal representative of his grandmother not able to pursue claim that a grave space had been reserved for her). The abolition of the heir reduces the force of this reasoning: the right would now vest equally in the next-of-kin.
75. *Matthews* v *Jeffrey* (1880) 6 Q.B.D. 290; *Strathcona Cemetery Co.* v *Taylor* [1924] 3 D.L.R. 625, 629 (goes to next of kin in Canada, though in England to heir.)
76. *Re Nottingham General Cemetery Co.* [1955] Ch. 683 (private Act specified right of personal inheritance); similar is the Highgate Cemetery Act 6 & Will 4 c. cxxvi referred to in *London Cemetery Co.* v *Cundey* [1953] 2 All E.R. 257. The Cemetery Clauses Act 1847 s.46 also specifies personal estate: the right may be assigned (see form of deed in s.45) in lifetime or bequeathed by his will.
77. (1828) 8 B. & C. 288; 108 E.R. 1050.
78. (1918) 46 D.L.R. 583.
79. At p. 587 citing *Moreland* v *Richardson* (1857) 24 Beav. 33; 53 E.R. 269 and *Ashby* v *Harris* (1868) L.R. 3 C.P. 523.
80. (1924) 3 D.L.R. 625, 628.
81. [1989] 2 All E.R. 431.

LOCAL AUTHORITY CEMETERIES

Gradually pressure developed for the provision of burial places under the auspices of public bodies. Burial boards were formed with the object of providing places of interment. The initial object was to close the overcrowded London churchyards and to replace them with public cemeteries. They partially superseded the churchyards, and as such were consecrated, and parishioners acquired substituted rights of burial. Other parts were unconsecrated.

A patchwork of no less than fifteen Acts developed over the years between 1852 and 1906. "Burial ground" was originally confined to a place of interment under the Burial Acts 1852-1906.[82] A cemetery was a similar place provided under the Public Health (Interments) Act 1879.[83] There was "no difference to the naked eye".[84] Powers to confer exclusive burial rights were conferred by a number of the Acts.[85]

Local authority cemeteries are now governed by the Local Government Act 1972.[86] Exclusive burial rights can be granted for a maximum of 100 years (subject to termination if unused after 75 years).[87]

FORMALITIES

A good test for the existence of an interest in land and for its nature is the formalities required for its creation. The leading case on the nature of an exclusive right of burial is *Bryan* v *Whistler*.[88] A right in a parish churchyard had been granted by parol. A written receipt that might have satisfied the Statute of Frauds did not mention the fact that the grave was exclusive. The question was not the nature of the interest in the land, but whether there was an interest in the land which required writing. If not, the Statute of Frauds prohibited action on any contract relating to land unless it was evidenced in writing. Bayley J.[84] indicated that it was either a grant of an interest in land (when there was no writing) or a grant of an easement or incorporeal hereditament (which required a deed). In either case the right was not supported by the proper formalities.

It is apprehended that the result of the decision might well have been different in Chancery, in that a contract properly evidenced in writing or an oral contract supported by acts of part performance would be recognised and enforced. Precisely these circumstances occurred in Chancery in 1857 in *Moreland* v *Richardson*.[90] After 1876 and the fusion of the courts, the same should apply in legal actions. On the principle of *Walsh* v *Lonsdale*[91] a specifically performable agreement for an exclusive burial right should now be enforceable in all courts, and an action for damages for trespass at common law should now succeed.[92]

82. Most of the Burial Acts applied only to England (then deemed to include Wales). In Scotland see Burial Grounds (Scotland) Act 1855 esp. s.18 re exclusive burial rights.
83. *Hoskins-Abrahall* v *Paignton U.D.C.* [1929] 1 Ch. 375 provides an example of an exclusive grant under the Public Health (Interments) Act 1879 incorporating Cemeteries Clauses Act 1847.
84. Charles Arnold-Baker, *New Law and Practice of Parish Administration* (1968) p.282.
85. Metropolitan Interments Act 1850 s.15, s.30 rep. 1852; Burial Act 1852 s.33 (London); Burial Act 1853 s.7 (extends 1852 Act out of London).
86. s.214 (applying to England & Wales). Existing powers ceased to be exercisable in 1st April 1974. Russell Davies op. cit. pp.77-88; Polson & Marshall op. cit. ch. XV.
87. Local Authorities' Cemeteries Order 1977 S.I. 1977 No. 204 (replacing 1974 S.I. 1974 No. 628) Art 10 sch 2 parts II-III; see infra "Formalities".
88. (1828) 8 B. & C. 288; 108 E.R. 1050.
89. At p. 293, 1052; supported by Holroyd J.; Littledale J. thought that there was no interest in land.
90. (1857) 24 Beav. 33; 53 E.R. 269; see also the earlier proceedings at (1856) 22 Beav. 596, 601; 52 E.R. 1238, 1240.
91. (1882) 21 Ch. D. 9.
92. *Hubbs* v *Black* (1918) 46 D.L.R. 583.

However, the general practice, that was followed in *Reed* v *Madon*, is still to grant exclusive burial rights by deed of grant. This practice is presumably coloured by the dicta in *Bryan* v *Whistler*.[93] This is because the exclusive right of burial is viewed as an incorporeal hereditament in the nature of an easement.[94] However in a local authority cemetery the burial authority may grant an exclusive right in writing, signed by a nominated officer.[95]

BURIAL RIGHTS AS AN INTEREST IN LAND

In *Reed v Madon*[96] the cemetery was owned by Brookwood Cemetery Ltd until 1976, when it was conveyed to the Brookwood Park Ltd. who were registered as proprietors. Morritt J. found it to be unnecessary to consider whether an exclusive right of burial amounted to an interest in land, because the purchaser company did not dispute its liability.[97]

It may be that sale of a churchyard would be rare, though the same issue might arise in the case of a double burial.[98] Transfers of cemeteries are a possibility.[99] One cemetery company may convey to another, where this is permitted. Local authorities have power to acquire private cemeteries. Again, the cemetery may be mortgaged, as in *Moreland* v *Richardson*.[100] The case shows how essential it is that the mortgagee should be bound by the burial rights. Five plaintiffs purchased graves in perpetuity from trustees, who had mortgaged the cemetery. The mortgage debt was transferred to the defendants, who instructed workmen to level the ground. The object had been to convert the burial ground to a timber yard. An injunction was obtained by the five plaintiffs to prevent disturbance of the plots appointed to them. The mortgagees in this case were bound by the notice which the original mortgagee had that the land was used as a burial ground. The only way in which it could be made profitable was to grant rights of burial there. The mortgagees successors were bound by this notice. Otherwise, as Sir John Romilly M.R. observed, the mortgagee could insist on disturbing all the graves and putting the land to a more profitable use.[101]

A very promising possibility that is little explored in the cases is that a burial right might be enforceable on the principle that a person might not derogate from his own grant. Simply setting aside the land for interments implies that it will not be dealt with inappropriately thereafter. In *Reg.* v *Jacobson*[102] a burial ground had been sold as building land by order of the Court of Chancery after the mortgagee had foreclosed. "The freeholder was bound when he originally disposed of the land for a burial ground to see that it was preserved for interments

93. Supra.
94. Nevertheless it is treated as a "conveyance or transfer on sale" within s.54 Stamp Act 1891, so a certificate of value should be included. No good purpose seems to be performed by treating the grant as stampable.
95. Local Authorities' Cemeteries Order 1977 No. 204 art. 10, Sch. 2 pt. II para. 1(1). Query therefore if it is stampable. An assignment must be by deed or by will: para. 3.
96. [1989] 2 All E.R. 431, 437b; this is because of the concessions in the actions noted at p.435e-f.
97. Presumably to avoid opening the argument that the sale of the cemetery was void under Cemetery Clauses Act 1847 s.9: see at p.442j. See also *Re St Mary Abbot's, Kensington* (1840) 12 Ad. & El. 824, 831, 113 E.R. 1026, 1029 per Coleridge J.
98. As in *Re St. Luke's, Holbeach Hurn* [1990] 2 All E.R. 749.
99. One of the reasons that the District Auditor has cast doubt on the legality of the sale of Westminster Cemeteries is that the sales apparently breached agreements granting rights of burial: Independent 17th February 1990.
100. (1857) 24 Beav. 33; 53 E.R. 269. The burials had been begun when the land was leasehold! In *Foster* v *Dodd* (1867) L.R. 3 Q.B. 67 the burial ground was ultimately held from year to year.
101. The limited protection available at common law was shown by *Foster* v Dodd (1867) L.R. 3 Q.B. 67, 77 Byles J.
102. (1880) 14 Cox C.C. 522.

only."[103] This right bound the mortgagees and "anyone who succeeded took the ground under the same obligation."[104] No doubt the purchasers were surprised not to get a good title from Chancery, but nevertheless the decision must on principle be correct.[105] These cases accord with the land law decisions that establish the obligation not to derogate from a grant as creating effectively a legal interest in land that is capable of binding not only the grantor but also those deriving title from the grantor.[106]

Apart from non-derogation, exclusive burial rights could only bind a purchaser if they were interests in land, and they had been properly protected.[100] It seems fair to assume that the only method of protection adopted in practice by cemeteries and plot owners is to have the plot entered on the statutory plan required by clause 41 of the Cemetery Clauses Act 1847. If it was not protected on the Land Register following first registration[101] it would have to be an overriding interest if it was to bind the purchaser company.[109]

If a burial right was an interest in land, a further problem to consider would be whether a repairing obligation could run. The only authority, *London Cemetery Co.* v *Cundy*[110] is against on both points, though the decision that a burial right did not amount to any interest in land, so that the repairing covenant was a merely personal covenant, was out of line with other authorities.

The possibility of burial rights being unrecognised proprietary interests in land shows again the difficulty of legislating exhaustively for the categories of interests in land. Inconvenient and unrecognised rights like the right of re-entry attached to an assignment of a lease[111] periodically appear. The Land Charges Act 1972 is notoriously unable to cope because of the list approach taken in defining the rights which require registration as land charges. This filters through into registered land in which it was assumed that all equitable interests were land charges or overreachable, though the definition of minor interests can apparently catch residual rights not otherwise covered.

TERMINATION OF BURIAL RIGHTS

Two different kinds of duration for a burial right can be discerned. One is the length of time for which further interments in the site are permitted. This may be limited in time. Another is the duration in which the exclusivity of the plot is maintained against further interments. The usual intention would be that the plot would be exclusive for ever, or at least for a long duration.

103. p. 528.
104. *Ibid.*
105. *Re Nottingham General Cemetery Co.* [1955] Ch. 683, 691.
106. Megarry & Wade, *The Law of Real Property* (5th ed.) p.695.
107. A burial might be a latent defect in title: *Dibley* v *Furter* (1951) 4 S.A.L.R. 73.
108. *Ency. of Forms & Precs.* (5th ed.) p.236 Form 29 n.1. If title to cemetery is registered, notice of the grant may be registrable on the title. Reference to the registered title number should appear in deed of grant and a plan showing the grave space must accompany the application. If a large number of grants are being made a general form of protective entry may be possible. The note applies to local authority cemeteries, but the principle seems general.
109. Presumably it could not be protected by Land Registration Act. 1925 s.70(1)(g) when as in this case the plot had been reserved but not filled; a right after a burial might be the ultimate undiscoverable overriding interest. It might be protected under s.70(1) (a) if it is an easement.
110. [1953] 2 All E.R. 257.
111. *Shiloh Spinners Ltd.* v *Harding* [1973] A.C. 691.

In churchyards, it is now provided that pre-1964 grants to exclusive burial rights will cease in 2064 unless enlarged or continued by faculty granted after 1964.[112] Exclusive burial rights in local authority cemeteries can be granted for a maximum of 100 years (subject to termination if unused after 75 years).[113] Cemetery companies usually had power to grant burial rights for ever or for a limited period.[114]

For example in *Reed* v *Madon* exclusive rights of burial were sold in five plots for thirty years. Clearly what was intended was that further burials could occur for thirty years, but if one of the Essad sisters survived for more than thirty years, she would not have the right to be buried in the remaining plot. However, it was not intended that the cemetery company could reuse plots that had been filled within the thirty years.

In principle land set aside for burial should remain undisturbed. As was said of the Abney Park Cemetery[115] "the bodies for the most part sleep in freehold." There is no automatic reverter of consecrated land when burial ceases.[116] Naturally the granting of burial rights eat up the land available to the cemetery company, so that gradually its value declines.[117] At last, the cemetery becomes merely a liability, with no income from burials and a heavy repairing responsibility.[118] In some cases the sites have been converted to open spaces, with responsibility for upkeep passing to the local authority.[119]

Where the land is consecrated, there is a jurisdiction to end the grant of an exclusive burial right: it must be conferred by faculty and is terminable by faculty if circumstances so dictate.[120] What is granted is the use of the ground for a vault so long as it is not required for the general use of the parishioners.[121] However, *St. Michael Bassishaw*[123] made it clear that rights annexed to faculty vaults cannot be interfered with except in cases of necessity. *L.C.C.* v *Dundas*[123] also makes it clear that a faculty grant is not easily revoked, at least where the faculty envisages retention of the thing licensed by the faculty, so that prima facie a burial right is not revocable. Where the terms of a faculty are exceeded, reinterment may be ordered.[124]

All burial rights may be altered or terminated by statutory powers. For example in *Slattery* v *Naylor*[125] the Privy Council held that bye-laws in New South

112. Faculty Jurisdiction Measure 1964 s.8. It must be limited to a maximum of 100 years. The provision does not apply to burial grounds or cemeteries: s.8(2).
113. Local Authorities' Cemeteries Order 1977 S.I. 1977 No. 204 Art. 10 sch. 2 part II (grant) and part III (termination).
114. Cemetery Clauses Act 1847 s.40.
115. Rev. Thomas Barker, *Abney Park Cemetery: A Complete Descriptive Guide etc.* (1869) p.20, cited by Hugh Meller, *London Cemeteries* p.61 n.8.
116. *Campbell* v *Mayor & Corporation of Liverpool* (1870) L.R. 9 Eq. 579.
117. Ryde on *Rating* (13th ed.) p.589. A number of cemetery companies went into liquidation; see e.g. *Re the Nottingham General Cemetery Co.* [1955] Ch. 683.
118. Until recently the growth of grass in a churchyard could be seen as a source of profit: *Greenslade* v *Darby* (1868) L.R. 3 Q.B. 421, 429 Blackburn J., but now it can only be a burden.
119. Under Open Spaces Act 1906 s.6. For a faculty granted to turn a churchyard into an open space, with an order that a family tomb was not to be interfered with see *Re Camden Town Burial Ground* (1889) 5 T.L.R. 311. Some old cemeteries are maintained by voluntary groups.
120. Prescriptive rights are superior to the jurisdiction of the Ordinary *supra* "Prescriptive Right of Burial in a Church or Churchyard". A faculty cannot end a pew right granted by statute: *Re St. Mary's Banbury* [1986] Fam. 24, 37C-E per Judge Boydell Q.C. Ch.
121. *St Botolph without Aldgate, Vicar and Churchwarden* v *Parishioners* [1892] P. 161, 168.
122. [1893] P. 233, 240 Con. Ct.
123. [1904] P. 1, 30-31 per Sir Lewis Dibdin, Dean of Arches, cited with approval by Judge Michael Goodman Ch. in *Re St. Luke's Holbeach Hurn* [1990] 2 All E.R. 749, 757 cd.
124. *Vestry of St Pancras* v *Vicar and Churchwarden of Parish of St Martin in the Fields* 6 Jur N.S. 540 (faculty for 20 reinterments, in fact 400-500 bodies disturbed).
125. (1888) 13 App. Cas. 446.

Wales were valid, even though they had the effect of closing a particular cemetery altogether and so destroyed the private property of the owners of burial spaces. Two main species of statutory power exercisable in England need attention, based respectively on sanitary considerations and disuse of redundancy or the burial ground.

Burial grounds in specified areas could be closed on sanitary grounds by Order in Council.[126] Particular classes of burial could be exempted. Originally the powers of the public authorities acting on sanitary grounds did not extend to private vaults, at least in the view of the ecclesiastical courts.[127] Later statutory powers clearly did convey the right to preclude further burials under exclusive grants and to order the disinterment of corpses that had already been buried in family vaults. Commonly, however, accrued rights under existing exclusive burial rights were not affected.[128] Exceptionally the Order might permit continued burials under new exclusive grants. The people entitled to benefit were then determined by construction of the Order in Council.[129] The faculty jurisdiction continued[130] so as, for example, to allow relatives of the deceased to choose a new site of interment.[131]

A second set of powers relates to redundant churchyards or disused burial grounds. The Disused Burial Grounds Act 1884 provided that it shall not be lawful to erect any buildings on any disused burial ground,[132] except for the purpose of enlarging a church, chapel, meeting house, or other place of worship.[133] The Church of England can override this restriction under the Pastoral Measure 1983 after following the procedure for declaring a church redundant.[134] The 1884 Act does not apply if (a) no person has been buried during the 50 years before the scheme or (b) no relative or personal representative of a deceased person objects or all objections are withdrawn.[135] Detailed rules are provided for the disposal of human remains.[136] During the waiting period for redundancy, the faculty jurisdiction applies.[137] Normally a scheme will end the legal effects of consecration, though the scheme may provide otherwise.[138] Other religious bodies are given similar power to override the restriction on building where there are no objections from a personal representative or family member of a person interred in the land within the past fifty years.[139]

126. Metropolitan Interments Act 1850 s.13 (rep. 1852); Burial Act 1852 ss.2-5 (London – existing family vaults could be used if Secretary of State granted licence permitting burial); Burial Act 1853 s.1. (extends 1852 Act out of London).
127. *St. Michael Bassishaw, Rector & Churchwardens* v *Parishioners (Braikenridge intervening)* [1893] P. 233, 240-245.
128. *Moreland* v *Richardson* (1856) 22 Beav. 596, 52 E.R. 1238; *Re St. Mary's, Barnes* [1892] 1 W.L.R. 456 Con. Ct. (order prevented only first time burials).
129. *Re Sargent* (1890) 15 P.D. 168 (burials were permitted in reserved grave spaces allotted to members of the families of parishioners – enabled a valid grant to be made to a living non-parishioner who was a member of the family of a parishioner).
130. *Lee* v *Hawtrey* [1898] P. 63; *St Michael Bassisshaw* [1893] P. 233.
131. *St Helen's, Bishopsgate, with St Mary Outwich, Rector and Churchwardens* v *Parishioners (M'Dougal intervening)* [1892] P. 259 Con. Ct.
132. Originally meaning only burial grounds closed under Order in Council, but extended by Open Spaces Act 1887, s.4 to cover any disused burial ground.
133. *Re St Ann's, Kew* [1977] Fam. 12 Con. Ct.
134. 14 Halsbury's Laws of England (4th ed.) p.575; Newsom *op. cit.* pp. 153-161.
135. s.30(4).
136. Pastoral Measure 1983 s.65 and Sch 6; Halsbury op. cit. at P. 609.
137. *Re West Camel Church* [1979] Fam. 79.
138. As should presumably be the case if human remains are left.
139. Under Disused Burial Grounds (Amendment) Act 1981 s.1(1); human remains, gravestones etc. must be disposed of in accordance with s.2 and Sch. S.4(1) discharges the land from rights of burial, but compensation must be paid under s.4(3).

A third set of powers apply where land is acquired for planning purposes.[140]

EXHUMATION

The question that must now be considered is whether an exclusive burial right can be enforced when an unauthorised body has been interred in the exclusive plot. This was precisely what happened in *Reed* v *Madon*[141] where Mrs Madon was interred in the plot reserved for the Essads. The problem might also arise where an extra body is interred in a plot already occupied. Clearly the enforcement of the exclusive right of burial in such a situation involves exhumation of the infringing corpse. Whether equity will order such exhumation can only be considered in the light of the law of exhumation.

The procedure for exhumation of human remains will vary depending upon the place in which the burial has occurred. If the land is consecrated, a faculty is required from the appropriate ecclesiastical authority. If unconsecrated, and also in many cases in which the land is consecrated, a licence from the Home Secretary is required. Thus exhumation might require a faculty, the Home Secretary's licence or both.[142]

CONSECRATED GROUND[143]

Ground consecrated according to the rites of the Church of England might be a churchyard or a consecrated part of a cemetery. A faculty will be required from the Ordinary having jurisdiction, who is usually the Chancellor of the Consistory Court for the diocese in which the burial ground is situated.[144]

The intention of burial in consecrated ground is committal into the safe custody of the Church of England. However it cannot be guaranteed that the remains will never be disturbed. "In English canon law, burial is not absolutely final."[145] So, clearly, the faculty jurisdiction does extend to ordering the exhumation of human remains from consecrated ground in appropriate cases. No distinction is to be drawn between a corpse and ashes.[146]

In many cases a faculty is granted in order to enable the remains to be moved to another place of interment.[147] In such a case the object is to gratify the wishes of the relations.[148] The court should not allow remains to become portable at the convenience of surviving family members, but may order remains to be moved after consideration of all material factors.[149]

Formerly such a faculty would only be ordered if the place of reinterment was itself consecrated, so as to be under the jurisdiction of the ecclesiastical courts. *Adlam* v *Colthurst*[150] showed the practical limits of ecclesiastical

140. Town & Country Planning Act 1971 s.128(6); Town & Country Planning (Churches, Places of Religious Worship & Burial Grounds) Regulations 1950 art. 7 (notice on personal representative if remains interred within 25 years). See Polson & Marshall op. cit. pp.255-60.
141. [1989] 2 All E.R. 431.
142. See Polson & Marshall ch. XIX. For forms see Ency. Forms & Precs. (5th ed.) vol. 6 Burial & Cremation Form 45 (faculty) and form 46 (Home Office licence). Neither is required for exhumation at the behest of a coroner: Coroners Act 1980, s.4.
143. Russell Davies op. cit. pp. 160-62.
144. Petersdorff's Abridgment vol. 4 (1826) p.776 Burial (6).
145. *Re Atkins* [1989] 1 All E.R. 14, 16e. Con. Ct.
146. *Re Atkins* [1989] 1 All E.R. 14, 16f-h citing Revised Canons Ecclesiastical, Canon B38 (Of the burial of the dead). But query whether this should be a principle of general application since there are no restrictions on where ashes are kept.
147. It was everyday practice in the Church courts to order a coffin to be set aside or moved to another place within a churchyard, or moved to another consecrated ground. *Druce* v *Young* [1899]. P. 84, 108.
148. *Re Sarah Pope* (1851) 15 Jur. 614.
149. *Re Atkins* [1989]. 1 All E.R. 14, 20c-21f.
150. (1867) L.R. 2 A. & E. 30.

jurisdiction where bones had been removed from a churchyard and placed in a private meadow. It illustrates the need for the old rule limiting exhumation under faculty to cases in which reinterment was to be in consecrated ground that was itself subject to the faculty jurisdiction. However, the requirement of the Burial Act 1857 that a licence from the Secretary of State be obtained in order to exhume a body from unconsecrated ground, has removed any objection to permitting a body to be moved from consecrated to unconsecrated ground.[151] In appropriate circumstances an order may be granted for a body to be exhumed in order that it can be cremated.[152]

However, it is clear that there is a power to licence exhumation for all purposes and not merely for moving a body from one consecrated ground to another.[153] For example in *Re Sarah Pope*[154] a faculty for exhumation of an adult female buried for three weeks was granted for the purposes of identification of the body. Exhumation can also be ordered to enable public works to be carried out, though a sufficient public benefit will have to be made out.[155]

Beyond such cases, the court has an unfettered jurisdiction. Each case is to be decided as it comes, though the discretion is to be exercised judicially.[156] Chancellor Judge Quentin Edwards in the Consistory Court of Chichester gave these examples of cases in which an exhumation might be appropriate:

> "Errors occur and bodies and ashes are placed in the wrong grave. Interment of both bodies and ashes are sometimes, for understandable reasons, conducted before all relevant considerations are weighed. A family mausoleum or group of graves may be overlooked; the wishes of the deceased may not be known at the time of burial or fully taken into account."[157]

The principles considering exclusive rights were set out in *St Michael Bassishaw*[158]

> "As to the rights annexed to faculty vaults, they are secured to families by the decrees of the court in consideration of considerable payments of money, and cannot be interfered with except in cases of necessity and then only be an order of the Court after citing all persons interested in the vaults."

These two dicta taken together seem to make it clear that the church courts would at least contemplate a claim that an infringing body has been buried in a family vault without the appropriate permission. The jurisdiction was asserted, and exhumation was ordered, in *Re St Luke's Holbeach Hurn, Watson* v *Howard*.[159] During a vacancy in the living, a burial occurred in a plot that had been reserved by faculty for the petitioner next to her deceased husband. Judge

151. *Re Talbot* [1901]. P. 1. Con. Ct.
152. *Re Matheson (decd.)* [1958] 1 W.L.R. 246; the jurisdiction had been doubted in *Re Dixon* [1892]. P. 386.
153. *R.* v *Tristram* [1898] 2 Q.B. 371, 374 Willes J.
154. (1851) 15 Jur. 614. It seems from *Druce* v *Young* [1899] P. 84, 107 that the licence of the Home Secretary would not be needed if a coffin lid was raised for identification purposes without removal of the body: doubted by Russell Davies op. cit. p. 164.
155. On road widening contrast *Norfolk County Council* v *Knights* [1958] 1 All E.R. 394n (refused on facts) and *Morley Borough Council* v *St Mary the Virgin Woodkirk* [1969] 3 All E.R. 952 (faculty granted - 191 graves to be disturbed), *St Botolph without Aldgate, Vicar & Churchwarden* v *Parishioners* [1892] P. 161.
156. *Re Matheson (decd.)* [1958] 1 W.L.R. 246, 248; *Re Atkins* [1989] 1 All E.R. 14, 19e. The speed of the application is a most material factor - a prompt application must be stronger.
157. *Re Atkins* [1989] 1 All E.R. 14, 19j.
158. [1893] P. 233, 240 Con. Ct.
159. [1990] 2 All E.R. 749 Lincoln Consist. Ct. Judge Michael Goodman Ch.

Michael Goodman Ch., after citing extensively from *Re Atkins,* held that the court clearly did have jurisdiction to grant a faculty ordering exhumation. He distinguished *Reed* v *Madon*[160] as the licence of the Home Secretary was not necessary where exhumation was from consecrated ground. Further, a right of burial once granted could not ordinarily be revoked.[161] Hence it seems that an exclusive burial right granted by faculty could normally be enforced against later infringing burials.

Some jurisdictional difficulties may emerge in seeking to enforce such an order. A faculty gives a licence: it is not a command.[162] Therefore the consents of rector or cemetery authorities having control of the site of the burial would need to be obtained. Further a right of burial in an alternative grave would have to be purchased.[163]

The ecclesiastical courts would be able to cite the relatives of the person wrongly buried in the vault, requiring them to appear and state any objection that they might have. In this way the court could do practical justice between the parties. If the issue affected a churchyard, the court could also cite the incumbent,[164] though it appears to be undecided whether the incumbent could be compelled to consent to the exhumation. Where the grave is situated in a cemetery more difficulty may be encountered if the officers of the cemetery company object to exhumation. The jurisdiction of the church courts is restricted by the decision in *R.* v *Tristram*[165] that the directors of a cemetery company are not amenable to jurisdiction of ecclesiastical courts. It is possible that these difficulties might be overcome by obtaining a declaratory faculty in the church courts and then moving to the temporal courts to seek to enforce the rights thus declared.[166] This possiblity is considered below.

UNCONSECRATED GROUND

The difficulty, highlighted by the case of *Reg.* v *Sharpe*,[167] was that while adequate protection was afforded to burial grounds of the established church, there was virtually no protection afforded to other burial grounds.[168] A son had got entry to a dissenter's burial ground on the pretence of measuring the family grave for the burial of his father. In fact, however, he dug up his mother's decaying remains and carted them off towards a churchyard. He was found guilty of a common law misdemeanor[169] but only because the consent of the trustees with the legal estate in the ground had not been obtained. An opposite decision would, as

160. [1989] 2 All E.R. 431.
161. Citing the headnote in *L.C.C.* v *Dundas* [1904] P.D.A. 1.
162. Newsom *op. cit.* ch. 7.
163. See for example *Re Atkins* [1989] 1 All E.R. 14 in which the consent of the rector of the churchyard in which burial had occurred and of the cemetery in which reinterment was proposed had been obtained.
164. Who would normally be the freeholder, but see "Burial in Churchyards" *supra.*
165. (1899) 80 L.T. 414, 416. They cannot be ordered to exhume or to consent to exhumation.
166. The abolition of the criminal jurisdiction over the laity in 1963 suggests that the faculty jurisdiction may not provide sufficient protection.
167. (1857) Dears. & Bell 160; 169 E.R. 959; 7 Cox C.C. 214. See also *Moreland* v *Richardson* (1856) 22 Beav. 596; 52 E.R. 1238 (right to injunction to protect sites in which exclusive burial rights given, but no protection for remainder of burial ground).
168. There was no property in a corpse: As Phillimore (op. cit. at p.667) says "It was at one time a vulgar error that a body might be seized by creditors." Burial grounds were said to be under the protection of the public in *Foster* v *Dodd* (1867) L.R. 3 Q.B. 67, 177; Phillimore op. cit. p.689.
169. And fined a nominal 1s., the court accepting that his motives were pious.

Erle, C.J. observed, have lessened the only protection for the burials of dissenters.[170] The facts of *Sharpe* (1857) prompted the enactment of section 25 of the Burial Act 1857 which requires the licence of the Home Secretary before an exhumation occurs from unconsecrated ground. The exact extent of that provision must now be considered.

THE HOME SECRETARY'S LICENCE

Section 25 of the Burial Act 1857 covers all exhumations from unconsecrated ground, as in *Reed* v *Madon*, and exhumations from consecrated ground unless the exception applies.[171] It provides as follows:

> ". . . except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial, without the licence under the hand of one of Her Majesty's Principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence . . ."[172]

In order to secure such a licence it is necessary in general to obtain the consent of the nearest living relative of the deceased, and of the nearest living relative or any other person whose remains must be interfered with in the exhumation process. The appropriate permission, a faculty or licence from the Home Secretary as appropriate, avoids criminal penalties that would otherwise follow,[173] but in no way alters civil rights. It does not give the right to burial in a place in which a burial right does not exist. Further, as *Reg.* v *Sharpe* shows, the permission of the owner of the site at which the first burial has occurred is a prerequisite for the legality of exhumation.

The scope of the exception in section 25 is ambiguous. Read in the context of *Sharpe* it seems clear that the Burial Act was supposed to protect unconsecrated ground, leaving the jurisdiction of the church courts over consecrated ground. It is now agreed that the exception applies where a body is moved within a churchyard or other consecrated burial ground.[174]

THE PRINCIPLES OF INJUNCTIVE RELIEF

In *Reed* v *Madon* the primary claim of the plaintiffs, at least in the pleadings,[175] was to an injunction requiring the defendants to take steps to secure the removal of Mrs Madon's remains. If granted this would have vindicated the exclusivity of the burial right granted to the Essads. The relief sought was an order that Mr Madon should provide his consent to the exhumation of the remains of Mrs Madon. Morritt J. rejected the claim for this relief.

170. (1857) Dears. & Bell 160, 163; 169 E.R. 959, 960. See also *R.* v *Lynn* (1788) 2 T.R. 733; 100 E.R. 394; *R.* v *Price* (1884) 12 Q.B.D. 247.
171. The Act applied to England including Wales. In Wales there appears to be no faculty jurisdiction and so a licence is always needed: Ency. of Forms & Precs. (5th ed.) vol. 6 para. 436 p.210 n.3 contra *Re Talbot* [1901] P. 1, 6.
172. See C.J. Polson and T.K. Marshall op. cit. ch. XIX esp. pp.300-303. In practice the Home Secretary acts. The D.G. Rossetti case is described at pp.297-8. A fee is prescribed by the Human Remains Removal Licence (Prescribed Fee) Order 1982 No. 364; see also 1981 No. 1739. 14 Halsbury's Laws of England (4th ed.) at 1197.
173. As in *R.* v *Jacobson* (1880) 14 Cox C.C. 522.
174. In the only direct authority, *R.* v *Tristram* (1899) 80 L.T. 414 the point was left open; the Home Secretary wrote to the Secretary-General of the General Synod of the Church of England on 18th March 1985 accepting the interpretation set out in the text.
175. At the trial their claim shifted to requiring removal of the infringing memorial erected to Mrs Madon and damages.

The main reasons advanced for the decision can hardly be disputed on the facts of the case. It was possible, as Morritt J. found, to give practical effect to the rights of the plaintiffs without the need for exhumation, so that the balance of convenience lay against the granting of injunction.[176] This was particularly true as the interment occurred without Mr Madon being aware of the Essad's claim to exclusive burial rights. This leaves open the possibility of relief where the burial occurs in flagrant disregard of an earlier grant of exclusive burial rights.

However, the other ground advanced by the judge does much to nullify the benefits of his holding that the right of burial was proprietary in nature. He pointed out that the exhumation of Mrs Madon required the licence of the Home Secretary, who had an absolute discretion in the matter.[177] He held that the court would be acting in vain in ordering the defendant to apply for exhumation because it could not enforce such an order.[178] This was on the basis that exhumation required the licence of the Home Secretary.

In *Matthews* v *Jeffrey*[179] an exclusive burial right in family "grave spaces" in Hanley Cemetery originally granted to A had passed, as Fry J. held, to B. C, the husband of the sister of B, caused his infant child to be buried in one of the reserved plots without B's permission. The jury awarded only a farthing's damages. The substantial point in dispute was the claim to an injunction requiring the removal of the infant's body. On this Fry J. said:

> "I am also asked to grant an injunction restraining the defendant from allowing the child's body to remain in the grave in question and I shall certainly not do so. It would, in my opinion, be highly improper and indecent to order the grave to be disturbed to remove the body of this child, who was after all a member of the family. Moreover, I am practically unable to make such an order, even if I desired to do so, inasmuch as the body could not be removed without the consent of the Home Secretary."[180]

Morritt J. followed this judgment in *Reed* v *Madon*.[181] With respect this passage in the judgment is unconvincing. The Home Secretary would be likely to refuse a licence for exhumation that was made against the wishes of the nearest living relative. But the court did have jurisdiction to order the defendant to make the application to the Home Secretary, if it was equitable to do so.[182] The assumption that the order would be in vain was on the basis that Mr Madon would refuse to obey the order.[183]

This reasoning means that the exclusive right of burial is in fact nugatory whenever another burial has occurred in the exclusive plot. It is another curious example of the inadequacy of rights that are protected in equity by specific performance or injunction. Certain rights, such as easements, seem to be protected as

176. At p. 440g.
177. At p. 440c.
178. At p.440d-e. Quite different reasoning (discussed above) would apply for removals within or between consecrated grounds..
179. (1880) 43 L.T. 796 in preference to 6 Q.B.D. 290.
180. (1880) 43 L.T. 796, 798. It does not appear whether the land was or was not consecrated. If it was, a faculty might have been sufficient. There is no report of an argument on the need for the Home Secretary's licence. In *Hubbs* v *Black* (1918) 46 D.L.R. 583, 590 Riddell J. described the demand that corpse of defendants should be dug up and carried off the plot as "ghoulish".
181. [1989] 2 All E.R. 431.
182. There is some evidence that exhumation will be ordered where two bodies have been confused so that the wrong body has been buried in a family grave: Ency. Forms and Precs. (5th ed.) vol 6 Burial & Cremation para. 436 p.210 n.4. The difficulty is that the Home Secretary's decision is administrative; *Reed* v *Madon* shows the need for a judicial discretion in disputed cases.
183. In *Re Kerr* [1894] P. 284, 286 the Consistory Court of London approached the Home Secretary to ascertain whether there was any objection on health grounds to the interment of ashes in a church.

of right by injunctions. But other rights depend very much upon the discretionary nature of the Chancery jurisdiction for their enforcement. In such cases they may almost cease to be property rights. The insistence upon the discretionary nature of the remedy supporting the right is such as to deny it the stability that is a pre-requisite of true proprietary status.[184]

CONCLUSION

This article has considered the nature of an exclusive burial right. It was prompted by the decision in *Reed* v *Madon*[185] concerned with rights in a cemetery owned by a private company. However it has been necessary to argue by analogy from rights in churchyards. A burial right does not usually convey a freehold estate in the grave plot. It is more akin to an easement. However, a difficulty with many burial rights in churchyards and most burial rights in cemeteries is that there is no identifiable land for the benefit of which the interest is taken. For this reason the right is not a true easement. It has been argued that it should be seen as an incorporeal hereditament, capable of existing in gross. The reason that is has been considered to be so important to establish that it forms some kind of interest in land is the concern that the right should bind a purchaser if the land containing the cemetery is sold. It has been suggested that a quite different approach – non-derogation from grant – might also give satisfactory protection. In the last section the legal regulation of exhumation has been considered. The effect of the decision in *Reed* v *Madon* is that an exclusive burial right cannot be vindicated after an infringing burial has occurred. The rule that exhumation cannot be ordered by injunction has been questioned.

184. Simon Garner (1986) 7 O.J.L.S. 60.
185. [1989] 2 All E.R. 431.