THE CONFLICT BETWEEN THE LAND OWNER, MINERAL RIGHT HOLDER AND THE MINING TITLE HOLDER IN SOUTH AFRICAN MINING LAW

by

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The conflict between the Land Owner, Mineral Right Holder and the Mining Title Holder in South African Mining Law

Introduction

South African law recognises that the right to minerals is one of the rights of ownership of land which can be subtracted from the full dominium. It was thus inevitable that the exploitation of South Africa's mineral wealth, in precious stones, precious metals and base minerals, should lead to a conflict between the interests of the owner of the land and the interests of the person, who by contract with the land owner or by law, became entitled to work the mineral deposits in such land.

The purpose of this dissertation is to examine the origins of such conflict, the form it has taken, the extent to which it has

been resolved and, to the extent to which it has been not resolved, how it might be resolved.

The law relating to mineral rights has always been part of the South African law of property. There is a dual relationship involved in the mining of minerals. On the one hand there is the relationship between the owner of the land and the holder of the mineral rights. On the other there is the relationship between the holder of the mineral rights and the State which controls the mining of particular minerals (such as precious metals, precious stones, natural oil, uranium and thorium and, in certain cases, the mining of base minerals), through whom the mineral right holder secures the right to mine ie secures a mining title.

A milestone in the legal analysis of mineral rights was the decision of Van Vuren and Others v The Registrar of Deeds.(1) In this case the judge regarded the rights to minerals as "in the nature of a personal servitude but freely assignable". The effect is that the owner of land remains the owner of the minerals therein until the minerals are severed from the land. The concept that the right to minerals can be held apart from the ownership of land is a concept recognised both by the common law and in South African

(1) 1907 TS 289.

legislation.(2)

Once the separation of rights to minerals from the title to the land has taken place, the problem understandably arises as to how the land owner may exercise his rights of ownership compatibly with the exploitation of minerals by the holder of the mineral rights or the holder of the mining title, ie whether these rights can be exercised beneficially for the optimum benefit of both parties.

Conflict has arisen in the following areas -

a. whether in the case of irreconcilable conflict between the rights of the land owner and the rights of the mineral right holder the rights of the latter must prevail;

b. whether the obligation of the mineral right holder to provide subjacent and lateral support extends only to land in its natural state;

c. the duty of support in relation to particular activities such as de-watering of a mine and the rights and

(2) Nolte v Johannesburg Consolidated Investment Company Limited 1943 AD 295 at p315; the Deeds Registries Act 47 of 1937 Sections 70 to 74.

obligations of a holder of mineral rights or of a mining title in the use of opencast methods of mining;

d. pollution of land, rivers and/or streams;

In an analysis of this conflict and the submission of proposals for its resolution, to the extent that it can be resolved, it is proposed to refer briefly to the Roman imperial monopoly of mines and minerals, to review the origins of South African law on mining and minerals in the Roman and Roman-Dutch context, to examine the statutory and regulatory provisions applicable to mining and minerals and the development and interpretation by eminent jurists of the common law, specifically in relation to the particular areas of conflict outlined earlier.

Historical

Minerals have always played an important role from the earliest times and mining represents one of the most ancient professions.

Gold is the first metal mentioned in the old testament,(3)

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(3) Genesis Chapter 2. Verses 10-12. Authorised King James version -

(Footnote continued on next page)

but it is in Egypt that the history of the use of gold begins. "Egypt was probably the richest gold producing area in the ancient world until the systematic Roman exploitation of Spanish gold-deposits started with the beginning of the Christian era. Her wealth was first unearthed at a time in the world's civilisation when the potentialities of gold were largely unrecognised and unsought in anything wider than regional commerce within the limits of a single culture ..... But historical and archaeological evidence leaves us in no doubt of the astonishing degree of that wealth or indeed of the great extent of the goldfields from which it was produced".(4)

According to Sutherland alluvial gold was systematically collected and worked and although it is clear that the working of copper preceded that of gold, its progress was hindered by the technical problems of "shaft-mining", a problem which did not affect

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(Footnote continued from previous page)

10. "And a river went out of Eden to water the garden; and from thence it was parted, and became into four heads.

11. The name of the first is Pison: that is it which compasseth the whole land of Havilah, where there is gold;

12. And the gold of that land is good: there is Bdellium and the onyx stone".

(4) Sutherland, C.H.V, "Gold", Thames and Hudson, London, 1959, p26.

"washing for gold", a process we know as "panning for gold". From the 4th millenium B.C. furnaces for smelting were developed along with a general improvement in technical skill which, led to "Systematic mining". "Although the progress of Egyptian mining technique from dynasty to dynasty and millenium to millenium cannot be traced in detail, and although the exploitation pattern of Egyptian goldfields is similarly obscured, it is quite clear from surviving evidence that it was from Egypt that the ancient world as a whole learned the main principles of gold mining and metallurgy at a very early period".(5) He quotes Diodarus' account of Egyptian mining methods in the later 2nd Century BC which he considers to be a fairly accurate description "from which it is clear that its essentials are an abundance of forced labour which made it possible to follow quartz veins through long underground galleries, followed by hand-milling under strict supervision on the surface".

On the laws which governed this early mining, Sutherland states: "Washing for alluvial gold, through the very simplicity of its methods and circumstances, was probably not subject to any centralised supervision in the period of early Egyptian culture - although a royalty of 10% seems to have been imposed, or at least

(5) Ibid, p29.

collected whenever possible, in respect of gold produced in this way. This hint of royal interest in the acquisition of washed gold becomes a certainty of rigidly exclusive royal claim when the mines themselves are considered. It is not possible to say just how early that claim was made and enforced. But the very necessity of slave labour in large quantity to drive passages through the solid rock .... leaves little doubt that as soon as the gold-mining industry was developed at all it quickly became a royal preserve."(6) When Ptolemaic Egypt passed from the control of Cleopatra to Octavian, Rome had gained the wealthiest prize ever won in warfare. In support of his contention that control of mines vested in the Egyptian state, Sutherland records that: "In the 3rd millenium BC the son of Phiops I appointed an Inspector of gold in Nubia; the existence of such officials is commonly known in later periods. If there had not, indeed, been a strict royal control of gold production it would have been difficult, if not impossible, for the first-dynasty King Menes, at the end of the 4th millenium, to set a prescribed and legal value upon gold in the form of small 14 gramme bars marked with his name. And when the kings of the 4th to 6th Dynasties (C.2720-2270BC) initiated or allowed the production of gold rings, not stamped with their name, but of a weight closely approximating to the bar of Menes and in fact constituting the earliest Egyptian currency in

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(6) Ibid, p31.

gold, they would have been unable to make or continue such an innovation (linked as it was to a corresponding system of stone weights) unless their control of gold itself had been virtually absolute".(7)

Rome first appeared on the historical horizon as a small, poor, rigidly organised community but by the beginning of the Christian era had become a mighty empire stretching from Spain in the west to Parthia in the east. Davies states: "The Roman Empire .... enclosed a sea suitable for navigation and commerce. It possessed mines of all metals used anciently and was thus self-sufficient. ..... Further, the Romans supplied metals to peoples outside their empire, on whom they thus had a political hold".(8)

The most flourishing periods of Roman mining were the late Republic i.e. after 50 B.C. and early Empire i.e. 27 B.C. New provinces were being explored and after their gold placers had been skimmed, the Romans undertook a systematic exploitation of their mines.

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(7) Ibid, p31.

(8) Davies, O., "Roman Mines in Europe", Arno Press, New York, 1979, p1.

One of the foremost characteristics of the Roman Empire was the huge standing army which was the only means of preserving the Empire intact. The Emperors, in order to finance the preservation of this army, had to have absolute control over the sources of mining, refining and coining, that is, an imperial monopoly of the sources of production was essential.

Development of the distinction between strict ownership and beneficial ownership.

Schönbauer is of the view that early civilisations had a clearly developed law of mining, but no law of mining rights, the latter being unnecessary as the land used for mining was State controlled public land and minerals were therefore merely regarded as fruits of such land.(9)

The view that the State owned the land, the minerals in it and the right to mine such minerals and that therefore, no conflict situation could arise, is supported by the following statement by Davies: "In the ..... Roman empire the question of ownership is complicated by the theory of the State's dominium in solo provinciali, so that there is no ultimate distinction between the

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(9) Schönbauer, E., "Von Bodenrecht Zum Bergrecht", 55 (1935), Zeitschrift Der Savigny Stiftung (Röm. Abt.), p193.

ownership of the soil and of the subsoil. In Italy, where quiritary ownership was valid, the Senate claimed the right to interfere in mining ventures; but perhaps the workings in Etruria, which probably were alone affected as they are the only ones of importance south of the Apennines, had been made ager publicus at the time of the conquest. The Roman State usually took over those mines which had been crown property at the time of the conquest, and perhaps all others known to exist, so that de facto it was normally the precarious as well as the absolute owner of minerals."(10)

A distinction must be drawn between strict ownership and beneficial or possessory ownership in Roman law. Strict or full ownership was said to embrace "the ius possidendi, the ius utendi, the ius fruendi, the ius abutendi, the ius disponendi, and the ius prohibendi - the first five being descriptive of the totality of ownership and the sixth descriptive of its exclusiveness."(11) To constitute full ownership all the above mentioned rights had to be present. Where all these rights were vested in one person he was the sole owner. Where all these rights were vested in two or more

(10) Davies, O., op. cit., p3.

(11) Cowen, D.V., "The South African Sectional Titles Act in Historical perspective: An analysis and evaluation", 1973, VI CILSA at pp23-24.

persons, the ownership of each was limited or restricted. Thus where one person had certain restricted and limited rights of ownership in land eg the rights of possession, use and enjoyment and another had unlimited and residuary rights, in that land, a distinction had to be drawn between the strict ownership (dominium strictum) and the beneficial ownership (dominium utile) of that land.

According to Roman law, both during the period of the Republic i.e. 509 B.C. and the period of the Empire, i.e. 27 B.C. ownership proper (dominium strictum) of all lands was vested in the State, and the State might or might not have had vested in it also the beneficial ownership (dominium utile) of the lands. Thus Ager Romanus belonged to the Republican State both in strict ownership and in beneficial or possessory enjoyment, whilst Ager Publicus too belonged to the Republican State but in strict ownership only, the possessory and beneficial ownership thereof being vested in the occupants thereof, who were tenants of the State, paying a rent or royalty to the State. In time, Ager Publicus became confined to provincial lands only, and assumed the name of Solum Provinciale. Eventually, when the Empire was fully established, the emperor developed from being the representative of the State to being the State itself and entitled therefore to the strict ownership (dominium strictum) of all lands within the ambit of the Empire. All occupants of land were entitled, at most, to the beneficial

enjoyment of their properties as tenants or possessors thereof from the State.

It appears that this same distinction, in respect of ownership, between dominium strictum and dominium utile, was applied to mines and minerals. Furthermore, in certain countries conquered by the Romans, eg Spain, gold and silver mines had, prior to such conquest, belonged exclusively to the State, both in respect of ownership and beneficial occupation, and were worked directly for the State by workmen in the State's immediate employ. The Romans, pursuing their accustomed policy of adopting the prevailing customs of such conquered countries, succeeded to the status of the conquered government and thus also to ownership of the mines of gold and silver.

By a decree of the Emperor Gratian (AD 367 to 383), imperial mining rights were defined as being an exclusive right in the crown to the full legal and beneficial ownership of all gold and silver mines; and a right in the crown to receive, in respect of all other mines, a proportion of their produce. This proportion was called the Canon Metallicus, and usually consisted of a one-tenth part of the produce, payable directly by the mine-worker to the crown. If the mine-worker was also the owner of the lands in which the mines were situated, then he was owner of the minerals subject only to the

payment of the Canon Metallicus. If, however, the mine-worker did not own the lands, then in addition to such one-tenth part of the produce payable to the crown, he was required to pay a further one-tenth part of the produce to the owner of the lands.

This definition of imperial mining rights was recognised and adopted by subsequent emperors, notably by Emperors Theodosius II (AD 408 to 450) and Valentinian III (AD 425 to 455): Accordingly, this definition of imperial mining rights appears to have become the expression of the measure of Roman imperial rights in respect of mines.(12)

Davies further opines that "the distinction between ownership of the soil and of the minerals beneath it can only arise with a developed mining industry; for in early days, when the ore is near the surface, an extensive system of opencasts or pitting would make agriculture impossible, and so it would be necessary to buy out the owner".(13) This is an interesting statement from the point of view that South Africa has a developed mining industry and yet the problem of the conflict situation arising from the use of the

(12) Merivale, C., "History of the Romans under the Empire", Longmans, Green, and Co., London 1851 - 1862, Volume 3 pp31-33 and Volume 4, pp44-45.

(13) Davies, O., op. cit., p2.

opencast and pillar extraction methods of mining remain unresolved. In Roman law the usufructuary was allowed to work existing mines, but he was not permitted to open up new mines unless this could be done without altering the character of the property - D.7.1.9.2, 3 and D.7.1.13.5. Minerals were regarded as fruits.(14)

Buckland and Macnair state: "There was much regulation of mining rights, notably, in the later Empire the rule that lodes could be pursued under neighbouring property subject to royalties fixed by law".(15) "Most mining areas were the property of the State, and mining in Italy was restricted, possibly for political reasons."(16) In fact, during the Principate (27 BC - AD 284), it was only in respect of public land that a separate concession to mine could be obtained. The major sources of information of mining on public land are the bronze tablets found in the mines of Aljustrel, Portugal in 1876 and 1906 respectively. The two laws written on these tablets are the Lex Metalli Vipascensis and Lex Metallis Dicta. They show that the mining communities were

(14) See Viljoen, H.P., "The Rights and Duties of the holder of mineral rights", Thesis, Leiden, 1975, pp6-9, and Master v African Mines Corporation Ltd, 1907 TS 925.

(15) Buckland, W.W. and MacNair, A., "A Manual of Roman Private Law", Cambridge University Press, 1953, 2nd edition, Cambridge, p62.

(16) Ibid, p101.

controlled by Procurators, who granted licences for trading monopolies and also managed all details of life on the mine. Gold and silver in particular, being closely linked to the economics of political power, it was natural then, as it is today, that the control and supervision of the mines be retained as the personal prerogative of the Emperors and the regulations found on these tablets consist mainly of administrative regulations confirming such prerogative.(17)

Roman Law did not develop the concept of a separation of the rights to minerals from the ownership of land. However, in South Africa, with its dependence upon the mining of minerals and the widespread development of mining activities, the concept of holding of mineral rights apart from ownership of the land to which they relate has developed as an indigenous product of South African jurisprudence. When Roman law was received in the State of Holland there was little or no mining activity with the result that scant attention was given to minerals or mineral rights. The body of mining law developed in South Africa over the past century must, therefore, be seen to be a combination of legislation, judicial decisions and reference to old authorities, in an effort to interpret certain concepts in the interests of the importance of the mining industry to the economy of South Africa.

(17) See Dale, M.O., "An historical and comparative study of the concept and acquisition of mineral rights", Thesis, Pretoria, 1975, pp5-9.

Chapter I - Statutory Law

> "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions and it is for the Courts to decide when the modifications which time has proved to be desirable, are of a nature to be effected by judicial decision and when they are so important or so radical that they should be left to the legislature".(1)

Under South African law, based on Roman-Dutch law, the basic principle from which mining law has developed is Cuius est solum eius est usque ad caelum et usque ad inferos, ie, the owner of land is also the owner of the space above and below the surface of the land.(2) Thus the owner of land is also the owner of all the minerals in and under his land. Despite the recognition of this principle in South African law, the right to mine and dispose of certain minerals is by statutory enactment vested in the State which in turn grants the right to mine to private individuals or companies. Such reservation of the right to mine constitutes a detraction from the full dominium of the land owner and was described in the following manner by Wessels J: "By the Roman-Dutch

(1) Innes, C.J. in Blower v Van Noorden 1909 TS 890 at p905.

(2) See Franklin, B.L.S. and Kaplan, M., "The Mining and Mineral Laws of South Africa", Durban, Butterworths, 1982, pp4-5.

law the ownership in the minerals lies in the Dominus of the soil. The gold law has not entirely abrogated the common law, but it has modified it to the extent of giving to the State the right of disposing of precious metals. The gold law provides the machinery by which the State disposes of these metals. The farm is proclaimed and the owner's full rights of ownership are, during the proclamation suspended..... The State therefore confers the privilegium of extracting minerals from a certain area upon the person who takes out a licence ..... The privilegium extends only to the extraction of minerals, for ..... the disposal of the surface of a claim belongs to the Government and the claim-owner can only use the surface for the purpose of working his claim..... Now, the State does not merely give the claimholder the use of the claim..... It gives him the right of destroying the whole nature of the ground he occupies and of taking away all the precious minerals under the surface".(3)

The first governmental steps directed to a separation of the rights of the owner of the land from the rights to mine certain minerals in respect of it are reflected in Sir John Cradock's Proclamation of 1813 applicable only to the Cape Colony. The earliest reference that I have been able to find in the South

(3) Neebe v Registrar of Mining Rights 1902 TS 65 at p85.

African Republic to minerals was "Volksraadsbesluit van 14 tot 23 September 1858" of the South African Republic, article 29 of which provided: "Met betrekking tot het voorstel van den Uitvoerenden Raad, omtrent plaatsen waar mineralen gevonden worden, eigenaars van dergelijke plaatsen verpligtende dezelve aan het gouwernement tegen een billijken prys te verhuren of te verkoopen, werd dit voorstel door den Volksraad eenparig goedgekeurd en bekrachtigd". - This was almost confiscatory legislation but with minimal compensation. However on 21 September 1859 the Government appears to have had a change of heart and a further Volksraadsbesluit revoked article 29 of 1858 viz:

> "Art 68 - Wordt besloten, art 29 der Raadbesluiten van 22 Sept 1858 af te schaffen en de ontginning der mijnen in deze Republiek open te zetten voor particuliere maatschappijen onder bescherming en aanmoediging van den Hoog Ed. Uitvoerenden Raad aan wien tevens is opgedragen voldoende voorzorgen te nemen in het belang van den Staat."

The effect of this was the throwing open of the exploitation of mines but only to companies under supervision of the Executive Council which was to protect the interests of the State.

The purpose of Ordonnantie 5 of 1866 of the South African Republic was given in the introductory words, viz -

> "Nademaal het noodig geoordeeld is voorzieningen te maken omtrent het ontginnen en bewerken van mijnen, binnen de Zuid-

Afrikaansche Republiek, zoo wordt mits dezen bepaald en vastgesteld, dat alle mijnmaatschappijen opgerigt zullen moeten worden onder de navolgende bepalingen".

The ordinance is fairly short and provided for registration of the relevant company, that minerals could only be extracted from those properties allocated by the government, and that the government was entitled to varying percentages of the value of minerals extracted depending on the kind of mineral eg 0,5% of copper but 1,5% of iron. The companies were also obliged to inform the government of any finds to enable it to make the necessary regulations. The so called "shareholders" were obliged to enter into a notarial agreement recording their interests and this was to be registered. Thus far there appeared to be no thought that any conflict between land owner and mineral right holder could occur as all mineral exploitation appeared to be firmly under government control. The next relevant legislative provision was Volksraadsbesluit of 7 June 1870 which dealt with the granting of land in Bloemhof. Article 159 provided as follows -

"3. Dat een gedeelte grond zal uitgenouden worden voor het gouvernment voor het graven van diamanten en edelgesteenten.

4. Dat de percenten op diamanten en andere edelgesteenten, alsmede op alle metallen gevonden op private eigendommen zullen betaald worden volgens de wetten van den Staat ..... De Raad besluit, ... dat 10 plaatsen van de gronden tusschen Vaalrivier en Hartsrivier, onderzijde het district Bloemhof, voor het gouvernement moeten uitgehouden worden, daar waar de Regering zulks mogt goedvinden, en bepaald vergraven van en op alle diamanten mineralen en

> edelgesteenten op al de nog open te zetten gronden blyft behouden, om daarover naar goedvinden te beschikhen, met dien verstande, dat wanneer daar het graven bovengemeld, schade aan gebouwen of landerijen enz van private landerijen enz, van private eigenaren mogt worden gedaan, die schade daar de Regering moet worden vergoed, zullende door de Regering worden zorg gedragen dat wanneer vergunning tot graven of zoeken wordt verleend door partijen securiteit voor dergelyjke schade wordt gesteld".

This appears to be the first time that damage to the surface of land was considered and the legislation now provided that the land owner was to be given monetary compensation. The phraseology of these "besluiten" was already indicative of the trend the law was to take in regard to the rights of the land owner as opposed to those of the holder of mining rights, namely that the holder of mining rights (in those days the holders of concessions) would have priority over the land owner. "The ordinances passed from time to time before 1889 to regulate mining on the Witwatersrand and elsewhere, commonly called the gold laws, show that the scheme of the legislation was to create or recognise mining rights, exercisable under a system of licence and control, which were not dependent on the possession of full rights of ownership in the ground worked, but were to be reconciled with the concurrent ownership rights of others."(4) ie despite the cuius est solum principle, South African law has, from the earliest times, recognised the constitution of real rights in minerals found

(4) Lord Sumner in Minister of Railways v Simmer and Jack Proprietary Mines 1918 A.C. 591 at p600.

on another's property. With this ideology as a base, the earliest reported, not very significant, discoveries of gold, led to the enactment by the Volksraad of what might be called the first gold law of the Transvaal viz Law 1 of 1871. Under this law the State assumed full control of mining for precious stones and precious metals. Article I with its opening words "Het mijnregt op alle edelgesteenten en edele metalen behoort aan den Staat....", is reminiscent of the early Roman/feudal concept that gold and precious stones found within the confines of a kingdom belonged to the Emperor or King. This State involvement in regard to precious stones and precious metals has been followed in every subsequent law, in the Zuid Afrikaansche Republiek, the Transvaal Colony and ultimately the Republic of South Africa. Although it has been argued correctly through the years, by the State, that this does not amount to an expropriation of the ownership of minerals themselves but only a vesting in the State of the right to mine such minerals, it is nevertheless an adrogation of one of the vested rights encompassing ownership and difficult to reconcile with the "cuius est solum, eius est a coelo et ad inferos" maxim. Sir John Wessels in commenting on this modification of the cuius est solum principle states: "In general ..... the principles and rules of the Roman-Dutch law still apply. In one respect, however, in various parts of South Africa a considerable change has been made in the law of ownership. I allude to the legislation with regard to the mining for precious

metals, stones and other minerals. The Dutch jurists accepted the principle of the Roman law that the owner of land is the owner not only of the superficies but of all that is found below the surface. Hence by the law of Holland the minerals under the ground belong to the owner of the land. Where there was no reservation in the title this was the law throughout South Africa until the mineral wealth came to be explored. The fear that the benefit resulting to the whole community from the development of the mineral resources might be curtailed if the owner had the exclusive right to the minerals led the legislatures of the Transvaal and Rhodesia to modify the principle "Cujus est solum ejus est usque, ad coelum et ad inferos ..... The owner's comm n law dominium in the minerals under the soil has been reduced to a very shadowy right. If in theory the dominium in the minerals still belongs to him, in practice he is completely debarred from enjoying his rights of ownership. The farm itself can in certain cases be thrown open to the public, and when proclaimed as a gold-field the owner's rights over the farm are to a large extent suspended. It still remains his property but as long as the field is proclaimed he can only enjoy such parts as are not occupied by the public as claims or stands. If, however, the farm is deproclaimed, so that it is no longer subject to the gold or diamond law, then the owner resumes his suspended dominium."(5)

(5) Wessels, J., "History of Roman-Dutch Law", Grahamstown, 1908, pp486-487 and p488.

Should deproclamation occur the question of the quality of the then remaining dominium, particularly of the surface, arises, and the adequacy or otherwise of statutory provisions for the restoration of the surface to provide for full enjoyment by the land owner, will be discussed at a later stage in this dissertation. Reverting to Law 1 of 1871 and its various provisions to ensure tight government control eg that no one had the right to dig for precious metals and precious stones unless he was in possession of the necessary licence, the first regulation between the land owner and the State in regard to mining on private land appeared, viz Article 15, which provided for control of the diggings by the State in exchange for the land owner receiving one half of the licence moneys payable to the State.

The alternative provided for was that the State would purchase the land if the owner was willing to sell. This was an early recognition of the potential conflict between rights of the holder of the right to mine and the owner of the land and an attempt to solve such conflict by legislation. A similar provision exists in the present law(6) where if, as a result of mineral exploitation

(6) Section 6 of the Mineral Laws Supplementary Act 10 of 1975 (as amended by Act 23 of 1981).

on land, such land or any portion thereof becomes unsuitable for agriculture or that portion not being used for mining is or is likely to become an uneconomic farming unit, the State can, but only with the owner's acquiescence, itself, or compel the mineral right holder to, purchase the whole or a portion of the land.

As the discoveries of gold in particular, escalated, bringing with them an avalanche of prospectors into the South African Republic, the Volksraad recognised the need for legislation to control the pegging and mining of claims and to deal with the advent of the "Uitlander" whose only allegiance was to gold, an allegiance so aptly captured in the words of G C Colton -(7)

> "They who worship gold in a world so corrupt as this have at least one thing to plead in defence of their idolatry - the power of their idol. This idol can boast of two peculiarities; it is worshipped in all climates, without a single temple and by all classes without a single hyprocrite".

Thus Law 1 of 1871 was followed by Law 2 of 1872 which regulated the mining of precious stones and precious metals. The provisions followed a similar tenor to those in the 1871 law. However Article 16 extended the rights of the land owner (whether the government or a private person) by providing that no prospector had

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(7) Presidential address to the Chamber of Mines - Goode, R.C.J. 1972 who cites Colton, G.C. without source.

the right by virtue of his prospecting operations to cause damage to houses, lands, gardens, kraals, dams, water furrows, plantations etc. In addition, this time, the full licence monies were allocated to the land owner. The potential and/or real conflicts between the land owner and mining right holder, were escalating, as the tempo of mining and prospecting increased and the government of the day attempted to solve these potential conflicts by legislating in this regard. Similar provisions have been carried forward into present legislation.(8) Law 2 of 1872 was followed by Law 7 of 1874 with similar provisions and again prohibited damage by virtue of prospecting operations to houses, lands, gardens etc., but made no provision for payment of licence monies or a portion thereof to the land owner.

One of the earliest cases heard in the Cape is interesting in this context. Although it concerned the interpretation of Sir John Cradock's Proclamation of 1813, (relevant only to the Cape Province) in relation to the right of the Government to remove gravel from lands held on quit-rent tenure, certain basic principles were enunciated. Some of these apply today in a conflict situation between the owner of the land and the holder of the mineral rights.

(8) See Section 47 and Chapters X to XII of the Mining Rights Act 20 of 1967 (as amended).

Thus in De Villiers v The Cape Divisional Council it was said -(9)

> "It has been urged that if the defendants' claim to the right of digging gravel on the plaintiff's land were to be sustained, his land would be rendered valueless .... But is it a fact that the plaintiff's land would be rendered valueless? The defendants do not deny that they are bound to use their rights in a reasonable manner; .... There can be no objection, however, to a judicial declaration to the effect that the defendants are not entitled to take materials from such portions of the plaintiff's land as have been improved by cultivation, irrigation, or otherwise, without compensation to the plaintiff .....".

Law 6 of 1875 had some interesting new provisions which did not appear in the earlier enactments. It would appear from these provisions that the rights of the land owner were becoming increasingly more important. A now standard provision, for the appointment of a committee by the gold commissioner consisting of the holders of business or digging licences, was repeated, but this time increased from 5 to 9 members with the additional provision that in the case of gold fields on private land the owner or owners of the land were entitled to be represented by a member of the committee, who would presumably draw the land owner's interests to the attention of the diggers. Article 17 provided inter alia that no one could mine on private land, without a digger's licence and without the consent of the owner. The permission of the latter took the form of a licence available from the owner. Thus this law

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(9) 1875 Buchanan 50 at pp68 - 69, De Villiers, C.J.

specially provided not only for a digger's licence from the State but also for the purchase of a special licence from the land owner without which the digger was not permitted to pursue his mining activities. This was the first instance of an owner of private land being in a position to prevent prospecting on his property. The penalty for contravention of these provisions was a fine of not less than £5 and not more than £25 for each infringement and failure to pay such fine attracted a prison sentence with or without hard labour, for not less than one month and not more than 12 months. These were rather stringent provisions when one considers the present day common law position that the holder of the mineral rights has priority over those of the land owner(10) and the present statutory position whereby on proclaimed land or land held under mining title, the land owner's rights are suspended and, though he retains the dominium, he, like any other person, requires the permission of the State to occupy or use the surface.(11)

Article 18 went a lot further than any previous law in protecting the land owner's rights, and the title to this portion of the article is "Regten van eigenaren beschermd". The first part of this article provided for the fees payable for a digger's licence

(10) Hudson v Mann and Another 1950(4) SA 485(T) at p488E-G.

(11) Section 90 of the Mining Rights Act 20 of 1967.

but in addition for the protection of the land owner's rights as follows -

> "welke licentie hem het regt zal geven om te prospecteeren of te delven op gouvernementsgronden, als ook op private gronden, in zooverre als daaroor niet schadelijke inbreuk gemaakt wordt op water en hout van eigenaars, voor welk gebruik de toestemming van den eigenaar verkregen moet worden totdat die gronden als goudvelden geproclameerd worden, in welk geval de eigenaar op redelijke wijze gecompenseerd of vergoed moet worden door het gouvernement uit de inkomsten de delverijen".

Here once more provision was made for payment of one half of the licence monies to the land owner but the total of licence monies collected for the right to carry on trade or business on any portion of the property was to be paid over to the land owner.

Article 19 provided that if the Gold Comissioner considered it necessary, in his discretion, he might give consent for the digging of water furrows or sloots through private property bordering on the farm on which mining was taking place, provided such water furrows or sloots did not interfere with the irrigation of land or cause inconvenience or damage to the owner or owners of such neighbouring properties. The Gold Commissioner also had the right to permit construction of dams on neighbouring private property on the understanding that the owners of such properties were indemnified against damage. In the case of dissension the matter was referred to arbitration and the compensation had to be paid prior to the

allotment being conferred. Once more, in Article 21, prospecting which caused damage to houses, gardens, dams, waterways and tree nurseries, was prohibited. In the case of dispute, as previously, the matter was submitted to arbitration.

The practice of severing mineral rights from land ownership appears to have originated in the Transvaal in 1881. This is substantiated by Volksraad Resolution 363 dated 8 November 1881, reading as follows -

"Art. 1 Dat geen verkoop van regt op mineralen, of verpachting of afstand van vruchtgebruik van zulk een regt op mineralen, verondersteld aanwezig te zijn of werkelijk aanwezig op eenige plaatsen zal wettig wezen, zonder dat de acte over den verkoop, de verpachting of het vruchtgebruik opgemaakt, behoorlijk geregistreerd is ten kantore van den Registrateur van Acten, de betaling voor welke Registratie tevens zal onderworpen zijn aan eene betaling van dezelfde Heerenregten als bij verkoop van vast eigendom".

(My translation):

"That no sale of right to minerals or lease or cession of usufruct of such right to minerals presumed to

exist or actually existing on any farms shall be lawful unless the deed of sale, the lease or the deed of usufruct is properly registered in the offices of the Registrar of Deeds; the payment for which registration shall be subject to payment of the same transfer duty as on a sale of fixed property".

Law 1 of 1883 deviated from previous laws in that Article 2 provided that both the ownership and the right to mine precious stones and precious metals, vested in the State ..... "with the exception of all previous lawful transfers of that right by means of concession to private persons or companies". This provision is interesting from two points of view, viz -

(i) it is contrary to the cuius est solum maxim and was the only time that the legislature appeared to have recognised separate ownership of minerals from ownership of the land, prior to extraction of such minerals from the soil;

(ii) could the words "lawful transfer" imply a holder, separate from the land owner, of the right to mine particularly in view of Volksraad Besluit 363 of 8 November 1881? Dale,(12) negates this view both

(12) Dale, M.O., "An Historical and Comparative Study of the Concept and Acquisition of Mineral Rights", Thesis, Pretoria, 1975, p183.

in this context and in the context of Article 4 which provided that in the event of gold being found in payable quantities on private land, the "owner" would have a preference for six months to obtain a concession to dig for gold on such land on terms approved by the State. He states that "The word 'owner' in the law was presumably intended to have applied to the land owner and not to the holder of mineral rights, the possiblity of separate holdings of mineral rights not yet being recognised in the laws".

Article 9 provided that the Gold Commissioner was to take account of the comfort of the diggers, do everything to promote their well being and thus ensure the expansion of the diggings. The element of State control was fortified by Article 19 which provided that a person guilty of rebellion or revolt forfeited his rights and property on the gold fields to the State, whilst in terms of Article 34 the State had the right to take over the whole or part of a proclaimed gold field subject to the payment of compensation to the holders of claims. In Dale's words, "The main innovations effected by this law therefore seem to have been to give the owner of private land a preference on proclamation of his land .....".(13) Already

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(13) Ibid, pp183-184

land owner's rights were being given more and more prominence albeit that the concept of separate holdings of mineral rights was perhaps not yet recognised in the laws.

In 1884 it seems that the existing mining laws were deficient in certain respects and an addendum to Law 1 of 1883 was published on 27 October 1884 and here the land owner's rights appeared to be of negligible importance. From this point of view the only relevant section was Article 13 in terms of which no owner of property bordering on rivers or other water ways, had any right of action against the State, the gold inspector, or gold diggers or a gold mining company who were mining, prospecting or digging, for making turbid or muddy the water in such rivers by the use of such water for mining purposes. For the first time, by Volksraad resolution of 10 November 1884, the State was authorised to grant licences, for the working of coal mines on State land, the mining laws up to this point having dealt only with precious stones and precious metals.

This addendum was followed by Law 8 of 1885 which contained wider and more detailed provisions than its predecessors and a much more clearly conceived system of balancing the land owner's and digger's rights on private land. The law provided for owner's reservations of certain areas prior to proclamation, and introduced a prohibition on prospecting and mining under such reserved areas as

also under stipulated surface improvements. In Article 7 the private land owner was permitted, without a licence, to prospect and mine on his own land for precious stones and precious metals but he was not allowed to permit public digging on his own land. However Article 8 permitted the private land owner to give written permission to a third party to prospect on his land in which event such third party was required to obtain a "Licentie tot Onderzoek" from the Mining Commissioner and was compelled to pay licence monies to the State. The land owner was entitled to a one-half share of such licence monies. It was in this law (in Article 18), for the first time, that there was reference to the grant of a "mynpachtbrief" (ie a right of mining) to the owner, where precious stones or precious metals were found by him personally, or by a prospector as envisaged in Article 8. The owner had to be in possession of a mynpachtbrief if he wished to open and exploit any mines on his farm. However, the State retained the right to refuse the granting of a mynpachtbrief and to proclaim portion or the whole of the property. If this decision was taken then the land owner had the right, in preference and before other diggers, to reserve to himself 10 claims. He was able to exercise this right before other diggers in that he was notified of the intended proclamation one month in advance. Prior to proclamation, the land owner was, in terms of Article 20, consulted on which areas, eg gardens, built up areas, lands and water furrows in the vicinity, would not be available for prospecting and mining.

Again provision was made in Article 35 that a land owner, whose property had been proclaimed, would, as long as he remained owner of the land, be and remain a member of the diggers committee the purpose of which was to make rules and regulations to meet local requirements on the diggings, but not in conflict with the law or any other Volksraad resolutions. A specific right given to this committee in terms of Article 48 was the apportionment of water but with the strict injunction to have regard to the owners of private property.

By an amendment to Law 8 of 1885 dated 29 July 1886, the law began to give effect to a policy which endures to the present day, namely, that the exploitation of the mineral wealth of South Africa was and is of paramount importance for the economy of the country. The owner of private land could now no longer veto the proclamation of his property but was compensated by an increase in the number of owner's claims available to him on proclamation.

At this stage it is interesting to note Volksraadbesluiten Art 1422 of 9 August 1886 confirming Raadbesluit Artikel 157 dated 9 August 1886 which read as follows - "Dat alle overeenkomsten omtrent afstand van regten op mineralen of omtrent regten om te delven, welke niet voldoen aan de voorwaarden genoemd in het eerste lid van Art 14 van Wet 7, 1883, ab initio nietig zullen zijn en dat

niemand uit zoodanige overeenkomst eenige actie hoegenaamd zal hebben" - a confirmation that the severance of the rights to minerals, in respect of land, from the title of land, was recognised in the law of the Transvaal. The very recognition of this principle now created the situation in which the exercise of their respective rights by the holder of the mineral rights and the owner of the land would in all probability give rise to a conflict of interests.

Law 10 of 1887 was a further amendment of Law 8 of 1885 but effected no major changes with regard to the rights of the land owner. It did however impose a new obligation on the land owner by an amendment to Article 20, to fence his owner's reservations and provided further that the State could erect, without payment of compensation, any State buildings on such areas, such buildings to remain the property of the State. This provision is of course contrary to the Roman-Dutch principle omnequod inaedificatur solo, solo cedit (movables affixed to immovables accede to them) and also a limitation to the cuius est solum maxim, to the effect that the owner of the land owns it upwards to the skies and downwards to the centre of the earth.

A further amendment occurred by Law 9 of 1888 which again did not alter the land owner's rights in any material way. After 1885 Volksraad Resolutions followed one upon the other to deal with the

feverish search for minerals that took place and also with the problems arising after the official proclamation, on 15 September 1886, of certain farms on the Witwatersrand, as public diggings.

As a result a new gold law, Law 8 of 1889, was enacted on 23 September 1889. Once again a reversal in policy in regard to privately owned land manifested itself in Article 10, which provided that unless the land owner prospected on his land himself or gave permission to a third party to do so, the State had no power to proclaim his land as a public digging nor had a third party the right to compel him to permit prospecting on his property. Where private property was proclaimed as a public digging, Article 17 prohibited damage to the land owner's improvements eg his house, outbuildings, water furrows and lands, without his consent and further provided that under all circumstances sufficient water had to be available for the land owner's cattle and watering of his gardens and lands.

In Greathead v Transvaal Government(14) Innes, C.J. commenting on the policy of the gold law from 1889 onwards, said: "The policy and scope of the gold law of 1889 and its successors, was to vest the sole right of mining for, and disposing over, precious metals in

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(14) 1910 TPD 276 at p288

the State. So far as the surface was concerned the exclusive rights of the owner were recognised to portions of it, such as his werf, his garden, his cultivated lands and so on; but, subject to those reservations, the government had in effect the control of the surface for purposes connected with the industry and the welfare of the population which it attracted".

Law 8 of 1889 was followed by an amending Law 8 of 1890 and it was in this law that there was the first reference to the grant of a Certificate of Bezitrecht, which was registrable and evidenced title to claims pegged or water rights. These certificates were eventually made irrefutable by Law 10 of 1891 thus evidencing real rights. Article 66 of Law 8 of 1889 was amended by Article 23 of Law 8 of 1890 and made provision for the issue of "bewaarplaats" licences for those portions of the property where no gold bearing reef or alluvial deposits appeared to exist, where such portions of the property were required for the depositing of tailings or other waste, pans or dams.

Law 10 of 1891 and Law 18 of 1892 followed, but with no significant changes generally, or specifically as regards the rights of the land owner. The only innovation was Article 60, in both laws, which provided for the allotment of ground for gardens and plantations on private proclaimed farms two years after proclamation

in such places where no gold bearing reef or alluvial deposits appeared to exist. Such allotment was however subject to the following conditions -

1. The allotment of such plots was effected on application by the owner to the State after investigation by the Mining Commissioner concerned and at the instance of the Mines Department and subject to such conditions as the owner might impose.

2. The earlier of the two laws provided that, should it appear at a later date that gold-bearing reefs were present, then the person entitled to that piece of land would have a preference to work it subject to the necessary digger's licence. Should such person not wish to make use of this preference, then the right could be allotted to another provided that the latter compensated him for all work and improvements on that land as assessed by arbitrators. This second condition was more specific in the later law in its reference to the preservation, side by side with mining, of agricultural pursuits. It provided -

> Should it appear at a later date that gold bearing reefs are present, then such portion traversed by such

> reefs shall be allotted in the usual manner, on the understanding that should damage be done to gardens or plantations, compensation for such damage should be paid by the licence holder or holders after assessment of same by arbitrators.

Once again this was a statutory attempt to reconcile the conflicting interests of mining and other surface uses. Article 60 of both laws provided that once plots had been allotted for gardens and plantations, such plots were not to be used for other purposes. Article 17 of Law 18 of 1892 was also interesting in that it was the first time, when referring to owner's claims that it specifically mentioned the owner's "werf" - his homestead. Water-rights made an historic first appearance in the provision dealing with the prohibition of prospecting and digging in certain areas, in Article 21 of Law 18 of 1892. Finally, both laws provided a last chapter of provisional rules for the mining of base minerals on proclaimed land. Authority was given for the granting of a licence to an applicant, who had the consent of the land owner, and subject to any conditions the land owner might choose to impose, to prospect and dig for coal, asbestos, cobalt, phosphate, lead, copper, tin or any other base mineral.

Law 18 of 1892 had an additional chapter dealing with stone crushers, rock quarriers and chalk burners who also required licences for such activities, with the exception of private owners indulging in such activities for their own benefit. Once again the

consent of the land owner was a requirement for such activities on private land subject to such conditions as he might wish to impose. The licence holder was entitled to remove his stone, rock or chalk from the designated stand or stands and was furthermore entitled to one stand for residential purposes and one or more special stands, "bewaarplaatsen" for the working of stone, the burning of chalk and any other purpose in connection with the licence. All these provisions followed a pattern of preoccupation with preserving the land owner's rights whilst at the same time stimulating and encouraging a vibrant mining community.

On the topic of bewaarplaatsen Innes, C.J. said: "Bewaarplaatsen were prior to 1908 included among the localities on or in which mining was forbidden. The State therefore could neither exploit nor dispose of the precious minerals which underlay them. Nor could the owner. Deprived of his surface rights in favour of the licensee of the site, and of his mineral rights in favour of the State, he retained a bare dominium which he could turn to no practical account. First Volksraad resolution of 25 August 1896, provided that the proceeds of the sale of the right to undermine bewaarplaatsen should be equally divided between the State and the owner of the land. The position which would have arisen had that policy been carried out is irrelevant; because it was not carried out and the besluit was repealed by the gold law of 1908".(15)

(15) Modderfontein B Gold Mining Company Ltd. v Commissioner for Inland Revenue 1923 AD 34 at p44.

It was only in 1917 that a direction was given by Parliament in Act 24 of 1917, that the registered owner of the bewaarplaats should receive a share of the nett sum accruing to the crown from the lease or other contract disposing of the undermining rights, Section 52 of the gold law of 1908 having vested in the crown the right to mine for precious metals underneath a bewaarplaats.

Law 3 of 1893 was the first piece of legislation dealing specifically with the operation of a mine. The heading of the first chapter was "The protection of the surface in the interests of public safety and public traffic". This chapter was short and in general provided for the following matters -

1. The fencing of those areas where large fissures or subsidences had occurred or could be expected and the erection of eye-catching warning notices to this effect.

2. It prohibited mining in places which would endanger residential stands, railways, water rights etc. and further provided for safety pillars of mineral deposits not to be removed.

3. It prohibited digging through such safety pillars except with the specific written permission of the Mine Inspector.

4. It prohibited the depositing and heaping of waste of coal mining operations on land where fissures or subsidences had occurred or were likely to occur, whilst it was prohibited to clear away such waste by burning.

5. Open works or shafts had to be fenced and prospecting holes filled in and the earth distributed evenly on both sides.

6. All precautions had to be taken to prevent the escape of toxic water in the treatment of tailings and concentrates.

The remainder of this piece of legislation dealt with the safety of the workers, their lives and health and is not pertinent to this dissertation.

Law 14 of 1894 contained no significant deviations from previous principles.

In 1895 Law 17 of 1895 was enacted dealing specifically with base metals and minerals. In contrast to all previous laws dealing with minerals it opened with the statement that ownership in and the right of disposal of all base metals and minerals vested in the owner of the land was subject, however, to a royalty being payable to the State. A new precious metals and precious minerals law,

Law 19 of 1895, followed, an enactment not very different in the relevant parts to its predecessors. The one interesting provision was Article 53 providing the State President with power to allow prospecting and digging on township ground but only if application was made for this purpose by at least two-thirds of the inhabitants of the township, but with the proviso that such rights would not be granted if they detrimentally affected areas for grazing.

Law 21 of 1896 followed which provided formally for the establishment of a Mines Department with its own Head. As in Law 19 of 1895 separate chapters dealt with prospecting, digging and mining, the proclamation of public diggings, the grant of residential stands, shop sites, water rights and control over dealing in unwrought gold. Article 28 was more precise and detailed in its grant to the owner of private land on which gold had been discovered of a mynpachtbrief extending over 1/10th of the farm. If the farm was thrown open as a public digging the owner was entitled to his "owner's" claims, in addition to his mynpachtbrief.

A further Law regulating the operation of mines followed as Law 12 of 1898 containing similar but, possibly, more detailed provisions to those of its predecessor in 1893. Certainly, the provisions dealing with protection of the surface were more extensive than those in the earlier law.

Law 21 of 1896 was augmented by Law 15 of 1898, an enactment not very different, in the relevant parts, to its predecessor, but this time dealing solely with precious metals, a separate law being enacted for Precious Stones, namely, Law 22 of 1898. Dale comments on this law as follows -

> "Nathan draws attention to the fact that in the early laws, the main consideration was the preservation of the land owner's rights, and mentions the reservation of his werf, of owner's claims and of the owner's mynpacht, and then the growing importance of State supervision and intervention and the recognition of the interest of the public at large. The present writer wishes to associate himself with the views expressed and moreover wishes to draw attention to the delicate counter-balancing of the potentially conflicting rights of the surface owner, mineral right holder and mining title holder, as also between the various mining title holders themselves".(16)

On 15 December 1898, Law 22 of 1898 was promulgated dealing only with digging for and dealing in precious stones. Private land manifesting the presence of precious stones could be proclaimed without the owner's consent, but if it was necessary, for the exploitation of diamond bearing ground, to proclaim private land not manifesting any signs of the presence of precious stones or for the purpose of incorporating such private land with diamond bearing land, this was only possible with the consent of the land owner.

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(16) Dale, M.O., op. cit., pp193-194

Furthermore, if private land was proclaimed as a public digging, or on proclamation was incorporated with land already proclaimed, then if precious stones were discovered on that portion reserved by the owner as his "werf" (homestead), such land could only be proclaimed with consent of the owner - Article 19. The heading to Chapter XII was "Owner's Rights" and dealt with the owner's right, on proclamation of his land as a public digging, to reserve a portion of land for his homestead, his water rights and his rights to various categories of claim licence monies.

Article 81 is particularly interesting in that it provided that if the owner leased or sold his rights to minerals, then unless there was a specific provision in the lease or deed of sale to the contrary, his rights to such licence monies were retained. Here again, there is a specific recognition of the principle of a separation of mineral rights from ownership of the land. The recognition of the principle of separation of rights was reinforced in the Precious Stones Ordinance 66 of 1903. Owners' Rights were again allocated a chapter of their own, viz Chapter IV and Section 26(1) and (2) provided respectively that if land was leased together with the owner's rights to precious stones and that lease was registered, then the lessee would be entitled to the rights and privileges accruing to the owner until termination of the lease, when such rights reverted back to him. Furthermore these sections

provided that if in a registered notarial deed precious stones were reserved to someone other than the owner of the land, the former was entitled to the rights conferred on the owner in respect of such precious stones and subject to the same obligations. Surface grantee's rights were once again protected in the Land Settlement Act 37 of 1907, Section 28 of which provided, inter alia, that where damage was caused as a result of prospecting or mining operations, compensation would be paid to the settler; that if land or any portion thereof was proclaimed the settler had the choice of either surrendering his holding and being compensated for improvements and labour expended upon such improvements, with the further rights to the allotment of another holding, not inferior to the holding surrendered and upon the same terms as those upon which his former holding was allotted; or if the settler gave the Minister of Lands notice within 2 months of proclamation, he would be entitled to an amount provided for under the Settler's Ordinance, plus a sum equal to 10% of that amount, plus the value of any improvements. Again, the settler had the right to select another holding. Once again, rather extensive provisions were made to protect the user, in this case, of the surface.

The year 1908 saw the enactment of the Precious and Base Metals Act 35 of 1908 which, with many amendments over the years, remained in force until 1967. For the first time there was a definition of

"holder of mineral rights", viz "shall mean, in relation to land, the owner thereof, or, if the mineral rights are for the time being severed from the ownership of the land, the person registered in the Deeds Office as holding such rights". The conservative character of the laws relating to mining had not altered radically particularly in the aspect of trying to keep the scales balanced between owner's and mining right holder's respective rights. Part VI, Chapter I dealt with prospecting, and on private unproclaimed land the prospector required not only a prospecting permit, but also the permission of the holder of mineral rights who thus had an election whether prospecting work could be conducted on his land or the land over which he held such rights, or not.

Chapter III was devoted to 'Rights of Owners of Private Land'. The most interesting provision was the first, Section 20, which for the first time provided "wherever precious metals have been found on unproclaimed private land, the holder of mineral rights shall .... have the right to select either one or two areas called a mynpacht ...". In all previous mining legislation from 1885 onwards, when the mynpacht system was first introduced, the mynpacht was granted to the land owner where precious stones or precious metals were found by him personally or by a prospector. Clearly, by this time the concept of severance of mineral rights from ownership of the land was well established, but the battle for supremacy between

land owner and mineral right holder was still in its infancy. Owner's reservations viz his homestead, buildings, cemeteries, land which had been under cultivation for two years prior to notice of intention to proclaim, and so on, were all preserved.

In Chapter IV under the heading "Proclamation of Public Diggings", Section 27(2) provided that if proclamation caused "damage to any rights existing on or over the land proclaimed ... the person entitled to such rights shall be compensated by the holder of the mineral rights". Another interesting provision in this chapter is Section 28(1) which stipulated that "no private land shall be declared a Public Digging without the written consent of the holder of the mineral rights" (who unless the mineral rights had already been severed from ownership of the land could also be the owner of the property), unless inter alia the Minister had ascertained through investigations carried out by the Government Mining Engineer that "there are reasonable grounds for believing that precious metals exist in payable quantities on such land". Thus the longstanding proviso for the protection of the owner of private unproclaimed land against prospecting on his land was now replaced with a statutory provision for compulsory prospecting on and consequent proclamation of his farm where payable minerals were presumed to be present. The statutory counter balancing of owner's and mineral right holder's interests appears to have taken a back

seat in a country that after the costly Anglo Boer war now depended for its solvency on the vigour of its mining industry. Under the law of 1898 the owner of a farm proclaimed a public digging was entitled to a mynpacht on 1/10th of the land proclaimed, to owner's claims, to grant vergunning claims and to a further mynpacht on the werf. In the 1908 Act these rights were consolidated into a mynpacht giving the owner the exclusive right to mine on 1/5th of the farm. In Chapter VI, Section 51(1) dealing with mining leases, reserved to the land owner the right to receive one-half of the rentals payable in terms of the lease. Part III dealt with Base Metals and Section 120 provided that if in the course of mining precious metals on private land, base metals were discovered and could not be worked economically, separately from such precious metals, then the provisions of Part II of the Act could be applied. If, however, the base metals could be separately worked, economically, then the owner's rights were preserved and the Mining Commissioner "may reserve from prospecting, pegging or digging any area necessary for the exercise by the owner of such rights".

Mining legislation in the Orange River Colony basically followed that in the Transvaal and land owner, mineral right holder and mining title holders' rights followed the same pattern with no major deviations worthy of note.

In Natal, however, the mining legislation differed radically

from that promulgated in the other two provinces. Law 16 of 1869 was the first Gold Law in Natal and was interesting in the context of this dissertation, in that it was open to the holder of a licence to prospect on private land without the consent of the land owner. Subsequent laws in 1883 and 1885 dealing not only with gold but also with other minerals and precious stones, followed a similar pattern, the only deviation being that licences could only be granted with consent of the land owner.

A consolidating Law 17 of 1887 reverted to, and in fact extended, the very early concept of an imperial monopoly, by reserving to the State the right to mine for and dispose of all minerals. The emphasis appears to have been on public exploitation of all minerals with no exclusions having little or no room for a conflict situation between land owner and mineral right holder.

The exploitation of possible sources of wealth was further encouraged by Law 34 of 1888 which provided for compulsory prospecting on and consequent proclamation of land where precious metals were thought to be present, if the land owner himself refused, or withheld his consent to a third party, to prospect and mine for precious metals. This was early statutory confirmation of the basic principle that in a conflict situation, the rights of the mining title holder prevail.

The Mines and Collieries Act 43 of 1899 (N) followed and in Section 4 drew no distinction between precious and base metals, merely defining "minerals" as "all substances which can be extracted from the earth by mining operations for the purpose of profit; provided that the term mineral shall not apply to any stone or clay for use for building, road-making or kindred purposes, except such as are mentioned in this Act, nor to any minerals which, not being so mentioned, may be excepted from the operation of this Act by Government Notice by order of the Governor in Council". In section 9 the following declaration was made - "The right of mining for and disposing of all minerals on land situated in the Colony of Natal is vested in the Crown subject to the provisions of this Act". Here the principle was laid down of vesting in the Crown the right of mining for all minerals. Under the provisions of the Act, however, the land owner was given extensive rights of pegging claims on his land for all minerals in preference to the public, and the public, although apparently not intended to be altogether excluded, was in practice very much in the hands of the owner.

Prospecting licences were no longer a requirement for prospecting on either State or private land where no excavations were made. Before prospecting licences could be issued to any person other than the owner, for prospecting on private land, notice had to be given to the owner who could lodge objections against the issue

of such licences and take out, himself, as many licences as he desired, thus defeating any intention there may have been on the part of the legislature to allow public pegging.

Ancillary rights granted to the registered holder of a prospecting claim were very wide whilst land owner's rights were protected by firstly, provision for a deposit as security for surface damage by the prospective prospector (the princely sum of £2.10s) and secondly, the land owner's right to object to the registration of prospecting claims; (the interesting feature of this provision is that in Section 52 the Minister, when considering any objection, had to "ascertain and determine whether the locality of the land, the geological features thereof or any other indications of fact, give reasonable belief that minerals are to be found on such land" - a policy not pursued in modern mining law, which will be discussed further on). Moreover under section 59 of the Act the land owner was given exclusive rights to mine for coal, limestone, stratified ironstone, slate, soapstone and any other minerals specified by the Governor in Council at any time which minerals could only be prospected with his consent.

In comparison to the South African Republic and the Orange Free State, Natal mining legislation, to 1899, allowed little room for a conflict situation based as it was on a system of claims with the

right to mine all minerals vested in the State and the land owner having little or no say in regard to the exploitation of minerals on his property.

In the Cape Province the legislature has never interfered with the common law ownership or right of mining and disposing of base minerals on private land. The Cape Colony Mineral Statutes dealt only with Crown land and land in the title of which there was a reservation of minerals to the Crown. Two aspects of the Cape legislation are, however, noteworthy, namely -

1. Sir John Cradock's Proclamation of 1813 reserving the rights only to precious stones, gold or silver, and the right to raise material for repairing public roads, to the State. The right to iron, lead, copper, tin, coal, slate or limestone vested in the land owner. It appears that the remaining minerals were not deemed worthy of mention but must in the absence of reservation to the State have remained vested in the land owner.

2. Section 69 of The Precious Stones and Minerals Mining Act 19 of 1883 permitted the following of lodes, a similar provision being carried forward into the Precious Stones Act 11 of 1899 as Section 81. These provisions allowed the registered claim

holders to "follow" soil containing precious stones "in all its dips, angles and variations and the soil containing precious stones lying outside of the actual declared boundaries of claims at the time of the discovery of such expansion or divergence shall be held to be the common property of the then registered claim holders in such mine ....". This is a derogation from the cuius est solum maxim and a potentially ripe "conflict" situation, whether between two separate claim holders inter se or the claim holder on one property and the land owner of the adjoining property. However when the topic did, in fact, become the subject matter of a court case in the Rhodesian context in Globe and Phoenix Gold Mining Co Ltd v Rhodesia Exploration Co Ltd ..... it was held that the following of lodes was not recognised in Roman Dutch law.(17)

The four colonies became part of the Union of South Africa in 1910 and although each retained the legislation pertinent to mining law prevailing in that Province at that time, subsequent amendments and enactments proceeded towards unifying the system of mining law.

The Base Minerals Amendment Act 39 of 1942 is an interesting piece of legislation. It was intended to facilitate prospecting and

(17) 1929 AD 434.

mining for base minerals on certain private land and Crown land in the Union. However, it made definite inroads into the vested rights of the owner of private land, in that if he failed to exercise his rights to prospect and mine for base minerals on his land, the government could step in and grant those rights to others under certain conditions. Thus Section 3 provided that the Minister might call for tenders for prospecting leases in respect of private land if the holder of base mineral rights or any person entitled to prospect for base minerals did not avail himself of that right after being called upon by the Minister to do so. Section 3(2) did, however, state that the lease "shall provide for payment by the prospector to the owner of the land" of compensation for any damage to the surface, crops or improvements.

It may be presumed that the complete control by land owners of prospecting for and the mining of base minerals on private land had been found to be an obstacle in the way of the proper exploitation of base minerals in the Union. There appears to have been a fairly large extent of land in the Union alienated from the State without a reservation of base minerals to the Crown, and many cases of land owners having little or no idea of the capital outlay and risk involved in any base mineral enterprise, who had greatly exaggerated ideas of the value of the base minerals which existed on their land. Such land owners, whilst doing nothing themselves by way of

prospecting, held out unreasonable terms to any person desiring bona fide to prospect and mine the base minerals on their land with the result that the base minerals were not exploited.

The emphasis in the entire Act was on the exploitation of all mineral resources which would be to the advantage of the economy of the country. There can be no doubt that the Act was intended to deal with land owners in an equitable manner, for whilst it permitted others to carry on prospecting and mining on reasonable terms it on the other hand gave to the land owner or holder of mineral rights a rental and share of the profits, both determined by the Mining Leases Board, and protected the normal rights of the land owner in regard to his crops, buildings and water rights.

Thus section 11 of the Act provided that no prospector or lessee should carry out any investigation, prospect or mine "upon land used as a garden, orchard, vineyard, nursery or plantation or on land under cultivation or within 100 yards of any spring, well, borehole " etc., "or within 200 yards of any building", without the written consent of the land owner. This section was, however, subject to the proviso that, subject to an obligation on the part of any such prospector or lessee to pay compensation for any damage that might be caused, the Minister might permit such prospecting or mining underneath such land providing due notice was given to the owner or

to the holder of the base mineral rights, or subject to such conditions as the Minister, on the recommendation of the Mining Engineer and after consideration of the land owner's written representations, might determine.

Section 12(1) prohibited a prospector or lessee from using the surface over which a prospecting or mining lease was granted otherwise than for prospecting or mining for the base mineral concerned without the written permission of the Mining Commissioner and subject to any conditions imposed by him. What is to be noted in this Act is that section 1 defined "lessee" as "the holder of a mining lease granted under the Act" and "prospector" as "the holder of a prospecting lease granted under the Act", whilst the section further distinguished "prospector" from the "holder of the base mineral rights" who was defined as "the owner of the land or (where the base mineral rights were held under a separate title), the person registered as the holder of those rights".

Sections 11 and 12 were only applicable to a prospector or lessee and not to the holder of the base mineral rights and likewise the person who was to pay compensation in terms of sections 3(2)(b), 4(2)(b) and 6(2)(d), was either a prospector or lessee as defined in the Act. An analysis of the Act therefore reveals that there was no provision prohibiting the holder of the base mineral rights from

prospecting or mining on any cultivated land or on any of the places referred to in section 11, or which prohibited him from using the surface for any purposes incidental to such operations, nor was there anything in the Act obliging the holder of base mineral rights to pay compensation to the owner of the land for damage caused to the surface as a result of such operations.

It may be that the reason for restricting the rights of the prospector or lessee, as defined in the Act, and for obliging either one of them to pay compensation to the owner of the land, was that the prospecting or mining leases granted under the Act did not come into being as a result of voluntary agreement between the land owner and the prospector or lessee, but were, in effect, forced upon the land owner by the Minister in the circumstances contemplated by the Act; whereas the rights acquired by the holder of the base mineral rights came into being as a result of voluntary agreement between himself and the land owner and formed part of the consideration for which a stipulated price was paid to the land owner. Once again this was a detraction from the full dominium of the land owner.

The decision in St Helena G.M. Ltd v Minister of Mines(18) indirectly appears to have affected the issue of owner's

(18) 1947(2) SA 1103(T) at p1113.

reservations in that the issues turned on whether land held under a registered mining lease in terms of section 26 bis of Act 35 of 1908 (Transvaal) was 'deemed to be proclaimed' and was therefore not unproclaimed land which could be proclaimed. The facts of this case are summarised in a portion of the headnote reading as follows: "Applicant was the cessionary of a mining and prospecting lease under section 12 bis of the Gold Law over the whole of certain farms, and had applied for and been advised that it would be granted a mining lease in respect thereof under section 20 bis, but the lease had not yet been registered. The respondent having stated his intention to recommend the proclamation of the farms as a public digging, which would mean that owners' reservations might be granted prejudicial to the applicants, application was made for an interdict restraining such proclamation, which applicant maintained would be illegal. The freehold owners were not cited in the proceedings."

The decision was that only 'unproclaimed land' could be proclaimed as a public digging under section 26, as land held under a registered mining lease was, in terms of section 26, land "deemed to be proclaimed". The effect of this decision was that when a person who was the holder of a prospecting and mining lease under section 12 bis of the Gold Law 35 of 1908, thereafter applied for a mining lease in terms of section 20 bis, the Governor-General was not entitled in terms of section 26 or any other provision, to

proclaim as a public digging the area of such lease either before or after registration thereof. One of the practical consequences which followed from this was that owners' reservations would have to be dealt with in terms of section 24 bis of the Act, which gave the Government Mining Engineer a discretion as to the area thereof, and not under section 23 (the section applicable on proclamation) where no such discretion existed.

It would appear that as a result of this decision Act 55 of 1947 was enacted which amended the Precious Metals Act 35 of 1908 (Transvaal) (commonly called the Gold Law) by, inter alia, providing that section 24 bis applied the provisions of section 23 (reservations of surface in favour of the land owner) to the grant of a mynpacht or mining lease even where it was not intended to proclaim the land. The Government Mining Engineer was now vested with a discretion to exclude from such reservations land, which in his opinion, might be required for mining purposes. To this provision was added the proviso that where the Government Mining Engineer exercised such discretion it would be "subject to the payment of compensation (the amount of which shall in the absence of agreement be determined by arbitration) to the owner ..... by the person so requiring any portion of such area". However, the following questions arise -

(a) who was the person who could be said "to require" a portion of the area? and

(b) when would he require such area?

It could have been possible that the Government Mining Engineer would have reserved an area too large for eventual mining requirements. Furthermore, even if land was excluded from owner's reservations, the owner himself was entitled by applying for a surface right permit under section 72, to the use thereof, if it was not required for mining purposes. Finally compensation was in fact only payable at the time the surface right permit was granted. If then the land was never required for mining purposes compensation would never have become payable.

South African mining legislation which had evolved over the past ten decades was finally modernised and consolidated culminating in four major statutes viz, the Precious Stones Act 73 of 1964, the Mining Rights Act 20 of 1967, the Nuclear Energy Act 92 of 1982 and the Mines and Works Act 27 of 1956.

The Mining Rights Act 20 of 1967 is essentially a consolidation of the existing law and is conceived in line with the general policy of its predecessors, namely, to encourage the exploitation by

private enterprise of the nation's mineral wealth and to avoid in many ways the placing of obstacles in the way of that exploitation. The holder of rights to base minerals (be it the owner of the property where title to the minerals has not been separated or the holder by virtue of a separate title) has not been deprived by statute of the right to mine or dispose of these minerals whilst such rights have been taken away from the holder of the rights to precious metals by statute. The mining and disposing of precious metals is subject to firm State control in regard to the conditions of exploitation. The rights of the surface owner of proclaimed land or land held under mining title and therefore deemed to be proclaimed land, are virtually, but not entirely, suspended and it rests with the State to grant rights of use, primarily to those who are mining or entitled to mine, for purposes incidental to mining, and to others for specified purposes.

This "legal metamorphosis in the ordinary proprietary rights relating to land resulting from its proclamation ..... whether by actual proclamation or registration of a mining lease"(19) was summarised in the following manner by Trollip J: "..... the ordinary proprietary rights of the freehold owner are suspended, and the only

(19) West Driefontein Gold Mining Company Ltd v Brink and Others 1963 (1) SA 307, Trollip, J.

rights and benefits that he is entitled to are those conferred by the Gold Law or any other special law. In so far as the surface of the land is concerned, those rights under the Gold Law are limited to the use of his homestead, buildings, cemetries, kraals, certain cultivated lands and water, reserved to him on proclamation of the land. ..... The rights in the remainder of the surface vest in and are at the disposal of the State, to be allocated by it or its officials to the freehold owner, the holder of the mining title or lease, or other person by means of permits, licences or certificates for such purposes of mining or other purposes as the Gold Law or any other law allows. ..... In return for being thus deprived of his ordinary rights the freehold owner is usually compensated by being given a portion of the licence moneys or rentals received by the State from those to whom it has granted any rights ..... of the Gold Law ..... or by an out and out award of compensation.....".(20) On the same topic Curlewis J P referred in the following manner to the freehold owner's reversionary right: "In addition he has what apparently is regarded by the Local Rating Ordinance as a reversionary right, and I take it by a reversionary right, under the Local Rating Ordinance is meant the right which the owner has to recover and use the freehold property unrestricted when the ground is deproclaimed under the Law".(21)

(20) Ibid, p308.

(21) Witwatersrand Gold Mining Company Ltd v Municipality of Germiston - Judgment delivered in the TPD on the 4th March 1926, - in summary form in (1926) PH. D.6.

I propose only to deal with those sections of the Act which I see as statutory inroads into the common law rights of the owner of the land as a preface to that part of this dissertation dealing with such common law rights. Thus, Section 15 provides for compulsory prospecting for precious metals and base minerals in that, if the mineral right holder fails to take steps towards ascertaining the existence of such minerals, after due notice from the State, such non-compliance gives the State the right to intervene and to grant a prospecting lease over such land to another party. The now traditional prohibitions against undermining townships, roads, land under cultivation etc, without the Minister's or (in respect of land under cultivation) the land owner's consent, are reiterated together with provision for compensation for damage to the surface or structures thereon.(22) However, because of the restrictive definition of "prospector" under the Act, these prohibitions do not apply to a prospector in respect of base minerals on private land.

However, section 18(12) which is the only sub-section in the Act dealing with the surface of private unproclaimed land in relation to base minerals, stipulates that sub-sections (2) to (8) inclusive as also sub-section (11) "other than the provisions relating to the use

(22) Section 17 of the Mining Rights Act 20 of 1967.

of water from a public stream, shall mutatis mutandis apply in respect of a holder of the right to base minerals or his nominee who prospects or mines for base minerals on unproclaimed private land or a holder of mining title in relation to the use of the surface of any unproclaimed land not held under mining title". Sub-section (2) provides generally for surface use but only with the written permission of the Mining Commissioner, who in terms of sub-section (3)(b) is obliged, before granting such permission to consult the land owner. Sub-section (5) makes provision for an appeal, inter alia, by the land owner, to the Minister of Mineral and Energy Affairs, if the former is dissatisfied with the decision of the Mining Commissioner either in regard to the fact that the Mining Commissioner intends to grant permission for such surface use or in regard to the conditions the Mining Commissioner has proposed to embody in such permission. Sub-section (8) makes provision for a rent or consideration (determined by the Minister of Mineral and Energy Affairs after considering representations by the owner or prospector) which is payable to the Mining Commissioner for the benefit of the land owner.

The permission lapses if the Mining Commissioner has certified that prospecting or mining operations have been abandoned.(23)

(23) Section 18(12)(b) of the Mining Rights Act 20 of 1967.

This section was clearly designed to provide relief for the mineral right holder in the event of a conflict with the land owner.

Owner's reservations prior to proclamation, of his homestead, curtilage buildings etc, are all preserved in Section 47, but, land included in such reservations and later required for mining purposes or purposes incidental thereto, may be excised from the reservations subject to the payment of compensation which, in the absence of agreement, is determined by arbitration. This is a legislative infringement upon the land owner's full dominium of his property and despite provision for compensation could almost be classed as confiscatory legislation in the sense that the land owner cannot really negotiate the amount of compensation for deprivation of surface rights.

Section 90 provides further statutory inroads into the land owner's rights in that the right of disposal over the surface of proclaimed land and land held under mining title is reserved to the State and, save as otherwise provided in the Act, the surface of land held under mining title may not be used for purposes other than mining without the permission of the Mining Commissioner, whilst the succeeding provision, viz Section 90(2)(a), empowers the person entitled to mine on proclaimed land or land held under mining title to apply to use such surface also for "any purpose incidental

thereto" the exclusions in such "purpose incidental thereto" being agriculture or afforestation, which are dealt with in section 91, and other purposes as are provided for in section 92. An application by a mining title holder for permission to use the surface of proclaimed land or land held under mining title for mining purposes or purposes incidental thereto, is not confined to the land actually held under that mining title, but may be made in respect of any land held under such title or proclaimed land not held under mining title.

The case of Botha v Rustenburg Platinum Mines[24] is particularly interesting in the context of section 90(1) of the Act. The first defendant was the registered owner of certain mineral rights over portion of the farm Paardekraal having acquired such rights in November 1962 by a notarial deed of cession from a certain Mr de Beer, the previous owner of this portion of Paardekraal. Clause 1 of the Notarial Deed of Cession of Mineral Rights provided: "The said Rustenburg Platinum Mines Limited acknowledges that it is fully aware of and is bound to respect all servitudes and conditions contained in the Title Deeds of 'the said property'."

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(24) 1983(1) PH M20.

The first defendant applied for and was granted a mining lease of the exclusive right of mining precious metals in November 1977, as a consequence of which the farm became proclaimed land in terms of the Mining Rights Act. In June 1980 plaintiff became the registered owner of the farm. In terms of clause 3 of the title conditions plaintiff had the right to build a further dam or dams on the farm. During the period November 1980 - May 1981 first defendant constructed a dam across the natural watercourse on the mining lease area on plaintiff's farm. The plaintiff alleged that in building the dam the first defendant had breached the plaintiff's rights qua owner. The defendant averred that it had been issued with a surface right permit for this purpose and that although the dam had been constructed prior to the date of registration of such surface right permit the Mining Commissioner's approval of the application had been communicated to him prior to the date of construction. The Court referred to the legal metamorphosis which land undergoes on proclamation citing, inter alia, West Driefontein Gold Mining Company v Brink and accepted the general principles set out in that judgment that the owner of land is only entitled to such beneficial use and occupation of the surface of his land as is conferred upon him by the Mining Rights Act and that only the Mining Commissioner has the right to decide to what use the surface should be put after proclamation. The plaintiff contended that, notwithstanding proclamation of his land, he nevertheless retained certain

residuary surface rights over his land, inter alia, his right to build a dam in terms of his title deed conditions and further relied on clause 1 of the Notarial Deed of Cession of Mineral Rights in support of his contention that his claim was founded on breach of contract. Counsel for the defendant advanced, inter alia, the following argument -

> "(1) 'Whatever rights were reserved to the owner of the farm by his Title Deeds, these rights were circumscribed by law as a result of due proclamation in terms of section 40(2) of the Act, pursuant to the mining lease issued in terms of section 25 of the Act, and by the grant of the surface right permit issued ..... under section 90 of the Act .....
>
> (2) The plaintiff's cause of action is founded on a breach of contract. Since no privity of contract exists between the respective parties, plaintiff's remedy has been misconceived and can accordingly not succeed".

The Court upheld the view that no privity of contract existed between the plaintiff and defendant, despite the fact that there was clearly privity of contract between the plaintiff's predecessor-in-title and the defendant. Therefore the same privity of contract existed between plaintiff and defendant by virtue of onerous succession in title, the plaintiff being entitled to the same rights and being subject to the same obligations as his predecessor-in-title. Plaintiff's counsel argued that "Trollip, J. ... has gone too far" in stating, in the West Driefontein case ..... that 'the ordinary proprietary rights of the freehold owner are suspended, and the only rights and benefits that he is entitled to are those conferred by the Gold Law or any other special law'." A

further argument on behalf of plaintiff was that "the plaintiff has proved on a balance of probabilities the existence of an obligation ex contractu which thereafter became a real right by registration and which forms part of its proprietary rights ex titulo, and which avail against the mining house ..... despite proclamation".

The Court correctly came to the conclusion that "the plaintiff has no cause of action based on contract and that the plaintiff's claim, since it is based on a breach of contract, is not maintainable, and should accordingly be dismissed". This conclusion, obviously was premissed on the fact that the land was proclaimed and that all the land owner's surface rights are from that date suspended, for clearly, prior to the date of issue of the mining lease, privity of contract did in fact exist between the plaintiff and the defendant and the defendant would have been in breach of the provisions of the Notarial Deed of Cession of Mineral Rights. The effect of proclamation on the common law rights of the land owner cannot be termed a modification of such rights but in fact renders such rights nugatory until such time as the land in question is deproclaimed, if ever, and even thereafter mining titles and certain forms of surface right permits survive for Section 44. Furthermore it cannot be justly claimed that the land owner has been fully compensated in any way for the loss of his surface rights by the payment of surface rent or licence monies allocated to him under the Mining Rights Act.

Until the 1981 amendment of the Act there was no compensation payable in respect of surface rights required for mining purposes on open proclaimed land. In terms of the amendment effected by Act 86 of 1981, section 90A now provides for the payment to the land owner both of open proclaimed land (ie land not held under mining title) and of proclaimed land held under mining title of a surface rent, for the area over which the surface right permit is granted of an amount not exceeding 50c per hectare per month, to be determined by arbitration in the absence of agreement plus a further sum of R1,00 per hectare per month payable to the Mining Commissioner who in turn remits this additional rent to the land owner. Where however permission is granted for the use of the surface for the purpose of a slimes dam, the additional rent is increased to R2,00 per month per hectare.

Section 90(5A) was introduced in 1981, apparently as a result of the decision in Kloof Gold Mining Co. Ltd v Mining Commissioner Jhb and Others[25] where the court held on review that the Mining Commissioner was not entitled in granting a section 90 permit for a slimes dam to impose a condition for the payment of compensation to the owners of the land that would be affected thereby.

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(25) 1981 (4) SA 509(T)

Thus section 90(5A) provides that if application is made to use the whole or any portion of the surface of land, not owned by the State, for the purpose of a slimes dam or cemetery for mine employees, and if the applicant is not the owner of the land, the Mining Commissioner after consultation with such applicant and the owner, may direct the applicant to buy and take transfer of the whole or portion of such land and further if the Director-General: Agriculture and Fisheries is of the opinion that the remainder of the land (if only a portion is the subject matter of the application) cannot be a viable farming unit, then the applicant can be called upon to buy and take transfer also of that portion of the land. There is an exception, namely, where the land owner notifies the Mining Commissioner that he wishes to retain ownership of his land or the portion thereof. If, however, the owner wishes to divest himself of his property and agreement cannot be reached on the purchase price payable "The purchase price shall be determined by arbitration upon the basis set out in section 12 of the Expropriation Act 63 of 1975".

Surface right permits entitling any person to use the surface of proclaimed land or land held under mining title for agriculture or afforestation are granted in terms of section 91 of the Act but if such application is in relation to private land which has been proclaimed, the consent of the land owner is required.

Section 92 of the Act provides for the grant of surface right permits for the use of proclaimed land or land held under mining title for any purpose for which permission cannot be granted under sections 90 and 91. After consultation with the land owner or mining title holder, whose rights could be affected by such contemplated use, the Mining Commissioner selects the area of land to be used. If there is an owner's reservation on the area of land which is the subject matter of the application, then permission in terms of section 92 can only be granted with the land owner's written consent and upon conditions to which he agrees. Compensation is payable to the land owner and to any other person whose rights in respect of the use of the surface of such land are adversely affected.

Chapter XII contemplates the grant of stands on proclaimed land for business and industrial purposes (other than those of a general dealer, builder or keeper of an eatinghouse for coloured or black persons). Provision is made for objections to be lodged with the Mining Commissioner in response to the written notice he is obliged to serve on the holder of the mining title and the owner of the land. Licence monies are payable and proportions thereof are allocated to the land owner.

Chapter XIV deals with the grant of stands on proclaimed land for the business of a general dealer, butcher or keeper of an

eatinghouse for coloured persons or blacks. Here the right to carry on such business on proclaimed land is vested in the owner of the land unless such trading rights have already been severed from ownership of the land, by reservation thereof to a previous land owner. Once again, if the Minister of Mineral and Energy Affairs is of the opinion that inadequate trading facilities exist, and the land owner fails to avail himself of such rights, tenders for such trading rights are called for by notice in the Government Gazette. One half of the rent received by the Mining Commissioner is paid to the land owner who has not availed himself of his rights in terms of this section.

On deproclamation in terms of section 44 of the Act land owners' rights which have been in a state of "suspension" are to an extent restored. This section provides that the land owner "may at any time after the date on which [the land] is so deproclaimed, and subject to payment of compensation, the amount whereof shall in the absence of agreement be determined by arbitration, expropriate any such surface right or stand, not being a surface right or stand" -

(i) required for purposes incidental to mining

(ii) held or exercised by the State

(iii) held in respect of a pipe line, overhead power line

etc., used in connection with any public utility undertaking

(iv) granted under various provisions of Act 35 of 1908 and as applied in the Orange Free State.

It appears inequitable that the land owner should have to expropriate any surface right or stand, the rights to which did not emanate from him qua owner in the first place, and secondly that he should be liable to pay an amount of compensation for the right to regain, as far as possible, full dominium of his land, albeit that he has prior to deproclamation been the recipient of surface rentals and/or stand licence monies the amounts of which can today no longer be regarded as adequate in relation to the current value of money or land. Surely once the limitations on a unified ownership lapse or come to an end, they should automatically be restored to the totality of ownership of the land ie as where the owner of a servient tenement becomes the registered owner of the dominant tenement, the servitude lapses by merger. This concept of the "elasticity of ownership" has been admirably expressed by Cowen as follows -

"The important idea that the phrase 'the elasticity of ownership' is designed to express is that no matter how many

limitations are placed upon ownership which is vested in a person - no matter how many subtractions there may be from the latter's ownership in the form of iura in re aliena - the owner nevertheless retains the reversionary or residual right; and what is more, he retains that right as a vested right, as distinct from a mere spes or expectancy. To use the analogy ... of a rubber ball, ... ownership is like a rubber ball in that no matter how much it might be compressed, it automatically expands again and recovers or attracts back the various subtractions, or iura in re aliena, once these come to an end".(26)

In the case of Ex parte Marchini(27) the court had to decide whether mineral rights reverted to the owner of the land in respect of which they had been granted, where the holder of the mineral rights, Rogerston Collieries Limited, had been put into liquidation and therefore ceased to exist.

Judge Cillie(28) came to the following conclusion: "..... It

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(26) Cowen, D.V., "New Patterns of Land Ownership - the Transformation of the Concept of Ownership as plena in re potestas" - extract from the text of a paper read at the University of the Witwatersrand 26/4/1984 p76.

(27) 1964(1) SA 147(T).

(28) Ibid, p150.

is clear that the rights which are ceded to Rogerston Collieries Limited constituted a personal quasi servitude which the Company would alienate freely and which continued to exist after it was abandoned on the liquidation of the company, and when the company itself ceased to exist. The argument, therefore, that on abandonment of the mineral rights by the liquidators, these rights reverted to the owner of the land in respect of which they had been granted, must fail." Viljoen[29] is justly critical on two grounds, namely:-

(1) "The general rule applicable to personal servitudes is that they revert to the owner of the land when their holder ceases to exist. If the court had found that mineral rights have this property in common with ordinary personal servitudes it would have followed that the mineral rights reverted to the owner of the land and the applicant would have established a title to these rights.

(2) It is incorrect to talk of rights which continue to exist after they have been abandoned by their holder because rights cannot exist in a vacuum so to speak, without anyone, be it a natural or a legal person, exercising them. Thus the question which the

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(29) Viljoen, H.P., "The rights and duties of the holder of mineral rights", Thesis, Leiden, 1975, pp27-28.

court had to decide, it is submitted, was whether the general rule applicable to personal servitudes, mentioned above, applied also to mineral rights. If this question was answered in the affirmative the application should have succeeded. If it was in the negative the rule as stated by Wille should have been applied viz: 'Upon the dissolution of a corporation, any property belonging to it to which no one can, or is likely to be able to establish a title, becomes bona vacantia and as such the property of the Government'.

If the court had followed the viewpoint of the Orange Free State Court (in Ex parte Pierce where mineral rights were held to be real rights sui generis) in regard to mineral rights, the confusion with personal servitudes would not have taken place and although the same result would have been achieved it is submitted that it would have been on a sounder basis."

Wilmans(30) however, disagrees with Viljoen's criticisms as above set out and opines that a personal servitude does not in fact revert to the owner of the land. He states that when the holder of a personal servitude no longer exists then the servitude expires and the fullness of dominium in the land is restored.

(30) Wilmans, J.W., "Minerale, Mineraleregte en Verbandhoudende Kontrakte", Thesis, Pretoria, 1977 pp108-113.

He is also critical of Viljoen's statement that "rights cannot exist in a vacuum" and avers that in the case of Marchini, the mineral rights did not cease to exist as they were registered in the Deeds Office but that they automatically devolved on the State as bona vacantia immediately upon liquidation of the company i.e. an order of court to this effect was merely confirmation of the factual situation. Finally he states that the general rule applicable to personal servitudes, viz. that when the holder ceases to exist the servitude expires and the fullness of dominium in the land is restored, cannot be similarly applied to mineral rights. He is of the opinion that an important characteristic of mineral rights, which distinguishes them from other limited real rights, is that when they are abandoned they do not automatically revert to the dominium of the land and that they are therefore an exception to the general rule applicable to servitudes.

Under the Precious Stones Act 73 of 1964, the position is different from that obtaining under the Mining Rights Act because section 54 states: "Save as is expressly otherwise provided therein, nothing in this Act shall affect the rights of the owner in respect of the surface of land proclaimed as an alluvial digging". However, there are numerous provisions "affecting the rights of the owner" to the surface eg in terms of section 55 every holder of a claim is entitled, without payment, to occupy an area of land on the

digging, as a residence for himself, his family and even his employees; in terms of section 57 the claim holder is entitled to apply to the Mining Commissioner for an area of land for the erection of machinery, depositing tailings etc.; again without payment for such surface rights, section 58 entitles the claim holder to apply for an area of land for a right of way or a roadway, whilst section 61 entitles the Minister to authorise the sinking of boreholes or wells on the diggings and the erection of appliances necessary for the supply of water. The Mining Commissioner has, in addition, the right in terms of section 56(1), without payment of compensation, to select and reserve from pegging on an alluvial digging, sites, inter alia, for schools, churches, trading purposes etc, with the proviso that the sites so selected shall not interfere with "cultivated lands, buildings, kraals or permanent improvements of the owner of the land". Owner's reservations are dealt with under section 24 which provides that "Before any land is proclaimed an alluvial digging" there shall be reserved to the owner of land the free and undisturbed use of his homestead, buildings capable of beneficial use, and certain other improvements, land under bona fide cultivation immediately prior to notice of intention to proclaim, and springs, boreholes etc.

Two further statutes must be touched on in that they too affect the rights both of the land owner and the mineral right holder, viz,

the Expropriation of Mineral Rights (Townships) Act 96 of 1969 and the Mineral Laws Supplementary Act 10 of 1975. In Transvaal Property and Investment Company Limited and Reinhold and Company v SA Townships Mining and Finance Corporation Limited and the Administrator[31] Schreiner, J. commented on the respective rights of the land owner and the holder of the mineral rights as follows -

> "No user of the surface by the (land) owner is defensible which has the effect of taking away the right of the holder of the mineral rights, when he decides to do so, to prospect for precious metals and if they are found to mine for them. To that extent I think that the holder of the mineral rights has, in a sense, priority over the surface owner".

The legal position thus stated has been somewhat tempered by the Expropriation of Mineral Rights (Townships) Act which was passed mainly to prevent a mineral right holder who never intends to prospect, or whose land in any event is not mineralized, from holding prospective township developers to ransom. This Act empowers provincial Administrators to expropriate rights to minerals in land required for the establishment of a township where such rights are severed from ownership of the land. Such expropriation is of course subject to the Administrator being satisfied that there are no

(31) 1938 TPD 512 at pp519-520.

impediments preventing the establishment of the township, that the development of the township in preference to the exploitation of minerals better serves the public interest, that the holder of the mineral rights refuses to give consent or part with those rights for a consideration the Administrator in concurrence with other Government officials considers equitable or finally that due to the number of holders of such mineral rights it is not practicable to obtain their consents. Compensation for such expropriation of mineral rights is determined by the Administrator in conjunction with the Minister of Community Development and the Minister of Mineral and Energy Affairs, and his determination is final.

The second of the abovementioned Acts provides in its long title inter alia "for the purchase or acquisition of certain land in certain circumstances", which is the only provision relevant to this dissertation.

Section 6(1) empowers the Minister of Mineral and Energy Affairs to acquire any private land or any portion thereof, in the name of the State, if the owner of that land or the person entitled to mine on that land, in terms of any law, for any base mineral, informs him that such mining for base minerals will render the land unsuitable for farming purposes, (example, in the case where the opencast method of mining is used) or that any portion of the land

not utilised for mining will no longer be a viable farming unit. This section is of particular importance to the mining industry, for once such a representation is made not only is the investigation contemplated in terms of section 6 undertaken, but the land owner is prohibited from instituting interdictory proceedings in terms of Section 6(6) during the period of such investigation. If it is found that mining activities will affect farming, one of the consequences is that the State may acquire the property, and the compensation to be paid in terms of section 6(2)(a) is determined by virtue of the provisions of the Expropriation Act 63 of 1975.

The option is however given to the land owner to inform the Minister that despite the above, he wishes to retain ownership of his land, in which event neither he nor any subsequent owner may apply to any court for an interdict prohibiting mining for base minerals on that land.(32) The Minister of Mineral and Energy Affairs is further empowered to require the person entitled to mine on the land in question, to purchase and take transfer of such land if he is of the opinion that the State should not acquire it. If agreement cannot be reached as regards the amount of the purchase price, this is determined by arbitration in terms of the Arbitration Act 42 of 1965, provided that in determining the purchase price the

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(32) Section 6(1)(f).

provisions of section 12 of the Expropriation Act 63 of 1975 will apply. The effect of this is that in addition to the market value of the land the purchase price may include an amount to make good any actual financial loss or inconvenience suffered by the land owner who is deprived of his land. In the event of the Minister not being satisfied, in terms of section 6(1)(b), that the mining will affect farming, the effects of the representations made in terms of section 6(1)(a)(i) or (ii), fall away, and the land owner is free to interdict the mineral right holder from mining for base minerals.(33) However, this right would appear to have a dubious content, for the Act is not clear "on what grounds the owner of the land would be entitled to restrain a party lawfully entitled to mine for base minerals on that land from doing so".(34) These authors are of the following view that: "The exercise of the mineral right holder's rights take precedence over the rights of the land owner. Section 6(1)(f), it is submitted, will not however override any contractual limitation on the mineral holder's right to mine or to use the surface".(35) The Act needs to specify the grounds on which an interdict can be applied for or if common law principles are to be applied, to state so.

(33) Sections 6(1)(f) and 6(6)(a).

(34) Franklin, B.L.S. and Kaplan, M., op. cit., p229.

(35) Ibid, p229.

Summarising therefore, the pivot of mining law is that the mining for and disposing of all precious metals and precious stones is vested in the State.(36) When precious metals or precious stones are to be exploited the mineralised land and so much other land as is necessary for purposes ancillary thereto, is proclaimed.(37) On proclamation the State assumes the right of regulating surface occupation and user(38) which is done by a series of reservations, surface right permits, grants of stands etc, all of which aim at the promotion of mining whilst preserving, as far as circumstances permit, protection for some of the rights which the freehold owner would normally expect to exercise. To compensate the freehold owner in terms of the Mining Rights Act, provision is made that he receives licence monies or rentals payable by the holders of mining title(39) whilst in terms of the Precious Stones Act(40) he is, in certain circumstances, granted an owner's certificate entitling him to a number of claims or a share in a mine, as the case may be. State policy, therefore, is that mining is to be encouraged and minerals are not to be sterilised.

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(36) Section 2 of the Mining Rights Act 20 of 1967 and Section 2 of the Precious Stones Act 73 of 1964.

(37) Op. cit., Sections 40 and 23, respectively.

(38) Op. cit., Sections 90 and 55-57, respectively.

(39) Op. cit., Sections 60 and 121.

(40) Op. cit., Section 17.

Chapter II - Common Law

> The following statement by Flemming is pertinent to this section - "Fundamental remains the belief that the law is neither occult, arcane nor oracular but to the contrary dedicated to the rational solution of social conflicts through the legal process; that because law is only a means, not an end, it falls to be adjudged not by any internal standard peculiar to it as a closed system but by the degree to which it furthers relevant social ends ....".(1)

There has always been a measure of conflict between the land owner and the holder of the mineral rights. The trend in South African case law appears to support the view that "when the respective claims enter into competition there is no room for the exercise of the rights of both parties simultaneously."(2) The very nature of mining operations makes them difficult to reconcile with other users of land, for example agricultural and residential user.

The expansion of the mining industry has as a consequence promoted the rise of secondary industries and the frenetic pace of modern urbanised life has in its turn encouraged a regeneration of

(1) Flemming, J.G., "The Law of Torts", The Law Book Company Limited, Sydney, Melbourne, Brisbane, Perth, Fifth Edition, 1977, Preface, pv.

(2) Malan, J. in Hudson v Mann and Another 1950 (4) SA 485 (T) at p488.

farming. As a result land values in both directions have followed an upward trend accentuating the conflict between the rights of the land owner and the holder of mineral rights.

> "The crucial consideration seems to me to be that the severance of the mineral rights in respect of land from the title to the land creates a state of affairs in which the exercise of their respective rights by the holder of the mineral rights and the owner of the land may give rise to a conflict of interests". (3)

By selling his "mineral rights" the land owner has brought a state of uncertainty into the exercise of his rights by, in effect, abdicating from the position of having "full dominium" of his land, free to do as he chooses (subject to the limitations imposed by law) with the object of his dominium. He is obliged to use his land with reasonable regard to the possible future needs of the holder of the mineral rights whilst the holder of the mineral rights cannot be compelled within any specified time period in terms of the common law to test his rights and assess their worth and will in fact, if conditions are unfavourable, eg fluctuations in the price of minerals, the rise and fall in working costs etc, postpone such mining operations.(4) As outlined in Chapter I the State has the

(3) Tindall, J.A. in Nolte v Johannesburg Consolidated Investment Company Limited 1943 AD 295 at p314.

(4) Transvaal Property and Investment Co Ltd and Reinhold and Co v SA Townships Mining and Finance Corporation Ltd and the Administrator 1938 TPD 512 at p519.

power to give notice to the mineral right holder to prospect the land over which his rights are held and if he fails to do so, to grant a third party a prospecting lease followed by the issue of a mining lease, all, if necessary, against the inclinations of the land owner. To a point the various mining statutes have reconciled the conflicting interests of the land owner, the holder of mineral rights and the holder of mining title by suspending or modifying common law rights and substituting such rights as are deemed to cater for the reasonable needs of all interested parties.

The property law of South Africa is based upon the Roman-Dutch system but as regards certain parts has departed somewhat from the principles worked out by the Courts of Holland, for, as De Villiers, C.J. remarked in Henderson and Another v Hanekom(5) -

> "However anxious the court may be to maintain Roman-Dutch law in all its integrity, there must, in the ordinary course, be a progressive development of the law keeping pace with modern requirements. In no department of law has this development been more marked than in the practice relating to leases, especially of mineral rights".

In principle, and subject to important modifications introduced by the various mining laws, the owner of the land "owns it

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(5) 20 SC 513 at p519.

upwards to the skies and downwards to the centre of the earth".(6) Although this is so South African law, with the exception of the Sectional Titles Act 66 of 1971, has not developed the theory of dominium so as to permit the severance of holdings horizontally. In the very explicit words of Mr Justice Bristowe "Horizontal layers of the earth's surface cannot with us, as they can in England, be separately owned".(7) It is consequently not possible under our law for X to have ownership of the land and for Y to have ownership of the minerals in situ. The effect of a reservation of mineral rights has been considered in a number of cases(8) and it has been held that mineral rights are personal quasi-servitudes. The quasi-servitude does not give the holder dominium in the minerals until he has severed them from the land, until which event dominium of such minerals remains in the owner of the land. All the servitude holder (mineral right holder) obtains is the right to go onto the land, to search for and if found to sever and take away the minerals, subject always to his compliance with the mining laws in

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(6) De Villiers, C.J. in London and SA Exploration Company v Rouliot 1891 SC 74 at p90.

(7) Coronation Collieries v Malan 1911 TPD 577 at p591.

(8) Rocher v Registrar of Deeds 1911 TPD 311 at p316; Coronation Collieries v Malan 1911 TPD 577 at p591; Webb v Beaver Investments Ltd and Another 1954 (1) SA 13 (T) at pp24 - 25; Nolte v Johannesburg Consolidated Investment Co Ltd 1943 AD 295 at p305 and p306.

force at the time.(9) Once such a quasi-servitude has been granted all things necessary for its exercise are considered to have been granted at the same time eg ancillary rights for the construction of roads, railways, sinking boreholes or shafts etc, "the only limitation on such ancillary rights at common law being that the holder of the mineral rights must exercise them 'civiliter modo' ie in a manner least injurious to the property of the surface owner".(10)

Thus "..... mineral rights and surface rights are co-extensive over the same area, which means that one of the two classes of rights must give way t he other. It is through this precarious situation, fraught with imminent conflagration and hostility, that the common law, assisted as best possible by statute law, has had to chart a path".(11) The case law affords a useful guide to the range of conflicts that have arisen over the years and the adaptation of Roman-Dutch principles to resolve such conflicts. In

(9) See van Vuren v Registrar of Deeds 1907 TS 289.

(10) Franklin, B.L.S. and Kaplan, M., "The Mining and Mineral Laws of South Africa", Durban, Butterworths, 1982, p132.

(11) Dale, M.O., "An Historical and Comparative Study of the Concept and Acquisition of Mineral Rights", Thesis, Pretoria, 1975, p294).

the words of Innes, C.J.[12] - dealing with a servitude of "siding-way" - "The servitude with which we are concerned differs in important respects from those of the same class discussed by the Commentators. ..... But it is governed by the same general principles; we must apply old rules to new circumstances". Thus in Nolte v JCI[13] the court approved the principle that guidance on the approach of the courts to the resolving of conflicts of rights between land owner and mineral right holder i.e. in regard to the way in which the mineral right holder exercises his rights, was to be obtained from cases dealing with rights of the owners of dominant and servient tenements in the context of servitudes of grazing. This view is endorsed by Viljoen who states: "It is submitted that this (sic) is a case where legal comparison can be applied fruitfully, and the decisions relating to the exercise of servitudes could shed light on the question."[14] Certain general principles can be deduced from the cases on grazing, for example Nolan v Barnard[15] where Wessels, J. held:

"The more reasonable view is that we must interpret a

(12) Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at p475.

(13) 1943 AD 295.

(14) Viljoen, H.P., "The rights and duties of the holder of mineral rights", Thesis, Leiden, 1975, p56

(15) 1908 TS 142 - at p.152.

servitude of 'pasturage' liberally, and in favour of the owner of the servient tenement ie that so long as the owner of the dominant tenement can exercise fully the right which has been granted to him, he must not be allowed to interfere with the right of the owner of the servient tenement to use his farm in a reasonable manner. The owner of the dominant tenement must not be allowed to curtail the rights of ownership of the owner of the servient tenement more than is necessary to enable him to enjoy his servitude. Where once there is an established right, that right should not be interfered with and the court should not allow the owner of the servient tenement to do aught that would materially affect the rights of the dominant owner .... but ..... where the owner of the servient tenement can use his property to his own advantage, and by such use in no way prejudice the rights of the owner of the dominant tenement, he should be entitled to do so".

In Volschenk v van den Berg[16] another case on grazing rights, three general rules were applied, namely that -

1. a servitude is exercisable only so far as the needs of the dominant tenement demand;

2. its user is to be within reasonable limits;

3. the owner of the servient tenement is not presumed by a grant of servitude to have renounced the right of using his own property except in so far as that user is inconsistent with the servitude.

The case further held that the owner of the servient tenement cannot depreciate or diminish the pasturage by the erection of permanent

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(16) 1912 TPD 321.

obstructions such as buildings.

Both the above decisions were considered in Badenhorst v Joubert[17] and Wessels, J. held:

> "It is a fundamental principle of our law that a servitude has to be exercised civiliter modo and therefore if a person has the right to graze an undefined number of cattle on his neighbour's farm, he cannot turn on to that farm such a mob of cattle as to make the farm useless to his neighbour. It has already been decided in this court that although the rights of an owner of a servient tenement are curtailed by the existence of a servitude of grazing, they are not diminished to such an extent that he cannot utilise his own property".

The courts have over the years frequently been called upon to decide between the conflicting interests of the holder of the mineral rights and of the owner of the land. The ramifications of the judgments in the three cases dealt with hereunder were considered to be of such importance that in 1946 the Witwatersrand Land Titles Commission was appointed to inquire into and report on the then position in regard to the development of or better utilisation of township and farm land, not proclaimed under the Gold Law, for residential, governmental, industrial or agricultural purposes, where the mineral rights in respect of such land were held by some person other than the freehold owner. It was further charged

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(17) 1920 TPD 100 at p106.

to inquire into "what changes, if any, were required in the existing law for the purposes of facilitating or controlling" such development and for regulating the rights of the parties respectively concerned."(18)

In Transvaal Property and Investment Company Ltd and another v South African Townships Mining and Finance Corporation Limited(19) -

Schreiner, J. said -

"Mr Stratford argued that where the mineral rights reside in a different person from the freehold owner there is necessarily a conflict of rights in regard to the user of the surface, that prima facie, the owner is entitled to the unlimited use of the surface and that before he can be prevented from using it in any way the holder of the mineral rights, who has but a quasi-servitude, must show either an express or implied term in his grant limiting the rights of the owner or, at least, that there is in any particular case a reasonable necessity for giving priority to the holder of the mineral rights. This argument, though attractive, is, in my opinion, unsound. It is true that both parties have the right to use the surface and that there is thus a measure of competition between their rights. In the absence of any present or immediately contemplated prospecting or mining operations at any particular place the surface owner could cultivate the land or even erect buildings thereon. For the rights of the dominus are not to be unduly interfered with. It is true that they have not exercised (their right to prospect and mine for precious minerals) since they were acquired and it is possible that they may never exercise them at all. But there is no obligation upon them to prospect at any particular time,

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(18) Report (Part I) of the Witwatersrand Land Titles Commission, appointed under Government Notices Nos 92, dated 11th January, 1946, and 1733, dated the 16th August, 1946.

(19) 1938 TPD 512 at p519

> or within any particular period. No user of the surface by the owner is defensible which has the effect of taking away the right of the holder of the mineral rights, when he decides to do so, to prospect for precious metals and if they are found to mine for them. To that extent I think that the holder of the mineral rights has, in a sense, priority over the surface owner and this is not unnatural, for without the right to prospect and mine the right to minerals ceases to have any content, whereas the right of the owner of the surface to use it subject to the requirements of prospecting and mining has a content, which may be more or less valuable according to the nature or extent of the mining operations undertaken".

With respect to the learned judge, once a mining lease is granted and the land is deemed to be proclaimed, or the land is in fact proclaimed, "the right of the owner of the surface to use it" has in fact little or no content. The rights to use of the surface vest in the State and on application the land owner might be granted a surface right permit for purposes other than mining whilst, he is in addition entitled to the paltry sum of R1,50 per hectare for every surface right permit granted to another person for the use of the surface of his land.

At p521 - 522 the learned Judge considered the form of relief to which the Applicants would be entitled and said:

> "This brings me to the question of the relief to which the applicants are entitled. Mr Stratford contended that an interdict is a discretionary remedy and that in this case the applicants should be left to an action for damages ..... Here, it was contended the rights of the applicants are, on the evidence, of insignificant value and in the absence of any evidence that the applicants intend within any reasonable period to exploit their rights an interdict should be refused. There

> is considerable force in this argument but in my opinion it is not entitled to succeed. ..... to compel the applicants to give up their rights in return for damages assessed upon a necessarily incomplete investigation seems to me to amount to confiscation. That the probability is strong that no payable minerals will ever be discovered under this land seems to me to be beside the point. A person's property is not to be interfered with or taken away with impunity because it is of little value".

In this case it was held that the holders of the mineral rights in respect of certain unproclaimed land lying to the north of the Johannesburg municipal area, which it was proposed to include in a new township to be known as "Bryanston", were entitled to an interdict, unlimited in duration restraining the respondent company, the owners of the freehold, from establishing a township on such land, on the ground that the establishment of the township would deprive the applicants of any effective exercise of their mineral rights, notwithstanding that the freehold owner showed that the prospect of finding payable minerals in the land concerned were extremely remote.

Nolte v Johannesburg Consolidated Investment Company Ltd[20] was an appeal from a decision given by Schreiner, J. in the Witwatersrand Local Division, in a case where JCI, being the holder

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(20) 1943 AD 295.

of the mineral rights in respect of seven portions of private unproclaimed land had applied for an interdict, restraining the respondent, Nolte, who was the owner of an area of land included in one of the seven portions, from proceeding with an application for the establishment of agricultural holdings on a part of his land. There was an important distinction between the facts of this case and those of the Transvaal property case, in that prospecting operations already carried out by JCI afforded strong proof that gold existed, probably in payable quantities, under the area which Nolte proposed to lay out as agricutural holdings. The dispute was as to whether further prospecting would be necessary and whether the reefs under the area were at depths so great that no restrictions of any kind would be imposed on the undermining of surface improvements. It was held that a prima facie case had been made out that further prospecting would be necessary and that the holder of mineral rights would continue prospecting in the not distant future. Schreiner, J. also found that if agricultural holdings should be established, prejudice to the applicant company's prospecting rights would be likely to result in several material respects. An interdict was therefore granted, leave being reserved to Nolte to bring an action within one month to have the interdict set aside. It was held on appeal that under the circumstances an interdict had been rightly granted, but that, in view of the dispute, the order should be altered to one restraining Nolte from proceeding with his application for the establishment of agricultural holdings or from

disposing of such holdings to third persons, pending an action to be instituted by the applicant company.

Tindall, J.A. who delivered the judgment of the Appellate Division, stated at p306 -

> "It is not necessary or advisable to attempt a comprehensive statement of the circumstances in which the Court will assist the holder of the mineral rights, but I think that in general, changes in the use and physical features of the surface which will materially interfere with exploitation of the mineral rights will entitle the holder of those rights to relief unless the changes are no more than ordinary way of using the property, having regard to the user at the time when the quasi-servitude came into existence.
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> The question raised by the arguments I have outlined is obviously one of great importance to the gold mining industry and to the owners of land who have parted with mineral rights. If the general proposition applied by Schreiner J. ..... is correct, it will have far reaching results on the surface rights of such owners for it makes the user of the land at the date when the mineral rights were severed from the title to the land a factor, and it recognises a right in the holder of the mineral rights to prevent proposed changes in such user which will materially interfere with the exploitation of the mineral rights. In the Transvaal property case it was held that, although at the date when the holder of the mineral rights approached the Court no prospecting had yet taken place on the land and the evidence showed that the prospect of finding payable minerals was extremely remote, the holder of the mineral rights was entitled to an interdict. It may be that the decision in that case went too far. The effect of the severance of title as regards precious metals is that the holder of the mineral rights steps into the shoes of the dominus in respect of the rights to precious metals conferred by the Gold Law. In such a case with as much reason as in the case of base metals, it seems to me that common law principles must be applied in reconciling the conflicting interests of the holder of the mineral rights and the owner of the land".

At p316-317 Tindall, J.A. dealt with the relevance of the principles applicable to grazing servitudes in relation to the conflict of

interests between land owner and mineral right holder and said -

> "The cases dealing with grazing servitudes do not afford a true analogy, but I agree with Schreiner J that they help us to ascertain how to approach the problem of deciding between the owner and the holder of the mineral rights in a conflict of interests that may arise where the owner of land has parted with the mineral rights. The likelihood that minerals exist in payable quantities in the land in question may also be an important factor. That being so, the facts in each particular case must determine whether the Court will come to the assistance of the holder of the mineral rights. But I wish to emphasize that from this view of the rights of the holder of the mineral rights it does not follow that, by refraining from prospecting, he can hold up for an unlimited period the development of the surface by the owner of the land, whether such development be in the course of the ordinary use of the land (having regard to the user at the time of the severance of title) or not".

It appears that the Appellate Division, while agreeing in substance with the main conclusions reached by Schreiner, J. qualified in the following important respects some of the views expressed by him in the Transvaal property case and in the Nolte case, viz -

(a) The Appellate Division expressed doubts in regard to the principle that the holder of the mineral rights was entitled to an interdict even if, at the date when he approached the Court no prospecting had taken place and evidence showed that the prospect of finding payable minerals was extremely remote.

(b) The general proposition that "in general changes in the use and physical features of the surface which will materially

interfere with the exploitation of mineral rights, will entitle the holder of these rights to relief unless the changes are no more than an ordinary way of using the property having regard to the user at the time when the quasi-servitude came into existence", was not accepted as correct.

(c) The remark at the end of Tindall, J.'s judgment, to the effect that the applicant company, if it succeeded in the action to be brought, would not necessarily be entitled to an interdict unlimited as to time must be noted as significant as to the discretion to be exercised by the trial court - deciding as to the degree of relief to be granted to a successful plaintiff in a case of this type.

A judgment was, however, ultimately given granting JCI a perpetual interdict restraining Nolte from proceeding with the establishment of agricultural holdings on his area of land.

A conflict situation was again brought before the Court - in the case of Zuurbekom v Union Corportion Limited(21) where general principles taken from the above two cases were again quoted and

(21) 1947 (1) SA 514.

applied. Following the decision in Nolte's case, the Appellate Division confirmed an interdict for eight years preventing the owner of the land in question from laying out agricultural holdings. To this extent the decision involved no new principles. The judgment does however contain several passages dealing with the question of whether the holder of the mineral rights forfeits his right to an interdict if he does not prospect and prove the existence of minerals within a reasonable period of time. The judgment suggests that such a question could only arise when there is doubt as to the existence of payable minerals. Once the prospect of discovering minerals in payable quantities has been established there would appear to be no basis for suggesting that the holder of the mineral rights can be compelled to mine on pain of losing his rights if he fails to do so within a reasonable period.(22)

However, in yet another case based on similar facts Yelland and Others v Group Areas Development Board(23) the matter at issue was that no prospecting had taken place and the applicants' expert was unable to express an opinion as to whether the minerals on the land had any substantial value. All he could say was that he believed that the farm was underlain by the Witwatersrand system and this

(22) Ibid, p542.

(23) 1962 (2) SA 151 (T)).

being so, the possiblity that minerals in payable quantities did exist, could not be ignored. The court interdicted the respondent for a period of three years from proceeding with the establishment of a township, this period being regarded as a reasonable period within which to afford the applicant an opportunity to determine whether or not minerals existed in payable quantities ie the interdict was granted on the negative basis that "there is no positive proof that minerals do not exist there in payable quantities".(24)

The case law does not provide any guidance as to the extent to which an applicant for an interdict is obliged to prove the value or potential value of minerals underlying the land concerned or even whether he is obliged to prove the existence of minerals at all. In fact it would appear that all that needs to be proved is that the likelihood of the existence of minerals in the land cannot be totally excluded: ".... an applicant need probably go no further than to show that the right which he asks the court to protect has or may have some potential value, but not necessarily any substantial value. ... It is not necessary for the applicant to establish a material present value attaching to the mineral rights held by him; ... he need go no further than to satisfy the court

(24) Ibid, p156G.

that there is a prospect of turning the mineral rights to account, whether by exploitation or alienation".(25) It is submitted that this is a most unsatisfactory state of affairs and that some minimum requirements should be laid down without proof of which no application for an interdict should even be considered. When the length of time involved before reaching proclamation of a township is considered, it appears incongruous that a potential township developer, for example, should be paralysed, in the exercise of his surface rights, for a period of, say, three years, only to find at the end of that period that minerals in payable quantities do not in fact exist. By this time, too, the property market may have changed to his detriment and the anticipated profits may no longer justify the estimated capital outlay. The estimated time of commencement of prospecting operations should also be taken into account with a view to permitting other developments if the first appears unlikely in the foreseeable future. Two further aspects were not dealt with in this judgment:

1. The respondent alleged that the area on which the township was to be laid out was relatively small in proportion to the total area of land subject to the reservation of mineral rights, and that therefore applicants could proceed

(25) Franklin, B.L.S. and Kaplan, M., op. cit., p130.

with their prospecting and mining operations undisturbed. However this allegation was not substantiated. Had this aspect been discussed some basic principles could have been laid down as to the degree of interference which is necessary to found an action.

2. The court did not deal with the question of what is considered to be a reasonable length of time necessary to establish whether or not minerals exist in payable quantities.

The case of Hudson v Mann and Another(26) concerned a dispute between the holder of a notarial mineral lease over portions of a farm, who sought an order restraining the freehold owner from preventing him from having access to a shaft sunk on the property and using it for prospecting and mining operations. Malan, J. in the course of his judgment had this to say at P488 -

> "... When the owner's are able reasonably to enjoy their respective rights without any clashing of interests no dispute is, as a rule, likely to arise. The difficulty arises, as has happened in the present case, when the respective claims enter into competition and there is no room for the exercise of the rights of both parties simultaneously".

(26) 1950 (4) SA 485 (T).

The principles underlying the decisions appear to be that the grantee of mineral rights may resist interference with a reasonable exercise of those rights either by the grantor or by those who acquire title through him. In case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploitation. The learned judge does not appear to support the statement 'that in case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploitation', by any direct authority or by any analysis of the juristic nature of mineral rights. The statement is probably too wide in that it does not make mention of the fundamental right of an owner of land to support from the subjacent and adjacent soil subject to any contractual derogation from that right.(27) Where the rights of the land owner are affected to the extent that they cease to have content and bearing in mind that the mineral right holder is obliged to exercise his rights in a manner least injurious to the land owner, the latter would be entitled to apply for an interdict even though he may not be able to establish any irreparable injury, and it seems that the fact that he may have a remedy by way of damages is no reason why he should not be granted an interdict - "Where no proper assessment of damages is possible and where consequently no

(27) Coronation Collieries v Malan 1911 TPD 577 at p586

protection can be afforded by an award of damages it seems to me that the only appropriate relief is an interdict".(28)

The juristic nature of mineral rights is important as the legal consequences attaching to any particular kind of right are determined by the juristic nature of such right.

Despite Appeal Division decisions to the effect that mineral rights constitute personal quasi-servitudes, the Courts have expressed this view, with respect, with no certain voice, always cautioning that the concept is subject to this or that modification. The better view appears to be that of Brink, J. expressed in the case of Ex Parte Pierce and Others(29) - "It has been frequently pointed out in our case law that it is not easy to find the exact juristic niche in which to place a reservation of mineral rights. In van Vuren and Others v Registrar of Deeds(30) Innes, C.J. referred to them as personal quasi-servitudes. He pointed out that mineral right reservations were not praedial servitudes because they were not constituted in favour of any praedium, and they differed from

(28) Transvaal Property and Investment Company Limited and Another v South African Townships Mining and Finance Corporation Limited - 1938 TPD 512 at pp521 - 522.

(29) 1950 (3) SA 628 at p634.

(30) 1907 TS 289.

personal servitudes inasmuch as they did not terminate with the death of the holder and were freely assignable. There can be no doubt, however, that a grant of mineral rights confers real rights, because it entitles the holder to go on to the property to search for minerals and to remove them. There is clearly a subtraction from the full dominium of the owner of the land concerned. One could say that mineral rights constitute a class of real rights "sui generis".

The view that mineral rights constitute a class of real rights sui generis and are not personal quasi-servitudes is shared by several legal scholars namely -

A. Professor P. van Warmelo: "The reference to a quasi-servitude is, with due respect, an unhappy one. For the concept of a quasi-servitude was known in Roman law already in the case of the so-called quasi- usufruct of consumable things".(31)

B. Professor C.G. van der Merwe: "Die standpunt dat minerale regte saaklike regte sui generis is, is die aanneemlikste. Die pogings om mineraalregte by een van die bekende

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(31) Van Warmelo, P., "Real rights" - 1959 Acta Juridica p91.

kategories van saaklike regte in te deel, is almal onoortuigend".(32)

C. Professor J.C. De Wet who concludes "Die eenvoudigste oplossing is om die regte op minerale as 'n nuwe kategorie van beperkte saaklike regte te beskou wat sui generis is en wat ontstaan het om 'n ekonomiese behoefte as gevolg van toenemende mynbedrywighede te bevredig. Hierdie standpunt het die bykomstige voordeel dat die beginsels wat op serwitute van toepassing is nie so afgewater word dat die deur geopen word vir die belasting van grond met 'n oneindige aantal analoë beperkte saaklike regte nie",(33) with which view the writer associates herself.

In Douglas Colliery Limited v Bothma and Another,(34) although following the principles laid down in earlier decisions, Neser, J. appears to have introduced an additional factor to those general principles. In dealing with the use to which the surface of land may be put by the land owner earlier cases had suggested that the

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(32) van der Merwe, C.G., "Sakereg" Durban, Butterworths, 1979, p401.

(33) De Wet, J.C., "Boekbesprekings - C.G. Hall and E.A. Kellaway; servitudes", 1943 THR-HR p187, p192.

(34) 1947 (3) SA 602(T) at p612.

test was that no change of user interfering with the exploitation of mineral rights, would be permitted.(35) Neser, J. appears to have considered the matter, inter alia, from the point of view of the right of support to the surface possessed by the land owner. He said:

> "The question to be considered in any case, in the absence of special provisions, is thus, not whether the owner of the land was making the normal or reasonable use of the surface. But whether at the time of the grant of mineral rights, it was implied that the owner of the land could erect buildings or other structures on the surface".(36)

And ...

> "the owner of the land is obliged to do nothing on the surface which would interfere with the holder's right to sever and remove the minerals".(37)

If, however, one compares this latter statement to those made by Tindall, J.A.(38) and Schreiner, J.A.(39) viz -

> "... it is not advisable to attempt to lay down a comprehensive rule defining limits on the restriction on the owner's use of the surface ..."

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(35) Nolte v JCI Limited 1943 AD 295 at p306 and Coronation Collieries v Malan 1911 AD 586 at p598.

(36) Ibid, p613.

(37) Ibid, p612.

(38) Nolte v JCI Limited 1943 AD 295 at p316.

(39) Transvaal Property and Investment Co Ltd v SA Townships Mining and Finance Corp Ltd 1938 TPD 512 at p519.

and

> "In the absence of any present or immediately contemplated prospecting or mining operations at any particular place the surface owner could cultivate land or even erect buildings thereon",

it is difficult, with respect, to accept Neser, J.'s statement as an absolute proposition.

A further interesting problem area is that of the prospective purchaser of land from which the mineral rights have not been separated and over which an unregistered prospecting contract has been granted to a third party. Assuming that the prospective purchaser is aware of prospecting operations on the property at the time of negotiation of purchase of the property, there is a strong likelihood that the purchaser would be held bound by the contract. The principles enunciated in Dhayanundh v Narain(40) would find application in such an instance, namely -

> "... a purchaser is bound by an unregistered agreement in terms whereof his predecessor in title granted a servitude over the property purchased in favour of a third party or in favour of another tenement, provided it can be proved that the purchaser had knowledge of the servitude when he bought". And "The effect ... is ... not to suggest that a purchaser who was entirely

(40) 1983 (1) SA 565 at p571F and p573C, Page, J.

> innocent at the time when he bought can be rendered subject to the doctrine by means of knowledge acquired subsequently thereto; it is no more than that a person whose knowledge at the time of the sale may be imperfect can nonetheless be hit by the doctrine if the imperfections in his knowledge are supplemented before he takes transfer - particularly if such imperfections were due to his own failure to make a proper investigation despite overt indications that it was necessary".

It appears from what has been cited above that principles have been laid down but no exhaustive statement has been made of what individual specific rights attach to the rights of either the land owner or the mineral right holder.

A conflict between surface use and mining use was once again the subject matter in the case of Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd and Another[41] where it was held that "the fons et origo of the grantee's rights under its prospecting grant is to be found within the provisions of the [Mines, Works and Minerals Ordinance 20 of 1968 (SWA)] and nowhere else. Consequently, the content and extent of the rights and/or privileges of the grantee under its prospecting grant are as defined and circumscribed by the provisions of the Ordinance". Accordingly, the legal relationship between land owner and mining title holder was governed solely by this Ordinance and South African common law principles had no application. The appellant, who was the holder of a section 60

(41) 1980 (3) SA 896 (SWA).

prospecting grant, (which is of limited duration in that it is issued and renewed for periods of two years at a time), sought an interdict prohibiting the respondent, the owner of the land, from further developing his farm by inter alia establishing lands, erecting boreholes, kraals, buildings and other structures, and giving an order directing respondent to remove those structures erected after the date of issue of the prospecting grant. "It was clearly the appellant's case that from the date of such accrual" (of rights under the grant) "the respondent was not entitled to effect further improvements on the farm which could make it impossible, more onerous or more expensive to perform prospecting operations in the grant area".(42) Thus Kritzinger, J. at p900 summarised the dispute as follows -

> "The essential dispute ...., is that the applicant contends that the first respondent is not entitled to create or build new lands, buildings, or works which have the effect of diminishing or nullifying its prospecting (and also possibly its future exclusive mining rights under section 61(1) of the Ordinance) whereas the first respondent claims that its activities amount to no more than a normal and legitimate user of the farm and the first respondent purports to 'consent' to the applicant's prospecting operations, provided it will pay compensation for any damage done to any improvements on the farm. The applicant contends that its rights under the prospecting grant have priority and that the first respondent has no right to foist such an additional burden on it".

Kritzinger, J. made the following pertinent observation at p903 -

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(42) On appeal - 1983 (1) SA 263 (A) at p269 D.

"The owner of land in South Africa who has parted with the mineral rights in his land is, therefore, it seems to me, largely the author of his own misery when he gets pestered and pushed around by the registered holder of the mineral rights. In this territory mineral rights have always vested in the State, and hence all operations concerned with prospecting for and the mining of minerals have, at all material times, been governed by statute".

At p909 Kritzinger, J. summarised the position under the South West african Ordinance and states that -

"... as I see the position, ... here in South West Africa, under our Mining Ordinance, it operates as follows: In terms of Section 67(1)(c) of the Ordinance the owner of private land is entitled to compensation in respect of operations by a prospector or mine owner in respect of the diminution of the surface value of that land and/or the total or partial interruption of the right of occupation of that land. But such compensation, in my opinion, would accrue only from the time when the prospector actually causes the diminution of value or the total or partial interruption of the right of occupation. According to the construction favoured by Mr Schutz, the landowner is doomed to a state of twiddling his thumbs, not knowing whether the prospector is ever going to prospect the area in question. He is, therefore, expected by the applicant to await the pleasure of the latter and thus to allow his land to lie fallow at his own expense and to his own loss. This naturally would be a very happy position for the prospector but hardly one of justice and fairness towards the landowner; and, as I read and understand our Mining Ordinance, I am satisfied that such was not the intention of the legislature".

The learned Judge concluded by expounding the philosophy underlying the South West African Ordinance and said -

"I am afraid that I am left with the impression that the applicant ..... seems to labour under the misapprehension that its rights are at all times of paramount importance and that they are also at all times entitled to precedence over those of the landowner. This I do not think is the intention of the legislature as expressed in the Mining Ordinance which contains many more restrictions on the prospector than on the landowner".

The court held that, on a proper interpretation of the provisions of the Ordinance, the respondent was free to develop its property until such time as the appellant wished to prospect. The application was dismissed with costs. On appeal[43] Van Heerden, A.J.A. stated -

> "It appears to me that in endeavouring to equate exclusive prospecting rights under the Ordinance with common law mineral rights Counsel for the appellant ignored a very important distinction between the two classes of rights. The distinction is this: The holder of mineral rights may exercise his right to prospect at any time in the future whereas the rights of the holder of a prospecting grant are limited by the duration of the grant. It follows that while a holder of mineral rights may have a legitimate complaint against an extension of the use of the surface which may detrimentally affect prospecting at an indefinite time in the future, the holder of a grant has no ground for complaint unless the extension may prejudice such prospecting operations, as may still be carried out during the continuance of his rights".

The decision of the court a quo was confirmed. Section 18 of the Ordinance prohibits interference with surface improvements, such as cultivated lands or buildings, by prospecting and mining operations, unless the land owner's consent thereto is obtained; whilst section 67 (1) entitles the land owner to claim compensation for "(a) damage to property on, or forming part of, that land, (b) diminution of the surface value of the land, and (c) total or partial interruption of the right of occupation of the land," resulting from such prospecting or mining operations. If the land

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(43) 1983 (1) SA 263 (A) at p274 H.

owner and prospector or mine owner have not entered into a written agreement defining their respective rights, then either party has the right to apply in writing to the Mining Commissioner with the request that the dispute be referred to an Adjudication Board for determination of the conditions subject to which each may exercise his rights, and the amount of compensation.(44) Once the compensation has been determined the land owner's consent is deemed to have been given, as contemplated in section 18(1)(b). The basic issue between the parties was whether the land owner was entitled to extend the process of cultivation to those areas of the land not so cultivated at the time of issue of the prospecting grant, and to continue erecting surface improvements of the nature referred to in section 18(1)(b) after the commencement of the grant, both of which activities would have the effect of extending the ambit of the prohibitions contained in section 18(1)(b) which would only cease to be operative by written consent of the land owner. It is clear that the land owner would not give such consent without payment of compensation.

The issues in this case were of course decided on the basis that a prospecting grant is only of limited duration, and therefore left open the interesting question of whether the resolution of a dispute in regard to a mining right of unlimited duration would have been

(44) Sections 68(1) and 68(5)(c).

decided on similar grounds having regard to the provisions of the Ordinance. Does the Ordinance in fact permit the land owner to continue developing the surface of his land during the period between the inception of prospecting or mining rights and the time when the prospector or mining title holder indicates his intention to prospect or mine on the land in question? Counsel for the respondent put forward the following, very logical and equitable submissions on behalf of his client "(a) .... a particular grant area can be very large, thus requiring a considerable time for prospecting. In such circumstances, the effect of the first interpretation" (the prohibition against prospecting in section 18(1)(b) only applied to land so used at the time of inception of the grant) "would be to restrict all development over the grant area for an indefinite period and would, in effect, amount to expropriation without compensation. (b) the proviso to section 66 clearly envisages the erection of buildings and enclosures and the cultivation of land within a grant area after the commencement of the grant. (c) section 67(1)(c)(iii) envisages the interruption of the right of occupation of the surface owner by the activities of the prospector"(45) "where existing rights are terminated or adversely affected by statute and two interpretations of the statute are possible, that interpretation should be adopted which is least burdensome to the person affected".

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(45) 1983 (1) SA 263 (A) at p267 and at p268.

It is to be hoped that should the question ever arise as to whether the Ordinance does in fact permit a land owner to continue developing his land until such time as the prospector is ready to prospect or continue prospecting, it will be decided in the affirmative.

Could it be that in South West Africa where minerals, as in South Africa, are also a vital part of the economy, a more equitable balance has been struck between land owner and mining title holder by simply recognising mineral rights as a manifestation of modern times and legislating accordingly as the need arises, without attempting to adapt principles inherited from the State of Holland where minerals never have and probably never will play a vital part in the economy? Furthermore, if it is averred that our system is Roman Law based, then it would appear from the paucity of material available to us on the topic of minerals, that they were in any event always regarded as an imperial monopoly and thus governed by statutory decree and not principles of common law the mantle of which never quite seems to fit the size of the problem involved.

The principles evolved as a result of the above cases and others on similar lines have to a degree been modified by the introduction of the Expropriation of Mineral Rights (Townships) Act 96 of 1969, and the Mineral Laws Supplementary Act 10 of 1975, as discussed above. These two Acts have for all practical purposes resolved -

(a) the condition of stagnation reached where the freehold owner desires to use his land for township purposes and the holder/s of the mineral rights refuses altogether to entertain such proposal, purely to retain his rights unjeopardised, or if willing to consider the proposal at all, demands an excessive sum of money in return for his consent, where not only is the possibility of mineral value shown, on expert evidence, to be remote, but he appears to have no intention of exploiting or turning to account such minerals; and

(b) the unhappy situation of land owners where mining activities render the surface of the land, or the remaining portion not used for mining, unsuitable for farming purposes.

Possibly, the most interesting of the range of conflict situations is the question of the obligation of the mineral right holder to provide subjacent and lateral support; whether that obligation extends only to land in its natural state; the duty of this support in relation to particular activities viz: dewatering a mine, open-cast mining, longwall mining and pillar extraction; pollution; and finally the effect of severance of mineral rights from the freehold, on preservation of the environment. In view of the considerable reliance placed on English law in regard to support and subsidence, it might well be apt to reiterate here that although English law recognizes ownership of horizontal strata, South African law does not. All this will be dealt with more fully in Chapter III.

Chapter III - The Duty of Support

It is a fundamental principle of our common law that the holder of mineral rights is obliged to exercise his rights in a reasonable manner. This does not mean that the holder of the mineral rights is obliged to abstain from any operation necessary for the purpose of mining, merely because it may interfere with the interests of the land owner. It merely requires that he may do whatever is necessary for the purpose of his mining operations in such place and in such manner as will be least injurious to the land owner, regard being had to the exigencies of mining. Thus in Texas Co (SA) Ltd v Cape Town Municipality(1) Innes, C.J. after pointing out that the holder of a servitude must exercise his right "in a reasonable manner, that is, with due regard to the interests of the servient property and its owner" quoted Van Leeuwen as saying that 'rural servitudes' "must be exercised properly and with the least damage or inconvenience to the res serviens". Applying this principle to the case of a railway siding, which was the subject matter of the above case, he said -

(1) 1926 AD 467 at pp474-475.

"Just as the holder of an ordinary servitude of way must select his route so as to cause as little prejudice and inconvenience as possible to the servient property and its owner, so the holder of a servitude of "siding-way" must so construct his line along the defined route as to prejudice and hamper the servient owner as little as possible in the legitimate use of his property ... the right of way is his, but in taking the steps necessary for its exercise he must respect the interests and convenience of the owner of the land. In deciding between two methods of construction, both reasonably practicable, a regard for those interests should be the paramount consideration".

As regards the "standards to be observed by the servitude holder", Schreiner, J.A. in Kakamas Bestuursraad v Louw(2) made the following observations -

"The more precise the description in the grant of the ways in which the servitude is to be exercised, the less room there is for complaint on the ground that it has not been exercised civiliter modo. By their agreement the parties may fix or indicate what is to be deemed to be a proper use of the servitude. But, agreement apart, the standard to be observed by the servitude holder does not depend on his technical knowledge or expertness. If he underestimates the risks of inferior design or unskilful execution, because he is ignorant of such matters this does not relieve him from liability. Nor, of course, will he be relieved by the fact that the owner of the servient property is likewise ignorant and so does not stipulate that the design and execution shall conform to proper standards".

Another aspect of the holder of mineral rights exercising his rights in a reasonable manner is that the holder of the servitude may not increase the "burthen" on the servient land beyond the express or implied terms of the servitude.(3)

(2) 1960 (2) SA 202(A) at p218.

(3) Van Heerden v Coetzee 1914 AD 167 at p172.

Halsbury(4) defines 'Ordinary user of property' as follows - "Owners or occupiers of land are legally entitled to use or occupy their land for any purpose which in the ordinary and natural course of the enjoyment of land it may be used or occupied ..," Although our courts have rejected the view that the English law doctrine of "nuisance" has been incorporated in our law, they have nevertheless reaffirmed the doctrine of ordinary user as being that of English law. Thus in Levin v Vogelstruis Estates and Gold Mining Co Ltd(5) Ward, J. said -

> "... it is no doubt true that owners of land are entitled to the use of their property for which it may in the ordinary course of enjoyment of land be used and are not responsible for the result of the operation of natural agencies as a consequence of such natural user .... In our law as in English law, the rule is subject to the neighbour's right of support".

And in Regal v African Superslate (Pty) Limited(6) Hoexter, J.A. said -

> "That is an unusual and unreasonable user of Bankdrift by the defendant and, in terms of the judgment of this court in the case of Malherbe v Ceres Municipality ... the defendant is

(4) Laws of England 4th edition, volume 34, paragraph 317 p108.

(5) 1921 WLD 66 at p68.

(6) 1963 (1) SA 102 (AD) at p114.

liable for any damage caused to Tweefontein by such user" and further on .... "his liability is not based on any negligent act or omission but simply on the wrongful user of his property ...".

In Halsbury(7) the 'Nature of the right of support' is defined as follows - "The right of support is a right to have the surface kept at its ancient and natural level. It is not an easement but a natural right incident to the ownership of the soil. The right of support arises on the severance of the surface and the minerals. Thus, the landowner may, on severance, by apt words convey the minerals with the right to let down the surface in working the minerals, or he may by means of exceptions and reservations of minerals and powers of working them grant the surface so that the right of support does not arise at all .... The right of support is independent of the nature of the strata, or the difficulty of propping up the surface, or the comparative values of the surface and the minerals. It is impossible to measure out degrees to which the right may extend. The surface owner's right is, therefore, not modified by the fact that the obligation not to cause damage by subsidence renders the effectual working of the underlying minerals impossible, as where the extent of pillars necessary to maintain the surface undamaged is such as to make the remaining minerals unprofitable to work. There is likewise no modification of the

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(7) Laws of England, 4th edition, volume 31, paragraph 47.

surface owner's right where the supported tenement contains strata of an unstable nature which shift or escape and cause subsidence if the adjoining owner excavates on his land".

Then in paragraph 48 'Limits to the natural right of support', it is stated that "the natural right of support is not an interest in the subjacent mines sufficient to entitle the surface owner to insist upon the minerals remaining unworked. The owner of the minerals is entitled as an incident to the enjoyment of his property to get his minerals in a usual and proper course of working consistent with leaving support, the minerals may be worked out completely provided adequate artificial support is substituted".

In paragraph 52 - 'Support for artificial structures' it is stated that "there is no natural right of support for that which is artificially constructed on the land; such a right cannot exist ex jure naturae for the thing itself did not so exist ..." and finally in paragraph 182 - 'Express and implied rights of working' it is stated that "... Prima facie there is incident to the ownership of mines, subject to planning legislation, power on the part of the mine owner to enter upon the surface, to dig pits and get minerals, to drive shafts vertically through an upper seam, or to make underground communications through a vertical barrier separating excepted mines. However, the power to win and work will

not be implied if the process, as in the case of quarrying, will be destructive of or permanently injurious to the surface. Such power will only be conferred if the instrument of severance grants the liberty in clear and unambiguous language".

Thus in Coronation Collieries v Malan[8] Bristowe, J. stated:

> "By the grant of the right to work the minerals he (the land owner) does not lose that right of support, unless there is something in the instrument containing the grant, inconsistent with the continuance (of that right)".

This appears to be a very strong suggestion that a mere severance of the mineral rights from the freehold is not in itself sufficient to give to the holder of the mineral rights, the right to destroy or permanently to injure the surface.

The legal consequences attaching to a particular kind of right are generally determined by the juristic nature of that right. As can be seen from the quotations from case law cited above, our Courts have, by their own admission "experienced considerable difficulty in finding an appropriate juristic niche" in which to place the right to search for and win minerals. However, it seems now, in view of the various Appeal Division judgments on the

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(8) 1911 TPD 577 at p586.

subject, that the juristic nature of the right to search for and win minerals is that of a personal quasi-servitude, the better view, with respect, would be to regard it as a real right sui generis. As a result two general principles have emerged from the decisions of the Courts viz -

(a) rights to minerals are real rights, and

(b) rights to minerals have certain characteristics in common with servitudes, but also differ quite radically in certain respects from both personal and praedial servitudes.

The principle of lateral support appears to have entered and become entrenched in our case law without a fanfare and, in the critical opinion of many of the writers on the subject, without any apparent careful consideration. Thus Milton states:(9) "The right of lateral support to land is one of the so-called natural servitudes .... To regard the right of lateral support as a servitude, or in the words as a right in the supporting land, would lead to certain consequences. For instance, the right would exist only in regard to the land itself and not in respect of artificial

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(9) Milton, J.R.L., "The law of neighbours in South Africa", Thesis, Durban, 1965, pp199-200.

erections on the land ..... Further, if the right be regarded as a servitude any violation of it would be dealt with by proprietary remedies. The wrong would arise from the withdrawal of support and not from any damage which such withdrawal would cause and as a result prospective damages could be awarded. It will be seen that a number of these consequences are reflected in our law. Conversely however, some of them are not. This is because there is a second theory as to the nature of lateral support which does not regard the right as arising from servitude ... the second theory regards the right to lateral support as a natural right of property, protected as are such other rights by the doctrine of nuisance". [However, our Courts have specifically rejected the view that the English law doctrine of nuisance has been incorporated in our law.(10)] "Thus the right is regarded as being a right in respect to the supported land and not a right 'to the support of any particular amount or of any special character, it is merely a right to enjoy land in its natural condition and to this enjoyment support is incidentally necessary. Regarded as such there are certain further consequences. The right would for instance apply equally to land and buildings on the land. Violation of the right would be a strict liability delict. It would also follow that it would not be the withdrawal of support but the actual damage caused which gave rise to liability. The law

(10) Regal v African Superslate 1963 (1) SA 102 AD at p106.

of lateral support as reflected in Anglo-American and to a certain extent South African law, is based on both of these theories. Thus it will be seen that the servitude theory is represented by the rule that the right does not apply to artificial erections on the land. On the other hand, the second theory is represented by the rules that actual damage, not withdrawal of support, is the cause of action and that liability is strict".(11)

Milton further points out that neither the Roman nor the Roman-Dutch law recognised any specific rules relating to lateral support. He is supported in this view by Kadirgamar.(12) who states: "It would, of course, be unreasonable to expect express denial of a right whose existence was obviously not debated as a controversial issue, and the non-existence of which, it is submitted, appears to be established by an overwhelming absence of authority in support of it"; and at p212: "If ... it transpires that no such concept was recognised in Roman and Roman-Dutch law. .... the modern doctrine of lateral support for land and buildings must be recognised for what it is - a novel concept masquerading in the guise of an ancient principle".

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(11) Milton, J.R.L., op. cit., p200.

(12) Kadirgamar, L., "Lateral Support for Land and Buildings - an aspect of Strict Liability", (1965), 82 SALJ 210 at p231.

It appears that the problem of lateral support initially arose and was dealt with, in the context of the working of diamond claims. Milton comments: "As a result of this haphazard working of claims, earth (or "reef") began to tumble from higher claims into the lower. Inevitably loss and damage occurred and the Courts were called upon to enunciate rules to deal with this unique situation. At the outset they were confronted with the problem of whether to apply the rules of lateral support to land as existed in other countries or to disregard them in the interest of the convenience of the diggers. For it was of the very essence of the claim method of seeking diamonds to remove the lateral support of neighbouring claims"(13) In Murtha v Von Beek(14) a case relating to diggers inter se, it was held that as between diggers with adjacent claims there was no duty of lateral support. However, in MacFarland v De Beers Mining Board(15) it was held that a digger did owe a duty of lateral support to a neighbouring landowner whose land was not on the mine. Milton is justly critical: "The Court seems to have accepted as axiomatic the right to lateral support. This is the first case which stated specifically that the right existed in South African law. The

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(13) Milton, J.R.L., op. cit., p202.

(14) 1 B.A.C. 121.

(15) 1884 (2) HCG 398.

legal basis for the decision is not clear and it seems as Buchanan J later pointed out[16] the judges merely 'assumed' that the right existed". The facts of the leading case on this topic - London and SA Exploration Company v Rouliot[17] were as follows. Plaintiff (Appellant) leased certain claims in the Du Toit's Pan Mine to the defendant (Respondent). The defendant went onto the plaintiff's adjoining claims to remove a reef which he felt was in danger of falling down into his claims. The plaintiff alleged trespass and claimed damages for disturbance of its common law right to lateral support for its ground. The defendant claimed that the ground removed had become dangerous to the working of his claims and it was therefore necessary that it be removed. In the Court a quo Solomon J granted judgment for the defendant, but the decision was reversed on appeal and damages were granted. At p88 De Villiers, C.J. said that it was necessary to consider three questions, viz -

1. "What is exact legal position of the defendant towards the plaintiff company?"

   The answer to this question depended on the terms of the lease. This gave a right to dig for and to keep the diamonds and precious stones found; and at p89 De Villiers, C.J. said:

(16) in London and SA Exploration Company v Rouliot 8 SC 75 at p203.

(17) 8 SC 75.

> "for that purpose the claims are subject to a burthen analogous to a servitude, but instead of the burthen being due, as in the case of praedial servitudes, to the proprietor or occupier, as such, of another tenement, it is due to the lessee or occupier of the claims."

2. "Is the defendant entitled to remove ground from within his own claims without regard to the effect which such removal may have upon the adjoining land belonging to the plaintiff company?" ie "whether such right of removal is limited by any right on the part of the plaintiff company, as owner of the adjacent land, to support for such land from lateral pressure."

At p90 De Villiers, C.J. answered this question as follows:

> "The theory of the law is that the owner of the land owns it upwards to the skies and downwards to the centre of the earth, but it is obvious that his exercise of the rights of ownership are practically confined to the surface and its neighbourhood above and below. Even at or near the surface his rights are not unlimited, for they must be exercised with due regard to the corresponding rights of the owners of adjoining lands".

After commenting on the dearth of Dutch authority, he quoted at p91 - 92 the words of Lord Cranworth in "Caledonian Railway Company v Sprot[18] ...

(18) 2 McQ 449.

> "I may add that the subject of the right of the owners of the surface to adequate subjacent and adjacent support has, on several recent occasions been discussed in the English Courts. The principles which there govern the decisions were not derived from any peculiarities of the English law, but rested on grounds common to the Scotch and, I believe, to every other system of jurisprudence".

The learned judge then pointed out that:

> "In England no department of law has received more careful consideration from the Courts than that which relates to the relative rights and obligations of the owners of the surface and the owners of mining rights. All important though the different mining industries are to the wealth and prosperity of the country, the rights of the owners of the surface to support from adjacent as well as subjacent land have always been carefully guarded".

and expressed the opinion that the right to lateral support exists as a natural incident to property in the following words at pp93 and 94:

> "If the right to lateral support exists as a natural incident to the plaintiff's land - as in my opinion it does - the parties to the contract must be deemed to have contracted with a view to the continued existence of that right. If they had intended that the plaintiffs should be deprived of this natural right ought not the defendant have stipulated to that effect? I am of the opinion that in the absence of such a stipulation the presumption is in favour of an intention to preserve a well established natural right of property rather than to part with such a right"; ..... "the right given to the defendant to mine diamonds from the claims must be taken to be subject to the plaintiff company's right of support".

3. Is the defendant entitled to remove ground from within his own claims without regard to the effect on adjoining land? If so "he

might go a step further and break down from the adjoining land such ground as would, if unremoved, prove an obstacle to his removing the supporting ground from his own claims by the open system of mining".

Since the answer to the second question was in the negative, it followed that the answer to the third question was also in the negative, and at p96 De Villiers, C.J. said:

> "In the present case, it has been contended on behalf of the defendant, that it is necessary for the due enjoyment of his mining rights that he should be allowed to break down portion of the reef on the plaintiff's land. .... The answer is two-fold. In the first place, the defendant has not stipulated as he might have done, for a right to break down the reef as well as to remove soil from the claims. In the next place, it is clear that by means of underground mining the soil can be removed from the claims without first removing part of the reef. This mode of mining may be more expensive than open workings, but is admitted to be quite practicable".

Following on this decision the right of lateral support to land in its natural state was entrenched in South African law. Where the land owner's right to subjacent and lateral support is threatened, ie even slight movement of the surface or gradual erosion of the surface may be sufficient,(19) the land owner is generally entitled to an interdict restraining the mineral right holder from

(19) Gijzen v Verrinder 1965 (1) SA 806 (D) at p811B.

interfering with that right and a claim for damages when damage results from the withdrawal of support.(20)

The land owner's inherent right to an interdict rather than, or in addition to, an award of damages was confirmed by Tindall, J. in Prinsloo v Luippardsvlei Estates and GM Co Limited:(21)

> "A person by committing a wrongful act is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages on that behalf, leaving his neighbour with the nuisance. In such cases the well known rule is to grant the injunction sought, for the plaintiff's legal right has been invaded and he is prima facie entitled to an injunction".

However, the question of whether such right extends also to such buildings as might reasonably be put upon the land is not quite settled in South African law. The view, that land with buildings on it, was in fact so entitled first received judicial recognition in Johannesburg Board of Executors v Victoria Building Company.(22) In Coronation Collieries v Malan(23) Bristowe, J. expressed doubts and said at p591

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(20) Douglas Colliery Limited v Bothma and Another 1947 (3) SA 602 (T) at p616.

(21) 1933 WLD 6 at p24.

(22) 1894 (1) Off Rep 43.

(23) 1911 TPD 577.

"But this difference between the two systems of law does not affect the right of support and the case of London and SA Exploration Co v Rouliot shows that, as regards the right of support for land in its natural state, there is no difference between the English and the Roman-Dutch law".

The learned judge made the following statement on the state of the South African law at p592:

"Where however, the surface is not in its natural state, as where its weight has been increased by a building or other erection or its self sustaining power has been weakened by an excavation, the additional support required does not, according to the law of England, exist as a right of property, but can only be acquired by grant, reservation or prescription. ... There was formerly some difference of opinion as to whether there was not a natural right of support for buildings which might be reasonably put upon the land, but this was finally negatived by the case of Dalton v Angus. Sup (pp763, 804, 808: see MacSwinney on Mines 3rd edition p288). If the decision in Johannesburg Board of Executors v Victoria Building Company is well founded, our law has not gone so far as this ...".

And so the controversy raged on through the cases some supporting others negating the view that the right of support was owed both to land and the buildings on it. The case of Douglas Colliery Limited v Bothma and Another(24) is in a sense the high water mark since the Court there granted an order for the demolition of a dwelling house and a labourer's hut and an interdict against the erection of any further buildings, on the land in respect of which the applicant held the mineral rights.

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(24) 1947 (3) SA 602(T).

Thus Neser, J. said at p612 -

> "... while the holder of the mineral rights is obliged so to conduct his mining operations as to leave support for the surface in its natural state the owner of the land is obliged to do nothing on the surface which would interfere with the holder's right to sever and remove the minerals".

However one senses a softening of such a strict application, in view of the following statements made by the learned judge at pp613 and 615, namely:

> "It may be that when the property is one of considerable extent on which agriculture is likely to be carried on in the near future, but on which there are at the date of cession of mineral rights no buildings t e Court would imply a term that the owner of the land was entitled to erect a farm house with the usual outbuildings and that when these were erected they would be entitled to support";

> "Mr Ettlinger contended that applicant's rights were violated and that damage was done to the applicant immediately the house was erected; he contended that it would make no difference to applicant's rights if the house was erected on a portion of Vlaklaagte which would not, according to applicant's present plans, be mined for a number of years provided it be proved that such house was underlain with payable coal. If that is the law it might well have the result that for years little, if any use, could be made of the surface of a valuable agricultural farm because of the impossibility of conducting farming operations without buildings".

But despite the above statements Neser, J. finally concluded at p616 that:

> "The holder of the mineral rights is entitled to mine whenever and wherever he chooses; if a building is erected his rights to mine under or near that building are interfered with immediately the building is erected; the fact that he may not wish to mine

near that building for some years cannot affect the question as to when his cause of action accrued".

Despite the fact that an order for demolition of existing buildings and an interdict prohibiting the erection of further buildings was granted Neser, J. still appears to have had doubts as to the equity of the decision, for at p617, he commented as follows -

"I understand that the legislature is contemplating legislation in connection with the conflict of interests between the holder of mineral rights and the owner of land; if that is so the conflict exemplified in the present case is one which may well be considered. A Court might, because of the apparent hardship to the owner, be disposed to refuse an injunction and to award damages in lieu of an injunction where the proper remedy is an injunction".

This judgment does not however cover the situation where the holder of mineral rights stands by and acquiesces in the erection of the house/s and at a later date attempts to claim damages for the immobilization of his mineral deposits, or where he parts with his mineral rights and his successor-in-title attempts to claim such relief.

Milton comments on the judgment as follows -

"There is one pertinent fact to be observed about this decision. It is concerned essentially with mining law and ...

different provisions exist in South African law regarding rights to land used essentially for mining purposes".(25)

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(25) Milton, J.R.L., op. cit., p206.

English law, as set out in the quotation from Halsbury's Laws of England, does not recognise a right of support of buildings erected on land. Milton poses the pertinent question:

> "The question is thus whether South African law will accept this same tradition of high regard for the rights of an owner to full enjoyment of his land, including the right to cause a neighbour's house to collapse with impunity, or whether it will adopt the more just and equitable rule (it is submitted) that a right of support is owed to buildings".(26)

Or put in another way by Cowen(27) -

> "Again as has often been pointed out, the classical ideal of the so-called 'totality of ownership' has probably never been realized in fact in any legal system, for the rights of others places necessary bounds on every owner's powers".

Milton further opines that Roman law drew no distinction between removal of support of land with or without buildings on it and that any withdrawal of lateral support would have given rise to an action.

Gijzen v Verrinder(28) is the most recent case on the same issues. Plaintiff and defendant owned adjoining properties in Durban

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(26) Ibid, p208.

(27) Cowen, D.V., "The South African Sectional Titles Act in historical perspective: An Analysis and Evaluation", 1973, CILSA at p24.

(28) 1965 (1) SA 806(D).

North. Defendant, in the course of building a house levelled his land and in the process excavated up to the boundary line. Plaintiff claimed that as a result of the excavations his land was deprived of lateral support causing subsidences to occur on his property with prospects of further subsidences in the future. Plaintiff further alleged that defendant had undertaken to build a retaining wall on the common boundary which would have prevented further subsidences, but had, in fact, failed to do so. At p810 Henning, J. adopted the following approach -

> "The first question for investigation is whether the defendant deprived the plaintiff of lateral support resulting in damage. The right of an owner with land to lateral support from adjacent land is a right given in the nature of things ... As far as I have been able to ascertain the cause of conflict in reported cases based upon deprivation of lateral support has usually been the subsidences caused in consequence thereof. By subsidence I understand a falling down or caving in. Nowhere, however, have I been able to find a statement to the effect that it is essential for a cause of action based on the removal of lateral support that a plaintiff should establish that a subsidence in this sense has occurred".

Milton comments on this case as follows(29) -

> "An important aspect of Gijzen v Verrinder is the fact that the Court regarded the right of lateral support as a natural right of property given in the nature of things, thus adopting the view that the right is a right to the integrity of the land, a

(29) Milton, J.R.L., "Lateral support of land: A Natural Right of Property" (1965) Vol. LXXXII SALJ 459 at p460.

natural and necessary incident of ownership of land which ensures its full use and enjoyment. This approach is to be distinguished from the view that the right is 'a natural servitude of support from the adjoining land. ... The Court's refusal to award prospective damages was dictated by its reliance on the natural - right approach. If the right to lateral support be regarded as a right to the integrity of the land, it is only when this integrity is violated that liability arises. Such a violation occurs when actual damage in the form of a subsidence occurs. ... It follows then that the damage, not the withdrawal of support, is the cause of action. Thus prospective damages cannot be recovered, there being no cause of action in respect of them".

Although Milton submits that the decision is correct he is nevertheless critical and makes the following remark at p461:

"... with respect, ... the statement of Henning J (in the above case) that in subsidence cases, 'there is usually no unlawful act and the cause of a tion is damage and damage alone' may be misleading. There is an unlawful act in that there has been a substantial interference with adjoining land. It is the presence of damage which converts a normally lawful act (digging upon one's land) into an unlawful act".

Milton finally summarises the legal position in regard to support as follows -

"South African law thus strikes a compromise between the rights of enjoyment in land and the interests of the mining industry. In general the right to vertical and lateral support is recognised as a natural right of property, and, apart from statute or custom, an owner who leases his land for mining purposes is entitled to lateral support for his unleased portion unless it is clear from his lease that his rights have been waived. Where, however, the surface is not in its natural state, as where the weight has been increased by a building, or its self-sustaining power has been weakened, it is doubtful whether a right of support exists as a right of property, or whether it can only be acquired by grant, reservation or prescription. ....

It is thus submitted that a clear distinction must be made between the right of support as existing in private property law and as existing in mining law. In the former case the doctrine of the Victoria case is to be preferred".(30)

With respect, however, two further situations have not been dealt with either by Milton or the case law on this subject, viz -

1. The right of the land owner to subjacent and lateral support for buildings already in existence at the time of severance of the mineral rights from ownership of the land.

2. The right of the land owner to subjacent and lateral support for those buildings erected after severance of mineral rights from ownership of the land, where the mineral right holder must be taken tacitly to have acquiesced to their erection by his lack of objection to sterilization of his mineral deposits, or having not registered an objection subsequently parts with his mineral rights and his successor-in-title then attempts to claim relief from such sterilization.

It is submitted that in both of the above instances the most "just and equitable" approach would be to regard the right of support as owed to both land and the buildings thereon.

(30) Milton, J.R.L., op. cit., pp210-211.

Finally, if in fact one accepts Kadirgamar's reservations that the "non-existence" of the right of support in Roman and Roman-Dutch law "appears to be established by an overwhelming absence of authority in support of it", then the following questions require to be debated.

1. "It is argued .... that the modern law is expressly based on the assumption ... that the doctrine of lateral support was recognized in Roman and Roman-Dutch law, that it was in the nature of an exception to the general rule according to which liability to recompense damage was based on the presence and proof of culpa on the part of the actor. If it is shown that the assumption is false, or, at any rate, that acceptable authority in support of it has not been cited and is singularly difficult to find, there may be a case for revising the notion that in Roman-Dutch law liability for unintended withdrawal of lateral support is strict (as in English law).

2. If an examination of the authorities shows that an absolute right of lateral support for land and/or buildings was recognized in Roman and Roman-Dutch law, involving as it does liability for the infliction of damage without proof of culpa, this would provide a powerful argument by analogy from our common law for the outright extension of the English rule of strict liability to other situations where its application is at present doubtful. If, on the other hand, it transpires that no such concept was recognized in Roman and Roman-Dutch law, then not only does the attempt to extend the English rule of strict liability receive a setback but ... (the concept) must be rejected if this can be accomplished without unsettling the law to any serious degree, or modified, in accordance with the principle that 'the action under the Lex Aquilia has in the modern law become a general remedy for loss wrongfully caused', or, if the merits of the doctrine require its perpetuation it must be absorbed as a conscious importation from English law.

3. An examination of the incidence of liability under the doctrine of lateral support compels one to reflect on the social and economic justice of applying the strict liability principle in a situation uncomplicated by the presence of those special factors of unusual danger arising from the abnormal user of land which, in a complex industrial society, might on other occasions make a rule of strict liability desirable".(31)

Once again there is a division of opinion as regards the acceptability of the principle of strict liability amongst legal scholars. Thus, for instance, Kadirgamar, in discussing D.10.1.13 as applied and used in our case law states -

> "D.10.1.13 is not the establishment of a right of support between adjoining lands nor can it be inferred from this text that a right of support existed; that, in any event to draw from the premise that there is a right of support the conclusion that there is absolute liability for damage done by the withdrawal of support is logically and legally unsound because it betrays confusion between the recognition of a legal right and the incidence of liability for its infringement; that if an actio in factum was available in Roman law for the damage caused by the withdrawal of support it must be remembered that the actio in factum in most cases lay only if there was dolus or culpa which is the very antithesis of strict liability". (32)

C.G. Van Der Merwe(33) takes the opposite view in the course of a discussion on the judgment in Foentjies v Beukes(34) - in this case defendant's excavations caused subsidence of plaintiff's land - "It may well be that the defendant's activities gave rise to a tort of strict liability for which fault is not a requirement. This view is strengthened by the fact that South African law on lateral support has been influenced by English law, and more particularly by

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(31) Kadirgamar, L., op. cit., p212.

(32) Kadirgamar, L., op. cit., p230.

(33) 1977 Annual Survey of South African Law at p246.

(34) 1977 (4) SA 964(C)

the English tort of nuisance - traditionally a tort of strict liability".

In a most interesting article(35) Van Der Walt suggests that due to the "rapid development of technology and the advance of industrialization which has brought a new and greater danger of harm to the community", the time has come to recognize "a new ground for liability apart from fault" based on the "risk principle". He states at p65 - "The fact that Roman-Dutch law, in which our present law of delict has its origin, is in principle based on the fault principle, surely does not mean that our law cannot at this later stage reduce the dominance of the fault principle to some extent by recognizing a new ground for liability apart from fault. ... the general characteristics of strict liability, the creation of a liability based on risk usually requires rather detailed and complicated legislation, owing to the special rules which attach to it, eg the restriction on the extent of the liability. Thus cases of strict liability should preferably be governed by legislation".

He concludes at p82 - 83 - "The existence of statutory cases of liability based on risk, the retention of several cases of liability without fault recognized at common law, and indications of the

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(35) Van der Walt, J.C., "Strict Liability in the South African Law of Delict", 1968, CILSA p49.

inadequacy of fault is the general and only basis for delictual liability in our case law and jurisprudence compel one to take notice of this new phenomenon which, as we have seen, is by no means restricted to our law, having made its appearance everywhere. And although the traditional fault theory is still firmly established in our law, there is sufficient ground for averring that it no longer offers the only basis for delictual liability. The arrival of the risk principle on the legal scene has been almost unnoticed, but it has come to stay as an independent ground for delictual liability side by side with the principle of fault".

Similar conclusions are drawn by Viljoen(36) in his discussion on the Dutch law on mining. He suggests that there is a place in modern day law for "liability without fault or liability for lawful acts causing damage", namely, "There appears to be a lot of difference of opinion in Dutch law on this subject and especially on the interpretation of the Hooge Raad's decisions. It is quite clear, however, that it is now part of the positive law that there are certain instances where someone, whether it be a public authority or a private individual, may commit acts causing damage to another provided that such damage is adequately compensated". However, in

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(36) Viljoen, H.P., "The Rights and Duties of the Holder of Mineral Rights", Thesis, Leiden, 1975, p105.

his review of Franklin and Kaplan's book "The Mining and Mineral Laws of South Africa" he expresses reservations that the authors support strict liability and suggests that the last word has not yet been 'writ'.(37) Although the "risk principle" has not as yet been officially recognized as the basis of strict liability, it is an interesting concept the limitations of which would possibly best be regulated by legislation. The last word on strict liability or otherwise must be given to Franklin and Kaplan - "although this issue can also not be regarded as having been finally settled, it is submitted that the preferable view is that the duty not to interfere with lateral support is a strict duty which does not depend upon proof of culpa or dolus,"(38) with which view the writer associates herself.

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(37) 1983 (46) THR-HR 105 at p106.

(38) Franklin, B.L.S. and Kaplan, M. "The mining and minerals laws of South Africa", Durban, Butterworths, 1982, p188.

Chapter IV - The duty of support in relation to open-cast mining, longwall mining and pillar extraction

There is English authority for the view that the right to win and work minerals by a process which is destructive of or permanently injurious to the surface such as quarrying or open-cast mining, will not be implied; that power will only be conferred if the instrument of severance grants the liberty in clear and unambiguous language.(1)

Although the above was cited with approval by Bristowe J in Coronation Collieries v Malan(2) and in subsequent cases, our Courts have held that the power to let down the surface may be conferred not only by express words but also by necessary implication.(3)

Halsbury,(4) states: "The intention (whether or not there is a power to interfere with the support of the surface) is to be

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(1) Halsbury's Laws of England, 4th edition, volume 31, paragrapn 182 - quoted above at p117.

(2) 1911 TPD 577 at pp590 - 591.

(3) Municipal Council of Johannesburg v Robinsion GMC 1923 WLD 99 at p110 and East London Municipality v SAR&H 1951 (4) SA 466 (E) at p474.

(4) Laws of England 4th edition, volume 31, paragraph 59.

gathered from the language of the instrument as a whole in the first instance, but evidence is admissible as to the circumstances in which the instrument was executed, including the facts known to the parties as to the practice of mining at the date of the instrument, in order to ascertain the sense in which the parties used the words employed by them to define their respective rights. The burden of proof in all cases is on the party who claims that the commmon law right of support has been varied".

In paragraphs 63 and 64 Halsbury states that the absence of provision for compensation for damage to the surface is almost conclusive proof that the right to let down the surface was not contemplated and, if there is such a clause, the inadequacy of the compensation provided for would be compelling evidence that the parties to the contract did not contemplate the right to cause subsidence. Thus in New Sharlston Collieries Company Limited v Earl of West Morland[5] the mine owner had applied longwall mining whereas the general method of mining in the area was the bord-and-pillar method. On appeal the House of Lords stated: ".... there being no express permission, the onus lies on a person who says he has a right to do it, to show something in the instrument which gives him that right".

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(5) 1904 (2) CL 443 (HL) at p446.

Whether there is such an implication will depend upon all the circumstances of the case, and inter alia the nature of the minerals, their depth below the surface, the manner in which it is possible to work those minerals at that depth, and the knowledge of the parties to the contract. It would seem, that if, for example, the minerals are at such a depth that they can only be extracted by open-cast mining or fully recovered by such means, and both parties are aware of this fact, then the holder of the mineral rights would be entitled to employ methods of extraction destructive of or permanently injurious to the surface without the right to do so being expressly conferred. If, on the other hand underground mining were practicable (even though less convenient and more expensive), the holder would not be entitled to resort to open-cast mining.(6)

There does not appear to be any obligation at common law upon the holder of the mineral rights who is entitled either specifically or impliedly to exploit the mineral deposits by open-cast mining to restore the land to its original condition or to pay compensation unless the contract or instrument of severance expressly so provides. However regulation 5.12 of the Regulations to the Mines and Works Act No 27 of 1956, relates to the rehabilitation of land after open-cast mining, and regulation 5.12.2 provides that rehabilitation of the surface at any open-cast mine shall form an

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(6) London and South African Exploration Company v Rouliot 8 SC 74 at p96.

integral part of mining operations and where applicable, be in accordance with a programme laid down by the Inspector of Mines after consultation with the mine manager and approved by the Government Mining Engineer.

A high degree of mechanisation has been achieved in the mining of coal in South Africa, both on the surface and underground. The various mining methods adopted are described briefly -

1. Bord-and-pillar is a method of underground coal mining in which the working places are rectangular rooms from five to ten times as long as they are broad. The bords or rooms are separated by pillars of solid coal. At an advanced stage of mining the pillars are stripped of some of their coal until progressively more and more dangerous roof conditions prevent further pilfering. This appears to have been the most conventional method for extracting coal.

The more important high extraction methods for mining coal are rib pillar extraction, pillar extraction and longwall mining. These methods have in common higher extraction of coal than the conventional bord-and-pillar method and the removal of support from the strata overlying the coal seam with the result that controlled subsidence of the overlying strata takes place.

2. Longwall mining is a method of underground mining by which the coal seam is removed in one operation by means of a long working

face or wall. The working advance is in a continuous line which may be several hundreds of metres in length. The space from which the coal has been removed is either allowed to collapse or is completely or partly filled with debris.

3. Open-cast or strip mining removes the overlying strata or overburden extracting the coal and then replacing the overburden.

In a particular colliery one may encounter only one or a combination of the above mining methods. The choice depends inter alia on profitability, roof conditions, closeness of exploitable seams and the depth of occurrence of the coal seams.

Where express power has been given to "let down the surface" in the document evidencing the right to minerals, there is no debate. The only conflict which can arise is whether such document gives such a right by necessary implication. A right to cause subsidence of the surface cannot be said to be a normal or necessary incident of the right to win minerals and could only be necessarily implied to the extent that the exploitation of the minerals, without causing subsidence, would be impossible or where it can be shown that it is commonly accepted and known that pillar extraction or long-wall mining are the only feasible methods of mining that particular mineral. The right to mine by either method would nevertheless still have to be exercised in a manner least injurious or onerous to

the owner. In Wakefield v Duke of Buccleuch[7] Malins, V.C. made the following statement:

> "In other words, if the rights of the plaintiff and defendant cannot co-exist, which must give way to the other? Upon principle, if there were no authority, I should say that the surface, having at all times been enjoyed by man, must be protected at the expense of the mines, which have never been so enjoyed, ie the mines in my opinion must be regarded as a tenement subservient to the surface".

This passage has been criticised as being too wide whilst in any event the rights of the parties must also be determined in accordance with the relevant stipulations of their contract. Although the right of the mineral right holder is a real right, it is in effect in competition with another real right, that of full dominium, over the same land, albeit that this real right to minerals has been subtracted from such full dominium. On the basis that the right to minerals has a limited content (especially if equated to a servitutal right), how then has the conclusion been arrived at that in case of irreconcilable conflict the rights of the land owner must be subordinated to that of mineral exploitation? Surely this conclusion has been reached only on the basis that this principle is not without limitation, ie where lateral and subjacent support are both removed and the land owner's rights therefore have

(7) 1867 LR 4 Ex 613 at pp638-9.

no content, then surely the conflict must be resolved in favour of the land owner unless it can be shown that he has expressly or impliedly waived that right to support. This principle was enunciated by Krause, J. in Municipal Council of Johannesburg v Robinson Gold Mining Co Ltd (8) in the following manner -

> "It is a clear principle of the English as well as of our law that every grant, whether voluntary or compulsory, must carry with it all that is necessary to the enjoyment of the subject matter of it and, therefore, if a certain amount of lateral support is essential to the safety of the sewer, the right to it must pass as a necessary incident to the grant. The nature and extent of the support is a question which in each particular case will depend on its own special circumstances; ... The right to the support of land in its natural state, vertically by the subjacent strata, and laterally by the adjacent soil, is a right to which the owner of the surface is of common right entitled. The right is an incident to the right of ordinary enjoyment of prope ty ...".

Furthermore, if it is accepted, contrary to Kardigamar's conclusions, that it is a necessary incident of our law, that the land owner is entitled to lateral and subjacent support, then the right to let down the surface in any form can only derive from the fact that the parties to the contract must have contemplated, possibly because the particular mineral is located on or immediately below the surface, that the right to mine and win minerals would inevitably lead to removal of the surface.

In the absence of clear or implied consent by the land owner to "let down the surface", the land owner would be entitled to an

(8) 1923 WLD 99 at p110.

interdict restraining the mineral right holder from utilizing methods of mining causing or likely to cause subsidence of the surface of the land. All the land owner would have to prove to succeed in a claim for an interdict, in the words of Innes, C.J. Setlogelo v Setlogelo[9] are:

> "a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy".

It is submitted that in a conflict situation regarding the mineral right holder's right to "let down the surface", be it by open-cast, longwall mining or pillar extraction, the right of the land owner to lateral and subjacent support must always prevail unless it can be shown that he expressly or impliedly (the latter by having the requisite knowledge for such to be implied) waived his right to such support.

The common law position with regard to the right to carry out open-cast mining has been somewhat modified by section 6 of the Mineral Laws Supplementary Act 10 of 1975 already discussed in the statutory section of this dissertation. However, if at common law no right to use the open-cast method of mining exists in the first place then Section 6 will be of no assistance to the mineral right holder, based on the premise that the mining operations must be "lawful".

(9) 1914 AD 221 at p227.

Chapter V - Dewatering a mine

Under this heading it is proposed to examine the liability of a mining company to the owner of, or a person having an interest in, land, situate in the same water compartment area as that in which mining operations are conducted, where as a result of the water pumping operations of the mine concerned, the water table in the area is lowered, in turn manifesting itself in -

(a) depressions and sinkholes caused by subsidences in some cases resulting in damage to surface installations such as buildings; and

(b) the drying up of boreholes situate on such neighbouring land.

Halsbury defines the doctrine of "ordinary user" as set out on p121 of this dissertation but continues ".... and [owners or occupiers] are not responsible for damage sustained by the property of others through natural agencies operating as a consequence of such ordinary and natural user or occupation", and then Halsbury states[1] that "The occupier of a mine is entitled to get all the

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(1) Laws of England, 4th Edition Volume 31, paragraph 173 p46.

minerals in his mine in a skilful and usual course of working, and legitimate operations conducted for that purpose do not impose a liability upon the owner of mines lying at a higher level if the result is to permit the escape of water which collects in the workings or even if the natural flow is increased".

In accordance with the above, it is an accepted principle of our common law that the ordinary and natural user of land, although resulting in damage to the property of others, will not give rise to a right of action.(2) Halsbury(3) cites the following illustrations of the principle: "Thus, no liability arises when, by the ordinary working of mines, subterranean water is tapped so as to dry up a well or the under stratum in adjoining property ..... or when, by draining or excavating in his property a person withdraws the subterranean water which supports the neighbouring land". In the leading Scottish case on the subject (of particular interest because Scottish Law is also Roman Law based), of Wilson v Waddell(4) Lord Blackburn enunciated the principle as follows:

> "The general rule of law in both countries (England and Scotland) is that the owner of one piece of land has a right to

(2) Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 at pp106, 110-111, 114 and 116.

(3) Laws of England 4th edition, volume 34 p108 Note 1.

(4) (1876) 2 appeal cases 95 at p99.

> use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of user of minerals; and that a servitude to prevent such a user must be founded on something more than mere neighbourhood".

Here the defendant's works caused subsidence of the surface, with the result that, when the coal in his workings was removed, the water flowed into the plaintiff's holding and he had the expense of removing it. It was held that the defendant's conduct was in accordance with the natural user of minerals and that it was the business of the plaintiff to protect himself to the best of his ability.

The principle of natural user was accepted in Austen Bros v Standard Diamond Mining Company Limited:(5) "Mining cases - the digging beneath the soil for the purpose of making use of the soil itself - do not apply to questions of the kind before the Court, because such a user of the soil is held to be a natural use of mineral land"; and in Reed v De Beer's Consolidated Mines(6) Lawrence, J.P. said:

> "But excavating and raising the minerals is considered the natural use of mineral land, and these decisions are referable

(5) (1883) 1 HCG 363 at p380, Jones J.

(6) (1892) 9 SC 333 at p344.

> to this principle, that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural use by his neighbour of his land, and that when an interference with this enjoyment by something in the nature of nuisance .... is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land".

This was a case between neighbouring claim holders, where the plaintiff claimed that the failure of the defendant to continue working its claims caused the overflow of water into his claims. The Court dismissed the plaintiff's claim for an order compelling the defendant to work its claim, alternatively, an award of damages. Further, in Levin v Vogelstruis Estates and Gold Mining Co Ltd(7) Ward, J. states:

> ".... it is no doubt true that owners of land are entitled to the use of their property for which it may in the ordinary course of enjoyment of land be used and are not responsible for the result of the operation of natural agencies as a consequence of such natural user".

It was held that, although by common law, the defendant mining company was entitled to pile up a dump in the ordinary course of mining, it was not entitled to pile it up in such a way that it encroached to within 10 yards of defendant's house. Flowing from the above, the common law principles relating to the abstraction of underground water were dealt with in Ohlsson's Cape Breweries Ltd v

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(7) 1921 WLD 66 at p68.

Artesian Well-Boring Co Ltd[8] and may be summarised as providing that the owner of land is entitled to search for, and if he finds it, to appropriate underground water, even if in the process he harms his neighbour either by reducing his supply or depriving him of, water, altogether. There are, however, three exceptions to these general principles, viz:

(a) where such underground water flows in a known and defined channel, or

(b) where a servitude to the contrary exists, or

(c) where the appropriation of such water is solely with intent to injure his neighbour.

This last proposition was considered to be of doubtful validity in the above case - see p131, and left open by the Appellate Division in Union Govt v Marais and Others[9] where it was held unnecessary on the facts of the case to consider it. The following two cases appear to extend the exceptions to the general principles, namely - New Heriot Gold Mining Company Ltd v Union Government[10]

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(8) 1919 CPD 125 at p130.

(9) 1920 AD 240 at p247.

(10) Innes, C.J. 1916 AD 415 at p421.

> "Apart from servitude no one is entitled by means of artificial works to discharge upon his neighbour's land water which would not naturally flow there, or similarly to concentrate and increase the natural flow to the detriment of his neighbour",

Seventeen years previously De Villiers, C.J. in Kohne v Harris,[11] had made the following important statement.

> "... persons should not, in order to make their own property more valuable, make their neighbour's less valuable. Every person should have due regard for the rights of others, and especially does this rule apply with regard to water where a person improving his own land injures his neighbour".

In view of the fact that in order to de-water a mine "artificial works" are necessary, and further that such activity could entail a serious risk both to person and property of neighbouring owners of land, it is submitted that the doctrine of ordinary and natural user of land cannot be invoked by a mining company.

A further consideration which arises, insofar as mining companies are concerned, is whether the provisions of the Water Act 54 of 1956 override the common law principles relating to the use or disposal of underground water or whether it can be held that the common law position of mining companies in relation to the removal of subterranean water is merely fortified by the provisions of this Act, or finally whether common law principles and the

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(11) (1899) 16 SC 144 at p145.

provisions of the Water Act must be considered side by side on the basis that the Water Act clearly indicates the Legislature's intention that there should be an interference with private rights in regard to the use of water. A question, which appears to remain unanswered, is whether the Legislature intended that such interference would extend to the right of a person not to be injured in his person or property.

In terms of section 28 of the Water Act, the State President may, by proclamation, declare any area to be a "subterranean water control area" if the Minister of Water Affairs is of the opinion that "it is in the public interest to do so, or that such area is a dolomite or artesian geological area or that the abstraction of water naturally existing underground in such an area may result in undue depletion of its underground water resources". Section 30(2) empowers the Minister to "make regulations" for, inter alia, the "preservation of subterranean water" and the limitation of "the number of boreholes or wells which may be sunk in any such area or portion thereof, or the quantity of water which may be abstracted by means of any borehole or well". In relation to the removal of subterranean water, only sections 30(4) (5)(a) and (b) and (5A) are relevant to mining companies. These provisions briefly provide that mining companies, if issued with a permit by the Minister of Water Affairs, subject to such conditions as he sees fit, are entitled to remove from the mining area any subterranean water if such removal can be shown to be necessary "for the efficient carrying on of

mining operations" or the safety of mine employees. Section 30 (5A) provides that the conditions of issue of the permit may provide for payment of compensation to any person who, in the opinion of the Minister, is or may be adversely affected by such removal of subterranean water. This sub-section was inserted in 1971 and amended in 1978.

If one assumes that the common law principles relating to the use or disposal of subterranean water by a mining company are merely fortified or in fact, overridden by section 30 of the Water Act, then the question of liability of a mining company in an action for damages arising out of the de-watering of a mine could be met by the defence of 'statutory authority' based on the issue of the section 30 permit.

The validity of a defence of statutory authority hinges on whether the Statute authorises an infringement of private rights. The general rule is that where the powers conferred by the Statute are directory, then their exercise in the manner authorised cannot create liability at the suit of the injured party, for the implication is clear that the Legislature intended to legalize an infringement of his rights.(12)

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(12) Metropolitan Asylums District v Hill 6 Appeal cases 193 at p203.

Where, however,

"... the Legislature has authorised a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law, permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others"(13)

This presumption may be negatived by other considerations, as stated in Johannesburg Municipality v African Realty Trust Ltd(14)

"Cases where the statutory powers are permissive and not directory present greater difficulty. But the test is the same - can an intention to interfere with common law rights of others be implied? Certain general considerations may be useful, but are not necessarily decisive. For instance, the Legislature is not presumed to intend an interference with private rights where no provision is made for compensation. .... The work authorised to be done may be defined and localized, so as to leave no doubt that the Legislature intended to sanction a specific operation. In such a case, especially if the work were one required in the public interest an intention that it should be duly constructed in spite of interference with common law rights might fairly be inferred" .... "On the other hand, where the permissive powers conferred are expressed in general terms and where there is nothing in the Statute to localise their operation, and where they do not necessarily involve an interference with private rights, the inference would be that the Legislature intended the powers to be exercised subject to the common law rights of third persons. If, however, the nature of the work authorised is such that it may or may not interfere with private rights according to circumstances, then the person entrusted with the Statutory authority is entitled to show that, under the circumstances of the case, it is impossible to carry out the work without such interference, in which case an inference that an infringement of private rights was sanctioned would be justified".

(13) Canadian Pacific Railway Company v Parke and Another 1899 Appeal cases 535 at pp544-545.

(14) 1927 AD 163 at pp172-173 - Innes, C.J.

When considering the principles laid down in the above case it is clear that the work authorised to be done in terms of a section 30 permit is both "defined" and "localized" whilst section 30(5A) does make provision for compensation. Assuming then that the mining company is in possession of, and complies with the conditions imposed in such section 30 permit, then the defence of Statutory authority would be a good defence to an action brought by neighbouring land owners either for an interdict to restrain the mining company from continuing to implement the policy of de-watering, or for damages sustained as a result of the de-watering of the mine. However, this must always be subject to the absence of negligence in the sense of failing to take reasonable precautions to minimize interference with the rights of neighbouring land owners. However, in deciding what measures are reasonably practicable it is necessary to take the facts of each case into account, and the feasibility of the measures considered to be reasonable, whilst at the same time having regard to the cost involved in implementing such measures. In Herschel v Mrupe (15) Schreiner, J.A. considered the following in relation to what should be taken into account when deciding on what measures would be regarded as reasonably practicable:

> "Apart from the cost of difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the

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(15) 1954 (3) SA 464 AD at p477.

chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial, the reasonable man might not guard against it even if the chances of it happening were fair or substantial".

As regards the duty to take precautions as envisaged by the "reasonable man" Johnson, on the doctrine of "Res Ipsa Loquitur" in relation to the duties of a passenger transport company, stated:(16) "It must be remembered that in deciding whether the requirement that certain precautions should be adopted is or is not a reasonable one to impose upon a party, the Court has, as it were, to balance conflicting interests. On the one hand there are interests of persons who may suffer if the precautions are not taken ... and on the other, the interests of the parties on whom the burden of taking the precautions will be imposed .... To the possible taking of precautions there is, of course, no end, and it is respectfully submitted that in considering this question, the element of reasonableness from the point of view of persons in the position of the defendant must not be lost sight of. The laying down of requirements as to the taking of a multiplicity of precautions to avoid unilkely consequences ..... must necessarily tend, to some extent ..... to clog the wheels of industry and to lead to such results, as for instance, the increase of the organisation of a ..... company's business with a possible increase in cost to the public ..... It is suggested that the general interest of the public as a whole must not be lost sight of, even in consideration of the hard case of an individual sufferer, in

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(16) Johnson, C.J., "Res Ipsa Loquitur" 1950 SALJ 245 at p255.

deciding whether or not a particular precaution is to be insisted on so that the conduct of normal operations be not cumbered by a host of precautionary measures really disproportionate to the possible happening of the evil they are designed to prevent".

There seems however, to be a considerable divergence of opinion amongst experts in the mining industry as to what measures are reasonably practicable to avoid the incidence of sinkhole formation. The success or otherwise of a defence of Statutory authority will surely hinge on the conclusion of the Court whether on the particular facts of the case, the precautions taken were, in fact, reasonable.

The final consideration is to what extent the Legislature intended to sanction the infringement of the private rights of an individual not to be injured in his person or property by the acts of another, by the provisions of the Water Act.

Both the long title to the Act and the provisions of Chapter III (in terms of which the section 30 permits are issued), deal with the control, conservation and use of water including subterranean water. Not only a mining company but also the owner of land in a subterranean water control area, is entitled, subject to the provisions of section 30, to abstract and use subterranean water. Although sub-section (5A) clearly contemplates an interference with private rights by providing for compensation for those adversely

affected by the de-watering of a mine, could the extent of interference contemplated, have been intended to extend to bodily injury or even death? It appears inconceivable that the Legislature could have intended to authorise either bodily injury or death purely on the basis of Statutory authority even though it is shown that the mining company has adhered strictly to the conditions of its section 30 permit and no negligence or failure to take reasonable precautions can be proved. It can, however, be argued that the provisions of the Mines and Works Act 27 of 1956 leave little room for any so-called neligent acts by a mining company. For example, section 3(2)(a) provides that when an Inspector of Mines finds at any mine that any practice or absence of practice "is calculated to cause bodily injury to, ... or to cause damage to any property .... he shall give notice in writing to the manager of the mine or works stating the particular thing or practice which he requires to be done or not to be done, or observed or discontinued and may give such instructions relevant thereto as he may deem expedient, and such notice may include an order suspending operations at a mine or works or part of a mine or works". A copy of such notice is immediately forwarded to the Government Mining Engineer. The Government Mining Engineer's Department is the watch-dog of the mining world and one must, therefore, assume that if the possibility of serious harm is foreseen the precautions required of a mining company by this department will be that much more stringent.

If the mining company disposes of subterranean water in a dolomitic water controlled area and is not in possession of a section 30 permit, then it is clearly in contravention of sections 30(4) and (5)(b) of the Act. In such case the principles laid down in Patz v Greene[17] would apply viz: The breach of a prohibition contained in a Statute gives rise to an action for an interdict and if the breach results in pecuniary loss, for damages, at the instance of (a) any person or class of persons in whose interests the prohibition was enacted and (b) any member of the public who can prove damage or wellfounded apprehension of damage if the prohibition was enacted in the public interest. The mining company therefore would be liable for damage suffered by neighbouring land owners as a result of subsidences on their land and/or the drying up of their boreholes. As regards the liability of a mining company to a neighbouring land owner who, in anticipation of future destruction or damage to a surface installation, incurs the expense of constructing and using another similar installation elsewhere, the test is whether the consequences could have been foreseen by a reasonable man placed in the position of the defendant. The point has not been finally settled in our law, but Franklin and Kaplan[18] state that "since the decision of the Privy Council in Overseas Tankship (UK) Ltd v Morts Dock and

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(17) 1907 TS p427.

(18) Franklin, B.L.S. and Kaplan, M. "The Mining and Mineral Laws of South Africa", Durban, Butterworths, 1982, p178.

Engineering Ltd,[19] the test whether the consequences are reasonably foreseeable is the criterion both of culpability and of compensation." Thus if on the facts of the particular case the mining company should reasonably have foreseen that there was a real danger of an existing surface installation being damaged or destroyed, then it could conceivably be held liable for losses incurred by the land owner, but not for the cost of erection of a new installation.

In the 1960's the Far West Rand Dolomitic Water Association was formed of which most mines on the far West Rand are members. One of the objects of this Association is to consider and settle claims made against Association members, in respect of damage which is directly attributable as the proximate physical cause, to the de-watering of mines. Franklin and Kaplan point out that there are difficulties in determining a "proximate cause"[20] and that "proximate cause" constitutes one of the "vexed legal questions".

The first question which comes to mind is whether the members of this Association have sufficient legal qualifications and training to pronounce on an aspect of the law which appears to cause headaches for even our most eminent Judges. This query aside, it

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(19) 1961 Appeal cases p388.

(20) Franklin, B.L.S. and Kaplan, M., op. cit., p180.

appears that this Association works in close conjunction with the State Co-ordinating Technical Committee on Sinkholes. The Association has inter alia undertaken to purchase undeveloped properties declared by the Committee to be unsuitable for development, to purchase land and buildings in existence on 31 December 1968 declared by the committee to be unfit for occupation and to repair or, if uneconomic to repair, to purchase land and buildings erected on or after 1 January 1969, also declared by the committee to be unsuitable for occupation. Since the formation of this Association every claim based on damage allegedly resulting from the de-watering of mines has been settled out of Court and our Courts have, therefore, made no pronouncement on whether a defence of Statutory authority based on the issue of a section 30 permit would, in fact, be a good defence to a civil claim. It is regrettable that this should be so.

Where property is, however, not situated in a proclaimed dolomitic area, to whom does the water extracted during mining operations, belong? ie is such water private or public water? Geduld Proprietary Mines Ltd v New Springs Collieries Limited(21) is a case in point. The facts in this case were that the plaintiff's predecessors in title granted a certain company all the

(21) 1934 TPD p104.

coal rights on a farm which rights were leased to defendant who carried on coal mining operations. The water, which existed naturally underground percolated into defendant's coal mine. Defendant utilized such water in its mining operations but in addition pumped the water to the surface of the land from where it conveyed the water, by means of pipe lines, beyond the boundaries of plaintiff's land, where it sold such water. The plaintiff disputed the defendant's right to -

(a) use the water;

(b) convey the water beyond the boundaries of plaintiff's farm;

(c) sell the water.

The original grant gave the defendant the right 'inter alia' "to pump out the water that may be found in the coal mines and let it flow away". The Court held that the grantee had the right "to use such water for mining purposes".(22) The question to be decided was whether the Court could infer from the terms of the contract that the grantor had abandoned all rights to the water. In this case it was held that "the grantee is not bound to discharge the water

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(22) Ibid, p107.

immediately it reaches the surface if such discharge interferes with his mining operations; but the implication that the grantor has abandoned the water to the grantee or that the grantee may convey the water off the property even where the consideration of detriment to the mining operations does not come into play, is wholly unjustified".(23)

It is submitted that where property is not situate in a proclaimed dolomitic area the common law applies and water pumped from a mine cannot be considered to be public water. The water being pumped out of such mine is private water and as such the land owner may freely dispose of it - it is "the property of the dominus of the land".(24)

(23) Ibid, p109.

(24) Ibid, p106.

Chapter VI - Pollution

All mines discharge, in the course of mining operations, a number of different kinds of liquid matter which usually finds its way into streams passing over farm lands or used by riparian owners. In addition to such liquid matter which is actively discharged, a considerable amount of seepage takes place from slimes and sand dumps. Slimes and sands, though normally controlled, also pass onto land and into streams owing to various causes which appear difficult to prevent. In this dissertation, the words "mine effluent" when used generally, are intended to include all types of liquids and solids emanating from mining operations.

A lower riparian owner is entitled, at common law, to have the water of a stream transmitted to him "without sensible alteration in its character or quality"(1) unless an upper riparian owner has acquired an adverse right, whether under the Water Act 54 of 1956, the Mining Rights Act 20 of 1967 or by prescription.

The normal remedy for breach of this right of the lower owner is an interdict against the upper owner. If the latter pollutes the

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(1) Prinsloo v Luipaardsvlei Estate and GM Co Ltd 1933 WLD 6 at p15.

stream and the pollution is a continuing one and causes damage, the former is prima facie entitled to an interdict and is not obliged to be content with damages for future injury. The Court, however, has a discretion to grant damages in lieu of an interdict.(2) No conclusive test has been laid down as to when the Court will exercise this discretion to grant damages in lieu of an interdict in respect of future injury but a working rule suggested in England was quoted with approval in Prinsloo's case(3) viz:

"(a) if the injury to the plaintiff's legal rights is small; and

(b) is one which is capable of being estimated in money; and

(c) is one which can be adequately compensated by a small money payment; and

(d) the case is one in which it would be oppressive to the defendant to grant an injunction;

then damages in substitution of an injunction may be given".

The practical effect of an interdict is of importance in determining whether it should be granted. The fact that an interdict prohibiting the discharge of such effluent as causes the pollution and damage complained of will cause inconvenience and expense to the mine concerned and will, in particular cases, seriously affect the conduct of mining operations making it

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(2) Ibid, p24 and p25.

(3) Ibid, p25.

difficult to carry on operations profitably are factors for consideration but are in themselves not sufficient grounds for a Court to justify refusal of an interdict.(4) These and similar facts may influence the Court in exercising its discretion whether or not to grant an interdict.

An interesting question for consideration is whether a mine which has discharged effluent consistently and uninterruptedly into a public stream for thirty years or more, could acquire a prescriptive right to do so. "In the case of an affirmative servitude .... the mere enjoyment of the right in question is, in itself, an adverse act" -(5) and at p291 Kotze, J.'s statement in Smit v Russouw and Others(6)

> "Seeing that servitudes are onerous, the law does not favour them, and where, therefore, the acquisition of a right such as that claimed by the defendants which is in the nature of a real servitude, is set up as having been acquired by prescription it is encumbent on the defendants to establish their claim by clear and satisfactory evidence".

Prescription in the context of pollution has never been fully considered by the Dutch authorities or South African Courts. In

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(4) Ibid, pp26 - 27.

(5) Head v Du Toit 1932 CPD pp287 at p292.

(6) 1913 CPD 847 at p853.

Dreyer v Cloete[7] the principle was argued and De Villiers, C.J. remarked:

> "The mere fact that Cloete had been allowed to send down polluted water does not give him the right to pollute the water to such an extent as to injure the plaintiff. ... The fact that he had done so for fifty years and upwards would not give him the right to increase the pollution to the detriment of the lower proprietors ..."

but in Salisbury Municipality v Jooala[8] in an obiter dictum, Innes, J. said:

> "The owner is entitled to the protection of the Court against the infringement of his common law rights, whether he happens to be then exercising them or not. If he neglects to apply for redress he runs the risk that a prescriptive right to pollute the stream may in due time be established".

The inference from the latter case is that some measure of protection can be obtained by prescription.

The opposite view was, however, taken by Buchanan in Gifford v Hare[9] where dealing with fumes from brickyards he said:

> "I quite agree with Mr Schreiner's argument that where a nuisance is proved to cause noxious injuries to life or

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(7) 1877 Buchanan 142 at p147.

(8) 1911 AD 178 at p185.

(9) 14 SC 255 at p259.

property, prescription cannot be relied upon to prevent such a nuisance being abated. A distinction, however, must be drawn between injuries noxious to health and property, and those which are detrimental only to personal comfort."

On the question of a prescriptive right three factors must be considered viz:

(a) the Salisbury Municipality case dealt with pollution of water by the owner of land and it is doubtful that the Court could have intended its remarks to apply to a form of title such as a right to mine granted by the State;

(b) in Prinsloo's case Counsel for the plaintiff, argued that the holder of a mining title cannot acquire a prescriptive right in favour of that mining title, because the holder of a mining right has merely a licence to exercise the Government's right to mine (p11). On the facts of the case, however, the Court found it unnecessary to give a decision. It is submitted with respect that plaintiff's Counsel was correct in his submission;

(c) Whether the pollution of the river constitutes a public or a private nuisance. If it is a public nuisance a right to commit it cannot be obtained by prescription.

Most pollution of rivers is a public nuisance and cannot, therefore, be legalised by prescription. Pollution of a public

stream, apart from being a public nuisance, can give rise to an action by a riparian owner for either an interdict or damages. Such owner could conceivably have lost his proprietary rights by prescription. Therefore, where an act is at the same time an infringement of the rights of the public and of individuals, the rights of individuals could be lost by adverse user ie although no right can be obtained by prescription to commit a public nuisance as such, insofar as the act of pollution constitutes the invasion of the proprietary rights of a riparian owner, a right could be obtained by prescription. To succeed in this defence the mine would have to prove that the same degree of pollution had continued for thirty years or more.

The rights and duties of upper and lower riparian owners under Common and Statute Law in respect of pollution of a public stream were considered at great length by Tindall, J. in Prinsloo v Luipaardsvlei Estates and GM Co Ltd.(10) In dealing with the common law he said(11)

> "There can, of course, be no dispute that if the common law rights of the parties were not modified by the gold law, the defendant would be liable for discharging foul water, acid water and water containing slimes and sludge into the spruit".

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(10) 1933 WLD p6.

(11) Ibid, p14.

Where then, Statutory authority exists to justify pollution, the same principles apply as were considered under the de-watering of a mine,[12] ie where the powers conferred by the Statute are permissive and there is nothing in such Statute to localise their operation and they do not necessarily involve an interference with private rights, the inference is that the Legislature intended the powers to be exercised subject to the common law rights of third persons. If, however, the nature of the work authorised is such that it may or may not interfere with private rights according to circumstances, then the person entrusted with Statutory authority is entitled to show that, under the circumstances of the case, it is impossible to carry out the work without such interference, in which case an inference that an infringement of private rights was sanctioned would be justified. If interference with private rights is justified then the exercise of the Statutory power is limited by the further consideration that it must be carried out without negligence. If by a reasonable exercise of the powers the damage could have been prevented, it is negligent not to adopt measures, reasonably practicable, to prevent injury. The onus lies on the party complaining of the injury to prove such negligence. As already stated,[13] in considering whether a measure is reasonably

(12) See pp159-161.

(13) See pp 163-165.

practicable, regard may be had to local requirements and the cost of taking such precautions. In Prinsloo's case the defendant company relied on these principles unsuccessfully because in that case the company was found to be negligent. However, the Court does not appear to have held that without negligence the defendant would not have been entitled to interfere with Prinsloo's rights because of its Statutory authority to carry on mining. In fact at p18-19 Tindall, J. said:

> "It seems to me clear that, to support the contention that it is entitled in law to do the acts complained of, the defendant is thrown back on the doctrine expounded in Johannesburg Municipality v African Realty Trust Ltd (1927 AD p163), namely, that it is authorised by Statute to mine, that it cannot do so without interference with private rights and that, therefore, the inference from the gold law is that such infringement is justified. ... But these facts do not justify the inference that the Legislature intended that the mining company is entitled to discharge such water wherever it pleases. Such water would be stored and purified and the necessary permit could be obtained from the Mining Commissioner. No doubt that would involve expense and inconvenience, but these considerations are not sufficient to support defendant's contentions".

Similarly, in Levin v Vogelstruis Estates and Gold Mining Co Ltd(14) the Court does not appear to have decided the matter of principle, because on the facts of the case the defendant was negligent and, therefore, liable. In the same case at p69 Ward J refers to: "the statement of the law" in regard to a Statutory

(14) 1921 WLD p66

right as expounded in Herrington v Johannesburg Municipality[15] viz:

> "Where in the absence of express provision, a Statutory power has been held to deprive third persons of their rights of action, not only has the work intended to be authorised been defined as regards locality as well as regards character, but its performance has been associated with an element of compulsion arising either from an express legislative command or because the power is combined with something in the nature of a public duty to exercise it whenever occasion requires or immediately as the case may be".

In Prinsloo's case the Court rejected the defendant's claim that it could not carry on mining without interfering with private rights and was, therefore, not responsible for the consequences of its mining operations on the grounds that it considered the enactment of Regulations 22 and 23 to the Gold Law 35 of 1908 (since repealed) to indicate that the Legislature considered that mining operations could and should be carried on without polluting streams or making them turbid and the mine had failed to prove that it could not carry on mining without interfering with private rights. In considering the historical aspect of the matter the Court pointed out that in 1898 there was a marked change in the Gold Law, due conceivably to the introduction of the cyanide process for the extraction of gold. After the enactment of Act 35 of 1908 regulations 22 and 23 were

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(15) 1909 TH at p192.

published, prohibiting pollution and providing that it would be a punishable offence to continue to pollute a stream after being called upon by the Mining Commissioner to refrain from doing so. In the view of the Court, these regulations showed that the Legislature, after providing for the grant of a water right, wished at the same time to make it clear that it did not authorise the pollution or making turbid of the water in any stream or watercourse.

In the present Mining Rights Act 20 of 1967 section 17(1)(c) prohibits inter alia prospecting "by means which disturb the surface of the earth in any public stream" where such prospector has been informed by the Mining Commissioner that the latter is of the opinion that that activity "will pollute the water in the stream". Section 90 of the Mining Rights Act deals with the grant of surface right permits for mining purposes and purposes incidental thereto and it is Franklin and Kaplan's submission(16) "that the depositing of slimes or effluent by a mining company under surface right permits in terms of section 90 of the Mining Rights Act is work carried out under Statutory authority." They do however query whether this section "impliedly sanctions the infringement of common law rights resulting from pollution". The answer would appear to be

(16) Franklin, B.L.S. and Kaplan,M., "The Mining and Mineral Laws of South Africa", Durban, Butterworths, 1982, pp166-167.

in the negative unless it can be shown that despite the mining company concerned having adopted all "reasonably practicable" measures to prevent the infringement of common law rights, it is impossible to conduct mining operations without some form of interference with such rights.

Section 96 deals with applications for water rights and sub-section (4) empowers the Mining Commissioner to impose any conditions he deems necessary when granting such right whilst section 101 entitles the Mining Commissioner to cancel such right if, inter alia, 'any condition of the grant is not being observed'. Finally section 187 empowers the State President to make regulations for "(q) the proper distribution of and prevention of waste, pollution, fouling or disturbing of any water on or underneath any proclaimed land or land held under mining title or in any public stream forming a boundary of proclaimed land or land held under mining title and (t) the prevention or abatement of nuisances". The 1976 regulations enacted in terms of section 26(1)(c) of the Water Act 54 of 1956 contain comprehensive and stringent provisions for the prevention of pollution whilst section 170(3) makes a contravention of such regulations a punishable offence. Section 171 makes provision for payment of compensation for any damage for an amount not exceeding R400,00. Further controls are provided by the Mines and Works Regulations made in terms of section 12 of the Mines and Works Act 27 of 1956, for example, Regulation 5.9.2 provides

that 'water containing any injurious matter in suspension or solution' must first be treated to render it 'innocuous' before it is discharged from the mine.

The conclusion to be drawn from the principles discussed above is that in a clash of interests between the land owner and the mining title holder or the holder of mineral rights in regard to pollution of public water, there appears to be no Statutory authority conferring on mining companies the right to pollute the waters of a public stream. Unless, therefore, the company concerned is able to show that under the circumstances of the case it is impossible to carry out its operations without interference with the common law rights of others and that it has taken all measures reasonably practical to prevent injury to lower riparian owners (a most difficult onus to discharge) it is submitted that the defence of Statutory authority will not succeed and the lower riparian owner will be granted an interdict or damages for breach of his right to have the water of a public stream transmitted to him "without sensible alteration in its character or quality".

In the nature of things prospecting and mining must impinge upon the ordinary range of the proprietary rights of the owner of land. The competition between the two sets of rights is becoming more acute as land values rise, as the tempo of mining increases and as ever larger shallow level mining operations (particularly for coal)

are undertaken. Much of the development of law in relation to the environment is likely to be directed towards grappling with the problem of competing rights between the miner and the land owner and the consequence which shallow level mining has upon the environment. Mining and minerals have played an important part in the development of the economy of South Africa and in a situation where the interests of environmental conservation must be reconciled with protection of human interests, including of course economic interests, the State has been reluctant to use its Legislative regulatory power in such a way as to discourage the enterprise of South African entrepreneurs with large capital investments in the exploitation of our mineral resources. Without such investment the economic progress of South Africa would be stunted whilst at the same time it cannot be ignored that mining development on a large scale can lead to appalling blight pollution and an escalation in conflicts between the competing interests of mining, agriculture and industry - the tripod on which South Africa's economy is founded.

In view of the enormous technological advancements, the resultant increase in the measure of pollution, the greater awareness of the public of the consequences of such pollution and their desire to improve the quality of life, Environmental Law is an area receiving urgent world wide attention.

In South Africa, as in every other country in the world, the issues of environmental pollution and the depletion of natural resources are matters of urgent concern. Cowen and Geach[17] advocate an integration of development and conservation. They state: "By development we mean the use of the resources of the biosphere to satisfy human needs and aspirations. By conservation we mean the control or management of such use so as to promote optimum sustainable enjoyment of the total environment for the benefit of both the present and future generations. Because it is generally accepted that resources are limited, it follows that development can be sustainable only if it is integrated with conservation. The two concepts, though potentially in conflict are not mutually exclusive. Indeed human survival may well depend on achieving a healthy balance or symbiosis between them".

The South African Government, in its legislative policy for the conservation of the environment has sought to avoid conflict between developers (including those seeking to expand mining development) and conservationists.

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(17) Cowen, D.V., and Geach C.H., "The cost-benefit of development controls for environmental conservation in South Africa", p210, International Bar Association - Third environmental law seminar on cost-benefit of environmental and planning controls held at Hyatt Regency Hotel Singapore 26-31 March, 1983.

The problems caused by the depletion of natural resources on the one hand and man's ever increasing dependence upon sources of energy which stem from the environment on the other hand, demand that the field of environmental law takes a look at traditional legal remedies in order to adapt them to the increasing need for environmental protection and environmental planning. Environmental law encompasses two related but different aspects ie that of pollution control and the conservation of natural resources. As far as pollution control is concerned, it could be said that South African private law remedies have always been available to the victim of pollution, albeit within the narrow confines of the actio legis aquiliae and the interdict.

However, in relation to mining operations the control of pollution has necessitated the involvement of the Legislature and a number of Statutes have been passed, designed to abate nuisances and protect the public health in relation to air, water and solid waste pollution. Thus the Atmospheric Pollution Prevention Act 45 of 1965 controls the creation of dust, either from mining operations or from the tailings dumps resulting from mining operations. Almost every area suitable for the mining and gasification of coal is designated a controlled area and in these areas no less than sixty different enumerated processes may only be carried out with the consent of the Air Pollution Control Officer.

The provisions of the Water Act 54 of 1956, the Mining Rights Act 20 of 1967 and the Mines and Works Act 27 of 1956 relating to water pollution control have already been discussed above.

In terms of section 12 of the Mines and Works Act the State President has the power to make regulations concerning, inter alia -

> "The conservation of the environment at or near any mine or works including the restoration of land on which activities in connection with mines or works are performed or have been performed".

Acting in terms of this section the State President published regulations the most crucial of which is 5.12.1 dealing with the rehabilitation of the surface of an open cast mine. It provides that a layout plan and a rehabilitation programme shall, on request, be submitted in respect of an open cast mine to the Inspector of Mines. There is a proviso that prior to the commencement of any mining operations in any new open cast mine which is planned to remove annually more than 12 000 tons of mineral, including overburden, such a report must be submitted to the Inspector of Mines setting out exactly how the mining company intends to rehabilitate the land to its former natural state. Rehabilitation of the surface is to form an integral part of mining operations and shall, as far as is practicable, be conducted concurrently with such operations, and where applicable in accordance with the programme laid down by the Inspector of Mines in regulation 5.12.2. The

short-coming of this regulation is that it does not go far enough in that it is not specific about precise obligations. Finally, the regulations provide that on completion of mining operations there is an obligation to rehabilitate the surface to as near to its natural state as is practicable to the satisfaction of the Inspector of Mines.

The essence of the Physical Planning Act 88 of 1967 as amended is to promote co-ordinated environmental planning and utilization of resources and makes provision for the drafting of guide plans for the future development of land. Control can be exercised over the use of land which is intended to be used for the processing of any mineral. No land may, except under a permit, be used for processing purposes unless it has been reserved under the Act or zoned in terms of a guide plan for that purpose.

The legislation of most developed countries eg United States of America, Australia and New Zealand provides that any mining development must be preceded by an exhaustive Environmental Impact Study. Regulation 5.12.1 of the Mines and Works Act approximates to such a study but as already stated does not go far enough. Geach[18] suggests that: "Perhaps South Africa could adopt the USA

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(18) Geach, C.H., "South African Environmental Legislation and its impact on Mineral Laws and Mining Practice" 1 at p24, paper presented at the Mining and Environmental Law Seminar, 4-8 April 1982 Washington DC.

practice of relying on a National Environmental Policy Act which in effect has allowed the courts to review the merits of administrative decisions so that the general public, developers and large industrial corporations can be governed by land rules embodied in legislation and enforceable if necessary in open court. In other words, the rule of law must be applied to ensure that the environmental consequences of significant developments particularly in the field of mining are properly and effectively taken into account before irreversible decisions to proceed are made".

Chapter VII - Conclusion

The laws governing and regulating the mining industry have clearly accommodated the South African economy and the mining industry well to date, but certainly not the interests of the land owner. Much still needs to be done to maintain the balance between technological and industrial advancement, which enhances the prosperity of the nation; the interests of the owner of the land and those of the person who, by contract with the land owner or by law, became entitled to work the mineral deposits in such land; and finally the preservation of the environment so that it remains habitable for man.

South African Property Law has been derived from Roman Law as the principal and original source. The concept of the totality of ownership has created many impediments to the exercise of mining rights on land owned by another and has brought the mineral right or mining title holder into constant collision with the recognised rights of the land owner. Like the miner, the law appears to have been compelled to traverse the labyrinths of darkness, not in search of precious stones or metals, but in search of some elusive principle of Roman and Roman Dutch law pertaining specifically to minerals and mining rights. In the search to trace the origins of

the conflict between land owner, mineral right holder and mining title holder I have concluded that "the owner of land in South Africa who has parted with the mineral rights in his land is ..... largely the author of his own misery ....." (Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd and Another.[1]

It can be argued correctly that a land owner's rights and requirements can be protected and preserved within the parameters of the contract in terms of which he disposes of his mineral rights and the fact that few land owners consult an expert to ensure protection of their interests is beyond the control of either the mineral right or mining title holder. Despite the soundness in law of this argument the fact remains that most land owners accept and sign the standard form of contract presented to them by the mining company concerned and do not understand to what extent they have disposed of a right of ownership. What is required is a more equitable framework of legislation to protect those land owners who do not realise what they are giving away, and furthermore, to provide for realistic compensation for loss of surface use of land, "diminution of the surface value of the land and/or the total or partial interruption of the right of occupation of that land".[2]. It is

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(1) 1980 (3) SA 896 at p903 (SWA)

(2) Section 67 (i)(c), (ii) and (iii) of the Mines, Works and Minerals Ordinance 20 of 1968 (SWA)

suggested that South Africa should legislate to create a compensation court to adjudicate and compensate in cases of conflict between land owner, mineral right and/or mining title holder. The Mines, Works and Minerals Ordinance 20 of 1968 (SWA),[3] although structured on the fact that all mineral rights vest in the State, appears to have succeeded in creating a framework within which the land owner may exercise his rights of ownership compatibly with the exploitation of minerals by the holder of the mining title, and where each is able to pursue his respective objectives in an ordered sequence, without retardation of either activity thus maximising each kind of resource with a minimal degree of conflict. Thus this ordinance provides that "no mining operations may be carried out on any land pegged as a claim until such time as the pegging of the claim has been registered .... and if the claim is situated on private land[4] a permit has been issued. The permit is only issued if a "written agreement has been entered into between the holder of the claim and the owner of the land in question as to the conditions subject to which the land owner shall be compensated .... and a copy of such agreement has been lodged with the

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(3) Based largely on the German Mining Law as contained in the Prussian Allgemeines Berggesetz of 1865.

(4) Section 28(1) of the Mines, Works and Minerals Ordinance 20 of 1968 (SWA)

Commissioner[5]. The Mining Commissioner is entitled to inform the claim holder that he is to execute such prospecting operations "as are in the opinion of the Mining Commssioner appropriate to the character of the mineral deposit or such claims" within a time period fixed by the Mining Commissioner[6]. If precious or base minerals have been regularly won from a claim for a period of two years and the Mining Commissioner is of the opinion that such minerals exist in payable quantities he is entitled to call upon the holder of such claim to convert it to a mining area.[7] On failure so to convert the rights in the claim lapse.[8] Further it is stated that "Every owner of a mining area shall within two years from the date of conversion ..... begin regular mining operations ..... and shall continue such operations without interruption unless prevented by circumstances over which he has no control ....[9]. The Mining Commissioner may grant permission to a prospector or mine owner to use the surface of land for ancillary works required for his mining operations but in the case of private land, the applicant must produce proof that he has entered into an agreement with the

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(5) Ibid, section 28(2)(a)

(6) Ibid, section 32

(7) Ibid, section 48(1)

(8) Ibid, section 48(2)

(9) Ibid, section 49(1)

owner of the land as to the terms on which the owner is to be compensated or if the parties have been unable to reach agreement that the matter has been submitted to a board of adjudication for settlement(10). Every mine owner is obliged to maintain the surface of the land in a safe condition and if he fails to do so, he is guilty of an offence.(11) Furthermore "Nothing in this section contained shall be deemed to deprive any owner of land of the rights to claim compensation from any mine owner for damage done to his land(12). Land under cultivation or on which buildings or enclosures for farming or industrial purposes have been erected is exempt from use for purposes ancillary to mining unless the prospector or miner can prove that the cultivation of the land or erection of buildings was done purely to obstruct him in his mining operations(13) As already set out on page 106 the owner of private land is entitled to compensation for damage to, diminution of surface value, and interruption of occupation, of his land.(14) This includes compensation for the use of his land to house the employees of the prospector or mine owner, and the use by the latter

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(10) Ibid, section 50(1)

(11) Ibid, section 53(1)(a)(b) and (c) and 53(2).

(12) Ibid, section 53(3)

(13) Ibid, section 66.

(14) Ibid, section 67(1)

of the land owner's roads, wood and water. If the prospector or mine owner fails to pay the amount of compensation at the time and moreover as set out in the agreement with the land owner, he is guilty of an offence and liable on conviction to certain penalties whilst in addition it is unlawful for him to continue conducting his prospecting or mining operations on pain of having his prospecting licence cancelled and the claim or mining area declared forfeited.(15) Finally the owner of private land is entitled to demand that the prospector or mine owner provide adequate security for the paymnent of compensation referred to above and failure to do so by the prospector or mine owner entitles the Mining Commissioner to prohibit the continuation of mining operations until such security is furnished. Perhaps within an amended framework of legislation for mining law South Africa could adapt and modify the philosophy and principles of this Ordinance.

The subject of comparative law in relation to the various conflict situations discussed in this dissertation is one which demands separate treatment as a topic on its own, and it is therefore not practical to deal fully with it here. However, the Comparative Survey on World Coal Mining Law published by the International Bar Association in 1984 is of great interest in this

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(15) Ibid, section 67(2)(a) and (b)

context as it reflects a measure of comparison of how other countries deal with similar problems.

For example:

In Australia

"It is presumed at common law that the owner of land is entitled to all that lies above or below the surface: cujus est solum, ejus est usque ad coelum et usque ad inferos. Minerals (other than the royal metals) are part of the land in which they are situated. ... a conveyance of freehold land includes the mines and minerals therein unless expressly excluded or previously reserved ..... ownership of minerals may be severed from ownership of the surface".(16) In New South Wales ownership of in situ coal is vested in the State whilst in Queensland certain coal is privately owned. It is, however, open to a State to compulsorily acquire land on any terms, as authorised by its legislation, and in 1982 the New South Wales Government acquired all remaining private in situ coal by legislative process. To date, the New South Wales Government has not determined a basis for compensation to previous owners. Further, although provision

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(16) Lang, A.G. and Crommelin, M., "Australian Mining and Petroleum Laws", Butterworths, Sydney, Melbourne, Brisbane, Perth, 1979, p1.

has been made in New South Wales accounts for some compensation, the amount provided is comparatively minimal and there is little immediate prospect of compensation being paid. In Queensland the State retains full control over the exploration of all privately owned coal which cannot be mined by anyone (including its owner) except under a mining lease granted by the State. Both the New South Wales and Queensland legislation permit exploration and mining on privately owned lands but only pursuant to an exploration or mining title granted under relevant legislation. The legislation of both States, therefore, derogates from the common law right of the individual.

The right of surface owners to surface support by adjacent strata is well established in the Australian common law but only New South Wales has specifically legislated in this regard. The New South Wales legislation makes provision for compensation payments to surface owners where improvements are damaged by subsidence, but such compensation is reduced where damage was compounded due to the improvements having been negligently or improperly constructed.

Assessment of compensation for damages to non-improved land is also codified. In the other States, the assessment structures permit a surface owner to receive compensation for any financial loss, hardship or inconvenience suffered as a consequence of mining operations. Should the owner and the mining operator disagree as

regards the amount of compensation either party may approach the courts for a decision as to the appropriate compensation. In assessing the amount of compensation payable the court must take into account any works that the mining operator has carried out or has undertaken to carry out to rehabilitate the land.

The advent of large scale open cut coal mining in Australia in the 1960's coincided with increasing public awareness of the necessity for conservation. As a result, an extensive series of government environmental controls have been imposed by the individual States and are administered and enforced by a statutory body formed for that purpose. The policy of such bodies toward pollution control is generally "minimisation" or "prevention" of pollution rather than "elimination". Conditions which the statutory body attaches to a project will be written into the required statutory licences and failure of the mine operator to meet the specified conditions or breach of those conditions, can lead to the licence being refused, revoked or suspended.

Legislatively, rehabilitation is seen as complementary to other measures for the control of air and water pollution, disposal sites and dumps. Detailed plans to achieve this must be submitted to the relevant statutory body and rehabilitation conditions are incorporated in the licences required for mining approval. This requirement of progressive rehabilitation is regarded as

environmentally superior to the traditional obligation to rehabilitate the land at the expiration of the title. Mining is viewed as a temporary use of the land and adequate consideration must be given to the preferred end-use of a mined area. The current underlying philosophy for rehabilitation is that mined land should be returned as closely as possible to its pre-mining appearance and to at least an equivalent productivity".(17)

In the Federal Republic of Germany

The Federal Mining Law (Bundesberggesetz) of 1980 enacted in 1982, is the law governing mining activities. Hard and browncoal are "free" (Bergfrei) which means that neither the landowner nor any other person actually owns these mineral resources.(18) Thus, coal, is not in legal terms, subject to landownership and a mining licence is required for the exploration and extraction of coal(19). A mining company is obliged to submit an operating plan to the mining authority for approval, before any mining title may be

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(17) See the Section on Energy and Natural Resources Law of the International Bar Association World Coal Mining Law, A Comparative Survey, 1984, law firm of Stephen Jaques Stone James, Volume I, pp10, 16, 17, 33-36.

(18) Federal Mining Law of 1980 - Article 3 - Sections 2 and 3.

(19) Ibid, Article 6

exercised.(20). The operating plan must describe the scope (ie the entire operation from initiation of exploration to rehabilitation of land surfaces used for mining), the technical execution and the duration of the project. The authorities consider the plan in regard, inter alia, to surface protection and the prevention of public damage. Thus approval of the water resources board is required for an open cast working, the approval of the forestry administration is required for deforestation and a building permit is necessary for any surface installations included in the mining development.

Acquisition of Land. If private land is required for prospecting for coal, the mining authority is entitled to grant the entrepreneur a right to use the land on payment of compensation(21). Generally however the mining company enters into an agreement with the land owner as regards the conditions on which the former is entitled to utilise the land. If agreement cannot be reached, the mine operator is granted the right to utilise the land by expropriation procedures in the public interest. Mining operations are regarded as generally requiring only a temporary use of land and expropriation in the

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(20) Ibid, section 51 ff

(21) Ibid, articles 39 and 40

context of Mining Law aims at a time limited transfer of the right of land utilisation. The land owner is entitled to compensation for damage suffered as a result of expropriation(22).

Liability for surface drainage from underground working and other liabilities to third parties

The operator of a mine is entitled to cause subsidence of the surface of land on the basis of his title to work and extract the coal. The land owner is entitled to compensation for damages caused by subsidence.

Precautions

The mining company is obliged to take precautions against danger to life, health and property of third parties. Such precautionary measures must be reflected in the operating plan of the mine but the law does not prescribe the extent of the measures necessary within the framework of this provision(23). The land owner has a legal obligation to adopt precautionary measures in regard to the erection of buildings.(24) At the request of the mining company, the land

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(22) Ibid, article 78 ff

(23) Ibid, article 1

(24) Ibid, article 110

owner must take into account the effect on the surface of mining operations, in regard to the positioning and construction of his buildings. Minor expenses incurred in this regard are borne by the land owner but major expenses are refunded to him by the mining company.(25) In certain cases it may not be possible to equip buildings with adequate safeguards to prevent damage caused by subsidence or the expenditure involved may be unreasonably high. In such an instance the mining company is obliged to notify the land owner in writing of such facts. This written notification has one of two consequences, namely: The mining company is freed of all liability for damage to the building if despite the written notification the building is erected; or if due to such written notification the development does not take place, the mining company is obliged to compensate the land owner for depreciation in value of the land.(26) Both personal injury and damage resulting from searching, extracting or preparing coal (Bergschaden) has to be properly compensated for by both the mine operator and the owner of mining title, who are regarded as joint debtors(27). Liability is not restricted to subsidence but arises from practically all mining operations. Liability is incurred regardless of illegality or fault on the part of the ooerator or mining title holder but the mining

(25) Ibid, article 111

(26) Ibid, article 113

(27) Ibid, article 114, 115 and 116

company is freed of liability if the land owner has contractually waived his right to compensation.

Legal presumption

The Federal Mining Law of 1980 introduced a legal presumption of damage caused by subsidence, a provision long demanded by land owners. However this presumption has been carefully formulated. If within the area of an underground mining operation damage occurs as a result of subsidence, compression or extension of the surface and such damage may have been caused by such underground operations, then it is presumed that the damage was caused by the mining operations. Such presumption is not applicable if it can be shown that the damage was caused by a patent defect in construction of the building or if the building is constructed contrary to building regulations. It remains to be seen whether this new provision will be more useful to the developer than the normal prima facie evidence, and whether fears on the part of mining companies of being held responsible for structural defects are justified.(28)

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(28) Seeliger, J. Legal Adviser for Ruhrgas AG and Unternehmensverband Ruhrbergbam, Essen, and Head of the Department of Law and Environmental Protection at Gesamtverband Des Deutschen Steinkohlenbergbaus, Essen; and Von Mässenhausen, H.U., Head of Section, Mining Law, Wirtschaftsvereinigung Bergbau, Bonn, pp57, 59, 60-63, 70, 71 and 72.

In the United States of America

Minerals are usually owned by the owner of the surface of land. Therefore, he owns the underlying minerals, and may sell or lease them to someone else. Thus, the surface of the land may be owned by one person; the minerals beneath by another. Approximately 67% of the coal reserves are mineable by underground methods. Environmentalists like underground mining; operators prefer surface mining. This creates further conflicts.

Legal doctrines regarding mineability and ownership of mineral resources are such that the owner of the mineral resource has a dominant position. The legal doctrines refer to the mineral estate as being the "dominant estate". This means that the destruction of the surface can occur, if necessary, to produce the mineral resource. The government of the United States has participated in the exacerbation of the obvious problem. After 1910, the government of the United States conveyed lands to private individuals for farming and ranching, townsites and the like, and kept the minerals under ownership of the United States. The law is such that these minerals can be mined without paying the surface owner for any damage to the surface wrought en route to the minerals. The mineral estate domination has spawned a myriad of legal and political problems. Railroads sold the surface of many of the lands they acquired by government largesse, but retained the rights to mine

coal. Here, too, the conflict erupts because of the right of the mineral owner to destroy the surface, if necessary, to mine the mineral. The rights to prospect for and mine coal are acquired in one of three ways -

(a) purchase and ownership of the minerals or coal underground in place;

(b) leasing or otherwise acquiring rights to mine coal from the owner of the resource;

(c) the acquisition from the United States of an exploratory licence, a "coal lease".

The legal system within the United States is a synergy among similar but distinct legal systems; the laws of the fifty states; the laws of the United States, the interpretations by the separate states and federal courts and administrative regulations having the force of law made pursuant to the various laws. Regulatory agencies have the power to promulgate rules to be super-imposed on the legal system. The result is almost a redefinition of the legal system and a geometric increase in the number of legal problems beyond that of fifty-two jurisdictions.

Liability for surface damage

The leading authority in the United States, is Rylands v Fletcher.[29] There have been some modifications to this, but the liability for subsidence and injuries to third parties is generally covered by the doctrine of this case.

"The essence of the decision of Blackburn, J. was that any person who for his own purpose brings onto his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril and if he does not do so, is prima facie answerable for all the damage which is a natural consequence of its escape. The view taken of the case was that it established two new advances in the law of torts. One was in the direction of the escape of things for which the owner was subject to strict liability. The incidence of strict liability applied to the general category of all inherently dangerous substances and made the owner of the land from which they escape responsible even though he took all reasonable steps to prevent the escape. The second advance was in the direction of the persons for whose default the occupier of the land was liable. The occupier cannot avail himself of the absence of negligence on his part or on the part of those over whom he has any measure

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(29) LR 3 HL 330 (1868).

of control ... It was generally accepted that liability extended not only to damage to property but also to cases of personal injury."(30)

The control of pollution and discharges from mines are covered by a number of statutes eg The Clean Air Act 42 USC 7401; The Federal Water Pollution Act 33 USC 1251; The Safe Drinking Water Act 42 USC 300; The Resource Conservation and Recovery Act 42 USC 6901.

Under the Surface Mining Control and Reclamation Act of 1977, the United States Government controls reclamation of surface and underground mining operations. The programme imposes requirements on coal operators for reclamation and restoring mineral sites to the 'original contour as it existed on the ground prior to the mining'. Certain geological environments may not be mined at all. The Act requires mine operators to post bonds to finance the later reclamation of mine sites and imposes minimum liability insurance requirements. Bonding and insurance must be proved to obtain mining permits under either state or federal law. Rehabilitation of mine sites must be provided for in the original mine plan.(31)

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(30) Milton, J.R.L., "The Law of Neighbours in South Africa", Thesis, Durban, 1965, pp146-147.

(31) William G Sumners Jr, Sumners & Miller, Attorneys and Counselors at Law, Denver, Colorado Volume 2, p454 at 469, 476, 478, 479, 483, 511, 513, 514 and 515

The topics of minerals and mining rights have experienced a rapid and, comparatively speaking, recent recognition and development and should, with respect, not have been forced into a juristic niche of Roman origin purely by analogy of similarity and to accommodate the original source of South African law. It is submitted that if the law is indeed dedicated to the rational solution of social conflicts through the legal process it should not stand settled by express decision based on internal standards peculiar to it as closed system but that there should be a "progressive development of the law keeping pace with modern requirements".(32).

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(32) Henderson v Hanekom 1903 SC 513 at 519.

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ABBREVIATIONS

CILSA - Comparative and International Law Journal of South Africa.

PH - Prentice Hall.

SALJ - South African Law Journal.

THR-HR - Tydskrif vir die Hedendaagse Romeins-Hollandse Reg.

CASE INDEX

INDEX OF STATUTES

(C = Cape; SA = South Africa, SWA = South West Africa;
T = Transvaal)