

The Law Commission

(LAW COM. No. 158)

PROPERTY LAW

THIRD REPORT ON LAND REGISTRATION

A. OVERRIDING INTERESTS

B. RECTIFICATION AND INDEMNITY

C. MINOR INTERESTS

*Laid before Parliament by the Lord High Chancellor pursuant to section 3(2)
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THIRD REPORT ON LAND REGISTRATION

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THIRD REPORT ON LAND REGISTRATION

Introductory Summary

In this report the Law Commission, as part of a general review of the Land Registration Acts, makes recommendations as to reform of the law relating to overriding interests, rectification and indemnity, and minor interests.

(i) In Part II the paper recommends retention of only five kinds of overriding interest, with some changes of substance. These five are: (1) legal easements and profits, (2) rights by adverse possession, (3) short leases, (4) rights of occupiers, (5) customary rights. The paper proposes that three general provisions should apply to these retained overriding interests, i.e. as to availability of indemnity, the date on which the interest binds a proprietor, and the consequences of fraud and estoppel. Other rights which bind registered proprietors under the general law but to which those provisions would not apply should be called "general burdens".

(ii) In Part III the paper proposes to retain almost intact the grounds of rectification that exist under the present law, but adds restrictions to this so as to strengthen the indefeasibility of title of the registered proprietor in actual occupation. Any person suffering loss due to rectification, or refusal to rectify, is entitled to indemnification in full, and this is, importantly, to include the case where an overriding interest is asserted against a registered proprietor. The paper proposes that the indemnity is to be reduced by such amount as is just and equitable in respect of any lack of proper care by the applicant. In addition, the Registry's ability to sue in place of the indemnified is to be enhanced.

(iii) Part IV recommends rationalisation of the rules governing the methods to be used to protect a minor interest: a notice is to be used where the proprietor acknowledges the rights, a caution where he does not; a restriction is to be used for all interests under a trust and an inhibition is to be retained for certain cases such as injunctions. Charges are no longer to be protected by "notice of deposit". As a matter of classification, a purchaser or transferee is to take subject to minor interests in the absence of good faith, and a new scheme for priority between minor interests has been devised. Equitable mortgages created by deed are to be capable of registration, but floating charges may not be protected until they have crystallised.

THE LAW COMMISSION

Item IV of the First Programme

THIRD REPORT ON LAND REGISTRATION:

A. OVERRIDING INTERESTS

B. RECTIFICATION AND INDEMNITY

C. MINOR INTERESTS

*To the Right Honourable the Lord Hailsham of
St. Marylebone, C.H., Lord High Chancellor of Great Britain*

PART I

INTRODUCTION

1.1. This is our third report on the subject of Land Registration.¹ Our first report² was published on 26 October 1983 and dealt with the subjects of identity and boundaries of registered land, conversion of title, the treatment of leases and the abolition of the minor interests index. A second report³ was published on 8 August 1985 concerning inspection of the register. The present report is about three separate but related topics: A. overriding interests; B. rectification of the register and indemnity; and C. the protection and priority of minor interests (including mortgages and charges). This report, contrary to the usual practice of the Law Commission, is submitted without a draft Bill to give effect to the changes we propose. The reason for this is that we intend overhauling and consolidating the whole of the Land Registration Acts 1925 to 1986 in 1987, and any revised version will incorporate the changes proposed in this report.

1.2 Our first report contained no attempt at any exposition of the land registration system as a whole.⁴ However, it was thought helpful, as background information, to indicate certain features of the system relevant to our purposes.⁵ In the interests of producing a self-contained report, these are repeated:

(1) The system of land registration is a statutory one governed by the Land Registration Acts 1925 to 1971⁶ and subordinate legislation,⁷ and administered by the Chief Land Registrar (who is appointed by the Lord Chancellor) and by his staff in the Land Registry and District Land Registries.

(2) The system was primarily designed to simplify the process of land transfer rather than to alter the substantive law relating to land, though some aspects of the substantive law are affected by the system.

(3) The foundation of the system is the registration of title to freehold and long leasehold estates, the legal title being established by an official register rather than by the assemblage of deeds and documents upon which unregistered titles are based. Since it is titles to land, and not the land itself, which are registered, it follows that estates in the same piece of land are registered separately and that some such titles may happen to be registered and others not. For example, the registered freehold of Blackacre may be subject to an unregistered lease, or the unregistered freehold of Blackacre may be subject to an unregistered lease and a registered underlease.

¹ We would like to thank the Chief Land Registrar and Roger Smith, Tutor in Law at Magdalen College, Oxford, for their help in compiling this report, though their views are not necessarily those expressed.

² (1983) Law Com. No. 125.

³ (1985) Law Com. No. 148.

⁴ Reference may be made to various text-books e.g. T.B.F. Ruoff and R.B. Roper, *Registered Conveyancing* 5th ed., (1986); D.J. Hayton, *Registered Land* 3rd ed., (1981); R.E. Megarry and H.W.R. Wade, *The Law of Real Property* 5th ed., (1984), Chap. 6.

⁵ (1983) Law Com. No. 125, para. 1.5.

⁶ Land Registration Act 1925 (the principal Act), Land Registration Act 1936, Land Registration Act 1966 and Part I of the Land Registration and Land Charges Act 1971.

⁷ This subordinate legislation is of great practical importance. The principal rules are the Land Registration Rules 1925 (S.R. & O. 1925/1093) and these and other rules and orders regulate such matters as the procedure on applications, searches, fees, forms and various administrative matters.

(4) The registration of a title is invariably carried out by reference to a plan based on the Ordnance Survey Map, so that all registered titles are readily identifiable on the map.

(5) In addition to the registration of title to freehold and leasehold estates the 1925 Act provides for the registration of legal mortgages or charges upon such estates, so that title to these mortgages and charges is established by the register. The many other rights and interests in land such as restrictive covenants, easements and various kinds of financial burden are not susceptible of substantive registration: they are however capable of protection by entry on the registers of the titles which they affect, and a limited class of interests (known as "overriding interests") is protected even though they are not entered on the register.

(6) The register is backed by a kind of "state guarantee", through the use of powers of rectification and indemnity. If there is some error or omission in the register the register may be rectified, though the possibility of rectifying a registered title against the proprietor when he is in possession is restricted. If an error or omission, or its rectification, results in loss, indemnity for that loss is payable out of public funds. For example where a registered title is found to contain more land than the vendor had to convey, if the registered proprietor is not in possession it may be rectified by the removal of the land from the title and the proprietor indemnified, and if the registered proprietor is in possession the rightful owner of the land registered in error may be indemnified.

(7) Although the Land Registration Acts extend to England and Wales the registration of title to land is compulsory only in particular areas designated under the Acts as areas of compulsory registration and only on occasions of sale or lease. The existing compulsory areas comprise over 70% of the population of England and Wales, and successive Governments have favoured the policy of extending areas.⁸

1.3 Apart from our two reports on land registration and in response to a reference, we have also submitted a report⁹ on the implications of *Williams & Glyn's Bank Ltd. v. Boland*.¹⁰ That decision established that, where a person has acquired an interest in a property by contributing to its purchase, his or her interest will be an overriding interest if he or she is in occupation of the property.¹¹ Our report attempted to balance the social policy of protecting co-owners, especially of matrimonial homes, on the one hand, and the practical need to avoid unnecessary conveyancing complications on the other. In it, we recommended a registration requirement for equitable co-ownership interests tempered by a consent requirement and a scheme for the equal co-ownership of the matrimonial home. Although these recommendations received some support in the House of Lords,¹² they were not found generally acceptable.¹³ Instead, it being considered impracticable to revert to the co-ownership package,¹⁴ the Land Registration and Law of Property Bill was introduced in 1985 to deal with the *Boland* problem. This would have preserved the automatic protection enjoyed by spouses occupying dwelling-houses, whilst removing for others "overriding interest" status in favour of protection by notice or caution or

⁸ The Registration of Title Orders 1984 and 1985 extended compulsory registration so that areas containing 85% of the population of England and Wales will be covered by 1987.

⁹ (1982) Law Com. No. 115.

¹⁰ [1981] A.C. 487.

¹¹ i.e. under L.R.A. 1925, s. 70(1)(g).

¹² *Hansard* (H.L.), 15 December 1982, vol. 437, cols. 639-64.

¹³ Your Lordship was apparently not then persuaded about the need for legislation either to confer co-ownership or to cure the conveyancing complications. As to the former, you said that the relevant question in the light of voluntary co-ownership by 75% of married couples is "how far it is prudent or socially desirable to legislate for the remaining one-quarter".

As to the latter, you observed:

"While not wishing to minimise the difficulties created by the *Boland* case, or the prejudice that might result from its reversal, it must be said that it has been part of our law for over a year now, and that in fact conveyancers have come to terms with it - and come to terms with it fairly well. Contrary to their predictions, the world has not come to an end as a result of the decision in *Boland* in the Court of Appeal and the House of Lords".

(Lord Hailsham L.C., *Hansard* (H.L.), 15 December 1982, vol. 437, cols. 660 and 662).

¹⁴ *Hansard* (H.L.), 5 March 1985, vol. 460, col. 1273.

otherwise.¹⁵ However, the Bill was withdrawn owing to a lack of parliamentary time when parts of it proved controversial.¹⁶ During the debates on the Bill,¹⁷ an awareness was shown of the fact that we were engaged in a study of overriding interests generally and of the protection of minor interests. We naturally awaited the outcome of those debates so that our conclusions could be settled in the light of the intentions of Parliament.

1.4 Hitherto in our published papers on land registration¹⁸ we have treated overriding interests on the one hand and rectification and indemnity on the other as if they were two entirely separate topics. In the preparation of this report it was realised that if overriding interests were to receive the fundamental reappraisal we believe they merit, then they had to be considered against the background of the present scheme for guaranteeing registered titles and for paying compensation as part of that guarantee. Overriding interests and rectification each represent a different way in which reliance upon the register of title may prove to be misplaced.¹⁹ Indeed, it is expressly provided that the existence of an overriding interest may lead to rectification of the register even against a proprietor in possession.²⁰ The most significant distinctions between the two are that overriding interests bind automatically whilst rectification remains discretionary, and that rectification may affect any aspect of a registration whilst overriding interests involve a restricted list of rights. Further the basic point must be emphasised at the outset that, although indemnity is generally a complementary remedy to rectification, this will not be so when rectification is in respect of an overriding interest.²¹ Over fifty years ago it was observed that the much used description "state guarantee" was subject to the fact that overriding interests were not covered.²² Whether or not they should be covered by the possibility of an indemnity claim is a question to which we direct specific attention.²³ Nevertheless, it should not be forgotten that rectification and indemnity are far from simply ancillary to the operation of overriding interests. In addition, there are inevitable overlaps with the topic of minor interests.²⁴ Once protected on the register, overriding interests become binding by definition as minor interests; alternatively, if one or other of the elements of overriding status is lacking, an interest should be treated as minor. What is more, certain issues, such as the effect of a lack of good faith or proper care, are relevant throughout. Accordingly, the structure of the report is as follows: In Part II, we first outline the nature and problem of overriding interests before putting forward a solution in general terms, introducing in this connection the rectification and indemnity aspect of the matter. We deal later in Part III with the wider operation of the rectification and indemnity provisions. And finally in Part IV, with appropriate cross-references, we consider minor interests.

1.5 There is one other preliminary point. Many of the proposals hereafter made will have implications for the resources and staff of H.M. Land Registry. So far as we are able to judge no net increase in either of these will be required; indeed the savings resulting from the proposals²⁵ might well exceed the increases, although we recognise that others are better placed than we are to judge this.

¹⁵We appreciate that the Bill is insufficiently summarised in the text. In particular, it should perhaps be noted that somewhat similar provisions were proposed for unregistered land, and that not all the possible rights of occupiers but only their interests under trusts for sale arising because of beneficial co-ownership were covered. Also the Bill was concerned only with land held by a sole registered proprietor or estate owner, the understandable assumption being that if there was more than one such proprietor or owner, any interests of occupiers could be overreached (see *Hansard* (H.L.), 5 March 1985, vol. 460, col. 1266, but cp. now to the contrary *City of London B.S. v. Flegg* [1986] 2 W.L.R. 616, C.A.).

¹⁶*Hansard* (H.L.), 16 April 1985, vol. 462, col. 604.

¹⁷See e.g. *ibid.*, 5 March 1985, vol. 460, cols. 1269-70 (Lord Mishcon); col. 1272 (Lord Wilberforce).

¹⁸See Working Papers (1971) No. 37 and (1972) No. 45.

¹⁹See features numbered (5) and (6) in para. 1.2 above.

²⁰L.R.A. 1925, s. 82(3).

²¹See further below para. 2.10.

²²The Report of the Land Transfer Committee (1935), Cmd. 4776, chaired by Lord Tomlin included the following (para. 21): "We do however desire to say that we do not consider that the phrase 'state guaranteed' is proper to be applied to describe the title of the registered proprietor under the present system of compulsory registration on sale without reference being made to the effect of section 70 of the Act in regard to overriding interests and (in the case of mines and minerals) to the effect of section 83(5)(b) of the Act." Cp. para. 1.2 above at (6).

²³See below paras. 2.11-2.12.

²⁴For which see below Part IV.

²⁵The Second Report on Land Registration: Inspection of the Register (1985) Law Com. No. 148 proposed an open register of title and it is thought that this would result in some savings (*ibid.*, para. 18(vi)).

PART II

OVERRIDING INTERESTS

2.1 The Land Registration Act 1925¹ broadly makes a four-fold classification of estates, interests and rights in or over land as follows:

- (i) registered estates;
- (ii) registered charges;
- (iii) overriding interests;
- (iv) minor interests.

But this list is not exhaustive of or coincidental with the matters to which a registered proprietor may hold subject. The effect of registration is to vest the legal estate in the proprietor subject to entries on the register, to overriding interests and to certain minor interests, "but free from all other estates and interests whatsoever".² Freedom from any right, liability or obligation not amounting to an estate or interest is *not* conferred. Accordingly not included in the classification are burdens, whether imposed by legislation or the common law, affecting land owners or occupiers generally, such as the liability to pay rates, the consequences of planning laws,³ criminal⁴ or tortious liability in relation to land.⁵ We shall return to this point below because it is one of our criticisms of the present legislation that the line between these general burdens and what is dealt with in the land registration classification is not always clearly or sensibly drawn.

2.2 The class of overriding interests is the only one of the above four classes to have given rise to substantial criticisms not only for what it comprises but also as a concept. The criticism centres on the fact that overriding interests adversely affect a registered title to land without any mention of them in the register.⁶ As was said in *Law Reform Now*:⁷

The mirror principle⁸ can never be complete until everything affecting the title (and the legal use and enjoyment of land) is reflected on the register. This means that the category of overriding interests should be abolished, or, if this is not possible, drastically reduced. To have a series of interests, both legal and equitable, not on the register, which bind a legal owner of land regardless of notice is inconsistent with the whole concept of registered title.

¹ In this report we shall use the term "the Act" to mean the Land Registration Act 1925 and "the Rules" or "L.R.R." to refer to the Land Registration Rules 1925 (S.R. & O. 1925/1093). Unless the context shows otherwise, plain references to sections and to rules are to be read accordingly.

² See ss. 5, 9, 20 and 23.

³ See, e.g., per Lord Scarman in *Westminster City Council v. Great Portland Estates Plc.* [1984] 3 W.L.R. 1035 at p. 1043:

There remains the point on the Landlord and Tenant Act 1954. It is, in my judgment, based upon a misconception of the relationship between the planning legislation and private law. Rights to the use and development of land are now subject to the control imposed by the planning law. The rights of landlords, as of others interested in land, take effect subject to planning control.

⁴ e.g. Law of Property Act 1925, s. 193(4).

⁵ e.g. the law of nuisance.

⁶ Overriding interests are not limited to those rights which *cannot* be protected on the register (see, e.g., *Bridges v. Mees* [1957] Ch. 475; *Webb v. Pollmount* [1966] Ch. 584; *Kling v. Keston Properties Ltd.* (1983) 49 P. & C.R. 212; and *Celsteel Ltd. v. Alton House Holdings Ltd.* [1985] 1 W.L.R. 204). However, according to the statutory definition, a right strictly appears not to be an overriding interest if and when entered on the register (L.R.A. 1925, s. 3(xvi)). Nevertheless the Court of Appeal has held that the validity of a right which can be an overriding interest is not affected by whether or not an entry is made (*Re Dances Way* [1962] Ch. 490, C.A.). Thus if an overriding interest was protected by entry of a caution which was then warned off, the consequence would be that "the registered land ... may be dealt with ... as if no caution had been lodged" (L.R.A. 1925, s. 55(1)); i.e. subject to the still subsisting overriding interest.

⁷ *Law Reform Now* ed. by Gerald Gardiner and Andrew Martin, (1964), p. 81 (contributor Gerald Dworkin). The words quoted were repeated virtually unchanged in *More Law Reform Now*, in effect the 1983 ed. of the same work (at pp. 197-8).

⁸ The expression "mirror principle" seems to have originated in *An Englishman Looks at the Torrens System* (1957), by T.B.F. Ruoff. The following explanation of the principle appears on p. 8:

The mirror principle involves the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man's title. This mirror does not reveal the history of the title, for disused facts are obliterated. It does not show matters (such as trusts) that are incapable of substantive registration. And it does not allow anyone to view and consider facts and events which are capable of being registered and ought to have been registered but which have not in fact been registered. In other words, a title is free from all adverse burdens, rights and qualifications unless they are mentioned on the register.

In a similar vein are the following remarks from a former Chief Land Registrar:

Clearly, such overriding interests are a stumbling block on registration of title. They may, perhaps, be described as *the* stumbling block. What purchasers want is that there should be a register to which they can look for proof of title and that they should have to look nowhere else. Any exception to the principle that they take free from everything not specifically set out on the register renders it useless over the field to which the exception extends. Absolute title becomes something of a misnomer.⁹

In other words, the risk of overriding interests shatters "that absolute certainty which is the ideal of all registration systems throughout the world".¹⁰

2.3 Another criticised feature of overriding interests is that they receive discriminatory treatment under the rectification and indemnity provisions. Again, it will be necessary to return to this in greater detail later, but for the moment it should be noticed that if an overriding interest, following rectification, is entered on the register, then no indemnity is normally payable.¹¹ An entirely innocent and properly careful purchaser for value of an "absolute" title, compelled and encouraged to rely upon the register,¹² who finds his land subjected to an overriding interest might legitimately consider the system *not* to be "so far as is humanly possible, complete and perfect".¹³ He might equally legitimately look for compensation essentially because limitations of the system were accepted which still left him at some risk.¹⁴

2.4 These criticisms of overriding interests would be disarmed if the matters making up the list of overriding interests were of little significance or worth. Unfortunately this is not so. It is tolerably clear that overriding interests¹⁵ comprise the list of items in section 70 of the Act,¹⁶ supplemented by rule 258 and section 5 of the Coal Industry Nationalisation Act 1946. A complete list appears in Appendix B. All registered land is deemed subject to such of the interests listed as subsist for the time being.¹⁷ The list includes rights of way and other easements, squatters' rights, leases for twenty-one years or less and all sorts of property rights enjoyed by occupiers. These matters may well have great practical and social impact on the value and use of the land. Thus obviously the benefit of an overriding interest may be vital and the burden devastating.

2.5 It is sometimes asserted that overriding interests comprise only those matters adversely affecting the title which in unregistered conveyancing would not be ascertainable from the title deeds.¹⁸ However, an examination of the list shows that this is not necessarily so.¹⁹ Nor is there any explicit intention that in this respect the two systems of conveyancing should produce the same results. With overriding interests, as with other aspects,²⁰ there are substantive differences between registered and unregistered land. This might be a cause for criticism plus a plea for consistency irrespective of the conveyancing formalities. Nevertheless, present Government policy involves a commitment to the overall extension of land registration within seven years, subject to resources being available, in the interests of simpler and cheaper house transfer.²¹ More than eighty years after the first compulsory registration under the Land Transfer Act 1897 we see little justification in trying at all costs to keep the two systems in step. In proposing the scheme in this report, we have not considered ourselves constrained by the fact that we might be creating or perpetuating distinctions from unregistered land. Registered conveyancing is after all to be the way forward, the new improving on the old.

⁹ Sir John Stewart-Wallace, *Principles of Land Registration* (1937), p. 32.

¹⁰ Ruoff and Roper, 5th ed., (1986), p. 878.

¹¹ See further below para. 2.10.

¹² See L.R.A. 1925, ss. 110 and 123.

¹³ Ruoff and Roper, 5th ed., (1986), p. 880.

¹⁴ Cp. L.P.A. 1969 and Local Land Charges Act 1975.

¹⁵ The definition of the expression in s. 3(xvi) of the Act operates in a rather circular manner.

¹⁶ In fact the expression "overriding interests" first made its appearance in the L.P.A. 1922 (Sched. 16). The definition there was not identical with the one now in force. This is of limited relevance, however, because the 1922 Act was overtaken by the L.R.A. 1925 and never itself became law.

¹⁷ Section 70(1), *semble* not applying to registered charges (see s. 3(xxiv)) but a chargee of land which is subject to an overriding interest will, of course, hold subject to that interest.

¹⁸ Brickdale and Stewart-Wallace, *Land Registration Act 1925* 4th ed., (1939), p. 190; *National Provincial Bank v. Hastings Car Mart Ltd.* [1964] Ch. 9 at p. 15 (per Cross J.), on appeal [1965] A.C. 1175.

¹⁹ Indeed, L.R.A. 1925, s. 70(2) contemplates the entry of a note of overriding interests which appear on the title deeds.

²⁰ e.g. as to adverse possession, see *Spectrum Investment Co. v. Holmes* [1981] 1 W.L.R. 221 and s. 75 of the Act.

²¹ Statement by Solicitor-General (*Hansard* (H.C.), 17 February 1984, vol. 54, Written Answers, cols. 347-8).

2.6 We have mentioned the theoretical ideal of the mirror principle. However, it should be appreciated that this is a conveyancer's ideal which can only prevail at the price of restricting someone else's rights. The conflict was plainly put by our predecessors fifteen years ago:²²

From the point of view of purchasers²³ of registered land, it is clearly desirable that as many as possible of the matters which may burden the land should be recorded on the register of the title to the land. We aim at simplifying conveyancing and a reduction in the number of overriding interests would contribute to that end. A balance must, however, be maintained between, on the one hand, the interests of purchasers of land and, on the other, the legitimate interests of those who have rights in the land which might be prejudiced by a requirement that such rights must be recorded on the register to be binding on a purchaser. Those who advocate eliminating or drastically reducing the number of overriding interests sometimes, we think, tend to look at the matter solely from the point of view of purchasers of land without paying sufficient regard to the interests of others.

The ideal of a complete register of title is certainly compatible with the policy of the law for over one hundred and fifty years of both simplifying conveyancing and maintaining the security of property interests on the one hand and the marketability of land on the other.²⁴ But the longevity of a policy hardly guarantees its acceptability to-day in the light of modern developments affecting land ownership. Plainly no policy should be followed blindly which works against rather than for "rights conferred by Parliament, or recognised by judicial decision, as being necessary for the achievement of social justice".²⁵ Put simply, it may be unjust to require that a particular interest be protected by registration on pain of deprivation. Apart from this basic aspect, also militating against the ideal of a complete register are the various matters the nature of which is such that recording them on the register would be "unnecessary, impracticable or undesirable".²⁶ Thus there are self-evident difficulties in reproducing in verbal form on the register rights which are acquired or arise without any express grant or other provision in writing. Again some rights may seem so transient as to be not worth the trouble of recording. Beyond this, other rights may be so readily discoverable by any purchaser without recourse to the register that no greater protection would be conferred by recording them. Similarly, perhaps, there is clearly common-sense behind the general rule relieving the registrar from the necessity of entering on the register notice of any liability, right, or interest appearing to him to be "of a trivial or obvious character, or the entry of which on the register is likely to cause confusion or inconvenience".²⁷ In addition, requiring an entry on the register to protect a right or interest otherwise accepted and exercised may be to provoke litigation unnecessarily soon: neighbours as well as spouses may see a notice or caution as a hostile act.²⁸ Finally to be borne fully in mind is the point that, as the law now stands, any reduction in the list of overriding interests inevitably involves a corresponding increase in the number of potential claims for indemnity (these provisions are not at present available where losses are in respect of overriding interests). These considerations persuade us to adopt two principles, with the first being subject to the second: (1) "in the interests of certainty and of simplifying conveyancing, the class of right which may bind a purchaser otherwise than as the result of an entry in the register should be as narrow as possible"²⁹ but (2) interests should be overriding where protection against purchasers is needed, yet it is either not reasonable to expect or not sensible to require any entry on the register. Thus far the welfare of the

²²(1971) Working Paper No. 37, para. 7.

²³The word "purchaser" here includes a lessee or mortgagee.

²⁴See (1982) Law Com. No. 115, para. 68 identifying the starting-point for the policy as the legislation following reports of the Real Property Commissioners in 1829-30.

²⁵Per Lord Scarman in *Williams & Glyn's Bank Ltd. v. Boland* [1981] A.C. 487 at p. 510.

²⁶(1971), Working Paper No. 37, para. 4.

²⁷L.R.R. 1925, r.199 which oddly appears not to preclude entry of a caution; there now seems no sufficient reason for saying that any matter omitted under this rule "must clearly constitute an overriding interest" (see (1971) Working Paper No. 37, p. 9 n. 25 and p. 59 para. 1(i)): unless the matter is listed in L.R.A., 1925, s. 70(1) it should not be an overriding interest but only a minor interest, so that, in the absence of an entry in the register, the position will turn, if at all, on the rectification and/or indemnity provisions.

²⁸Entry of notice to protect a Class F land charge of a spouse (i.e. a charge affecting any land by virtue of the *Matrimonial Homes Act 1983*: see L.C.A. 1972, s. 2(7)) is seen as a "hostile act" and because of this the registered proprietor is not given the opportunity to object: *Watts v. Waller* [1973] 1 Q.B. 153; (1976) Working Paper No. 67, para. 25; Ruoff & Roper, 4th ed., (1979), pp. 319, 747. Lodging of a caution can be seen as a "hostile act" because it does not require the production of the land certificate and so can be done without the registered proprietor's consent; Ruoff & Roper, 5th ed., (1986), p. 814. See further Part IV at paras. 4.27-4.28.

²⁹(1971) Working Paper No. 37, para. 34.

conveyancer, or rather his client, is our first but not our paramount consideration. However, particularly perturbed by thoughts of honest and careful purchasers suffering losses because of principle (2), we will proceed to propose that the ordinary indemnity provisions should become available for claims occasioned by overriding interests.

2.7 The considerations and principles just outlined emerged fairly clearly as essentially supported following various consultations. Our first published discussion of overriding interests was in 1971.³⁰ However, that discussion may be regarded as undermined by a no doubt excusable failure to anticipate what has proved to be the most significant decision of recent years concerning registered conveyancing, namely *Williams & Glyn's Bank v. Boland*.³¹ As already mentioned,³² the implications of this decision were referred to us for consideration and we reported³³ after a narrow consultation chiefly intended to ascertain the nature and extent of the practical conveyancing problems.³⁴ The report was not widely welcomed,³⁵ and must for present purposes be largely disregarded. Recognising this, further proposals were drafted for discussion which purported to prescribe a cure for the whole malady of overriding interests instead of concentrating upon the particularly worrying symptoms discerned following the *Boland* decision. These proposals, which were never those of the Commission, in essence involved the total abolition of overriding interests (albeit retaining certain of them as general burdens) coupled with a corresponding enlargement of the potential for rectification and/or indemnity.³⁶ A discussion document

³⁰*Ibid.*

³¹[1981] A.C. 487. Mr. and Mrs. Boland both contributed to the purchase price of their matrimonial home. They were equitable tenants in common. Mr. Boland was the sole registered proprietor. Later Mr. Boland granted a legal charge in favour of the bank. The bank did not enquire of Mrs. Boland though she lived in the house. Mr. Boland defaulted. The bank sought possession. Held that Mrs. Boland was "in actual occupation" and that her right as equitable tenant in common under a statutory trust for sale of the house bought to be lived in was a right "subsisting in reference [to land]", all in terms of s. 70(1)(g). She therefore had an overriding interest to which the bank's legal charge was subject. Para. 65 of (1971) Working Paper No. 37 preferred a different result; see similarly our Third Report on Family Property: The Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods (1978), Law Com. No. 86, para. 1.253(b) (also paras. 1.332 and 1.333).

³²See para. 1.3 above.

³³(1982) Law Com. No. 115.

³⁴See *ibid.*, para. 6.

³⁵Cp. comment in each of the Conveyancer and Property Lawyer [1982] Conv. 393-5 and [1983] Conv. 5-8 and the Journal of Social Welfare Law (1983) J.S.W.L. 67-9.

³⁶The conclusions and proposals were summarised as follows:

- (1) Overriding interests are an expensive complication in conveyancing and fundamentally inconsistent with the principles of land registration.
- (2) The rectification and indemnity provisions also represent a breach of the mirror principle but a more flexible and equitable one.
- (3) Following a transitional period during which most but not all overriding interests should be capable of protection by registration of a notice or caution, their existence under the Act should be abolished. Thereafter matters which, but for abolition would have found protection as overriding interests, may be the subject matter of claims for rectification and/or indemnity.
- (4) It is accepted that not all overriding interests can conveniently or practicably be made the subject of any entry on the register; such rights, which we term "general burdens" in this Report, should be listed as incumbrances and take effect under the Act by amendment of the sections dealing with the effect of registration of a transaction.
- (5) If the problem of overriding interests is to be dealt with once and for all, provision should be made for the registration of those interests which would be overriding interests were the servient land registered in anticipation of the land becoming registered.
- (6) *A fortiori* provision should be made for the registration of overriding interests where title to the land is already registered. In both cases a transitional period of three years, by the end of which registration of the overriding interest must be made, is needed.
- (7) The new freedom from overriding interests should only operate in favour of a transferee for value in good faith.
- (8) Certain expressions presently occurring in s. 70 can be omitted as being no longer of legal force.
- (9) Easements and profits, except rights of common, need only be the subject of the registration requirement where title to the land is already registered. In all other cases their existence can, assisted by a duty on the applicant to disclose, be noted on first registration.
- (10) Public rights need not be specifically mentioned in a land registration context but should operate as general burdens.
- (11) Short leases should be the subject of the registration requirement unless they come within the wording of s. 54(2) of the Law of Property Act 1925.
- (12) Where tenants have statutory security of tenure their rights should operate as general burdens binding registered proprietors.
- (13) Local land charges need only take effect by general mention as their existence is recorded elsewhere.
- (14) The rights of those in occupation of land should, if not dealt with under any other head of overriding interest, be registered if they are to continue to have effect.
- (15) Where protection by actual occupation is of a right which might, in unregistered land, become void for non-registration as a land charge, rectification should not be available if registration does not take place as proposed above.
- (16) Rectification of the Register should be available generally where either it is just or the transferee has lacked good faith or been fraudulent.
- (17) There should be a rebuttable presumption that it is just to rectify to give effect to the rights under trusts for sale in relation to the dwelling-house of a person in actual occupation as at completion. This would be subject to the existing overreaching machinery being operated.
- (18) Indemnity should in general complement rectification. But indemnity should not be paid where rectification is ordered in respect of matters within the actual knowledge of the proprietor when he purchased the land.
- (19) Partial indemnity may be payable where the applicant has been at fault.
- (20) The Land Registry's rights of recourse where indemnity is paid should be extended.
- (21) A vendor's duty of disclosure of interests potentially affecting a purchaser of registered land should be extended.

was circulated for comment to a limited number of specialists and other persons interested.³⁷ The responses appeared to indicate a likely lack of consensus: they ranged from welcoming the flexibility whereby neither of two innocent parties need depart empty-handed, to condemning the whole scheme as unworkable. In the uncertain light cast by this, we arranged a seminar to which many of those expressing apparently opposed responses were invited to discuss and, so far as possible, resolve the issues seen as arising.³⁸ It was held on 16 October 1985 and happily demonstrated that the differences between consultees were not completely irreconcilable. The previous draft proposals were regarded as unnecessarily radical and received no substantial support. Overriding interests should remain a feature of registered conveyancing, practitioners in particular having come to terms with the implications of the *Boland* decision, but the list should be reduced and revised basically in accordance with the principles outlined in our previous paragraph. In addition a number of amendments of detail, some of them major in operation, now proposed in this report may properly be attributed to the near consensus arrived at through the seminar debate. Further, however, participants in general voiced no opposition in principle but rather acceptance of the idea derived from the provisional scheme, that the indemnity provisions should become available in respect of overriding interests.

2.8 In all these circumstances, our first task was to look very closely at the present list in section 70 with a view to deciding how far the paragraphs can be pared. Any entry in the present list of overriding interests may be viewed in one of three mutually exclusive ways:

- (i) The adverse interest or right might be such as needs protection but ought not to be expected or required to be recorded in a register of title. These should properly continue to be "overriding interests" in accordance with principle (2) indicated in paragraph 2.6 above.
- (ii) The interest or right might be among the less frequently encountered more esoteric items in section 70. As to these, assuming in any particular case that they should not rank as general burdens,³⁹ we consider that in the interests of modernisation and simplification they can and should be entered in the register. If not so entered, a purchaser should not be affected, and the holder of the interest or right will cease to enjoy the privileged status of overriding interest. This will necessarily entail the removal of such interests or rights from section 70.
- (iii) The interest or right although mentioned in section 70 might simply be so much superfluous drafting. For example, the list in section 70 contains both specific and general entries covering much the same items. We see no reason for there to continue to be duplication or overlap between these two.

2.9 The other aspect of our proposals for overriding interests, involving issues of principle, is the extension of the indemnity provisions to which we now turn. At present, all registered titles are held subject to the possibility of a successful application for rectification in any of a fairly widely-drawn list of cases.⁴⁰ There is no rule limiting the type of interest which might be the subject of a claim for rectification and the statute contemplates rectification to give effect to an overriding interest.

2.10 Rectification and overriding interests share the feature that they are each a means of asserting an unregistered interest against a proprietor of registered land. In this respect, rectification is also a crack in the mirror principle.⁴¹ However, the crack opened by rectification is wider but shallower than that opened by overriding interests. It is wider in

³⁷List of consultees: Appendix A, Part I.

³⁸List of participants: Appendix A, Part II.

³⁹For these see below para. 2.15.

⁴⁰See s. 82 and r. 14: Appendix C.

⁴¹See para. 2.2 above.

that it can be used to alter any aspect of a registration: the statutory provisions⁴² are drawn not in terms of those interests which might be the subject of an application, but in terms of the circumstances when rectification may be requested. It is shallower in that it is a discretionary matter and is, with four exceptions,⁴³ not generally available against a registered proprietor in possession. It is also less devastating because rectification is backed by a scheme of compensation for those who suffer loss. At present, rectification in respect of an overriding interest will not normally be refused - because, if refused, the interest will presumably continue to subsist as an overriding interest adversely affecting the land. However, here indemnity is not, it seems, payable⁴⁴ (other than perhaps for legal costs⁴⁵) because, the land having been subject to the interest at all material times, no loss has been suffered. In other words, with overriding interests one (normally) innocent party must lose without compensation; with rectification (and non-rectification) an indemnity may become available. As was said in the original working paper⁴⁶ in relation to *Hodgson v. Marks*⁴⁷ (where a claim based on an overriding interest succeeded):

While we do not wish to suggest that that particular case was decided otherwise than in accordance with the merits, we think that it is unsatisfactory that the law should require cases of that sort, involving two innocent parties, to be decided on a basis which can only result in total failure for one side or the other. Mrs. Hodgson had not taken any steps to protect her beneficial interest on the register and had she failed to establish that she was "in occupation" when Marks became the registered proprietor (as, indeed, she did at first instance) she would have lost her home; as it was, she was held to have had an overriding interest, so that the defendant Marks and his mortgagee were deprived of all rights in relation to the house.

We consider that the criticism in that paragraph is still valid and that it could be met by a greater harmonisation of the overriding interest provisions and the rectification and indemnity provisions.

2.11 Against any extension of the indemnity provisions to cover overriding interests, it can be said that these are by definition interests which subsist apart from the register of title so that there will be no question of fault on the part of H.M. Land Registry, and that any purchaser should, in substance, be bound by such interests and therefore investigate the situation just as if the title were unregistered and not place reliance only on the register.⁴⁸ Consistently with this the "state guarantee" covers what is or ought to be on the register, not what must be off the register and is therefore of no concern to its officials.⁴⁹ True there is no express provision that indemnity should never be available in respect of overriding interests. This rule has been supplied by some first instance judicial reasoning: where registered land had been held to be subject to rights which constituted an overriding interest and rectification had therefore been ordered, an application for indemnity by a registered proprietor with absolute title failed on the grounds that:

the rectification of the register for the purpose of giving effect to those overriding rights had put the applicants in no worse position than they were in before such rectification; with the result that the applicants having suffered no loss by reason of

⁴²See Appendix C.

⁴³These are (all in s. 82(3)) first, where rectification is to give effect to an overriding interest or, secondly, to give effect to an order of the court or, thirdly, where the proprietor in possession has contributed to the error through fraud or lack of proper care or, fourthly, where it would be unjust not to rectify against the proprietor in possession.

⁴⁴See para. 2.11 below.

⁴⁵See s. 83(8)(b) of the Act.

⁴⁶[1971] Working Paper No. 37, para. 69.

⁴⁷[1971] Ch. 892.

⁴⁸See s. 110(2) of the Act.

⁴⁹Note, however, that as to certain overriding interests entry on the register is mandatory: L.R.A. 1925, s. 70(2) (see per Diplock L.J. in *Re Dances Way, West Town, Hayling Island* [1962] Ch. 490 at p. 508); as to any other entry is discretionary: L.R.A. 1925, s. 70(3), see also L.R.R. 1925, r. 41. Presumably errors or omissions occurring in connection with such entries or in any official search in relation to such entries would lead to indemnity in respect, in effect, of overriding interests: L.R.A. 1925, s. 83(2), (3); see further Appendix D for details of such claims. Compare Land Registration (Scotland) Act 1979, s. 12(3)(h) expressly excluding indemnity where "the loss arises in respect of an error or omission in the noting of an overriding interest".

the rectification were not entitled to be indemnified under s. 83 of the Land Registration Act, 1925.⁵⁰

These grounds have been described as "strictly logical" and the position as "precisely what it would have been had the land been unregistered".⁵¹

2.12 However various further arguments for an extension of the indemnity provisions to cover losses suffered by reason of overriding interests themselves may be urged.⁵² To begin with, as a matter of long-standing policy, registration of title is rapidly being made compulsory for the whole of England and Wales in the public interest.⁵³ But the public interest being pursued here is undoubtedly that of providing quicker and cheaper conveyancing with particular reference to house transfer.⁵⁴ Achievement of this interest would certainly be facilitated by the abolition of overriding interests,⁵⁵ but as a matter of conflicting policy it has been decided that the system should remain subject to these. In other words, the ideal of a complete register could have been imposed in the interests of purchasers, but instead certain third party interests are, many think rightly, to be protected as paramount.⁵⁶ This being so, as second best to the complete protection of purchasers, the machinery of registered conveyancing ought to be oiled by means of a "state guarantee" of title.⁵⁷ A precedent for the provision of compensation out of public funds as a just solution for a defective system established by Act of Parliament may be seen in relation to

⁵⁰Headnote (extract) to *Re Chowood's Registered Land* [1933] Ch. 574 (Clouston J.); the case concerned rights to a strip of the registered land acquired, prior to the registration, by adverse possession. See also per Wilberforce, J. in *Re Boyle's Claim* [1961] 1 W.L.R. 339 at p. 344 restating the basis of that decision but adding that "if the rectification is not ordered on the basis of existing overriding interests but on the basis of some defect in paper title, the matter might be dealt with differently." Curiously, however, in the *Chowood* case the various grounds on which judicial reliance had been expressly placed as enabling rectification did not include (perhaps per incuriam) any mention of the fact that the rights in question constituted an overriding interest: see *Chowood Ltd. v. Lyall (No. 2)* [1930] 1 Ch. 426; [1930] 2 Ch. 156, C.A.

⁵¹Ruoff and Roper, 5th ed., (1986), p. 114.

⁵²e.g. see (1971) Working Paper No. 37, para. 69, mentioned in para. 2.10 above.

⁵³Royal Commission on Legal Services (Benson) Report (1979), Cmnd. 7648, Chap. 21, Conveyancing Annex 21.1., Improvements and Simplification, para. 7: "We have no doubt that it is in the public interest that the registration of title in the Land Registry should proceed as quickly as possible".

⁵⁴See e.g. Solicitor-General's Written Answer (*Hansard* (H.C.)), 17 February 1984, vol. 54, Written Answers, cols. 347-8) to Mr. Austin Mitchell's question about "what plans the Government have for improving the house transfer system in England and Wales". The answer concluded:

Furthermore we intend to speed up the extension of land registration. Additional manpower is to be made available to the Land Registry so that compulsory registration will cover areas containing 85 per cent of the population - as opposed to 73 per cent at present - by 1987. This is the first extension of compulsory registration (except for former council houses) since 1978.

We expect that computerisation will release manpower within the Land Registry and allow the programme of compulsory registration to be completed within 10 years.

These measures demonstrate the Government's commitment to simplifying house transfer and to competition so that the public can benefit from a quicker and cheaper system.

⁵⁵See Second Report of the Government's Conveyancing Committee (1985), para. 4.51:

It ought to be a fundamental principle of any ideal system of land registration that purchasers should not be bound by matters not indicated on the Register itself. Nonetheless, overriding interests do not appear on the register of title for England and Wales. In November 1984 a draft provisional Report entitled "Land Registration: Overriding Interests, Rectification and Indemnity" prepared within the Law Commission, under the direction of our Chairman, was issued for limited consultation. This proposed eventual abolition of overriding interests, with the rectification and indemnity provisions being used "to provide a more flexible and equitable method of protecting those matters which would otherwise be overriding interests." At the same time, the Government indicated its intention to introduce legislation in the 1984-5 session of Parliament to deal with the specific problems raised in this context by the *Boland* case. There is little further we can properly do except note these developments whilst supporting the statement in the draft Report referred to above that "overriding interests are an expensive complication in conveyancing and fundamentally inconsistent with the principles of land registration." There is clear scope here for changes which will simplify and cheapen conveyancing.

⁵⁶See para. 2.6 above.

⁵⁷See second Report of the Conveyancing Committee (1985), paras. 4.58 and 4.59:

The Land Registry's indemnity provisions are not intended to be comprehensive. As to this, we received a submission from the Institute of Conveyancers which commented that the Land Registry "gives insufficient guarantee" and that its functions might be expanded "to give the same kind of services provided by the title-insurance companies of America". From submissions we received from American title insurance companies, it appears that the additional cover purports to be essentially against the legal costs of defending unsuccessful claims, and, more important, against overriding interests.

It would be possible to improve the effectiveness of the Land Registry's indemnity provisions if overriding interests were covered as these presently represent a flaw in any scheme to simplify registered conveyancing. This would obviously have some effect - perhaps incalculable even actuarially - on the level of Land Registry fees if the basis on which these are calculated is changed so that the fees more clearly reflect the indemnity risk (see ante, paragraph 4.44). However, the implications of extending the indemnity provisions in this way will of course be dependent on the developments referred to ante, paragraph 4.51.

land charges registered against pre-root estate owners.⁵⁸ In our opinion there is no good reason why indemnity should be completely precluded, all other matters being equal, when an overriding interest is asserted against a registered proprietor. The availability of indemnity, will, we believe, go some way to enabling an acceptable balance to be achieved between competing innocent interests.

2.13 To the above, it might be added that, without indemnity covering overriding interests, the advantages of the registered over the unregistered system will seem insufficient to justify the latter's eventual abolition.⁵⁹ This is especially so if it is appreciated that the position of a purchaser may actually be disquietingly worse under the registered system as regards the rights of occupiers because they constitute overriding interests.⁶⁰ Witness Vinelott, J. in relation to an estate contract:⁶¹

In the case of unregistered land, registration replaces the equitable principle of notice; the system of registration would be pointless if a purchaser could still take subject to interests of which he had notice actual or constructive. Under the Land Registration Act 1925, registration as a caution or by other appropriate means is sufficient to protect an interest which in the case of unregistered land could only have been protected by registration under the Land Charges Act 1925, but it is not necessary. That would not matter if a purchaser took subject only to [an] interest of which he had notice actual or constructive. But that is not the case. It is quite clear that there can be cases where a purchaser may make the most searching inquiries without discovering that the land in question is in the actual occupation of a third party. It is disquieting that the system of land registration which is being steadily extended should be so framed that a person acquiring an interest in registered land may find his interest subject to an option or right of pre-emption which has not been registered and notwithstanding that there is no person other than the vendor in apparent occupation of the property and that careful inspection and inquiry has failed to reveal anything which might give the purchaser any reason to suspect that someone other than the vendor had any interest in or rights over the property.

Similarly there is a difference with equitable easements: in unregistered conveyancing registration as a land charge is necessary to bind a purchaser but in registered conveyancing it has recently been held that they can be binding as overriding interests.⁶² It will also be appreciated that any "lack of proper care" on the part of the applicant adversely affects his entitlement to indemnity.⁶³

2.14 It could be argued that indemnity is inappropriate because overriding interests do not involve any fault or other error or omission on the part of H.M. Land Registry. However, reference to cases of forgery shows that this is not necessarily the case under the present system.⁶⁴ Where the register is rectified against a proprietor claiming in good faith under a forged disposition, he is deemed to have suffered loss by reason of the rectification and is therefore entitled to claim indemnity.⁶⁵ Indeed the entitlement of such a proprietor was considerably reinforced in 1971: by virtue of amendments to the original subsection, indemnity had become precluded if the applicant had, in effect, contributed to the loss by

⁵⁸L.P.A. 1969, s. 25 derived from a recommendation in (1969) Law Com. No. 18, para. 33; see also (1967) Law Com. No. 9, para. 46(1). Such land charges, having been registered prior to the root of title (reduced to 15 years by the 1969 Act) are not discoverable by the purchaser because registration is by reference to the name of the estate owner. Nonetheless, they are binding on him as a result of the L.P.A. 1925, s. 198. Cp. Local Land Charges Act 1975, s. 10, "Compensation for non-registration or defective official search certificate".

⁵⁹Cp. the view of one practising academic, sub-headed "The Confidence Trick of Section 70", that "Overwhelmingly, however, the mounting case against registration is the nightmare of overriding interests ... Remember, too, that the famed indemnity provisions of the Land Registration Act do not assist the proprietor bound by the overriding interests ... his sole remedy is against his vendor, if anyone. Moreover, title insurers might take the risks of covering at least some overriding interests. Put shortly, the full flowering of s. 70 often gives purchasers less protection at greater cost" - J.E. Adams (1985) 82 L.S. Gaz. 2401.

⁶⁰i.e. under L.R.A. 1925, s. 70(1)(g). However, it would appear that the duty of a purchaser of unregistered land to make reasonable enquiries about the rights of occupiers is not so easily discharged: *Kingsworth Finance Co. Ltd. v. Tizard and another* [1986] 1 W.L.R. 783.

⁶¹*Kling v. Keston Properties Ltd.* (1983) 49 P. & C.R. 212 at pp. 221-2.

⁶²*Celsteel Ltd. v. Alton House Holdings Ltd.* [1985] 1 W.L.R. 204.

⁶³Under L.R.A. 1925, s. 83(5)(a) at present no indemnity at all shall be payable, but see our proposals for a reduction in indemnity, below para. 3.27.

⁶⁴And see also L.R.A. 1925, s. 30(2) as to indemnity for loss by reason of a failure on the part of the post office. In some circumstances an error in the register as a result of double conveyancing might occur without fault on the part of the Land Registry.

⁶⁵Under L.R.A. 1925, s. 83(4).

his own act⁶⁶ and this could include innocently lodging for registration a void conveyance or transfer.⁶⁷ This had not been intended and accordingly the subsection was amended again so that indemnity was precluded only in cases of "fraud or lack of proper care".⁶⁸ As to this the view was expressed by the then Chief Land Registrar:⁶⁹

...it is greatly to be hoped that the fresh formula will at one and the same time preserve the Land Registry's assets from unreasonable jeopardy at the hands of a careless applicant, whilst ensuring that no one who suffers loss from a rectification of the register and is utterly free from blame, in the ordinary sense of that word, will be denied compensation.

This approach appears readily applicable to losses suffered through the existence of overriding interests; indeed it appears impossible in principle to justify adopting any different approach.⁷⁰

2.15 Before scrutinising the present list of overriding interests in detail, there are two other matters to be disposed of. First, in paragraph 2.1 above the present uneasy boundary between overriding interests and general burdens was mentioned.⁷¹ For such burdens we propose the express recognition of a fifth class of rights under the Act. This class will simply involve the amendment of the relevant sections of the Act to indicate more clearly than heretofore the boundaries of the land registration system. The amendments will simply indicate in general or in particular, those matters subject to which registrations under the Act take effect. It follows that although these matters will bear a superficial resemblance to overriding interests in operation, rectification and indemnity will never be or become relevant in their connection. Nevertheless, recognising that for policy or other reasons the boundaries of registration may shift⁷² we propose that the Registrar should have a

⁶⁶See L.R.A. 1925, s. 83(5)(a) as amended by L.R.A. 1966, s. 1(4) so as to restore words omitted in error in 1925 (Lord Gardiner L.C., *Hansard* (H.L.), 24 May 1966, vol. 274, cols. 1298-9).

⁶⁷Under L.R.A. 1925, s. 83(4). See S. Cretney and G. Dworkin, "Rectification and Indemnity: Illusion and Reality", (1968) 84 L.Q.R. 528 at pp. 545-54; also T.M. Aldridge (1967) 111 S.J. 629.

⁶⁸By Land Registration and Land Charges Act 1971, s. 3(1). As your lordship explained: "Clause 3 removes a small injustice which has been created by judicial interpretation. Section 83 of the Land Registration Act 1925 excludes the right to indemnity in cases where the applicant has caused or contributed to the loss by his own act. The effect of judicial decisions is that this exclusion may extend to quite innocent acts, although in practice extra-statutory administrative practice allows indemnity where the causation is in fact innocent. This practice is now given statutory recognition by Clause 3." (Lord Hailsham L.C., *Hansard* (H.L.), 11 March 1971, vol. 316, cols. 229-30).

⁶⁹Theodore Ruoff and Peter Meehan, "Land Registration: The Recent Act", (1971) 35 Conv. (NS) 390 at pp. 394-5.

⁷⁰An incidental curiosity is worth noticing about one overriding interest, namely rights acquired by adverse possession within L.R.A. 1925, s. 70(1)(f). Under the Land Transfer Act 1875, s. 21 such rights simply could not affect a registered proprietor. Then under the Land Transfer Act 1897, s. 12 the position was altered: such rights were still not overriding interests, but otherwise successful squatters against a registered proprietor could apply for rectification and seem indemnity was supposed to be available to the proprietor. Consistently with this, such rights became overriding interests in 1925 but provision was made for indemnity to be paid to persons prejudicially affected by entry of them, albeit the indemnity was only payable in special circumstances and was discretionary: L.R.A. 1925, s. 75(4), which was actually extended by L.R.A. 1936, s. 3. However, this subsection was repealed by Land Registration and Land Charges Act 1971, s. 14(1)(b) as "obsolete or otherwise unnecessary". This repeal was referred to as being among the provisions which were "consequential or technical" (Lord Hailsham L.C., *Hansard* (H.L.), 11 March 1971, vol. 316, col. 231). In the only relevant reported case, *Re Chowood's Registered Land* [1933] Ch. 574, a claim for indemnity was made in respect of a rectification because of adverse possession; the claim failed under s. 83 without any reference to or reliance upon the then unrepealed s. 75(4). This seems explicable only on the basis that the title by adverse possession had been acquired not against a registered proprietor but before first registration (although that occurred before the 1925 Act): see *Chowood Ltd v. Lyall* (No. 2) [1930] 1 Ch. 426; [1930] 2 Ch. 156, C.A.

⁷¹A nice illustration occurs with a so-called "statutory tenancy" under the Rent Act 1977: the "tenant" has long been regarded as enjoying no estate or interest in the land but merely "a personal right to retain the property" or a "status of irremovability" which by virtue of judicial development of the Rent Acts is good against the world (see *Jessamine Investment Co. v. Schwartz* [1978] Q.B. 264 per Sir John Pennycuik at p. 270 and per Stephenson L.J. at p. 277; cp. C. Hand at [1980] Conv. 351). Thus purchasers of the landlord's estate should be bound by a statutory tenancy irrespective of the L.R.A. 1925. However, there are obiter dicta to the effect that the right of a statutory tenant to be in possession although not a proprietary right will be protected as an overriding interest clearly within L.R.A. 1925, s. 70(1)(g) (per Lord Denning M.R. in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* (No. 2) [1964] Ch. 665 at p. 689; reversed on appeal sub nom *National Provincial Bank Ltd. v. Ainsworth* [1965] A.C. 1175 without adverting to this point). There are at least two technical but important difficulties in taking this view: first, the residential occupation required of a statutory tenant by s. 2(1)(a) of the Rent Act 1977 may not always amount to the actual occupation required by L.R.A. 1925, s. 70(1)(g); and second, it is not one of the grounds of possession under the Rent Act 1977 that a statutory tenant on enquiry has failed to disclose his rights (cp. L.R.A. 1925, s. 70(1)(g)). It is the undoubted policy of Parliament that statutory tenants should remain completely safe from defeat at the hands of even innocent purchasers from their landlords (but cp. the position as against mortgagees of protected tenants *Dudley and District Benefit B.S. v. Emerson* [1949] Ch. 707, CA; quare: would the position differ for a statutory tenant? See also *Quennell v. Maltby* [1979] 1 W.L.R. 318). This leads inevitably to the conclusion that their rights should be confirmed as burdens of general incidence.

⁷²For an example of the converse of this there is the discontinued practice of entering exemption from land tax under the proviso to s. 70(1) following the abolition of land tax by Finance Act 1963.

discretion to enter a note of general burdens on the register.⁷³ We shall discuss in greater detail below which matters now appearing in section 70 should be regarded as being in this category. In this report we shall refer to this class as "a general burden". In so far as other statutes create specific estates, interests or rights which are capable of adversely affecting proprietors of registered land, it would appear obviously desirable for express provision to be made as to whether or not they should operate as overriding interests.⁷⁴

2.16 The second matter relates to transitional provision. If it is proposed that certain overriding interests should lose their status as such and require protection as minor interests, this will represent a different, less beneficial, form of security for the adverse right holder from that which he has previously enjoyed. Ought there therefore to be a transitional period during which protection as of right by registration - even so as to bind new registered proprietors—should be available to such people? The arguments are finely balanced, but in the end we think there ought not to be such a period.

2.17 In the earlier draft proposals the possibility of a transitional period was examined.⁷⁵ It was found, however, to be extremely complicated to construct and even if achieved it still had elements of injustice about it.⁷⁶ Participants in the seminar mentioned above⁷⁷ opposed a transitional period on the grounds that a time limit on registration was unfair for those overriding interests which were not immediately discoverable⁷⁸ and that such a stipulation might generate litigation. Moreover such a period does nothing for the difficulties regarding place of registration of those who have an overriding interest against land, the title to which is only registered during the course of the period. The earlier proposals also envisaged the registration of rights affecting unregistered land which, were the land registered, would be overriding interests. Again, the difficulties with this course, in particular the lack of an appropriate register in which to protect such rights - the land charges register would patently not be appropriate—proved insurmountable on consultation and we do not now make any such proposal. This also weakens the case for any transitional period; for why should there be any such period only for land already registered? The enactment of a transitional period is intended to be for the benefit of the holder of an overriding interest; but from his point of view the question of whether title to the land is registered or not is not governed by any logical consideration.⁷⁹ A transitional period would therefore be a benefit of an arbitrary nature.

2.18 However, in virtually all cases there would be a sort of transitional period.⁸⁰ The former overriding interest would continue to bind the current registered proprietor and

⁷³This discretion will be exercisable generally and not just at first registration, as is now the case: see L.R.R. 1925, r. 40.

⁷⁴At present we are only aware of four such provisions, namely:

- (1) Coal Act 1938, s. 41: "... Act shall have effect in relation to premises that are registered land within the meaning of the Land Registration Act 1925 as if they had not been registered land, and all rights and title conferred on the Commission by this part of this Act shall be overriding interests within the meaning of that Act."
- (2) Leasehold Property (Temporary Provisions) Act 1951, s. 2(4): "A tenancy continued by this section shall be deemed to be, and as from the date of continuation to have been, an overriding interest specified in subsection (1) of section seventy of the Land Registration Act, 1925 (which specifies interests subject to which a registered title has effect notwithstanding that they do not appear on the register)."
- (3) Leasehold Reform Act 1967, s. 5(5): "... rights conferred on the tenant by this Part of this Act to acquire the freehold or an extended lease of property thereby demised, nor shall any right of a tenant arising from a notice under this Act of his desire to have the freehold or to have an extended lease be an overriding interest within the meaning of the Land Registration Act 1925; but any such notice shall be registrable under the Land Charges Act 1925 or may be the subject of a notice or caution under the Land Registration Act 1925, as if it were an ..."
- (4) Matrimonial Homes Act 1983, s. 2(8): "Where the title to the legal estate by virtue of which a spouse is entitled to occupy a dwelling house (including any legal estate held by trustees for that spouse) is registered under the Land Registration Act 1925 or any enactment replaced by that Act—
 - (a) registration of a land charge affecting the dwelling house by virtue of this Act shall be effected by registering a notice under that Act, and
 - (b) a spouse's right of occupation shall not be an overriding interest within the meaning of that Act affecting the dwelling house notwithstanding that the spouse is in actual occupation of the dwelling house."

⁷⁵See n. 60, paras. (5) and (6).

⁷⁶e.g. where title was only registered shortly before the close of the period.

⁷⁷See para. 2.7 above and n. 62.

⁷⁸e.g. implied easements: see L.P.A. 1925, s. 62.

⁷⁹See ss. 123 and 1(2) of the L.R.A. 1966; see also First Report on Land Registration (1983) Law Com. No. 125, for an explanation of the registration of leases.

⁸⁰This "transitional period" will apply to the following rights: legal easements and profits by express grant or reservation over land already registered (para. 2.26); equitable easements and profits (para. 2.33); rights of persons "in receipt of rents and profits of the land" (para. 2.70); liability in respect of highways arising from tenure (para. 2.81); liability in respect of embankments, sea and river walls (para. 2.85); crown rents (para. 2.88); tithe rentcharge and related charges (paras. 2.91-2); manorial rights, including rights of fishing and sporting where these are incidental (para. 2.99); mineral rights (para. 2.102).

also subsequent proprietors short of a purchaser in good faith for valuable consideration. Such a purchaser becoming proprietor would only be bound by the interest, like any other minor interest, if it was previously protected by entry on the register, which ought to be achievable, in effect, as of right. If not so protected, the interest would not necessarily be worthless as there might well be remedies against the previous proprietor.⁸¹

Superfluous wording

2.19 It is convenient to dispose first of all of those matters within paragraph 2.8 (iii) above. In section 70(1)(a) and (j) rights of common, drainage rights, rights of way, rights of sheepwalk, watercourses, rights of water, rights of fishing and sporting are all, in strictness, examples of either of the two wider terms, easements or profits à prendre. More accurately perhaps, easements or profits à prendre are the genera whereas the rights mentioned above are the species. Given that both easements and profits à prendre appear on their own as overriding interests, there seems little point in the reference to these specific rights. We consider they may be disregarded as being superfluous.

2.20 Working Paper No. 37 (1971) contained a helpful analysis of certain of the rights mentioned. In amplification of the point made in the previous paragraph the appropriate paragraphs (or parts of paragraphs) appear worth reproducing here:

Rights of common

Profits à prendre

37. These items may conveniently be considered together. A profit à prendre is a right to enter another's land and take therefrom part of the land (e.g. sand, gravel or minerals) or its natural produce (e.g. grass, wood, turf or fish) ...

38. Since, in this context, all rights of common are profits à prendre, we suggest that separate reference to them might be eliminated. It is worth noting that under the Commons Registration Act 1965, the continuing enforceability of almost⁸² all rights of common and some sole profits à prendre depends on their registration under either that Act or the (Land Registration) Act. In the latter case they are by definition not overriding interests; and in the former, although they are overriding interests, they are readily ascertainable without reference to the documentary title.

Rights of sheepwalk

39. A sheepwalk is an expression which seems to be more apt to describe the land over which the right to pasture sheep exists - the actual right being formerly called the right of foldcourse.⁸³ Whatever may be the correct description of the rights referred to under this heading in paragraph (a), it is clear that what is intended is a reference to the right to pasture sheep. Again, such a right is a profit à prendre (it may be either a sole right or right of common) and if profits à prendre are specifically mentioned as a head of overriding interest it seems unnecessary to refer to this particular form of profit. We suggest that the reference to rights of sheepwalk could be deleted.

Drainage rights

40. Drainage rights will, in many cases, constitute positive easements. How far other types of drainage rights are intended to be covered by the expression is uncertain. The term public rights used later in the paragraph would seem to cover public rights of drainage and it is for consideration whether anything would be lost by removing from the paragraph the specific reference to drainage rights.

Rights of way

43. Rights of way may be public or private. If they are public they would, presumably, be covered by the expression "public rights" used earlier in the paragraph. If they are private they will either constitute easements (and thus be covered by the general reference to easements at the end of the paragraph) or be enjoyed by custom. It is suggested that there is no need to mention rights of way as a separate head of overriding interest.

⁸¹Cp. *Eagon v. Dent* [1965] 3 All E.R. 334.

⁸²The Minister had a limited power of exemption under s. 11 of that Act.

⁸³See *Robinson v. Duleep Singh* (1879) 11 Ch. 798.

Watercourses

44. In the context of paragraph (a) it seems probable that the expression "watercourse" means an easement or right to the running of water rather than the actual stream or channel which carries the water.⁸⁴ It seems unnecessary, therefore, specifically to mention the expression if easements are mentioned in the paragraph.

Rights of water

45. Rights of water can be of many kinds. They include the right to water cattle, the right to take water for domestic purposes, the right to draw water from a spring or a pump or to use the water of a natural stream, the right to send water across land by means of an artificial watercourse and the right to discharge rainwater. It would, we think, be impracticable to require these matters to be referred to on the register (unless they are expressly created easements) and it is therefore necessary to retain this head. But we do suggest that the head should expressly exclude rights of water which constitute easements...

2.21 By way of further explanation of our present treatment we would add only the following:

- (i) *Rights of water*: In the working paper it was stated that rights of water are of many kinds and a list was given which crossed the boundary between incorporeal hereditaments and natural rights. Natural rights are nowhere mentioned *eo nomine* in the Act and section 70 contains the only possible mention of some of the various rights that make up a landowner's natural rights. We are of the opinion that the Act should give consistent treatment to the question of natural rights and an enumeration of some but not all of these rights is not the correct approach. For example, the natural right of support is not mentioned in section 70. There is no question but that natural rights are private rights of property and in certain circumstances may adversely affect adjoining land. As such, they ought *prima facie* to feature in the scheme of registration of title. Nevertheless, there are two arguments against express mention of natural rights which we have found conclusive. First, such rights flow from proprietorship of a legal estate rather than grant and in the case of land already registered the important legal estates are recorded in the register. An entry in respect of natural rights would therefore simply be so much superfluous writing. Secondly, it would be impossible precisely to catalogue each and every natural right in every case; nor would it appear very helpful. Reference to rights of water no longer appears needed.
- (ii) *Rights of fishing and sporting*: As discussed in the working paper, the repeal of the reference to these rights would not extend to sporting rights preserved by statute following copyhold enfranchisement which we deal with later.⁸⁵

Redundant references

2.22 Quit-rents, heriots and other rents and charges (until extinguished) having their origin in tenure, although still referred to in section 70(1)(b), have all ceased to exist by reason of provisions in the Law of Property Act 1922.⁸⁶ These references may safely be repealed.

Remaining heads of overriding interest

2.23 After this exercise in cosmetic surgery it will be seen that the overriding interests remaining comprise a fairly miscellaneous collection of estates, interests and rights. They may be indicated as follows:

- easements;
- profits à prendre;
- rights by adverse possession;
- short leases;
- rights of persons in actual occupation or receipt of rents and profits;
- customary rights;

⁸⁴For a discussion as to the possible meanings of the expression "watercourse", see *Taylor v. Corporation of St. Helens* (1877) 6 Ch.D. 264 per Jessel M.R. at p. 271.

⁸⁵See para. 2.95.

⁸⁶ss. 128, 138 and 140; see also (1971) Working Paper No. 37, para. 51.

public rights;
chancel repairs liability;
highways, sea and river walls and embankment liability;
crown rents;
payments in lieu of tithe and certain tithe rentcharges;
local land charges;
rights preserved on enfranchisement of copyhold land;
certain mineral rights;
excepted rights where title less than absolute.

2.24. Applying the two principles explained and adopted in paragraph 2.6 to the above list, we consider that the only candidates for continued overriding interest status come within the following sub-heads:

- (1) easements and profits à prendre;
- (2) rights by adverse possession;
- (3) short leases;
- (4) rights of persons in actual occupation;
- (5) customary rights.

However what we propose within these sub-heads will not correspond in many significant respects with the equivalent overriding interests under the present provisions. We now examine these sub-heads in turn.

(1) EASEMENTS AND PROFITS

Expressly created

2.25 This subject receives slightly confusing treatment in the Act. Where a proprietor of registered land grants an easement or profit à prendre⁸⁷ then, unless it is granted for a term not exceeding twenty-one years at a rent without taking a fine,⁸⁸ it must be "completed by registration".⁸⁹ This appears to involve in all cases the entry of a notice against the servient title and, if the dominant title is registered, the inclusion of the easement or profit in the registration but only as appurtenant. Similar considerations apply mutatis mutandis to the reservation, or the acceptance of a grant out of unregistered land, of an easement or profit.⁹⁰

2.26 Against this, section 70(1)(a) provides that easements and profits are overriding interests. However, it will be readily apparent that the foregoing provisions beat the air if holders of easements and profits need simply look no further than section 70 for protection. We can see no justification for this ambivalent status where easements and profits arise by express grant or reservation over already registered land. According to the principles explained and adopted in paragraph 2.6, we consider that it is reasonable to expect and sensible to require such express grantees to protect their interests against subsequent purchasers on the register. Pending "completion by registration", such express easements and profits should be treated as minor interests only.

Arising by operation of law

2.27 The picture is however slightly more complex than so far painted. Easements and profits may be legal or equitable; they may also arise otherwise than by express grant or reservation: for example under section 62⁹¹ of the Law of Property Act 1925 or by implied grant or reservation including the rule in *Wheeldon v. Burrows*⁹² or by prescription.⁹³

⁸⁷Assuming that a profit à prendre is included in the words "easement, right, or privilege" in ss. 18 and 21, which seems likely having regard to the construction put on the same words in s. 1(2) of the L.P.A. 1925; see also R.E. Megarry and H.W.R. Wade, *The Law of Real Property* 5th ed., (1984), p. 855, n. 5.

⁸⁸The requirement of a rent and no fine are removed by Land Registration Act 1986; for an example of a lease of an easement see *Land Reclamation Co. Ltd. v. Basildon D.C.* [1979] 1 W.L.R. 767.

⁸⁹ss. 19(2) and 22(2).

⁹⁰rr. 252 *et seq.* provide a code to be followed when entry of an appurtenant right is sought.

⁹¹Applied to registered land by r. 251.

⁹²(1879) 12 Ch. D 31.

⁹³See Megarry and Wade, 5th ed., (1984), pp. 869-92.

2.28 The benefit of section 62 is incorporated by express reference where registered titles are concerned, but this leaves uncertain how easements arising in any of the other ways take effect in the land registration system.⁹⁴ In our view, as a matter of practical justice easements (and, less commonly, profits) by implied grant or reservation generally ought to arise in registered land with exactly the same frequency and incidence as where title to the land is unregistered. The conveyancing machinery of registration of title should not here inhibit the operation of substantive land law rules and it would not appear to be reasonable to expect or sensible to require grantees by implication only to register their interests. At present, most often the wide scope of section 62 (and of rule 251, the wording of which closely follows section 62) will be sufficient with implied grants⁹⁵ and against the servient land the rights will enjoy protection as overriding interests. Less clear is how an implied reservation of a right on the severance of registered land takes effect.⁹⁶ The burden of the right will be an overriding interest, but for the benefit it appears necessary to fall back on the possibility of requesting a specific entry under rule 252. An equivalent procedure exists in rule 197 for requesting a specific entry in respect of the burden of a right rather than relying on general protection as an overriding interest. These provisions call for clarification but, apart from the overriding interest aspect, are not our present concern.

2.29 If the statutory position with regard to implied easements and profits suffers from a lack of clarity, there is no position at all with regard to other rights arising through the doctrine of non-derogation from grant.⁹⁷ In *Browne v. Flower*⁹⁸ it was explained that rights arising in this way can amount to something different in kind from an ordinary easement although, no doubt, any duty cast on a land owner under the doctrine will always be negative in nature.⁹⁹ No doubt also provision need not be made for the benefit of any such rights to be entered in the register as they do not readily fit into the existing catalogue of incorporeal rights. However, we consider provision should be made for the burden of these rights, and they are included in the general recommendation we make in the following paragraph.

2.30 We consider that the case for easements, profits and other rights arising in any of the ways mentioned in the previous three paragraphs remaining overriding interests is irresistible. Rights as between neighbours, unless expressly granted or reserved, do not always arise in a logical and recognisable manner, and the legal status and extent of such rights is often not questioned until many years after they have come into existence. In our view such rights arising by operation of law provide support for the status quo in relations between land owners. Any interference would be likely to provoke unneighbourly litigation. All easements and profits arising at law otherwise than by express grant, whether by implication or by virtue of any other rule (e.g. by estoppel), must surely be treated alike. It would not be reasonable to expect or sensible to require entries on the register in respect of them. Accordingly they should retain overriding interest status and we so *recommend*. Of course, it is not our intention to prohibit specific entry of any established right being requested, as can happen at the moment, if this is desired.

Equitable easements and profits

2.31 Equitable easements and profits appear in practice to be created more often than not expressly; so that according to the principles already indicated they should be protected on the register. However, it is possible for equitable easements to arise otherwise. The Act makes no special provision for equitable easements or profits other than the cryptic words in section 70(1)(a) "not being equitable easements required to be protected by notice on the register". The debate¹⁰⁰ concerning the meaning of these words has been rendered more or less academic by the recent case of *Celsteel Ltd. v. Alton House Holdings*

⁹⁴See *Emmet on Title*, 19th ed., §§15.056, 15.059 and 15.068.

⁹⁵These rights appear to arise on registration rather than on execution of the transfer or other document; see also ss. 19(3) and 22(3).

⁹⁶There does not appear to be a difficulty as far as a first registration of the land with the benefit of the reservation is concerned: see s. 123(1) and ss. 5 and 9.

⁹⁷For these rights, see Paul Jackson, *The Law of Easements and Profits* (1978), Chap. 4.

⁹⁸[1911] 1 Ch. 219.

⁹⁹*Aldin v. Latimer Clark, Muirhead & Co.* [1894] 2 Ch. 437.

¹⁰⁰See *Wolstenholme & Cherry's Conveyancing Statutes* 13th ed., (1972), vol. 6, p. 64; D.J. Hayton, *Registered Land* 3rd ed., (1981) p. 83.

*Ltd.*¹⁰¹ In that case it was held, inter alia, that an equitable easement, not being excluded by the wording of rule 258, was by virtue of that rule an overriding interest.

2.32 In practice probably the commonest sort of equitable easement or profit, peculiar to registered land, arises where a legal easement, or profit appurtenant, adversely affecting registered land and requiring "completion by registration"¹⁰² is not so completed. Until it is, it takes effect at best in equity and now, by virtue of rule 258, as an overriding interest.

2.33 The scheme of the 1925 legislation¹⁰³ was to provide that equitable rights should affect purchasers of legal estates no longer through the equitable doctrine of notice but should depend on protection by registration and, where not capable of protection by registration,¹⁰⁴ should take effect, on a sale of the legal title, against the proceeds of sale. The error that has been made, whereby these rights become overriding interests, is that the draftsman of rule 258 borrowed the wide general words of section 62 of the Law of Property Act 1925 and, without limiting their operation to legal rights, applied them to the servient land (i.e. as to the burden instead of the benefit created). We see no sufficient reason why the position of a purchaser here should be worse than with unregistered conveyancing: it would seem equally reasonable to expect and sensible to require that equitable easements and profits should be protected on the register as minor interests. Accordingly we *recommend* that equitable easements and profits should no longer be overriding interests.

Pre-first registration easements and profits

2.34 Looked at from the point of view of land being registered for the first time (in other words as to easements and profits created by express grant or reservation or otherwise prior to first registration), the Act directs¹⁰⁵ the entry in the register of adverse easements and profits ascertainable from an examination of the title. We understand that this is ordinarily done. Similarly rule 251 provides that easements and profits benefiting the land are generally deemed included in any registration of the land. But this general provision leaves the question of title open. Rules 252 to 257 provide a code for the specific entry of a right as appurtenant to registered land. We understand that the requirement of this code that notice be served is sometimes relaxed where, on ordinary principles, a good title to the easement or profit is shown.

2.35 As to legal easements and profits existing at first registration of the servient land, which are not entered in the register - either through error or because they are not ascertainable from the title - they will continue to bind successors as overriding interests. We cannot conceive that it would be reasonable to expect or sensible to require persons with the benefit of such easements and profits to protect themselves on the register of title by cautions against first registration on pain of future forfeiture of their established rights, even though such forfeitures would be subject perhaps to a successful claim for rectification and/or indemnity. Accordingly we *recommend* that legal easements and profits granted or arising before first registration of any title should continue to be overriding interests. The same considerations do not apply to equitable easements and profits which would have to be protected by registration as land charges to bind the first registered proprietor, being a purchaser for value of unregistered land: these should be only minor interests.

(2) RIGHTS BY ADVERSE POSSESSION

2.36 Under this heading are now included "rights acquired or in course of being

¹⁰¹[1985] 1 W.L.R. 204; a contract in writing was made for the grant of a long lease of a garage (in consideration of a premium which was paid in full) including a right of way for access; the lessee entered into occupation of the garage but, since the contract was never completed by a grant, his leasehold estate and the easement of way remained equitable; they were not protected on the register; subsequent registered proprietors were bound by each as overriding interests.

¹⁰²See ss. 19(2) and 22(2).

¹⁰³Law of Property Act 1925, Settled Land Act 1925, Administration of Estates Act 1925, Land Registration Act 1925, in particular Land Charges Act 1972 (replacing the same Act of 1925).

¹⁰⁴See s. 2(5)(iii) of the Land Charges Act 1972.

¹⁰⁵s. 70(2); this is mandatory: *Re Dances Way* [1962] Ch. 490.

acquired" under the Limitation Act 1980.¹⁰⁶ The acquisition of rights by adverse possession under the general law¹⁰⁷ must be regarded as outside the scope of the present report: any substantive reform of this topic should be undertaken separately and ought not to be conditioned purely by registered conveyancing considerations. Accordingly, we consider that such rights in relation to registered land can continue to be accommodated acceptably in the registration of title system as overriding interests and we so recommend.¹⁰⁸

2.37 However, a right in the course of acquisition by adverse possession, but not yet acquired, for obvious reasons cannot strictly be treated as an overriding "interest" within section 70(1). The reference to such rights is understood to signify simply that time should not start to run again on the registration of a new proprietor, i.e. for the twelve years or other period of adverse possession (but without prejudice to whether or not the squatter could be evicted as a trespasser pending its expiry). We consider and recommend that this position, which prima facie appears both fair and practical, can be better preserved by a direct provision separately from the provisions dealing with overriding interests.

(3) SHORT LEASES

2.38 Until recently the list of overriding interests included "leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine".¹⁰⁹ However in our first Report on Land Registration¹¹⁰ we made a recommendation that "the present exclusion of gratuitous leases, and of leases granted at a premium, from the category of overriding interests ... should be removed".¹¹¹ The Land Registration Act 1986 inter alia implemented that recommendation.¹¹²

2.39 Our first report, so far as affects present purposes, had concerned itself solely with the implications of a lease being granted gratuitously or at a premium.¹¹³ Other aspects of leases as overriding interests were expressly left to be dealt with in this general report.¹¹⁴ In particular, the appropriate maximum period for a so-called "short" lease received no consideration, and no explicit recommendation was made about how long a short lease could be if it was still to bind purchasers automatically as an overriding interest.¹¹⁵

2.40 Under the principles explained in paragraph 2.6 above, tenants certainly have interests which need protecting against purchasers, so that the question should become one of drawing the line so as to include as overriding interests only those leases which it would not be reasonable to expect, or sensible to require, to be protected on the register. Since the present sub-head only covers legal leases, an attractively straightforward approach might appear to be to draw the line at such leases actually granted by deed:¹¹⁶ these should *not* be overriding interests on the basis that it is reasonable to expect persons who have undertaken the one formality to be aware of and comply with the additional one of

¹⁰⁶L.R.A. 1925, s. 70(1)(f) which begins, "Subject to the provisions of this Act ...": this means s. 75 whereby the Limitation Acts apply to registered land by means of making the registered proprietor a trustee for the squatter (see per Clauson J. in *Re Chowood's Registered Land* [1933] Ch. 574 at p. 581, also *Bridges v. Mees* [1957] Ch. 475 where a purchaser who had taken possession of land without completion by transfer and registration, but who had paid the full price, was held by Harman J. to have acquired title by adverse possession against his vendor and to have an overriding interest within paragraph (f)). Compare n. 94 above.

¹⁰⁷For which see Megarry and Wade, 5th ed., (1984) Chap. 18 and/or Cheshire and Burn's *Modern Law of Real Property* 13th ed., (1982), Chap. 27.

¹⁰⁸See to like effect para. 55 of (1971) Working Paper No. 37; this approach seemed to be supported throughout the consultations.

¹⁰⁹L.R.A. 1925, s. 70(1)(k).

¹¹⁰(1983) Law Com. No. 125.

¹¹¹*Ibid.*, para. 6.9; Clause 4(1) of the Draft Clauses in Appendix 1 to that report would provide that para. (k) should simply read "Leases granted for a term not exceeding 21 years".

¹¹²s. 4(1).

¹¹³See (1983) Law Com. No. 125, paras. 4.36, 4.37.

¹¹⁴See *ibid.*, para. 4.38, instancing agreements for leases and an occupation requirement, as to which see below paras. 2.50 and 2.51.

¹¹⁵Cp. (1970) Working Paper No. 32, para. 45 which raises the question but answers it by reference to the registrability of leases, i.e. without accepting the possibility of an intermediate category of leases which could be protected by notice or caution as minor interests.

¹¹⁶For this requirement and exceptions to it, see L.P.A. 1925, s. 52(1), (2)(d) and especially s. 54(2): "Nothing in the foregoing provisions of this Part of this Act shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine".

protection by registration.¹¹⁷ Against this, however, there is the primary point that it is the landlord rather than the tenant who undertakes the formality of executing a lease as a deed. In addition, it would hardly appear sensible to require protection on the register of very short leases (although by virtue of statutory protection these may prove enduring).¹¹⁸ Here the views expressed in the working paper leading to our first report seem persuasive:¹¹⁹

Ideally, particulars of all leases and tenancies to which a title is subject, would be recorded on the register of that title. There are, however, a number of factors which seem to make this undesirable or impracticable.

Many tenancies are informal or for short or periodic terms. It would be unduly optimistic to expect the register invariably to be kept up-to-date with accurate information concerning such tenancies. Leases may be varied or terminated by notice, forfeited, or formally or informally surrendered. It seems unlikely that in all such events notice would be given to the Registry to vary or remove the entry of the lease. For this reason alone, we think that it would be preferable not to attempt to record such tenancies on the register. If the information on the register is not reliable and up-to-date it could well be misleading and any expense involved in putting it there will have been incurred unnecessarily.

Further, where property is let for a short term, particularly for residential purposes, the tenant is often not legally represented. In such a case, we think that it would be unrealistic to assume that the tenant would protect his rights by complying with any formalities, however simple. Accordingly, we suggest that all short leases or tenancies must inevitably be overriding interests and that the tenant should not have to make any application under the Act or Rules to protect his interests.

We accept this.

2.41 This still leaves unanswered the question of the length of term which should constitute a "short" lease for the purpose of being an overriding interest. The draft proposals previously referred to,¹²⁰ in effect, incorporated the existing exception to the general requirement that legal leases should be by deed and proposed a three year period.¹²¹ The specialist reaction to this particular proposal was not wholly favourable and so raised for discussion at the seminar already mentioned,¹²² the issue: "Short leases: is three years too short? twenty-one years too long? seven years, say, just right?"¹²³ The consensus which emerged clearly favoured the present twenty-one year period on the twin grounds of not increasing the cost and inconvenience to tenants and their professional advisers or the workload of H.M. Land Registry.¹²⁴ Neither practitioners nor any others apparently saw or were disturbed by any potential problems from the point of view of purchasers finding themselves bound by leases, of whatever length, as overriding interests.¹²⁵ In the face of this consistent attitude on consultation and recognising that the

¹¹⁷See s. 22 of the Solicitors Act 1974 as amended by s. 6 of the Administration of Justice Act 1985 prohibiting the preparation, *inter alia*, of leases and contracts for leases by unqualified persons.

¹¹⁸See e.g. Landlord and Tenant Act 1954, Part II and cp. Rent Act 1977 and n. 95 as to statutory tenancies being a general burden.

¹¹⁹(1970) Working Paper No. 32, paras. 42-4.

¹²⁰Para. 2.7.

¹²¹See n. 60, para. (11).

¹²²Para. 2.7.

¹²³Note that if the term exceeds 7 years, the rate of stamp duty calculated on the annual rent increases (Stamp Act 1891, s. 1, Sched. 1) and, more significantly, the lease has to be "produced" to the Inland Revenue Commissioners and this will be denoted by a stamp (Finance Act 1931, s. 28).

¹²⁴Resources, in manpower terms, were indicated as a critical factor, but it should be appreciated that leases with terms between 3 and 21 years would not have required substantive registration but only the entry of a notice or caution on the landlord's title.

¹²⁵Query: what problems might have been seen had Mrs. Boland been granted a 21 year lease (cp. *William & Glyn's Bank Ltd. v. Boland* [1981] A.C. 487)? Bear in mind that para.(k) of s. 70(1), unlike para. (g), has no proviso about enquiries (but see para. 2.75 below) and that by virtue of the Land Registration Act 1986, s. 4(1) an overriding lease may be granted at a premium or even gratuitously. In this respect, it may be of some academic interest to contrast the conveyancing approach to beneficiaries in occupation revealed by (1982) Law Com. No. 115, paras. 68, 69 and 121(i) recommending a registration requirement, with that adopted towards tenants (who may or may not be in occupation) in (1983) Law Com. No. 125, para. 4.20 which states, without elaboration, as a guiding principle that "leases should be adequately protected against dealings with a superior registered title" and para. 4.37 as to this being achieved "without the tenant having to take positive steps to that end". The only conceivable justification for this discrimination seems legalistic: in unregistered conveyancing leases as legal estates automatically bind all purchasers whilst beneficial (i.e. equitable) interests do not. But in registered conveyancing all overriding interests enjoy that binding effect whilst long leases, until registered, do not necessarily enjoy more than minor interest status.

existing twenty-one year period was implicitly accepted in our first report, we make no recommendation now about altering the term of short leases as overriding interests.

2.42 One argument advanced by others for the protection of short leases as overriding interests is that their existence is ascertainable from an inspection of the land.¹²⁶ This argument influenced those responsible for section 18 of the Land Transfer Act 1875 because that section gave protection only to leases "where there is an occupation under such tenancies."¹²⁷ The law was changed by Schedule 16 to the Law of Property Act 1922. The change involved omitting the words above quoted and thereby, in effect, including reversionary leases within this class of overriding interests. This change, which took place with apparently very little discussion, has received adverse comment.¹²⁸

2.43 The criticism centres on the fact that the existence of a reversionary lease is not ascertainable from an inspection of the property or enquiry of a current occupier and user. There is no clear evidence available to us of how commonly reversionary leases are granted; we think it unlikely that in the residential market, where generally what is required is the immediate right to occupy as a home, they are commonly used. In the commercial field it is not uncommon for rights in respect of a development to be granted before building work has finished; but we understand that the device most often used for this is the agreement for a lease or licence because of their greater flexibility. Other instances of reversionary leases would be, first, where an existing tenant wishes to extend his term without surrendering it,¹²⁹ (but here the limitation is that the extension cannot take place at any time more distant than twenty-one years in the future),¹³⁰ secondly, where two leases for shorter terms are granted in place of one at a longer term because of the more favourable stamp duty treatment.¹³¹

2.44 Apart from the criticism mentioned, any lease *not* "taking effect in possession" must be made by deed if it is to be a legal lease.¹³² Thus these leases cannot occur either informally or unintentionally. In our opinion, therefore, the circumstances should as a rule be such that it will be both reasonable to expect and sensible to require their protection by entry on the register of title. We do not think that what slight evidence we have of the use of reversionary leases should deter us from recommending that they no longer have protection as overriding interests. Indeed, it strengthens the case for tidying up this area of the law if it can be done without upsetting established commercial practice. However, we do recognise one practical reality the occurrence of which is not unlikely and should be anticipated: for instance, a short tenancy granted to-day but to start at the beginning of next week should not be treated too strictly for present purposes.¹³³ Some reasonable leeway should be allowed. Accordingly we *recommend* that to be within this category of overriding interest a short lease should take effect in possession either immediately or within one month.¹³⁴

2.45 We do not propose any exception in this context to cover the situation where in addition to a lease in possession a reversionary lease is granted to one tenant: the former if it is a short lease can be an overriding interest, the latter would be either a minor interest or, depending on its length, a registrable estate.¹³⁵

2.46 A connected point to which our attention has been directed is that the wording "term ... not exceeding twenty-one years" can be construed so as to comprehend a

¹²⁶See e.g. the directions inside the land certificate cover.

¹²⁷s. 18(7). See also C.F. Brickdale and W.R. Sheldon, *The Land Transfer Acts* 2nd ed., (1905), p. 164, commenting on that subsection, stated that "leases and tenancies of this character are easily discovered by inquiry on the land".

¹²⁸Brickdale and Stewart-Wallace, *Land Registration Act 1925* 4th ed., (1939), p. 194; cp. Hayton 3rd ed., pp. 47-8.

¹²⁹Explained in *Jenkin R. Lewis & Son Ltd. v. Kerman* [1971] Ch. 477.

¹³⁰L.P.A. 1925, s. 149, but note the possibility of an agreement for a future lease; see *Re Strand and Savoy Properties Ltd.* [1960] Ch. 582; *Weg Motors Ltd. v. Hales* [1961] Ch. 176; [1962] Ch. 49, CA; cp. *Green v. Bowes-Lyon* [1960] 1 W.L.R. 176.

¹³¹See *Sergeant and Sims on Stamp Duties* 8th ed., (1982), p. 152 *et seq.*; but see *Ingram v. I.R.C.* [1986] 2 W.L.R. 598.

¹³²See L.P.A. 1925, s. 54(2).

¹³³Cp. *Foster v. Reeves* [1892] 2 Q.B. 255 at p. 257 as to a lease taking effect not immediately but in 19 days' time being reversionary.

¹³⁴Cp. L.R.R. 1925, r. 47.

¹³⁵See L.R.A. 1925, s. 8, also s. 3(xxvii) defining a term of years absolute so as to include reversionary leases; note that for the purposes of s. 8 the two leases to the one tenant will be deemed "to create one continuous term" (r. 47).

discontinuous term.¹³⁶ We consider that leases for such terms should be treated in the same way as reversionary leases: it appears both reasonable to expect and sensible to require that, as against purchasers from the landlord, such fluctuatingly absent tenants should be protected by entry on the register of title. This argument is supported by the fact that discontinuous terms are less likely to be discoverable by enquiry.¹³⁷ Accordingly we *recommend* that it be provided that short leases, in order to be overriding interests, should also be granted for a continuous term.

2.47 The aspect of agreements for leases as overriding interests was also left by our first report, in effect, to be dealt with here.¹³⁸ The relevant statutory definition of "lease" includes an agreement for a lease.¹³⁹ However this is made expressly subject to the context otherwise requiring, and the word "granted" has been held a sufficient context to exclude an agreement for a lease from being an overriding interest as itself a short lease.¹⁴⁰ It has been put to us that in a commercial context it is not uncommon for occupation of land to be attributable to an agreement for a lease rather than a lease until either the lessor has acquired sufficient title to grant the lease in question or some other condition, such as the completion of the development in respect of which the lease is to be granted, is met. In these circumstances (the argument runs) an agreement for a lease is to all intents and purposes the same as a lease and the legislation should recognise this.

2.48 We are not persuaded that this is such a serious problem as to require a change to the present provisions of the Act. First, to admit agreements for leases to this class of overriding interests leaves as anomalous an agreement to purchase the fee simple; no one has suggested that these should without more be overriding interests. Secondly, an agreement for a lease must be registered as a land charge where the title is unregistered¹⁴¹ and the present requirement for registered land is no more onerous than this. Thirdly, there will be protection of the agreement as an overriding interest where there is actual occupation. We conclude that there is no sufficient case for changing the present status of agreements for leases here.

2.49 Where a short lease is, as such, an overriding interest, this does not necessarily mean that a purchaser, becoming registered proprietor of the landlord's reversion, will be bound by all the rights of the tenant.¹⁴² The present position appears to be that the new proprietor's relationship with the tenant, as to the burden and benefit of the covenants and other provisions of the lease, will depend upon privity of estate, i.e. enforceability will turn upon whether or not they have reference to the subject-matter of the lease.¹⁴³ The substance and operation of the doctrine of privity of estate may be open to question,¹⁴⁴ but for present purposes we are content to assume its continued application in registered conveyancing. We *recommend* only that the law should be clarified by an express provision that where short leases constitute overriding interests, the ordinary rules (as amended if that occurs) governing the running of the benefit and burden of lessees' and lessors' covenants should apply.¹⁴⁵

2.50 The suggestion that a lessee should have to be in occupation if his (short) lease is to be an overriding interest was also left over by the first report¹⁴⁶ for later consideration. *Prima facie* we reject the suggestion because, so far as concerns short leases, the mere fact of occupation is not the decisive factor in our concluding that it is not reasonable to expect

¹³⁶*Cp. Cottage Holiday Associates Ltd. v. Customs & Excise Commissioners* [1983] Q.B. 735 where, in essence, leases were granted (for a premium plus a peppercorn rent and management fee) allowing occupation of a cottage for 1 week in each year for 80 years: Woolf J. held that these were *not* leases "for a term certain exceeding 21 years".

¹³⁷The same reasoning applies to "time shares", which we believe should be protected by entry on the register if their total duration is less than 21 years. We understand that this is the current practice of H.M. Land Registry.

¹³⁸(1983) Law Com. No. 125, para. 4.38.

¹³⁹L.R.A. 1925, s. 3(x).

¹⁴⁰*City Permanent B.S. v. Miller* [1952] Ch. 840, C.A. (where there was no actual occupation so that s. 70(1)(g) was not available).

¹⁴¹Land Charges Act 1972, s. 2(4).

¹⁴²i.e. solely by virtue of L.R.A. 1925, s. 70(1)(k). See *Webb v. Pollmount* [1966] Ch. 584 at p. 593 concerning an option to purchase the reversion which constituted an overriding interest under para. (g), not para. (k), of L.R.A. 1925, s. 70(1).

¹⁴³See L.P.A. 1925, ss. 141 and 142 replacing the "touch and concern" the land test derived from *Spencer's Case* (1583) 5 Co. Rep. 16a.

¹⁴⁴See our (1986) Working Paper No. 95: Privity of Contract and Estate: Duration of Liability of Parties to Leases.

¹⁴⁵i.e. as at present stated in L.P.A. 1925, ss. 141 and 142.

¹⁴⁶(1983) Law Com. No. 125, para. 4.38 which adverts to the overlap with the protection afforded to actual occupiers by L.R.A. 1925, s. 70(1)(g).

or sensible to require protection by registration. In other words, with this present category of overriding interests, the aspect of discoverability by purchasers has not been accepted by us as the basic *raison d'être*.

2.51 The suggestion should also be rejected because to do otherwise would be to introduce an additional and unnecessary measure of uncertainty and complexity into the present system. The suggestion would involve that once a lessee was out of occupation, then if his interest is not to be defeated it should be protected by notice or, more probably, caution in the register. This would give the word "occupation" an enormous significance here, and we do not feel able to recommend the introduction of this consideration and all the attendant uncertainty in the context of short leases.¹⁴⁷ The main practical consequences of the suggestion would be to require protection by notice (or caution) of those leases where there had been a sub-letting or where the property was unoccupied or occupied only by a licensee. But a sub-letting, at any rate for a term not exceeding three years and taking effect in possession at a market rent,¹⁴⁸ and the grant of a licence, can be effected with very little formality. The arguments against requiring protection on the register of short leases therefore apply with similar validity here.

2.52 At this point, it would appear convenient to collect our conclusions concerning short leases into one composite recommendation. Accordingly we *recommend* that the list of overriding interests should include leases granted for a continuous term not exceeding twenty-one years and taking effect in possession either immediately or within one month of the grant. This would not cover contracts and would only cover rights having reference to the subject-matter of the lease.

2.53 It has not appeared appropriate in the context of this report to consider making any special provision or provisions directed to dealing with the various forms of security of tenure given to tenants by other statutes. The general effect and implications of such statutory protection should be a matter of public policy to be dealt with in the relevant legislation. As a matter of property law, the protected tenant's estate, interest or right may fall within the present "short" leases category of overriding interests or within the next category to be considered (rights by actual occupation) or the lease may be registrable or may even be protected as a minor interest. Which of these applies will depend upon the circumstances and a proper construction of the particular statute's provisions.¹⁴⁹ It has already been noted¹⁵⁰ that the so-called "statutory tenancy",¹⁵¹ involving a personal status of irremovability good against the world, but not amounting to any estate or interest in land, should bind proprietors not as an overriding interest but as a general burden.¹⁵²

(4) RIGHTS OF ACTUAL OCCUPIERS

2.54 The present statutory provision¹⁵³ protects, as the most amorphous category of overriding interest:

The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed.

This paragraph has been criticised as occasioning the most litigation in a comparatively unlitigated area and as constituting a so-called "occupational hazard" for conveyancing

¹⁴⁷Cp. "if and so long as he occupies ..." from s. 2(1)(a) of the Rent Act 1977; see in this connection *Woodfall* 28th ed., vol. 3, para. 3-0196 *et seq.*

¹⁴⁸L.P.A. 1925, s. 54(2).

¹⁴⁹e.g. under the Agricultural Holdings Act 1948, s. 3(1) agricultural tenancies continue as tenancies from year to year unless terminated by notice; under the Landlord and Tenant Act 1954, s. 24 business tenancies are similarly extended until terminated by notice; under the Housing Act 1980, ss. 29 and 32 secure tenants, in effect, enjoy periodic tenancies.

¹⁵⁰See n. 95.

¹⁵¹Arising by virtue of the Rent Act 1977, or under the Landlord and Tenant Act 1954, Part I of the Rent (Agriculture) Act 1976.

¹⁵²In consequence, no question of rectification and/or indemnity claims could arise even under our proposals above.

¹⁵³L.R.A. 1925, s. 70(1)(g).

practitioners and their purchasing (or lending) clients.¹⁵⁴ Yet the paragraph also has its supporters:¹⁵⁵

Fundamentally its object is to protect a person in actual occupation of land from having his rights lost in the welter of registration.... No one can buy the land over his head and thereby take away or diminish his rights.

Careful consideration of the place and purpose of this provision is clearly called for, with a view to possible reforms which will, in effect, balance fairly the needs of purchasers and of occupiers when weighed against the principles already explained and outlined.¹⁵⁶ However certain seemingly straightforward points of interpretation of the existing provision should be disposed of first.

2.55 The reference to “*land*” in the paragraph does not mean any estate in land but “the physical land”.¹⁵⁷ Further, the reference should be construed as being to “the land or any part thereof”.¹⁵⁸ So far as we are aware here, this aspect causes no difficulties in practice although these might easily be envisaged with large estates. Plainly a provision relating or restricting the occupier’s overriding rights to his or her unit of occupation within the land comprised in a registered title would inevitably introduce complexities.¹⁵⁹ On consultation and from elsewhere we have received no suggestions for change here beyond mere clarification of the construction judicially indicated.

2.56 It appears that the “*rights*” referred to in the paragraph must be proprietary rather than personal rights. Thus the definition section begins: “All registered land shall ... be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto ...”¹⁶⁰ Again the overriding effect of such interests is, in the operative sections, expressly confined to interests “affecting the estate transferred or created”.¹⁶¹ In consequence it seems that in nature the rights capable of being protected as overriding interests do not differ in substance as between registered and unregistered land. Thus Lord Wilberforce has explained:¹⁶²

To ascertain what “rights” come within [para. (g)], one must look outside the Land Registration Act and see what rights affect purchasers under the general law. To suppose that [para. (g)] makes any right, of howsoever a personal character, which a person in occupation may have, an overriding interest by which a purchaser is bound, would involve two consequences: first, that [the Land Registration Act] is, in this respect, bringing about a substantive change in real property law by making personal rights bind purchasers; second, that there is a difference *as to the nature of the rights by which a purchaser may be bound* between registered and unregistered land ... One may have to accept that there is a difference between unregistered land and registered land as regards what kind of notice binds a purchaser, or what kind of inquiries a purchaser has to make. But there is no warrant in terms of this paragraph or elsewhere in the Act for supposing that the nature of the rights which are to bind a purchaser is to be different, excluding personal rights in one case, including them in another. The whole frame of section 70, with the list that it gives of interests, or rights, which are overriding, shows that it is made against a background of interests or rights whose nature and whose transmissible character is known, or ascertainable, aliunde, i.e., under other statutes or under the common law.

¹⁵⁴See Ian Leeming, “Engines of Fraud and Occupational Hazards”, (1971) 35 Conv (N.S.) 255 (concerning *Hodgson v. Marks* [1971] Ch. 892, C.A.) and also, of course, our report on the implications of *Williams and Glyn’s Bank Ltd. v. Boland* [1981] A.C. 487, H.L., (1982) Law Com. No. 115; Cmnd. 8636 - especially para. 28 as to “The purchaser’s risk: a pig in a poke”. Cp. para. 1.3 above as to subsequent developments.

¹⁵⁵Per Lord Denning M.R. in *Strand Securities Ltd. v. Caswell* [1965] Ch. 958 at p. 979.

¹⁵⁶See para. 2.6 above.

¹⁵⁷See per Ungood-Thomas J. in *Webb v. Pollmount Ltd.* [1966] Ch. 584 at pp. 593-4 (refusing to regard the land as being the subject-matter of a lease).

¹⁵⁸See *Hodgson v. Marks* [1971] Ch. 892 at p. 916 (per Ungood-Thomas J.) and, on appeal, at p. 931 (per Russell L.J.).

¹⁵⁹e.g. where there is exclusive occupation of a room and use of the rest of a dwelling: cp. *Hussey v. Palmer* [1972] 1 W.L.R. 1286. See also *Celsteel Ltd. v. Alton House Holdings Ltd.* [1985] 1 W.L.R. 204 per Scott J. at pp. 219 and 220 as to the possibility of an occupier under an agreement for a lease of a garage which formed part of the registered land enjoying equitable easements over other parts of the land coming within the present paragraph.

¹⁶⁰L.R.A. 1925, s. 70(1); cp. L.P.A. 1925, ss. 141 and 142 as to covenants etc., having “reference to the subject-matter” of leases.

¹⁶¹L.R.A. 1925, ss. 20(1)(b) and 23(1)(c); see as to this and the preceding point per Ungood-Thomas J. in *Webb v. Pollmount* [1966] Ch. 584 at p. 595 *et seq.*

¹⁶²*National Provincial Bank Ltd. v. Ainsworth* [1965] A.C. 1175 at p. 1261.

This approach, properly it seems to us, leaves for decision in accordance with general principles of land law the question of whether or not various particular rights are purely personal or are proprietary and within the paragraph.¹⁶³ For example, we would burst the bounds of this report were we to debate the moot point of which, if any, licences are capable of constituting an interest in land binding subsequent purchasers.¹⁶⁴ The paragraph is not at present supposed to enlarge the rights of the occupier¹⁶⁵ and there is no suggestion that it should. Similarly where an occupier's rights are within the paragraph and so do bind purchasers, the way in which this will substantively operate must depend upon rules of law or equity to be found elsewhere than in the Land Registration Acts.¹⁶⁶ On consultation and generally this established approach was accepted, and no change was supported from the paragraph's present potential protection of proprietary but not personal rights.

2.57 The meaning and application of the requirement "*in actual occupation*" seems to be primarily a question of fact.¹⁶⁷ Thus it has not been thought desirable "to attempt to lay down a code or catalogue of situations" in which a person should be held to be in actual occupation for present purposes because "it must depend on the circumstances".¹⁶⁸ Nevertheless, there exists case law on what amounts to "actual occupation". So there cannot, apparently, be actual occupation of an easement as such.¹⁶⁹ In contrast, there may perhaps be actual occupation for present purposes through the agency of another person, such as a caretaker or other employee,¹⁷⁰ although, in effect, this would permit constructive actual occupation, which might well be thought a contradiction in terms. Further it is now quite clear that a person can be in actual occupation notwithstanding that the registered proprietor/vendor was or appeared to be also in occupation.¹⁷¹ What is more, "actual occupation" does not connote continued and uninterrupted physical presence, nor is it negated by regular and repeated absence.¹⁷² Against this, one crucial question may not

¹⁶³Illustrated best perhaps by the leading cases concerning the beneficial interest of co-owners: *Williams & Glyn's Bank Ltd. v. Boland* [1981] A.C. 487, H.L.; *City of London B.S. v. Flegg* [1986] 2 W.L.R. 616, C.A. But see also e.g. *Blacklocks v. J.B. Developments (Godalming) Ltd.* [1982] Ch. 183 (a right of rectification, often referred to as a "mere" equity, held capable of being an overriding interest where ancillary to or dependent upon an equitable estate or interest in land).

¹⁶⁴See per Goff J. in *Re Solomon* [1967] Ch. 573 at pp. 583-6; per Browne-Wilkinson J. in *Re Sharpe* [1980] 1 W.L.R. 219 at p. 226; but cp. *Midland Bank Ltd. v. Farmpride Hatcheries Ltd.* (1980) 260 E.G. 493 and *Street v. Mountford* [1985] 1 A.C. 809, H.L.

¹⁶⁵See *Paddington B.S. v. Mendlesohn* (1985) 50 P. & C.R. 244 at p. 248 where Browne-Wilkinson L.J. said:

Section 70(1) deems the registered land to be subject to certain rights which "override" the rights appearing on the register. The rights referred to in paragraph (g) are "the rights of every person in occupation." There is no doubt therefore that the registered land is subject to the rights of such person. But the essential question remains to be answered, "What are the rights of the person in actual occupation?" If the rights of the person in actual occupation are not under the general law such as to give any priority over the holder of the registered estate, there is nothing in section 70 which changes such rights into different and bigger rights. Say, in the present case, before the acquisition of the flat a trust deed had been executed declaring that the flat was held in trust for the mother but expressly subject to all the rights of the society under the proposed legal charge. The effect of section 70(1)(g) could not in my judgment have been to enlarge the mother's rights so as to give her rights in priority to the society when, under the trust deed, her rights were expressly subject to those of the society. Her rights would be "overriding interests" in that the society would have to give effect to them, but the inherent quality of the mother's rights would not have been such as to give them priority over the society's rights. So in the present case, once it is established that the imputed intention must be that the mother's rights were to be subject to the mortgage, there is nothing in section 70 of the Registration Act 1925 which enlarges those rights into any greater rights.

Cp. per Lord Denning M.R. in *Strand Securities Ltd. v. Caswell* [1965] Ch. 958 at p. 980 as to getting out in a reasonable time someone with a mere determinable licence. Note that certain proprietary rights of a tenant may be protected within the present paragraph where they would not be, for failing to touch and concern the demised land, under the paragraph protecting short leases; see per Ungood-Thomas J. in *Webb v. Pollmount* [1966] Ch. 584 at p. 593 (concerning an option to purchase the freehold reversion).

¹⁶⁶See *Chhokar v. Chhokar* [1984] F.L.R. 313, C.A., considering the position as between a purchaser and an occupying beneficiary (i.e. the vendor's wife): in the circumstances, neither sale nor an occupational rent was ordered.

¹⁶⁷See per Lord Wilberforce in *Williams & Glyn's Bank Ltd. v. Boland* [1981] A.C. 487 at p. 506: "Occupation, existing as a fact, may protect rights if the person in occupation has rights" (emphasis supplied); also per Templeman J. in *Epps v. Esso Petroleum Co. Ltd.* [1973] 1 W.L.R. 1071 at p. 1080 (regular parking of car on strip of land held on the evidence not to constitute actual occupation in whole or in part); also per Lord Denning M.R. in *Strand Securities Ltd. v. Caswell* [1965] Ch. 958 at pp. 980-1 (beneficial occupation rent-free by licensee: licensor held not also in actual occupation).

¹⁶⁸Per Russell L.J. in *Hodgson v. Marks* [1971] Ch. 892 at p. 932.

¹⁶⁹See per Scott J.: *Celsteel Ltd. v. Alton House Holdings Ltd.* [1985] 1 W.L.R. 204 at p. 219 - the dominant tenement (a garage) actually occupied by the grantee of a right of way (over a drive-way) was not part of the same land as the servient tenement; also *Re Pitsea Access Road, Basildon* (1977) 246 E.G. 401 and *Land Reclamation Co. Ltd. v. Basildon D.C.* [1979] 1 W.L.R. 767, C.A.

¹⁷⁰See per Lord Denning M.R. and Russell L.J. in *Strand Securities Ltd. v. Caswell* [1965] Ch. 958 at pp. 981 and 984 respectively.

¹⁷¹See *Hodgson v. Marks* [1971] Ch. 892, C.A. and *Williams & Glyn's Bank Ltd. v. Boland* [1981] A.C. 487, H.L.

¹⁷²See per Judge John Finlay Q.C. in *Kingsnorth Finance Co. Ltd. v. Tizard* [1986] 1 W.L.R. 783 at p. 788.

yet be adequately answered: namely, whether or not the occupation need be apparent to purchasers.¹⁷³ Nevertheless the better answer must surely be in the negative since the equitable doctrine of constructive notice has been so firmly excluded from this context.¹⁷⁴ However, also not finally established is another crucial question, namely what the relevant date is for the occupation: there has long been acceptance of the proposition that it is the date of registration,¹⁷⁵ not that of inspection or even that of completion despite their obvious practical significance,¹⁷⁶ but this question has recently been left open by the Court of Appeal.¹⁷⁷ Nevertheless, once there has been actual occupation on the relevant date, overriding status is not lost by the holder of the interest subsequently going out of occupation.¹⁷⁸ Not surprisingly, on consultation and from elsewhere, numerous submissions were made urging that the nature and, particularly, time of occupation for present purposes should be reconsidered and, at least, clarified.

2.58 The alternative requirement of “*receipt of the rents and profits*” appears to have been relied upon little in litigation. The words do not equate the paragraph exactly to the concept of “*possession*”:¹⁷⁹ it is not a mere right to receive but actual receipt of rent from a tenant which is required.¹⁸⁰ Again a squatter in adverse possession by virtue of cutting underwood could come within the present paragraph, not on account of occupation, but on account of receipt of profits.¹⁸¹ In addition dicta have even suggested that merely demanding the token sum of a penny a week from a licensee would suffice for purchasers to be bound.¹⁸² Various submissions were received that this alternative to occupation constituted an unjustifiable trap for purchasers and lenders which should not be allowed to continue.

2.59 The proviso to the paragraph—“*save where enquiry is made of such person and the rights are not disclosed*”—may be regarded as self-explanatory.¹⁸³ Certainly, so far as we are aware, the wording has not called for scrutiny or construction in any reported case. Therefore to observe that the proviso is not explicit or precise as to when or by whom the enquiry should be made¹⁸⁴ or as to the capacity of the person enquired of,¹⁸⁵ might be thought to be quibbling academically about details which involve no real practical difficulties.¹⁸⁶ Instead, on consultation and generally, criticism was directed to the fact that the word “*reasonable*” is missing from the proviso. Identifying all the occupiers and addressing enquiries to each of them would prove so troublesome, if not impossible, that

¹⁷³At first instance in *Hodgson v. Marks* [1971] Ch. 892, Ungoed-Thomas J. treated “in actual occupation” as “in actual and apparent occupation” (p. 916); on appeal, Russell L.J. first observed rather ambivalently of this treatment: “I do not see that this adds to or detracts from the words in the section” (p. 931) yet was prepared to assume without necessarily accepting that the construction was correct (p. 931), but later, speaking of a wise purchaser or lender taking no risks and making enquiries, he added: “indeed, however wise he may be, he may have no ready opportunity of finding out; but, nevertheless, the law will protect the occupier” (p. 932).

¹⁷⁴See per Lord Wilberforce in *Williams & Glyn's Bank Ltd. v. Boland* [1981] A.C. 487 at p. 508.

¹⁷⁵i.e. date of application for registration: L.R.R. 1925, r. 83(2).

¹⁷⁶*Re Boyle's Claim* [1961] 1 W.L.R. 339, Wilberforce J.; this was simply asserted without reasons being given. It is thought that the reason this date was chosen was because it is not until then that the purchaser is deemed to be proprietor of the legal title, see ss. 20, 23 and 26. See also *City Permanent B.S. v. Miller* [1952] Ch. 840 per Jenkins L.J. at p. 854. *Re Boyle's Claim* has been followed at first instance in *Kling v. Keston Properties Ltd.* (1983) 49 P. & C.R. 212 at p. 218. There are inconclusive dicta pointing to a different time in *E.S. Schwab & Co. Ltd. v. McCarthy* (1975) 31 P. & C.R. 196, per Buckley L.J. at p. 215.

¹⁷⁷In *Paddington B.S. v. Mendelsohn* (1985) 50 P. & C.R. 244 a county court judge had held that occupation as at the date of a mortgage, not as at the date of registration, was relevant, but on appeal Browne-Wilkinson L.J. said:

Both parties were anxious that we should decide the appeal on the point determined by the judge, viz. what is the relevant date as at which to determine whether the mother was in actual occupation for the purpose of section 70(1)(g)? However, although I am far from saying that the judge's decision on that point was wrong, it is a point of great importance in the law of registered conveyancing generally and I do not think it is desirable for a Court of Appeal of only two judges to adjudicate on such a point if the appeal can be disposed of on some other ground.

¹⁷⁸*London & Cheshire Insurance Co. Ltd. v. Laplagrene Property Co. Ltd.* [1971] Ch. 499.

¹⁷⁹L.R.A. 1925, s. 3(xviii): “‘Possession’ includes receipt of rents and profits or the right to receive the same, if any.”

¹⁸⁰See per Sir John Pennycuik in *E.S. Schwab & Co. Ltd. v. McCarthy* (1975) 31 P. & C.R. at p. 213.

¹⁸¹See *Re Chowood's Registered Land* [1933] Ch. 574 at p. 578 (in argument) and per Clauson J. at p. 580.

¹⁸²Per Lord Denning M.R. and Russell L.J. in *Strand Securities Ltd. v. Caswell* [1965] Ch. 958 at pp. 981 and 983.

¹⁸³The words appeared for the first time in the 1925 Act without, so far as we have been able to ascertain, any prior public or parliamentary explanation, discussion or debate.

¹⁸⁴See note at [1980] Conv. 161-2.

¹⁸⁵See Jill Martin's article [1980] Conv. 361 at pp. 371-2 drawing attention to the potential problem of young children unable to comprehend the enquiry.

¹⁸⁶For a suggested *Practice Note* (editorial and unofficial) as to the Chief Land Registrar serving an “official notice of enquiry”, see [1980] Conv. 85-7, 311-2 and 313-8; cp. (1982) Law Com. No. 115, Appendix 2 paras. 13-15, rejecting this suggestion.

the proviso is in practice worthless.¹⁸⁷ Solicitors acting for purchasers and lenders essentially place reliance on the word of vendors and borrowers, seeking waivers or consents from any revealed occupiers of full age.¹⁸⁸ In other words, a risk is undertaken, no enquiries are made on the spot and reliance is placed upon conveyancing being conducted on a basis of good faith.¹⁸⁹ Consistently with this, during consultations, we considered the point that, even without express provision, an occupier would undoubtedly be unable to enforce his rights against a purchaser or mortgagee in any case of fraud or estoppel, and this appears correct.¹⁹⁰ We further considered that this must surely be the position too for all other overriding interests: tenants or squatters, like tenants in common, could not conceivably be permitted to escape the consequences of fraud or estoppel. Accordingly, the view was taken that the proviso to the present paragraph performs no useful function.

2.60 Having examined the interpretation of the “occupational hazard” paragraph, the time has come to consider its place and purpose. The traditional judicial explanation of the paragraph’s *raison d’être* is as “a statutory application to registered land of the well-known rule protecting the rights of persons in occupation”.¹⁹¹ The rule referred to is the one in *Hunt v. Luck*,¹⁹² namely that a purchaser has constructive notice of anything reasonably detectable from an inspection of the property and in particular of anything which might be discovered by reasonable enquiry of any occupier.

2.61 Unfortunately, perhaps, actually equating the paragraph to the *Hunt v. Luck* rule involves surmounting certain substantial difficulties. First, the equitable doctrine of notice, although apparently preserved in relation to occupiers,¹⁹³ was to a large extent superseded

¹⁸⁷The practical difficulties were graphically illustrated in *Kingsnorth Finance Co. Ltd. v. Tizard* [1986] 1 W.L.R. 783; witness the words of Judge John Finlay Q.C. (note that the Mr. Marshall mentioned was a surveyor treated as an agent for the plaintiff-mortgagees):

On the balance of probabilities, I find that the reason Mr. Marshall did not find Mrs. Tizard in the house was that Mr. Tizard had arranged matters to achieve that result. He told Mrs. Tizard that on a particular Sunday, and I find in fact that it was the Sunday that Mr. Marshall did inspect, he was going to entertain friends to lunch and would she take the children out for the day. She did; and having regard to the manner in which I find that the signs of her occupation were temporarily eliminated by Mr. Tizard, the reasonable inference is that he made this request so that Mr. Marshall could inspect and find no evidence of Mrs. Tizard’s occupation. (at p. 793) . . .

Here Mr. Marshall carried out his inspection on a Sunday afternoon at a time arranged with Mr. Tizard. If the only purpose of such an inspection were to ascertain the physical state of the property, the time at which the inspection is made and whether or not that time is one agreed in advance with the vendor or mortgagor appears to me to be immaterial. Where, however, the objective of the inspection (or one of the objects) is to ascertain who is in occupation, I cannot see that an inspection at a time pre-arranged with the vendor will necessarily attain that object. Such a pre-arranged inspection may achieve no more than an inquiry of the vendor or mortgagor and his answer to it. In the case of residential property an appointment for inspection will, in most cases, be essential so far as inspection of the interior is concerned. How then is a purchaser or mortgagee to carry out such inspection as “ought reasonably to have been made” for the purpose of determining whether the possession and occupation of the property accords with the title offered? (at pp. 794-5).

¹⁸⁸See as to this (1982) Law Com. No. 115, paras. 39-41; also *Emmet on Title* 19th ed., §§5.192.

¹⁸⁹See per Russell L.J. in *Hodgson v. Marks* [1971] Ch. 892 at p. 932.

¹⁹⁰Estoppel was argued at first instance but failed on the facts in *Hodgson v. Marks* [1971] Ch. 892; Ungeod-Thomas J. said (at p. 917):

The defendant Marks pleaded that Mrs. Hodgson was estopped as against him, as a result of her conduct on his visits to the house before contract, from alleging that she had any rights in the property. There was no such conduct to provide a foundation for estoppel.

The defendant building society pleaded that it was within Mr. Evans’ actual or ostensible authority to agree to sell the property with the vacant possession to Mr. Marks and to transfer it to him, and that Mrs. Hodgson was therefore estopped from relying on the trust. It was not within Mr. Evans’ actual authority; was it within his ostensible authority? This came down to the question whether the transfer to Mr. Evans, being expressed to be from natural love and affection, held out Mr. Evans as having such ostensible authority. The title on which they relied did not include the transfer. They relied on the registration and not on the transfer and it was not suggested that the registered title held out Mr. Evans as having such ostensible authority. And it was common ground that the building society and their representatives never saw the transfer. This seems fatal to the plea.

See also the proposition stated by the Court of Appeal in *Spiro v. Lintern* [1973] 1 W.L.R. 1002 at p. 1010: “If A, having some right or title adverse to B, sees B in ignorance of that right or title acting in a manner inconsistent with it, which would be to B’s disadvantage if the right or title were asserted against him thereafter, A is under a duty to B to disclose the existence of his right or title. If he stands by and allows B to continue in his course of action, A will not, if the other conditions of estoppel are satisfied, be allowed to assert his right or title against B.” In the case, in effect, one spouse with full knowledge of a proposed disposition by the other did not disclose any lack of authority or willingness for it to proceed: he was held estopped. Cp. *Paddington B.S. v. Mendelsohn* (1985) 50 P. & C.R. 244, C.A. as to an imputed intention that the otherwise overriding interest of an occupier should be subject to the rights of a mortgagee.

¹⁹¹*National Provincial Bank Ltd. v. Ainsworth* [1965] A.C. 1175 at p. 1259; see also per Lord Denning M.R. in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1964] Ch. 665 at p. 689; per Lord Evershed M.R. in *Grace Rymer Investments Ltd. v. Waite* [1958] Ch. 831 at p. 849; per Vaisey J. in *Mornington Permanent B.S. v. Kenway* [1953] Ch. 382 at p. 386; and per Danckwerts J. in *Woolwich Equitable B.S. v. Marshall* [1952] Ch. 1 at p. 9.

¹⁹²[1902] 1 Ch. 428.

¹⁹³L.P.A. 1925, s. 14.

in 1925 for unregistered conveyancing in favour of protection by land charges' registration,¹⁹⁴ so that its survival in registered conveyancing might understandably be criticised as anachronistic. The paragraph's protection is not restricted to those interests or rights which cannot be protected by notice or caution on the register;¹⁹⁵ this represents for purchasers of registered land an obviously unfavourable divergence from the unregistered position. Secondly, the literal wording of the paragraph does not incorporate any element of *reasonably* detectable occupation or *reasonable* enquiry of the occupier which is central to the equitable doctrine of constructive notice. Attempts to incorporate such an element by implication have not yet succeeded,¹⁹⁶ and the possibility of occupation being of part and as at registration would appear incompatible with it. Thirdly, the paragraph, unlike the rule in *Hunt v. Luck*, may cover more or less of the relevant rights of an occupier: for example, a purchaser of unregistered land may be affected by constructive notice of interests under a strict settlement but not by latent equities of rectification; vice versa with registered land.¹⁹⁷ Fourthly, the paragraph at present, again unlike the rule in *Hunt v. Luck*, protects the rights of some specified non-occupiers, i.e. persons in receipt of rent or profits. Indeed, in this respect, the paragraph would actually reverse the very decision in the case: there occupation by a tenant did *not* give constructive notice of the equitable title of those receiving rents.¹⁹⁸ Lastly and most significantly perhaps, the paragraph, unlike the rule in *Hunt v. Luck*, protects an occupier despite the fact that his or her occupation and rights are not inconsistent with those of the vendor or mortgagor who is also in occupation.¹⁹⁹ It is in this situation that the enquiries made necessary by the paragraph, however desirable they may be for social justice, often seem to conveyancers so intrusive as to be embarrassingly unreasonable.

2.62 If the present existence of this paragraph, protecting occupiers' rights, cannot be convincingly justified by reference to the rule in *Hunt v. Luck*, what can justify its future existence? One possible justification would be via amendments importing the essence of the equitable doctrine of constructive notice. This was indeed provisionally recommended in the original working paper²⁰⁰ where it was proposed that the requisite occupation should expressly be "actual and apparent".²⁰¹ As to this it was explained:

By including a reference to "apparent", we wish to convey the sense that the occupation must be apparent from such enquiries and inspections as ought reasonably to have been made by a purchaser in the circumstances of each particular case.²⁰²

However, such a revival of the doctrine of notice was included in our *Boland* report amongst the rejected solutions for the following reasons:²⁰³

This suggestion is to make the rights of occupiers of registered land subject to the doctrine of notice which still applies in unregistered conveyancing. The purchaser would take free of the rights of occupying co-owners unless he had actual or constructive notice of them....

This idea would make a marginal improvement in the position of a purchaser of registered land, for he would not, as at present, be bound by occupiers' rights which

¹⁹⁴L.P.A. 1925, s. 199(1)(i); L.C.A. 1972, s. 4.

¹⁹⁵See e.g. *Grace Rymer Investments Ltd. v. Waite* [1958] Ch. 831, C.A. and *Webb v. Pollmount* [1966] Ch. 584 as to estate contracts.

¹⁹⁶Cp. para. 2.57 above.

¹⁹⁷Cp. L.R.A. 1925, s. 86(2) and contrast *Smith v. Jones* [1954] 1 W.L.R. 1089 with *Re Brickwall Farm* [1982] Ch. 183.

¹⁹⁸In that case Farwell J. in a passage approved by the Court of Appeal (at [1902] 1 Ch. at p. 432) stated the principle as follows:

- (1) a tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights;
- (2) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of that person's rights.

¹⁹⁹As in *Williams & Glyn's Bank Ltd. v. Boland* [1981] A.C. 487; cp. per Vaughan Williams L.J. in *Hunt v. Luck* [1902] 1 Ch. 428 at p. 433 "... if a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession - of the tenant who is in possession - and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or rights of the tenant in possession."

²⁰⁰(1971) Working Paper No. 37.

²⁰¹*Ibid.*, Part D, para. 4.

²⁰²*Ibid.*, at para. 75.

²⁰³(1982) Law Com. No. 115, Appendix 2, paras. 16-17.

he could not reasonably have been expected to discover. Nevertheless, we reject the idea on several grounds. First, it would do virtually nothing to remove the need for purchasers and mortgagees to make the additional enquiries which have become necessary since *Boland*. Secondly, it would not *remove* the risk to purchasers and mortgagees of being bound by rights which they had failed to detect, for they would be bound to make "reasonable" enquiries, and what is or is not reasonable in this context cannot safely be predicted. Thirdly, it would weaken the occupier's position, for it would make the enforceability of his rights against a purchaser dependent upon the purchaser's state of knowledge. Fourthly, it would reintroduce into a small area of the land registration system the very doctrine which the system was designed to displace. It is a feature of the system that the purchaser is bound only by matters which are entered on the register or by overriding interests. To introduce a third category of matters which bind purchasers who have notice of them outside the register would in our view be a retrogressive step.

We remain persuaded that this rejection was right.²⁰⁴

2.63 Another possible justification for retention of the paragraph lies in the very fact that enquiries do have to be made of occupiers who may have rights. Upsetting and expensive though this initially seemed to conveyancers in the wake of the *Boland* decision,²⁰⁵ as was emphasised by that case, the judicially developed recognition of spouses' equitable rights of ownership in matrimonial homes is nowadays very well known and necessarily implies an obligation that society generally (which includes purchasers and mortgagees) should recognise and respect those rights. In our view, it is undeniably desirable that spouses with such rights should be consulted and involved in all important decisions and transactions affecting their homes.²⁰⁶ The pure conveyancing necessity for prospective purchasers and mortgagees to make enquiries of occupiers incidentally achieves this desirable consultation and involvement and, as was observed some four years ago, conveyancers have learnt to live with it.²⁰⁷ However, we do not look to this as a sufficient justification for affording a general protection to occupiers' rights; the paragraph is not restricted to the co-ownership rights of spouses in matrimonial homes and there are now no proposals that it should be.²⁰⁸ It is not self-evident that other persons with such rights, as well as anyone with other rights, should not be similarly consulted and involved, whatever the property.²⁰⁹ But this should, we consider, be achieved, if at all, by direct substantive provisions in other legislation rather than indirectly by amendments of what were intended to be mere machinery provisions governing registered conveyancing.²¹⁰

2.64 Nevertheless the incidental benefits of requiring enquiries of occupiers should not be lightly discounted in the course of pursuing conveyancing simplifications. True, any occupier wanting to be consulted and involved could achieve this for him or herself by means of a notice or caution on the register.²¹¹ Yet we recognise that it is not always reasonable to expect or sensible to require protection by registration.²¹² The rights of actual occupiers, including in practice most beneficial interests in dwelling-houses, are very often of the sort which arise without express grant, without the grantee or acquirer having the benefit of legal advice, and thus in the same sort of circumstances which lead us to

²⁰⁴Cross-reference should be made to the effect upon indemnity claims of "a lack of proper care"; see below para. 3.27.

²⁰⁵See (1982) Law Com. No. 115, Part III.

²⁰⁶See *ibid.*, paras. 95-100 and 121(ii) recommending a special "consent requirement"; also (1978) Law Com. No. 86, paras. 1.227-1.246 and 1.270-1.292.

²⁰⁷*Hansard* (H.L.), 15 December 1982, vol. 437, col. 662, Lord Chancellor:

While not wishing to minimise the difficulties created by the *Boland* case, or the prejudice that might result from its reversal, it must be said that it has been part of our law for over a year now, and that in fact conveyancers have come to terms with it - and come to terms with it fairly well. Contrary to their predictions, the world has not come to an end as a result of the decision in *Boland* in the Court of Appeal and the House of Lords.

²⁰⁸Cp. the withdrawn Land Registration and Law of Property Bill (1985), see para. 1.3 above.

²⁰⁹Cp. *City of London B.S. v. Flegg* [1986] 2 W.L.R. 616, C.A.

²¹⁰Cp. L.P.A. 1925, s. 26(3): "Trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of the subsection have been complied with" (emphasis supplied).

²¹¹Cp. the "registration requirement" primarily recommended for co-owners in (1982) Law Com. No. 115, para. 121(i).

²¹²See para. 2.7 above.

conclusions regarding the retention of easements, rights by adverse possession and short leases²¹³ as overriding interests. Indeed these expectations and requirements seem to us very likely to be even less reasonable or sensible with the rights of actual occupiers.

2.65 The preceding paragraph included a statement of, and cross-reference to, the principle which, in effect, we see as still justifying a large measure of protection for the rights of occupiers. This does not necessarily mean unamended retention of the present provision. In any event, if the occupiers' rights class of overriding interest is not completely abandoned, some more or less minor amendments will inevitably be called for in the interests of clarification of its operation. Beyond this, as a matter of substance, it is arguable that protection should not extend to all the property rights of occupiers and that the principle adopted by us does not require this. Accordingly the acceptability of certain restrictions on the rights protected is considered in subsequent paragraphs. However, it should be appreciated that cutting down the range of rights which may bind purchasers or mortgagees as overriding interests would not, of course, cut down the strict necessity in conveyancing practice for them to make adequate enquiries of all occupiers, although it might cut down the extent of their risk on failure to enquire (at all or successfully).

2.66 Various suggestions were put to us of particular ways in which the range of rights protected could be cut down. One would be by restricting them to those rights by virtue of which the occupier was actually in occupation.²¹⁴ Another suggestion would be to exclude any rights which could be protected as land charges by entry of a notice or caution.²¹⁵ Neither of these was considered satisfactory in itself in that unnecessary complexities might well be introduced into the registered system which at present merely cause criticism and doubt in unregistered conveyancing.²¹⁶ Apart from this, however, neither way could be based upon the principle which we have indicated and accepted.

2.67 Our conclusion in principle that occupiers' rights should be overriding interests because it is not reasonable to expect or sensible to require their protection by registration, led us to look at the circumstances in which they were acquired. No interest in land can be created or disposed of without the formality of writing, duly signed,²¹⁷ except by virtue of a resulting, implied or constructive trust,²¹⁸ or prescription²¹⁹ or adverse possession,²²⁰ or part performance.²²¹ The conveyance or creation of a legal estate in registered land requires not just a deed²²² but most often completion by registration.²²³ At present the "occupational hazards" paragraph in theory permits the extreme possibility of a transferee under a registrable disposition relying upon actual occupation instead of registration.²²⁴ This might be deliberate to avoid paying registration fees or stamp duty,²²⁵ but in practice the advantages of registration in establishing legal title, and preserving priorities, not least for the benefit of mortgagees, are such that it is much more likely to be a matter of inadvertence or ignorance.²²⁶ The sole statutory sanction for non-registration is directed to compelling first registration²²⁷ and we have no evidence whatsoever of any current need or call to discourage "off the register" conveyancing. Nevertheless we presume that neither this potential practice nor any reluctance to protect themselves by entry on the register on the part of any others who could reasonably be expected to do so should be encouraged. Accordingly we considered the proposition that where a proprietary right (i.e. an interest

²¹³See paras. 2.30, 2.36 and 2.52 above.

²¹⁴Cp. the wording of L.P.A. 1925, s. 14, not a model of clarity: "This Part of this Act shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may be entitled in right of such possession or occupation." See also the equally obscure provision in L.R.A. 1925, s. 82(4).

²¹⁵Incorporating by reference the relevant provisions of the L.C.A. 1972.

²¹⁶See e.g. *Poster v. Slough Estates Ltd.* [1969] 1 Ch. 495.

²¹⁷See L.P.A. 1925, ss. 53(1) and 54(1), also s. 40(1) ("Contracts for sale etc. of land to be in writing").

²¹⁸*Ibid.*, s. 53(2).

²¹⁹But cp. *ibid.*, s. 12 which only applies to Part I of the L.P.A.

²²⁰*Ibid.*, s. 55(c).

²²¹*Ibid.*, ss. 40(2) and 55(d).

²²²Cp. *ibid.*, s. 52(1).

²²³See L.R.A. 1925, s. 69.

²²⁴As, e.g., in *Bridges v. Mees* [1957] Ch. 475 where there was also title by adverse possession.

²²⁵Cp. (1948) 13 Conv. (N.S.) 102, (1958) 22 Conv. (N.S.) 25-6, and (1966) 30 Conv. (N.S.) 20-3 successively considering this undesirable possibility.

²²⁶See *Mascall v. Mascall* (1984) 50 P. & C.R. 119, C.A. where a gift of registered land was held effective in equity since the donor had handed to the donee a duly executed form of transfer together with his land certificate.

²²⁷L.R.A. 1925, s. 123.

in land) has been acquired with all due formality (i.e. signed writing or deed), then the additional formality of protection by entry on the register could reasonably be expected both on their part and in the interests of potential purchasers. By applying this proposition, the line could be drawn so as to protect as overriding interests only those rights of occupiers which had, in effect, arisen informally. However, we came to the conclusion that this could not be a straight enough line to follow in practice or to justify in principle: complying with formalities is the function of grantors not grantees,²²⁸ and even signed writings can very often be rather informal.²²⁹ In addition, it is difficult to support a case for cutting down overriding rights here by reference to the variable formalities of their creation whilst rejecting such a case in respect of the settled formalities for "short leases".²³⁰ Accordingly, we make no recommendation for restricting the rights of occupiers, in effect, by incorporating by cross-reference the statutory provisions prescribing the formalities of creation or transfer.

2.68 Another possibility of cutting down this category of overriding interest, would be to confine it to the rights of persons in actual occupation of a dwelling-house.²³¹ However, the distinction between dwelling-houses and other premises is not always easy.²³² No policy ground has been put to us and substantiated for imposing the restriction here whilst not imposing it for short leases. On principle, we were not persuaded that it would be reasonable to expect and sensible to require occupiers of *non* dwelling-houses alone to protect their rights by registration. Accordingly this possibility of restricting this category to dwelling-houses is not recommended.

2.69 At present beneficial interests arising under strict settlements "take effect as minor interests and not otherwise".²³³ This must mean that even if the beneficiary is in actual occupation, no overriding interest is enjoyed. In contrast, an occupying beneficiary under a trust for sale may enjoy an overriding interest.²³⁴ This distinction was probably unintended²³⁵ and will normally be of little significance because the principal beneficiary under a strict settlement, alone entitled to occupation, will also be the registered proprietor.²³⁶ Nevertheless the distinction now seems, in principle, unjustifiable: the unintentional and informal creation of a strict settlement is not infrequent, and occurs in circumstances in which it would not be reasonable to expect or sensible to require the tenant for life to become registered as proprietor or to protect him or herself on the register.²³⁷ Accordingly we recommend that the proprietary rights of beneficiaries under strict settlements should be capable of being overriding interests within the present "occupiers" category.

2.70 One proposed restriction of the category which we do accept is the exclusion of the rights of persons "in receipt of the rents and profits" of the land.²³⁸ We consider it reasonable to expect and sensible to require such persons in their own interests and as against purchasers to protect themselves on the register because greater injustice lies in expecting the purchaser to be able to ascertain by enquiry of the recipient of the rents and

²²⁸i.e. the grantors or their agents or attorneys must sign the writing or execute the deed: L.P.A. 1925, ss. 54(1), 52(1) and 40(1).

²²⁹See particularly L.P.A. 1925, s. 40 under which contracts for the sale etc. of land need only be evidenced in writing, which need not have been intended to satisfy the section and which need not be in any special form: e.g. *Re Hoyle* [1893] 1 Ch. 84; *Hill v. Hill* [1947] Ch. 231; *Parker v. Clark* [1960] 1 W.L.R. 286.

²³⁰See L.P.A. 1925, ss. 52(2) and 54(2) and cp. so-called "rental purchase" cases such as *Bretherton v. Paton*, *The Times*, 14 March 1986 where the circumstances could give rise to a contract for sale or a tenancy or both.

²³¹Cp. Land Registration and Law of Property Bill (1985) the provisions of which were so confined (and also to co-owning spouses).

²³²Cp. Leasehold Reform Act 1967, s. 2(1) defining "house" as including "any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes"; see *Lake v. Bennett* [1970] 1 Q.B. 663, C.A.; also *Luganda v. Service Hotels Ltd.* [1969] 2 Ch. 209, C.A.; *Kensington and Chelsea (Royal) London Borough Council v. Victoria Wine Co.* (1977) 75 L.G.R. 835; *Prosser v. Sharp* (1985) 274 E.G. 1249; cp. *Stott v. Hefferon* [1974] 1 W.L.R. 1270.

²³³L.R.A. 1925, s. 86(2).

²³⁴*Williams & Glyn's Bank Ltd. v. Boland* [1981] A.C. 487, H.L.

²³⁵See F.R. Crane, "Equitable Interests in Registered Land", (1958) 22 Conv. (N.S.) 14 at p. 24; i.e. the assumption would have been that a beneficiary under a trust for sale would not have any overriding or other interest in land but only an overreachable interest in the proceeds of sale: see *Irani Finance Ltd. v. Singh* [1971] Ch. 59, C.A.

²³⁶See L.R.A. 1925, s. 86(1).

²³⁷See *Bannister v. Bannister* [1948] 2 All E.R. 133 and *Binions v. Evans* [1972] Ch. 359; also *Re Duce and Boots Cash Chemists Contract* [1937] Ch. 642.

²³⁸See L.R.A. 1925, s. 70(1)(g) and further para. 2.58 above.

profits. In practice two sets of enquiries appear called for: the first to establish with those in occupation anybody either to whom rent or other payment is tendered or who removes any of the produce of the land;²³⁹ the second to establish with such person whether they have any rights. It does not seem to us that this position serves the simplification of conveyancing. Moreover the interest of one in receipt of the rents and profits is inherently more likely to be compensatable by payment of indemnity than the interest of the purchaser. Accordingly we recommend that the rights of such persons should no longer be capable of being overriding interests within the present "occupiers" category.

(5) CUSTOMARY RIGHTS

2.71 One head of overriding interest includes "customary rights".²⁴⁰ A custom may be defined as:

a particular rule which has existed either actually or presumptively from time immemorial and obtained the force of law in a particular locality although contrary to, or not consistent with, the general common law of the realm.²⁴¹

Although commonly a customary right in relation to land may be in favour of a class of persons, such as the inhabitants of a locality, because a custom cannot in law extend to the whole realm, it is not considered that a customary right is the same as a public right.²⁴² Customary rights will be mentioned in the context of sea and river walls and embankments, in paragraphs 2.83 and 2.84, and what follows should be read as not extending to customs giving rise to liability in respect of those matters.

2.72 Examples of customary rights in relation to land include the right to dance upon a particular close belonging to an individual,²⁴³ the right of the fishermen inhabitants of a parish to spread and dry their nets on the land of a private owner,²⁴⁴ a right of way in favour of the parishioners to go to and from the parish church over the land of a private owner,²⁴⁵ the right of all the inhabitants of a township to take water from a well for domestic purposes,²⁴⁶ and certain other rights of recreation.²⁴⁷ It will be seen therefore that the rights that might be the subject of custom bear a similarity, in their nature, with legal easements although their existence will not always be evident from an examination of the title.²⁴⁸

2.73 It is in the nature of a custom that its origin will always ante-date the registration of the land. Given also that its existence may not be ascertainable from the title deeds, the analogy with pre-first registration legal easements arising by operation of law is complete, and the case for retaining customary rights as a head of overriding interest (rather than treating them as a general burden) is unanswerable. It seems fair also that a purchaser finding himself unwittingly subject to a customary right should in principle be indemnified.

Overriding interests: generally

2.74 Two matters are relevant to all of the retained heads of overriding interest.

(1) FRAUD OR ESTOPPEL

2.75 We have adverted to the peculiar point that occupiers' rights but no others' may cease to be overriding interests because of non-disclosure on enquiry.²⁴⁹ In our opinion this express proviso to one single category of overriding interest is otiose. As we have observed, there can be little if any real doubt that no overriding interest would be allowed to prevail against a purchaser or mortgagee in any case of fraud or estoppel.²⁵⁰ We recommend that the proviso should not be repeated and that a general provision should be introduced explicitly subjecting all the categories of overriding interests to the jurisdiction of the

²³⁹See para 2.58 above.

²⁴⁰L.R.A. 1925, s. 70(1)(a).

²⁴¹*Halsbury's Laws of England* 4th ed., vol. 12, (1975), para. 401.

²⁴²See para. 2.23 above.

²⁴³*Abbot v. Weekly* (1665) 1 Lev. 176.

²⁴⁴*Mercer v. Denne* [1905] 2 Ch. 538, C.A.

²⁴⁵*Brocklebank v. Thompson* [1903] 2 Ch. 344.

²⁴⁶*Race v. Ward* (1855) 4 E. & B. 702.

²⁴⁷*Halsbury's Laws* 4th ed., vol. 12, (1975), para. 434.

²⁴⁸*Cf. Wyld v. Silver* [1963] Ch. 243.

²⁴⁹See L.R.A. 1925, s. 70(1)(g).

²⁵⁰See para. 2.59 above, also L.R.A. 1925, s. 114 and, e.g., *Lyus v. Prowsa Developments Ltd.* [1982] 1 W.L.R. 1044.

courts to postpone them as against subsequent purchasers and lenders on the general grounds of fraud or estoppel. This general provision in relation to all overriding interests with regard to fraud and estoppel would obviate the need for the specific proviso relating to the non-disclosure of occupiers' rights, and would accord with the ordinary principles governing priorities of competing interests (registration apart) which similarly qualify the general rule that the first in time prevails.²⁵¹

(2) REGISTRATION GAP

2.76 Taking the attitude we have so far to occupiers' rights and other overriding interests leaves the technical problem known as "the registration gap". This was identified and explained in the *Boland* report.²⁵² Briefly the problem is the possibility that, between completion of the purchase and registration, an overriding interest will arise because of occupation or otherwise and, if it does, it has been assumed that it will have priority over the rights subsequently obtained on registration.²⁵³ This is because it has been held at first instance that the correct moment for determining whether a registered title is subject to an overriding interest by virtue of actual occupation is the date of registration of the title or other interest.²⁵⁴ However, the matter is not free from doubt.²⁵⁵ In particular, a recent decision of the Court of Appeal deliberately left open the question of which date was material for overriding interests purposes.²⁵⁶ In our view it is unsatisfactory that this very important point is unclear.

2.77 A number of proposals were considered but rejected in the *Boland* report to deal with the gap in relation to occupiers' rights only. As was pointed out in that report, they all involved doing violence to the principles in the Act governing the consequences of registration. This report looks at the matter from a slightly different point of view. It is thought that for the sake of consistency any solution to the registration gap must apply to all overriding interests.²⁵⁷ We therefore propose that for the purposes of deciding whether purchasers and lenders take subject to an overriding interest, the relevant date should be the date of the disposition, i.e. the date of the instrument which on registration creates or transfers the legal interest. This simple solution avoids the difficulties associated with tying the relevant date to the question of whether the disposition had been lodged within the period of an official search. It should be noticed in passing that the legal estate already passes on completion when land is first registered; this, accordingly, should leave no room for a registration gap.²⁵⁸

2.78 That concludes the list and discussion of interests which we consider should be retained as overriding interests. We now turn to the remaining items in section 70 with a view to their disposal in accordance with paragraph 2.8(ii) above.

²⁵¹See e.g. per Fry L.J. in *Northern Counties of England Fire Insurance Co. v. Whipp* (1884) 26 Ch. D. 482 at p. 494 summarising the position as follows:

The authorities which we have reviewed appear to us to justify the following conclusions:-

(1) That the Court will postpone the prior legal estate to a subsequent equitable estate: (a) where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot otherwise be explained;

(b) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.

But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.

See also L.R.A. 1925 s. 114 and e.g. *Lysus v. Prowsa Developments Ltd.* [1982] 1 W.L.R. 1044.

²⁵²(1982) Law Com. No. 115, Appendix 2.

²⁵³No difficulty appears to arise where occupation is only taken up after registration of a purchaser, because the purchaser "when registered" takes subject only to those matters mentioned in the register and overriding interests: see L.R.A. 1925, ss. 20(1) and 23(1).

²⁵⁴*Re Boyle's Claim* [1961] 1 W.L.R. 339 (Wilberforce J.); this was simply asserted without reasons being given. It is thought that the reason this date was chosen was because it is not until then that the purchaser is deemed to be proprietor of the legal title, see ss. 20, 23 and 26. See also *City Permanent B.S. v. Miller* [1952] Ch. 840 per Jenkins L.J. at p. 854. *Re Boyle's Claim* has been followed at first instance in *Kling v. Keston Properties Ltd.* (1983) 49 P. & C.R. 212 at p. 218.

²⁵⁵There are inconclusive dicta pointing to a different time in *E.S. Schwab & Co. Ltd. v. McCarthy* (1975) 31 P. & C.R. 196, per Buckley L.J. at p. 215.

²⁵⁶*Paddington B.S. v. Mendelsohn* (1985) 50 P. & C.R. 244: "I am far from saying that the judge's decision on that point was wrong", per Browne-Wilkinson L.J. at p. 247 of the county court judge who preferred the date of the instrument. See also para. 2.57 above.

²⁵⁷See L.R.A. 1925, s. 70(1)(a).

²⁵⁸s. 27(3) also gives a charge when registered a degree of retrospective effect: see *Grace Rymer Investments Ltd. v. Waite* [1958] Ch. 831.

Public rights

2.79 The category of "public rights"²⁵⁹ covers a miscellany of rights. As stated in paragraph 2.1 above, a category of overriding interests should cover only *private* rights of property adversely affecting the land. Examples of public rights might be a public right of way or a public sewer. A public right of way is, it seems, the only right in reference to land which the common law recognised as capable of being enjoyed by the public at large. All other public rights, including public sewers, arise under statute. Of these there appear to be more or less two sorts. First, there are general public utilities such as the passage of electricity cables across property. As to this there is no question of an automatic statutory right; there is instead a procedure for service of notice on the landowner and, following his acceptance or the dismissal of his objection, a form of statutory right in favour of the appropriate Electricity Board comes into existence.²⁶⁰ It is in our view questionable whether a right in favour of a legal body such as a public corporation is thereby a "public right" within the contemplation of the relevant provisions of the Land Registration Act 1925. For one thing, if it were correct to say that it was such a public right, then it would not have been necessary to have created another head of overriding interest for the mineral rights in favour of the National Coal Board.²⁶¹ Even so, our view is that general statutory provisions giving rise to rights that are not readily accommodated by the usual classification of legal estates and interests, do not call for an express place in the land registration scheme. Secondly, there are rights created by statute in favour of members of the public generally. These are, we consider, unarguably "public rights". An example here might be the rights given to the public over commons and waste lands.²⁶² Nevertheless, such statutory rights need not, we consider, be mentioned in any system of registration of title given that they arise and operate by way of general provision in a statute (see paragraph 2.15 above as to general burdens).

2.80 As far as public rights of way are concerned, the common law recognised that these arose by acts (either actual or presumed) of the landowner, that is to say, dedication and acceptance.²⁶³ The task of proving dedication and acceptance has been facilitated by statute²⁶⁴ but the principle is unchanged. The process and final result is, therefore, more akin to the creation, by grant, of a private right of way. However, the existence of public rights of way is generally, but not always, ascertainable either by an inspection of the definitive map kept under the provisions of the Wildlife and Countryside Act 1981²⁶⁵ or a search of the index kept under the Highways Act 1980.²⁶⁶ For these reasons we recommend that all public rights should from now on be general burdens.

Chancel repairs liability

2.81 Liability to repair the chancel of any church is at present listed as an overriding interest.²⁶⁷ We have recently submitted a report on this topic²⁶⁸ which primarily recommended abolition of the liability after ten years but which included an alternative recommendation involving registration and apportionment. That report examined the present law and the nature of a landowner's liability for chancel repairs. We incidentally stated that the liability is not a charge on the land so that it is arguable that the liability should not have been listed as an overriding interest.²⁶⁹ Accordingly for present purposes, pending implementation of the earlier report, we recommend that chancel repair liability should continue to subsist as another general burden, like liability for rates, and should no longer be regarded as an overriding interest in land.

²⁵⁹See L.R.A. 1925, s. 70(1)(a).

²⁶⁰Electricity Act 1947; Electricity (Supply) Act 1919, s. 22. Similarly, the British Gas Corporation had, until its dissolution, rights of entry and access to land: Gas Act 1965, s. 6(3) and Gas Act 1972 Sched. 6, para. 14. It seems unlikely that these rights can continue to be public rights following Gas Act 1986 (which expressly preserves the rights for public gas suppliers, *ibid* Sched. 7, para 6).

²⁶¹See Coal Industry (Nationalisation) Act 1946.

²⁶²L.P.A. 1925, s. 193.

²⁶³*Pratt and Mackenzie's Law of Highways* 21st ed., (1967), Chap. II.

²⁶⁴Highways Act 1980, s. 31.

²⁶⁵s. 57(5).

²⁶⁶s. 36.

²⁶⁷L.R.A. 1925, s. 70(1)(c).

²⁶⁸(1985) Law Com. No. 152.

²⁶⁹*Ibid.*, paras. 2.5, 2.6 and n. 9.

Liability in respect of highways arising from tenure

2.82 Liability to repair highways by reason of tenure is listed as an overriding interest.²⁷⁰ The legal nature and origin of the liability is the subject of some uncertainty.²⁷¹ Under the present law²⁷² the liability is now enforceable by application to the Crown Court and by the exercise of default powers by highway authorities; enquiries of those authorities have elicited no known instance of such a highway. In these circumstances the question of liability for repairs becomes academic. We recommend that the status of such rights as overriding interests should simply be abolished.

Liability in respect of embankments, and sea and river walls

2.83 The liability in respect of the repair of highways referred to in the previous paragraph is only that arising by reason of tenure. "Liability in respect of embankments, and sea and river walls" as an overriding interest²⁷³ is not so restricted; nor is it restricted to repair.

2.84 It seems that the Crown had, by virtue of royal prerogative, a right to protect the kingdom from incursions of sea water or river water, tidal or non-tidal, at the expense of those who thereby directly benefited. The device used to give effect to this right was the commission of sewers.²⁷⁴ In time, the prerogative came to be regulated and commissions of sewers to construct and maintain sea and river walls were only available in accordance with statute.²⁷⁵ An embankment was a naturally occurring de facto protection against the sea and the Crown had rights in respect of these.²⁷⁶ Apart from liability being imposed by a commission of sewers (generally in the form of a rate on the benefiting land), liability to repair and maintain might be imposed on a landowner by prescription, custom, tenure, covenant or statute.²⁷⁷ It does not seem that there was ever liability on a landowner to build a wall where none previously existed,²⁷⁸ although he could be restrained by injunction from removing or interfering with a naturally formed embankment which acted as protection.²⁷⁹ Enforcement of the liability against a landowner by those who benefited from, and were equally liable in respect of, the sea wall etc.²⁸⁰ existed alongside the possibility of enforcement by a commission of sewers,²⁸¹ and the modern law has, to some extent, continued this distinction. It follows from this that liability might be either a duty to repair and maintain or a duty to contribute towards the total cost of repairing and maintaining a sea wall etc.; this is, no doubt, the reason why the draftsman merely stated "liability in respect of ..." rather than in any way confining the liability.

2.85 The modern law is to be found in the Land Drainage Act 1976 and the Coast Protection Act 1949. These Acts expressly preserve the obligations arising "by reason of tenure, custom, prescription or otherwise".²⁸² They further provide for the enforcement of the liability by the appropriate coast protection authority or the appropriate drainage authority.²⁸³ Under the 1976 Act, the drainage authority has power to commute obligations arising by tenure, custom, prescription or otherwise in connection with repairing sea or river walls²⁸⁴ and, in the case of "main rivers",²⁸⁵ is under a duty to commute. On commutation, the land becomes charged with an annuity registrable as a land charge.²⁸⁶

²⁷⁰L.R.A. 1925, s. 70(1)(b).

²⁷¹*Pratt and Mackenzie's Law of Highways* 21st ed., (1967), p. 78, n. (i).

²⁷²Highways Act 1980, ss. 56 and 57.

²⁷³L.R.A. 1925, s. 70(1)(d).

²⁷⁴See Coulson and Forbes, *The Law of Waters and Land Drainage* 6th ed., (1952), p. 44.

²⁷⁵*Hudson v. Tabor* (1877) 2 Q.B.D. 290.

²⁷⁶*A.-G. v. Tomline* (1880) 14 Ch. D. 58.

²⁷⁷See A.S. Wisdom, *The Law of Rivers & Watercourses* 4th ed., (1979), p. 40.

²⁷⁸See Coulson and Forbes, p. 53.

²⁷⁹See *A.-G. v. Tomline* above.

²⁸⁰*Keighley's Case* (1609) 10 Co. Rep. 139a.

²⁸¹Sewers Act 1833.

²⁸²Coast Protection Act 1949, s. 15; Land Drainage Act 1976, s. 24.

²⁸³There may be some overlap between the two statutory codes; see s. 49(1) of the 1949 Act and s. 116(1) of the 1976 Act.

²⁸⁴s. 26(1).

²⁸⁵"Main rivers" are defined in s. 8(3) of the 1976 Act.

²⁸⁶L.C.A. 1972, Sched. 2, para. 1(d).

2.86 In our opinion it would be reasonable to expect and sensible to require that the authorities concerned should, if they wish, protect their enforcement rights by entry of any liability in respect of embankments, etc., on the register of title. Accordingly we recommend that status of such rights as overriding interests should be abolished.

Crown rents

2.87 The meaning of the words "crown rents"²⁸⁷ is unclear; they are not defined in the Act and do not appear at any time to have been the subject of judicial or statutory explanation. Nevertheless, the words, occurring as they do within a list of other expressions normally associated with the incidents of the different forms of feudal tenure, must, we consider, be understood in that context. It seems that a manor belonging to the Crown at the time of the Norman Conquest was known as a "manor of ancient demesne".²⁸⁸ Collectively, these manors were known as the "demesne lands of the Crown". It was common practice for the King to grant these manors to his subjects in return for rents and in a feudal context these are, we believe, what was intended by the draftsman's use of the expression "crown rents" in the section. Tenure in ancient demesne, it seems, may have survived any enfranchisement by the Law of Property Act 1922,²⁸⁹ and, accordingly, the rents may still be exigible. Moreover, these rents may be payable to persons other than the Crown where the Crown has sold, as we understand it has in some instances,²⁹⁰ its interest.

2.88 Again it is our opinion that, if there are still subsisting crown rents, it would be reasonable to expect and sensible to require their protection on the register of title. Accordingly, we recommend the status of such rights as overriding interests should be abolished.

Payments in lieu of tithe and certain tithe rentcharges

2.89 This head of overriding interests reads: "... payments in lieu of tithe, and charges or annuities payable for the redemption of tithe rentcharges."²⁹¹ The law relating to tithes is, unfortunately, highly technical and involved. Originally, a tithe was a one-tenth share of the annual produce of the land. The tithe was rendered to the rector of the parish in which the land was situated. Although tithes were always treated in law as a species of real property, it is not quite so clear that they gave rise to a property interest in any land as the remedies for their enforcement were all personal.²⁹² Support for this view is to be found in the fact that the paragraph never mentions "tithes" simpliciter, and there is no other machinery in the Act that makes provision for them. Over time, statutes were passed to remedy the twin injustices of having to render in kind and the fluctuating amount of the liability according to whether there had been a good harvest or not. It is not necessary to rehearse the effect of the various statutes in this context other than to note that most, but not all, tithes were converted into tithe rentcharge by the Tithe Act 1836, and nearly all tithe rentcharge was supplanted by the tithe redemption annuity by the Tithe Act 1936. Tithe redemption annuity was abolished by the Finance Act 1977²⁹³ and need therefore concern us no further. Tithe rentcharge gave the owner thereof an interest, in the land in respect of which it was payable,²⁹⁴ akin to the rights of an ordinary rentcharge owner.²⁹⁵ In this connection it should be noted that, when first enacted, the present heading included at the beginning the words "tithe rentcharge" and the repeal of those words by the Tithe Act 1936 was expressed to be "except as regards any tithe rentcharge not extinguished by this Act".²⁹⁶ If the overriding interest is to be abolished, it follows that it is necessary to consider whether to make provision for any tithe rentcharge that is still subsisting.

2.90 The story is further complicated, however, in that many tithes were commuted prior to 1836 (and, more rarely, after 1836) by a local Act or under the Inclosure Acts. Such

²⁸⁷L.R.A. 1925, s. 70(1)(b).

²⁸⁸*Mertens v. Hill* (1901) 1 Ch. 842 at p. 853.

²⁸⁹*Iveagh v. Martin* [1961] 1 Q.B. 232.

²⁹⁰See also *Blackstone's Commentaries* vol. I, p. 285.

²⁹¹L.R.A. 1925, s. 70(1)(e).

²⁹²See P.W. Millard, *The Law Relating to Tithes* 3rd ed., (1938), p. 6.

²⁹³s. 56.

²⁹⁴Tithe Act 1836, s. 67.

²⁹⁵Tithe Act 1891; the powers and remedies were not, however, so extensive as a rent-owner's: s. 2.

²⁹⁶s. 48(3) and Sched. 9.

tithes became known as "corn rents" because frequently the money value of the commutation fluctuated in accordance with the price of wheat. Unfortunately, the remedies for the recovery of a corn rent depended on the wording of the statute in question, and it is not possible to be certain that all corn rents gave the rent owner a property rather than a personal interest.²⁹⁷ So far as it is a property interest, doubtless, it is covered by the words "payment in lieu of tithes." Section 30 of the Tithe Act 1936 and earlier legislation²⁹⁸ permitted but did not require the redemption of corn rents. This is still in force because no scheme for the redemption of corn rents under the Corn Rents Act 1963 has yet been made. An alternative possibility was that corn rents were converted into tithe rentcharge under the Tithe Act 1860,²⁹⁹ in which case they would have fallen within the Tithe Act 1936. We understand that as recently as 1966 corn rents were still in collection by the Church Commissioners in about three hundred and seventy English parishes.

2.91 As before and subject to the last paragraph, we consider it reasonable to expect and sensible to require that "corn rents", if collection is still wished, should be the subject of an entry on the register of title. Accordingly, we recommend the status of such rights as overriding interests should be abolished.

2.92 As far as outstanding tithe rentcharge is concerned, this would seem to be limited to the following:

- (1) a rentcharge payable under the Tithe Act 1860 in respect of the tithes on any gated or stinted pasture or,
- (2) a sum or rate payable for each head of cattle or stock turned on land subject to common rights or held or enjoyed in common.³⁰⁰

As to (1), this appears, on examination, to be a rentcharge payable in respect of the right of common and to be enforceable only against the chattels of the person enjoying the right.³⁰¹ As to (2), this equally gave rise to no interest in any land; the sum or rate referred to came about as a result of the difficulty of fixing a rentcharge on any land where what was titheable was a right of common in gross.³⁰² The remedies for failure to pay the sum or rate were a distress against the chattels of the person liable.³⁰³ Neither of these require any further discussion in the context of overriding interests.

2.93 There are two final points; first, the word "charges" in this head refers, it is considered, to the charges which the Board of Agriculture was empowered to impose by section 6 of the Tithe Act 1918 to secure any unpaid redemption money in respect of a redemption agreement under section 4 of that Act. The "annuity" referred to was a possible way of paying the consideration money due under such a redemption agreement. Both "charges" and "annuities" are registrable as Class A land charges under the Land Charges Act 1972³⁰⁴ and so, when the title is registered, should appear in the charges register of the title anyway. Secondly, the words "payments in lieu of tithe" appear to have originated in section 90 of the Tithe Act 1836 in connection with the payment of tithes in London. All such tithes have now been abolished by City of London (Tithes) Act 1947.

Local land charges

2.94 This head of overriding interest, "rights under local land charges" until protected on the register,³⁰⁵ can be dealt with quite shortly. Given that all land charges are registrable in the Local Land Charges Register,³⁰⁶ there seems no sensible point in requiring their registration under the Land Registration Act as well. If registered, these charges always should bind purchasers irrespective of the provisions of the Land Registration Act. Indeed,

²⁹⁷See Millard, p. 14.

²⁹⁸Tithe Rentcharge Redemption Act 1885.

²⁹⁹ss. 1-8.

³⁰⁰Tithe Act 1936, s. 47.

³⁰¹Millard, pp. 81-2; this seems to follow from the definition of "lands" in the Tithe Act 1836, s. 12. Where the rentcharge was later apportioned in respect of the gates or stints under s. 19 of the Tithe Act 1860 the rent owner's rights are expressly made the same as the rights given him by the 1836 Act but on the personal property and not the incorporeal hereditament of the commoner. See also Tithe Act 1891, s. 9.

³⁰²e.g. a profit of pasture in favour of the inhabitants of an area.

³⁰³Tithe Act 1860, s. 24.

³⁰⁴s. 2.

³⁰⁵L.R.A. 1925, s. 70(1)(i).

³⁰⁶Local Land Charges Act 1975, s. 5.

even if not registered, purchasers will be bound by such charges and provision for payment of compensation is already made.³⁰⁷ We accordingly propose that local land charges take effect as a general burden under the Act.

Rights preserved on enfranchisement of copyhold land including franchises

2.95 This general head of overriding interest indicates the somewhat esoteric items collected in one paragraph: "Rights of fishing and sporting, seignorial and manorial rights of all descriptions (until extinguished), and franchises".³⁰⁸ With these nothing much seems to have moved since they were considered in our original working paper.³⁰⁹ The substance of that consideration is now repeated.

2.96 The fishing and sporting rights of the lord of a manor were unaffected by the enfranchisement of copyholds under the 1925 property legislation.³¹⁰ It was therefore logical that these rights together with other manorial rights which were treated in a similar way should constitute overriding interests. In contrast to "seignorial and manorial rights of all descriptions (until extinguished)", which can only refer to rights which were associated with the old forms of tenure, the reference to fishing and sporting rights is not, in terms, limited to those which were so associated. It is arguable, therefore, that fishing and sporting rights of *all* kinds are overriding interests. If that interpretation is correct, we do not imagine that it can have been intended. In relation to rights of fishing in non-tidal waters, these, where separated from the ownership of the bed of the river, would normally constitute a profit à prendre (already covered)³¹¹ or be granted under a licence.³¹² If granted under licence, it seems questionable whether in principle they should constitute overriding interests. Similarly, in relation to other sporting rights, these too, depending on the nature of the grant, might constitute a mere licence or a profit. It is suggested, therefore, that there is no case for the reference to fishing and sporting rights to extend to such rights outside the context of enfranchised copyhold land.

2.97 As well as the sporting rights of the lord, certain other manorial incidents were preserved for an indefinite period (unless extinguished by agreement) under the legislation which enfranchised copyholds on 1 January 1926. Many manorial incidents have now ceased to exist. Those which may still remain are:

- (a) the lord's or tenant's rights to mines and minerals,³¹³
- (b) the fairs, markets and sporting rights of the lord,³¹⁴
- (c) the tenant's rights of common;³¹⁵
- (d) the lord's or tenant's liability for the construction, maintenance, cleansing and repair of dykes, ditches, canals and other works.³¹⁶

Where land has been enfranchised and the deeds or abstract of title show the rights of the lord which were saved, it is the practice of the Land Registry to repeat this information on the register when the title to the land comes to be registered.

2.98 A franchise is a right arising by grant from the Crown or by prescription which authorises something to be done such as the holding of a market or the operation of a ferry.³¹⁷ It, also, may arise within or without the context of enfranchised copyhold land. Franchises are examined and explained at Appendix F.

2.99 In these circumstances there seems no good reason why preserved manorial rights should be included as overriding interests: it can hardly be contended that it is not reasonable to expect or sensible to require their protection on the register. Accordingly we

³⁰⁷*Ibid.*, s. 10 (not applying in cases of non-registration of non-public matters under the Rights of Light Act 1959, s. 2(4)(b) or the Leasehold Reform Act 1967, s. 19(10A)).

³⁰⁸L.R.A. 1925, s. 70(1)(j).

³⁰⁹(1971) Working Paper No. 37, paras. 84-7.

³¹⁰L.P.A. 1922, Sched. 12, para. (5).

³¹¹At para. 2.25 *et seq.* above.

³¹²*Fitzgerald v. Firbank* [1897] 2 Ch. 96.

³¹³L.P.A. 1922, Sched. 12, para. (5).

³¹⁴*Ibid.*, para. (5).

³¹⁵*Ibid.*, para. (4).

³¹⁶*Ibid.*, para. (6).

³¹⁷*Hammerton v. Dysart* [1916] 1 A.C. 57; note the abolition of certain franchises by the Wild Creatures and Forest Laws Act 1971, s. 1; see also as to the right to hold fairs and markets *A.-G. v. Horner* (1884) 14 Q.B.D. 245.

recommend that these manorial rights (including the fishing and sporting rights referred to) should not be listed as overriding interests.

2.100 However, franchises seem to be subject to different considerations. They are evidently much more akin to customary rights.³¹⁸ Franchises which remain in existence consist mainly of markets and fairs, but this franchise does not confer on the holder a right against land³¹⁹ (a right of entry to land not being necessarily inherent in the franchise). Accordingly, we propose that these should no longer remain as a category of overriding interest, but should be classified as a general burden.

Mineral rights

2.101 We now deal with rights to minerals and mines created before 1898 where the land was first registered between 1876 and 1898, and similar rights created before first registration where first registration took place after 1897; these are currently protected as overriding interests.³²⁰

2.102 In all post-1925 registrations the Act treats title to mines and minerals no differently from proprietorship of other strata of land with the qualification that no indemnity is payable in respect of erroneous registration unless an express note of the inclusion of the mines and minerals is entered on the register.³²¹ These rights are not protected as overriding interests except in the case of all rights and title of the National Coal Board in coal, mines of coal and allied mineral substances with ancillary rights;³²² and manorial rights which have already been mentioned above. This additional protection however is superfluous in the case of coal since the Coal Act 1938 needs no further enactment. Further, this form has not been used in the case of natural gas and oil³²³ or uranium.³²⁴ Similarly, Crown prerogative rights relating to gold and silver are not protected as overriding interests. We see no necessity for the present treatment in the Land Registration Acts and recommend that the status of mineral rights as overriding interests should be ended. It is sensible to expect and reasonable to require protection by entry in the case of this limited class of mineral rights. However, the right and title of the National Coal Board should, we consider, be treated, not as a minor interest, but as a burden of general incidence binding purchasers as such.

Qualified, possessory and good leasehold titles

2.103 It will be appreciated that registration under the Act may be effected with different classes of title. The best class is absolute title. Anything less than absolute means that the register is not conclusive as to the matters expressly left outstanding by the class of title in question. With a qualified title what is left outstanding is ascertained from the terms of the registration. With possessory and good leasehold titles the Act itself³²⁵ specifies the consequences of the class of title. There would not appear to be any restriction on the interests that may form the subject-matter of a qualification in the register.³²⁶ We have been told that the grant of a qualified title is rare.

2.104 It is not our intention to interfere with the practice of granting different classes of title which we recognised in our first report as both important and convenient.³²⁷ However, once a matter has been expressly excepted by a class of title less than absolute, it stands and takes effect outside the register of title. It follows that there is no need to make further provision for any such matter in the register and on this basis alone overriding interests status may be removed, and we so recommend.

³¹⁸See *Wyld v. Silver* [1963] Ch. 243, C.A. and paras. 2.71-2.73 above.

³¹⁹See Appendix F.

³²⁰L.R.A. 1925, s. 70(1)(l).

³²¹L.R.A. 1925, s. 83(5)(b).

³²²Coal Act 1938, s. 41; Coal Industry Nationalisation Act 1946, ss. 5 and 8.

³²³Petroleum (Production) Act 1934, s. 1 vests in the Crown petroleum existing in its natural condition in strata including any mineral oil or relative hydrocarbon and natural gas.

³²⁴Atomic Energy Act 1946, s. 10.

³²⁵ss. 6, 10 and 11.

³²⁶ss. 7 and 12 of the Act.

³²⁷(1983) Law Com. No. 125, para. 3.5 *et seq.*

SUMMARY OF PART II

2.105 Our positive recommendations in this Part are that only the following should be overriding interests:

- (1) legal easements and profits à prendre;³²⁸
- (2) rights acquired by adverse possession;³²⁹
- (3) leases for twenty-one years or less;³³⁰
- (4) rights of persons in actual occupation of the land;³³¹
- (5) customary rights.³³²

2.106 Also recommended are the following three amendments to apply to *all* these five categories of overriding interests:

- (i) that they should be expressly subject to a general provision regarding fraud or estoppel;³³³
- (ii) that their relevant date should be, not registration, but completion of a disposition³³⁴ thus removing the problem of the "registration gap";
- (iii) that indemnity should become available.³³⁵

2.107 In addition, the recognition of general burdens as a class of rights over registered land is recommended.³³⁶ These rights would bind registered proprietors, as do overriding interests, but the matters mentioned in the preceding paragraph would not apply. Certain existing overriding interests should, we recommend, become such burdens, namely public rights,³³⁷ chancel repairs liability,³³⁸ local land charges,³³⁹ mineral rights³⁴⁰ and franchises.³⁴¹

2.108 Negatively, the recommendation follows that any other existing overriding interests should cease to be such and become minor interests.³⁴² No transitional period is recommended.³⁴³

³²⁸See paras. 2.25-2.35; note the exclusion of easements and profits expressly created by a registered proprietor which remain equitable until completed by registration.

³²⁹See paras. 2.36 and 2.37; note that such rights in the course of acquisition call for a separate provision.

³³⁰See paras. 2.38-2.53; in detail this head would cover rights having reference to the subject-matter of a lease granted (not a contract) for a continuous term not exceeding 21 years taking effect in possession either immediately or within one month (see paras. 2.49 and 2.52).

³³¹See paras. 2.54-2.70; note the inclusion of part occupation (para. 2.55) and of rights under strict settlements (para. 2.69) but the exclusion of receipt of rents and profits (para. 2.70).

³³²See para. 2.73.

³³³See para. 2.75.

³³⁴See para. 2.77.

³³⁵See paras. 2.10-2.14; also Part III, para. 3.29.

³³⁶See para. 2.15.

³³⁷See paras. 2.79 and 2.80.

³³⁸See para. 2.81.

³³⁹See para. 2.94.

³⁴⁰See paras. 2.101 and 2.102; note that this recommendation applies to the right and title of the National Coal Board only.

³⁴¹See para. 2.100.

³⁴²See Part IV of this report for methods of protection on the register; also Part III as to the possibilities of rectification and/or indemnity.

³⁴³See paras. 2.16-2.18.

PART III

RECTIFICATION AND INDEMNITY

3.1 In the beginning the Land Registry Act 1862 contained no provisions for rectification: that Act prescribed such stringent conditions precedent to the grant of an absolute title that no possibility of error was foreseen. The Land Transfer Act 1875¹ both removed the stringent conditions and gave the court a power to rectify the register, but expressly excepted from rectification any rights or estate acquired by registration, a limitation so drastic that registered titles essentially remained indefeasible. The Land Transfer Act 1897² altered the rectification provisions of the 1875 Act only negligibly by giving sanctity to possession and introduced indemnity provisions. The 1925 Act greatly extended the power of rectification but endeavoured to preserve a measure of indefeasibility for registered proprietors "in possession".³ These rectification and indemnity provisions were fully explained and considered in a working paper.⁴ The response then and subsequently to the more recent consultation⁵ largely favoured a continuation in substance of the present powers of rectification but coupled with an extended and more flexible availability of indemnity.⁶

3.2 The modern provisions are to be found in sections 82 and 83 of the Act. They are reproduced in Appendix C of this report. Rectification can at present be sought in the fairly widely drawn list of instances to be found in section 82. Complementing rectification, which always remains discretionary,⁷ is the right to indemnity in section 83. Section 83(1) provides for the payment of indemnity where rectification of the register is ordered, and section 83(2) provides for payment where "an error or omission has occurred in the register, but the register is not rectified". These words do not in all respects precisely complement section 82 but, given that section 83 represents the insurance aspect of the system of registration of title, the proper approach in principle should be to construe the section so that it harmonises with section 82.⁸

Rectification

3.3 There are other powers to rectify, notably under rule 13 for clerical errors and rule 14 for a registration in error of too much land.⁹ An argument that indemnity is not available here might be based on the fact that section 83(1) (which should be contrasted with section 83(2) for non-rectification) pre-supposes a rectification of the register *under the Act* and strictly the only power under the Act to rectify is section 82. However, this argument would not appear to be sound: the Rules enjoy "the same force as if enacted in this Act."¹⁰ Nevertheless, it would seem that the provision in section 82(3) for the occasions on which no rectification is obtainable cannot apply when rule 14 is invoked.¹¹ Curiously the rule 14 power appears to be exercisable only by the Registrar and not by the court.¹²

3.4 As we have said, there was little suggestion on consultation that the powers to rectify should, in substance, be more narrowly drawn,¹³ although there was significant support for simplification and clarification of the provisions particularly those purporting to protect a registered proprietor in possession. We accept this. Defeasibility of title through the

¹ Land Transfer Act 1875, ss. 95 and 96.

² Land Transfer Act 1897, s. 7.

³ L.R.A. 1925, s. 82(3); see below para. 3.12 *et seq.*

⁴ (1972) Working Paper No. 45.

⁵ See Part II, para. 2.7.

⁶ Cp. Part II, para. 2.14 as to overriding interests and indemnity.

⁷ *Epps v. Esso Petroleum Co. Ltd.* [1973] 1 W.L.R. 1071.

⁸ A wide construction appears to have been adopted by the Land Registry in relation to *Freer v. Unwins Ltd.* [1976] Ch. 288; see Ruoff and Roper, 5th ed., (1986), p. 890, n. 95.

⁹ See also r. 131 (where power of disposing of registered land has become vested in some person other than the proprietor), rr. 211 and 248 (due to the transitional provisions of the 1925 property legislation), r. 283 (correction of particulars of addresses), r. 284 (correction of plans) and r. 285 (alterations to resolve conflicting descriptions).

¹⁰ L.R.A. 1925, s. 144(2).

¹¹ s. 82(3); this was commented on in *Chowood Ltd. v. Lyall (No. 2)* [1930] 1 Ch. 426 at p. 439.

¹² This is presumably why r. 14 was not relied on in *Re No. 139 Deptford High Street* [1951] Ch. 884. There could of course be an appeal to the court under r. 299.

¹³ Cp. Professor D.C. Jackson, "Security of Title in Registered Land", (1978) 94 L.Q.R. 239.

existence of section 82 may be regretted in principle, but is compensated for in practice by the possibility of indemnity under section 83.

3.5 Nevertheless, it is obvious that defeasibility through the ready availability of rectification is productive of future uncertainty and contrary to the *raison d'être* of registration of title.¹⁴ In the interests of conveyancing simplification, sympathetic attention must be paid to the reasonable expectations of purchasers of registered land who pay the price, take possession and become proprietors in reliance on the register. Accordingly the present provisions restricting the availability of rectification against such proprietors should be reconsidered with a view to possible strengthening.

3.6 As far as the powers of rectification are concerned, we adopt the principal suggestion of the working paper which was, in effect, that rectification should be available whenever the register does not accurately reflect the title to the land according to the otherwise established rules of land law (i.e. those which would apply, including Land Charges Act 1972 where relevant, apart from registration of title,¹⁵ or of land charges) and rectification would be just in all the circumstances (in particular if it is shown that there has been fraud in the obtaining of an entry in the register, or if the transferee or grantee lacked good faith or did not give value). This should be the basic position in relation to all claims however arising. This jurisdiction and its limits are in fact all present in section 82 at the moment and we see no reason for any very substantial amendment of that section except in so far as necessary to present the principles clearly.

3.7 As far as the criterion of rectification being just is concerned, paragraph (h), which at present contains this as a long-stop case, has not infrequently been relied on as a ground for rectification¹⁶ with very little judicial heart searching or even discussion.¹⁷ On the face of it, the paragraph appears wide enough to render all the other specific paragraphs largely superfluous: "deemed just to rectify" is the last but paramount consideration. We should make it clear, however, that the question of whether or not it is just to rectify should not turn upon the existence of the property right in question; rather the question should be whether, regard being had to the conduct of the parties and other surrounding circumstances, including indemnity aspects,¹⁸ it is just to give effect to the right by rectification. This is not to license disregard for the statutorily required way of effecting transactions in registered land; someone claiming under a document which might have legal effect were the title unregistered, but not if registered, cannot assume that the discretion to rectify will be automatically exercised if the land is later dealt with in favour of an innocent purchaser (especially one who gives value and takes possession). A similar difficulty might arise under the present paragraph (c): not all applications for rectification are automatically granted simply because all persons interested consent, otherwise, for example, what might, in truth, be an ordinary transfer of a title might be effected as a rectification by consent.¹⁹

3.8 The power to rectify was considered in *Freer v. Unwins Ltd.*,²⁰ where Walton J. held that it cannot be exercised with retrospective effect. Consequently, a lessee under a lease constituting an overriding interest was not affected by notice of restrictive covenants entered by virtue of a rectification after the lease had been granted. Quite apart from the fact that we do not think that this should be the law, it is not clear that the power of rectification is at present so limited. Section 82(2) reads:

¹⁴A strong preference for certainty rather than flexibility was expressed at the seminar referred to in Part II, para. 2.7; cp. provisional draft proposals in n. 53 of Part II.

¹⁵See (1972) Working Paper No. 45, para. 87 whence this recommendation. The paragraph includes the proposition that:

"On the other hand, the register should never be rectified in favour of an applicant who had failed to register an interest or charge which the Act requires to be registered; nor should it be rectified to give effect to any matter which, had the land been unregistered land, would have been a registrable land charge."

¹⁶See e.g. *Freer v. Unwins Ltd.* [1976] Ch. 288; *Epps v. Esso Petroleum Co. Ltd.* [1973] 1 W.L.R. 1071; *Orakpo v. Manson Investments Ltd.* [1977] 1 W.L.R. 347.

¹⁷See also e.g. *Chowood Ltd. v. Lyall (No. 2)* [1930] 1 Ch. 426.

¹⁸This consideration was present in the mind of Wynn-Parry J. in *Re No. 139 Deptford High Street* [1951] Ch. 884.

¹⁹See (1972) Working Paper No. 45, para. 73; cp. D.G. Barnsley, "Rectification, Trusts and Overriding Interests", [1983] Conv. 361. Here the differences between applications for registration of a transfer and for rectification are: formalities, fees and perhaps stamp duty, not matters of substance.

²⁰[1976] Ch. 288; but see also per Buckley L.J. in *Orakpo v. Manson Investments Ltd.* [1977] 1 W.L.R. 347 at p. 361 as to rectification of the register putting the situation right as against the registered proprietor.

The register may be rectified under this section, notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by any entry on the register, or otherwise.

The words “or otherwise” can only, it would seem, refer to an interest taking effect as an overriding interest. In *Freer v. Unwins Ltd.* it was emphasised that only matters actually registered at the time of the disposition, in that case the lease, affect the person deriving title from the registered proprietor. However, section 82(2) was not apparently cited to the court, and it seems unacceptable for rectification to affect a registered leasehold title retrospectively but not an overriding interest. We consider that the court and the Registrar should have as full and ample a power of rectification as is needed to achieve justice. This would include the power to affect the holder of an overriding interest in existence at the time rectification is sought. If rectification and indemnity are to become truly complementary, this reform is essential.

3.9 There is however another aspect to this. It will be recalled that our proposal is that certain, but by no means all, of the heads of overriding interests should cease to exist as such. This may open the way for anyone losing that form of protection to apply for rectification of the register. Given that this might be relevant to rights of long-standing, it is plain that the power of rectification should be exercisable so as to preserve *any* interest retrospectively—not just the retained heads of overriding interest. We have already given our reasons why we do not favour any transitional phasing of the changes to the overriding interests provisions.²¹ It follows from this that rectification must also be capable of retrospectively affecting any interest in order to fill the interval, which may be quite considerable, between our proposals coming into force and discovery that a right is technically unenforceable through loss of overriding interest status.

3.10 The power to rectify was also considered by the Court of Appeal in *Argyle B.S. v. Hammond*.²² It was held that the jurisdiction is exercisable against persons claiming through a registered proprietor (even a bona fide mortgagee) and that therefore, in a proper case, the charges register may be rectified.²³ Bearing in mind that an order for rectification remains discretionary and that the complementary remedy of indemnity should be available to such persons suffering not dispossession but financial loss, we are quite content to make no recommendation here; i.e. we would leave the law as it is.

3.11 The power to rectify was further considered by the Court of Appeal in *Proctor v. Kidman*.²⁴ Without dissent, Croom-Johnson L.J. observed: “Where the register is wrong, it may be rectified. This includes errors of description. An entry cannot be rectified if the whole transaction is void ...”²⁵ The former observation meant that rectification could be ordered so as to add to a title an omitted strip of land. The latter observation, in its context, must have meant that the register could not be rectified so as to enter a wholly void transaction: rectification (or deletion) of the entry of such a transaction is plainly possible.²⁶ We see no sufficient reason to recommend anything other than clarification of this position.

3.12 We now turn to section 82(3) of the Act which still embodies the best attempt at indefeasibility. That sub-section provides, subject to certain exceptions, that there shall be no rectification “so as to affect the title” of the registered proprietor in possession. The quoted words appear wide enough to preclude rectification in any respect of the register, but presumably adverse entries or alterations were contemplated.²⁷ Possession is defined “unless the context otherwise requires” in section 3(xviii) to include “receipt of rents and profits or the right to receive the same, if any”. A strict application of this definition would appear to lead to a very narrow availability of the powers of rectification if not also a

²¹Part II, paras. 2.16-2.18.

²²(1984) 49 P. & C.R. 148.

²³*Ibid.*, at p. 157 relying on L.R.A. 1925, s. 82(2) set out in para. 3.8 above.

²⁴(1985) 51 P. & C.R. 67.

²⁵*Ibid.*, at p. 72.

²⁶See, e.g., *Argyle B.S. v. Hammond* (1984) 49 P. & C.R. 148, C.A. which concerned a forged disposition; the decision cited in the text turned on the effect of L.R.A. 1925, s. 123 on a conveyance of land in a compulsory area where no application for registration is made within 2 months, but without apparently appreciating that the section does not render the transaction wholly void but only so far as regards the legal estate (i.e. a good equitable title might still subsist).

²⁷Cp. Land Registration (Scotland) Act 1979, s. 9(3): “If rectification ... would prejudice a proprietor in possession ...”

vicious circle: it would cover any non-occupying proprietor since he could claim the right to receive the profits of the land, if any, merely by virtue of being registered.²⁸ However, the definition was, in effect, assumed applicable in *Freer v. Unwins Ltd.*²⁹ In another case,³⁰ it was held that if someone is in adverse possession of the land then the registered proprietor cannot be in possession, but section 3(xviii) was not there cited to the court. The better view may be that, in context, the expression "in possession" should be restricted to protecting a proprietor in actual occupation of the land.³¹

3.13 Substantial inroads are apparently made into this attempt at indefeasibility for the registered proprietor "in possession" because the subsection continues "except for the purpose of giving effect to an overriding interest or an order of the court". The words not underlined will continue to be applicable in respect of the reduced number of overriding interests that we have proposed. Rectification will be neither needed nor relevant in respect of burdens of general incidence under the Act. The words underlined are more difficult. Having given the court extensive powers of rectification in section 82(1), Parliament then proceeds to render any limitation of them nugatory by the insertion of the underlined words. These words were inserted by the Administration of Justice Act 1977.³² We understand that it was the intention that the powers of the court in relation to conveyances made with a view to defeating the rights of a trustee in bankruptcy³³ should not be affected by other amendments and, in consequence, the underlined words were inserted. Whatever may be the proper position now that these words are present in section 82(3), we have no doubt that the words should be replaced by language that more accurately represents the policy of the exception.

3.14 Section 82(3) also does not apply if there has been "fraud or lack of proper care" by the registered proprietor.³⁴ Fraud has already been mentioned and we propose no change; lack of proper care is not such an established concept. The concept was first introduced in 1971 in relation to indemnity (not rectification) when the basis of the indemnity scheme was overhauled. It was extended to the present provision in 1977, thus

²⁸See L.R.A. 1925, s. 69 as to the effect of registration.

²⁹[1976] Ch. 288 at p. 294 G-H, where Walton J. referred to the registered proprietor as "in possession" through receipt of rents and profits.

³⁰*Chowood Ltd. v. Lyall (No. 2)* [1930] 2 Ch. 156, C.A.

³¹Thus in Ruoff and Roper 5th ed., (1986), p. 887 it is stated:

There is little doubt, however, that the principle behind the Land Registration Acts is that an innocent registered proprietor who is in physical occupation of the registered property should not be ousted from his enjoyment of it. Monetary compensation is of little comfort to a man who is thrown out of his home or ejected from his land, whilst it should normally be ample to recompense an owner who has never occupied his property. This is plain common sense.

Cp. ss. 70(1)(g) and 82(4) of the 1925 Act; also per Templeman J. in *Epps v. Esso Petroleum Co Ltd.* [1973] 1 W.L.R. 1071 at pp. 1077-80 as to de facto possession.

³²s. 24.

³³*i.e.* the trustee's rights under, principally, ss. 37 and 42 of the Bankruptcy Act 1914; see also L.R.A. 1925, s. 42.

³⁴L.R.A. 1925, s. 82(3)(a), as amended by the Administration of Justice Act 1977, to replace the words "act, neglect or default, ... fraud, mistake or omission". As your Lordship explained (*Hansard* (H.L.), 26 July 1977, vol. 386, cols. 871-2):

The power of the registrar or the court to order rectification is, however, limited where the registered proprietor is in possession of the land, since it is an accepted principle that the proprietor in possession should not be dispossessed unless there is good reason to do so. Section 82(3) of the Land Registration Act 1925 deals with the position of the proprietor in possession, but it has become clear from decisions of the courts that the subsection does not give the proprietor in possession the full benefit of the presumption against rectification which the Act was clearly intended to provide. This has been pointed out by learned commentators as a serious defect in Section 82, and the Law Commission put forward some provisional proposals for remedying the defect in a 1972 working paper.

The Law Commission's proposals were, in brief, that rectification should not be ordered against the proprietor in possession unless either he was in some way to blame for the error or omission in question, or for some other reason—on a kind of balance of hardship test—the justice of the case required it. I am assured by the Law Commission that these proposals received widespread approval in consultation and will be confirmed when they submit their final report. The Law Commission have also confirmed that this is a self-contained point which can be implemented in advance of their comprehensive report on improvements to the land registration system. Accordingly, this would appear to be a useful amendment to the Land Registration Act which will be of practical benefit in the working of the system.

The approval on consultation was widespread but not unanimous and, as your Lordship will appreciate, the position was reserved in our 12th Annual Report ((1976-77) Law Com. No. 85) where, after reference to the 1977 Act, we observed (paras. 20 and 21):

That is not however to say that we may not in due course have further recommendations to make in the latter connection: our working paper suggested a more extensive revision of the Land Registration Act 1925 in that area.

It is likely that our report on land registration will propose extensive amendments of the law; the preparation of the report will take a considerable time.

Accordingly the present proposals do go further than the limited proposal suggested and adopted in 1977.

making the exclusion the same for both rectification and indemnity. However, in our view there is an important distinction to be drawn between these two. Where indemnity is payable in respect of an error or omission, it may be thought just in any particular case that payment should not be barred as now but reduced, reflecting the fact that the claimant had in some way contributed to the loss or error.³⁵ This seems to us a sensible approach and the idea of "lack of proper care" may equally seem suitable. But where rectification is being asked for, there is no question of any reduction in the extent to which the proprietor "in possession" retains his immunity: rectification is either ordered or it is not. Further, the wording "lack of proper care" is not a technical expression familiar to conveyancers and it still lacks definition, statutory or judicial. These and other criticisms³⁶ point to the concept being retained but defined in more familiar terms; it should also do least violence to the register as a guarantee of indefeasibility.

3.15 We consider it would make for greater consistency with the general and statutory principles of property law and conveyancing if the apparent protection against rectification conferred by section 82(3) were to be redrafted so as to benefit registered proprietors who were prudent purchasers for value in good faith³⁷ in actual occupation of the land. This approach will be familiar to land lawyers, and in particular it harmonises with our analysis of the position of minor interests where they are asserted against someone who has not given value or is not in good faith.³⁸ It also reinforces the important objective that "the entry of a person on the Land Register as a registered proprietor of a piece of land should, so far as possible, be conclusive as to his title."³⁹

3.16 The other occasion on which section 82(3) does not at present apply is when "for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against" the registered proprietor. For similar reasons, we do not recommend the retention of this possibility. It introduces too great an element of uncertainty into the registration system. In our opinion the title should only be open to rectification (i.e. defeasible) against a registered proprietor who was a bona fide purchaser for value and who is in actual occupation of the land in order to give effect to one or other of the surviving overriding interests (or in favour of a trustee in bankruptcy, see paragraph 3.13 above).

3.17 In substance we have so far proposed some strengthening of indefeasibility of title in the interests of confident and secure conveyancing. In practice this may make little difference to the present operation of the rectification provisions, but will be of significance for the principles of registration of title and could produce more cases than now of indemnity being paid for non-rectification.

3.18 It may be helpful to pause here to recapitulate the effect of our recommendations. First, there would be no rectification against a registered proprietor if he were a bona fide purchaser for value, who had exercised the standard of care of a prudent purchaser, and was in actual occupation *unless* the rectification is simply the entry of an overriding interest or in favour of a trustee in bankruptcy. Second, otherwise⁴⁰ there is to be rectification if

³⁵See below para. 3.27.

³⁶In (1972) Working Paper No. 45 the suggestion was merely that "similar wording" should be used to that in the indemnity provisions (see para. 81, also para. 87). As to this, it has been observed that:

It remains to be seen how rigorous is the standard of proper care but it would seem that failure to carry out the usual conveyancing inquiries and inspections should amount to lack of proper care, which probably should be judged objectively and not subjectively.

D.J. Hayton, *Registered Land*, 3rd ed., (1981) p. 175. For a relevant illustration, where the words were not but might well have been considered, see *Epps v. Esso Petroleum Co. Ltd.* [1973] 1 W.L.R. 1071 at p. 1081 where Templeman J. concluded:

In my judgment, whereas the defendants bought the disputed strip, the plaintiffs bought a law suit, thanks to the default of their vendor in not taking steps to assert ownership and possession of the disputed strip, and thanks to the failure of the plaintiffs to make before completion the inquiries which they made immediately after completion. Cp. The Law Society's General Conditions of Sale (1984 Revision) No. 5(1) excluding from a warranty of disclosure matters "which a prudent purchaser would have discovered" (also unlitigated but see *Mustafa v. Baptist Union Corporation* (1983) 266 E.G. 812 at p. 814, and *Avon Finance Co. Ltd. v. Bridger* [1985] 2 All E.R. 281, C.A.). The Land Registration (Scotland) Act 1979 in equivalent provisions (ss. 9(3)(a)(iii) and 12(3)(n)) simply uses the words "carelessness" and "careless act or omission".

³⁷The concept of a bona fide purchaser for value has to be introduced because at present the section does not contain a reference to "purchaser" and therefore the definition section, 3(xxi), cannot apply.

³⁸At paras. 4.14-4.18 of Part IV, Minor Interests.

³⁹Lord Chancellor (*Hansard* (H.L.), 26 July 1977, vol. 386, col. 871).

⁴⁰*i.e.* where none of the foregoing considerations is present.

(a) the register does not reflect the estate and the incumbrances according to the rules of land law⁴¹ and (b) rectification would be just in all the circumstances. Once (a) and (b) were satisfied, no discretion to refuse rectification should remain. Third, there might still be rectification to correct clerical errors etc.⁴²

3.19 At present the Registrar has jurisdiction to order rectification in most but not all of the cases in section 82 and under rules 13 and 14. The court has jurisdiction to rectify under all the cases in section 82 but not under rules 13 or 14.⁴³ We can see no purpose in having misleadingly multifarious jurisdictions to rectify exercisable by different bodies—particularly in view of the fact that the Registrar has power to refer any matter of difficulty into court,⁴⁴ and that any person aggrieved by a decision of the Registrar under rules 13 or 14 can appeal to the court.⁴⁵ We therefore recommend that both the Registrar and the court⁴⁶ have identical jurisdiction in regard to rectification.

3.20 Additionally, a distinction should be drawn between the court's inherent jurisdiction and its statutory jurisdiction to rectify the register of title.⁴⁷ The former enables the court to give effect to the rights of the parties inter se by means of an order which acts on them in personam. Such an order would direct one of the parties to apply for rectification of the register. The inherent jurisdiction has been exercised by the court to direct the vacation of a caution.⁴⁸ The statutory jurisdiction enables the court to make an order under section 82 directing the Registrar to rectify the register. We do not recommend any alteration to this present position.

Indemnity

3.21 We turn now to consider certain aspects of the indemnity provisions. In essence, the present position is that any person suffering loss because of the rectification or non-rectification of the register of title is entitled to be indemnified.⁴⁹ It is this which constitutes the "state guarantee".⁵⁰ Lord Justice Slade explained the situation simply:⁵¹

The effect of rectification of the register may on occasions be to cause loss to innocent, no less than guilty, parties. Section 83(1) of the 1925 Act accordingly provides that, subject to the provisions of the Act to the contrary, any person suffering loss by reason of any rectification of the register under the Act shall be entitled to be indemnified. In contrast, however, since the jurisdiction given to the court by section 82(1) is

⁴¹This does not exclude from consideration land registration procedural requirements as to the need to register or protect by entry or the requirement in unregistered conveyancing to register as a land charge under Land Charges Act 1972; see (1972) Working Paper No. 45 quoted at n.15 above. See also para. 3.7 for the need to use the prescribed Form.

⁴²See para. 3.3 above; although prima facie discretionary, the criteria would appear to be administrative convenience rather than judicial justice: cp. L.R.R. 1925, r. 199 as to entry of trivial rights not being required.

⁴³Note that "the court" here generally means the High Court and not the county court: L.R.A. 1925, ss. 3(ii) and 138 as amended by Administration of Justice Act 1982, s. 67(1) and Sched. 5. But para. (a) of s. 82(1) uses the expression "a court of competent jurisdiction" which has been held to extend that paragraph alone to a county court in appropriate cases: *Watts v. Waller* [1973] 1 Q.B. 153, C.A.; *Proctor v. Kidman* (1985) 51 P. & C.R. 67, C.A.

⁴⁴See r. 298(2); also r. 220(4).

⁴⁵See r. 299.

⁴⁶In principle, it might be considered undesirable that the Registrar should have jurisdiction to decide questions of rectification when the answer to such questions can be relevant to the amount of indemnity that will be payable. However, this is the position at present and no complaint was made to us on consultation that it had been open to abuse. Also we understand that were all the jurisdiction to be transferred to the court, there might be an unwelcome increase in the burden on the legal aid system.

⁴⁷See e.g. *Hynes v. Vaughan* (1985) *Estates Times Law Reports* vol. 1, No. 12, p. 113 at p. 118 where Scott J. said:

It is I think accepted that the court has an inherent jurisdiction to vacate a caution. It is a jurisdiction that, in my judgment, ought to be exercised where necessary to avoid injustice. The plaintiff has not, in my judgment, shown a fair or arguable case in support of her caution. And to maintain the caution and thereby to require the defendants either to submit to the plaintiff's excessive pecuniary demands or to await the trial of the action before being in a position to obtain the proceeds of sale of their property, would be, in my judgment, an injustice to them.

Moreover, under s. 82(1)(b) of the Land Registration Act 1925, the court has a discretion to rectify the register on an application made by "any person who is aggrieved by an entry made in the register."

This is a discretion which, on the facts of the present case, ought, in my judgment, to be exercised. I propose, therefore, both under the inherent jurisdiction and under the statutory jurisdiction conferred by s. 82(1)(b) of the Land Registration Act 1925, to order that the caution be vacated.

⁴⁸See e.g. *Lester v. Burgess* (1973) 26 P. & C.R. 536, and *Calgary and Edmonton Land Co. Ltd. v. Dobinson* [1974] 2 Ch. 102.

⁴⁹See L.R.A. 1925, s. 83 for specific details, but note that in cases of non-rectification, loss must be because of some error or omission in the register. Cp. L.R.A. 1925, s. 131 excluding from liability officers of the registry acting in good faith.

⁵⁰See (1983) Law Com. No. 125, para. 1.5 at (6), quoted in Part I, para. 1.2.

⁵¹Giving the judgment of the Court of Appeal in *Argyle B.S. v. Hammond* (1984) 49 P. & C.R. 148 at p. 158.

discretionary, there may be cases where, even though an error or omission in the register has occurred, the register is not rectified. Section 83(2) deals with such cases by providing:

“Where an error or omission has occurred in the register, but the register is not rectified, any person suffering loss by reason of such error or omission, shall, subject to the provisions of this Act, be entitled to be indemnified.”

As already mentioned, on consultation there was some substantial call for more flexibility in the availability of indemnity. We have recognised this to a considerable extent in the recommendation in Part II that losses suffered by reason of overriding interests should also be covered.⁵² Later other lesser recommendations are made with a view similarly to simplifying and modernising the indemnity provisions.

3.22 The first most significant aspect to be considered is that our proposals relating to overriding interests and other recommendations may be expected to increase the number and amount of claims to indemnity. This consequence would follow not only directly from the recommendation that indemnity should be available in respect of overriding interests, but also indirectly in any event from the recommendation to reduce the classes of overriding interests. Each of the recommendations will enable claims to be made in cases where this is not at present possible.

3.23 The present indemnity scheme can be traced back to the Land Transfer Act 1897,⁵³ but it was not until 1925 that the real principle of insurance was accepted. In *Principles of Land Registration* (1937)⁵⁴ Stewart-Wallace, a former Registrar, says that the great benefit of the insurance principle was that it enabled justifiable risks, not just in one case but spread over the whole field, to be taken in the examination of title by the Land Registry. This reduced the cost of investigation of title, and the saving thus made from the fee income went to build up an insurance fund sufficient to pay indemnity “in the rare case where the holding is disturbed, and where an impracticably costly and stringent investigation of title might have revealed the flaw.”⁵⁵

3.24 Take this forward to today and it is plain that the principle has to some extent been departed from. The insurance fund was nominally abolished by section 1 of the Land Registration and Land Charges Act 1971, but no payments into it out of the fee income had been made since 1936 with the exception of two small lodgements in 1966 and 1968.⁵⁶ By contrast, the fee for dealing with a registered title and for the first registration of a title is still essentially fixed by reference to the value of the land.⁵⁷ The greater the value, the higher the fee. The current level of fee income produces large operating surpluses,⁵⁸ whilst

⁵²Part II, para. 2.14.

⁵³s. 7.

⁵⁴At p. 50.

⁵⁵*Ibid.*

⁵⁶See S. Cretney and G. Dworkin, (1968) 84 L.Q.R. 528 at p. 549.

⁵⁷See Land Registration Fee Order 1985 (S.I. 1985/359).

⁵⁸According to the 1985-86 Annual Report by the Chief Land Registrar the sums involved for the last 10 years are as follows:

Financial year	Registration of Title Department		
	Receipts	Expenditure	Surplus or deficit
	£	£	£
1976-77	21,493,878	24,109,843	- 2,615,965
1977-78	29,160,259	27,528,834	+ 1,631,425
1978-79	36,175,142	31,412,402	+ 4,762,740
1979-80	46,160,014	38,951,462	+ 7,208,552
1980-81	49,679,810	48,865,854	+ 813,956
1981-82	60,745,750	54,483,085	+ 6,262,665
1982-83	75,977,161	64,252,240	+ 11,724,921
1983-84	82,781,229	73,314,821	+ 9,466,408
1984-85	99,962,356	79,818,703	+ 20,143,653
1985-86	104,689,000	87,768,000	+ 16,921,000

the payments of indemnity are fairly small.⁵⁹ The obtaining of surpluses simpliciter from fees has never been authorised, but the inclusion of an insurance premium element in fee orders has always been required.⁶⁰ Prima facie finding the appropriate premium element might well be thought to call for actuarial calculations, although we understand that this is not the practice and that the premium element in fees is actually negligible. However, it is not our purpose now to embark upon a critique of the methods of fixing fees, and we would merely observe that the numbers of applications are so great⁶¹ that an insignificant increase in each fee should easily cover considerably increased indemnity payments, even if the present operating surpluses were to be left aside.

3.25 A further development is that indemnity is today paid for matters which no traditional title investigation would have revealed, for example, a forged charge.⁶² Under our proposals in Part II, registered proprietors will find themselves able to appreciate and rely on if need be a real "state guarantee" of title as the possibility of an overriding interest being asserted against them turns into the possibility of a claim for rectification backed up by indemnity. Seeing that the insurance element will increase in importance, it is not unreasonable to expect that there ought to be in fees charged a sufficient "premium" to cover prospective claims.⁶³ As we have already said, we do not feel that the additional "premium" element payable in consequence of our proposals should cause any significant increase in fees. Nor would it be any more difficult to administer or collect than at present since the fees already, in theory, include a "premium". Indeed enactment of our proposals might lead to an increase in popular support for compulsory or voluntary registration of title as actually constituting a valuable title insurance scheme.

3.26 Adoption of the insurance principle (by which we envisage insuring all titles against interests not on the register and all interests against the adverse effects of registration) and any consequent increase in payments of indemnity is not without qualification. Necessarily there will be some occasions when no indemnity is payable and others when, we propose, a full indemnity should not be payable. At present, speaking generally, the Act stipulates that no indemnity at all should be payable in respect of (a) losses caused "by fraud or lack of proper care"; (b) mines and minerals; and (c) legal costs incurred without consent.⁶⁴ The only query raised seriously in response to consultation or otherwise has been whether lack of proper care should completely preclude payment of any indemnity.⁶⁵ Consideration has also been given to the necessity of requiring prompt

⁵⁹From the relevant Annual Reports the sums paid by way of indemnity in the last 3 years were:

1983-84	£117,683
1984-85	£161,824
1985-86	£181,155

The last sum was "the highest total amount yet paid in a year" (Report for 1985-86, para. 42). For details of these indemnity payments, see Appendix D below.

⁶⁰Surpluses would clearly have been contrary to s. 145(4) of the L.R.A. 1925 which provided that:

The fee orders ... shall be arranged from time to time so as to produce an annual amount sufficient to discharge the salaries and other expenses (including the annual contribution to the insurance fund) incidental to the working of this Act, and no more. (emphasis supplied)

However, that subsection was repealed and replaced by s. 7 of the L.R.A. 1936 which provides that fee orders made under that Act:

shall be arranged from time to time so as to produce-

- (a) amounts sufficient to discharge the salaries and other expenses incidental to the working of that Act ...
- (b) such further amounts as are in the opinion of the Lord Chancellor and the Treasury reasonable, regard being had to any indemnities theretofore paid, and to the contingency that indemnities may thereafter become payable, under that Act.

This section equally does not authorise the simple obtaining of surpluses from fees, but in paragraph (b) it does indicate a proper basis for the fixing of fee levels.

⁶¹Dealings with registered land involved total transactions numbering 3,596,578 in 1985-86: Annual Report, para. 10.

⁶²Where the forger might be living with and intercepting the mail of the party supposed to have executed the charge.

⁶³See L.R.A. 1936, s. 7 cited in n. 60.

⁶⁴See L.R.A. 1925, s. 83(5), also Land Registration and Land Charges Act 1971, s. 2(2) as to costs of applying to court for indemnity.

⁶⁵Para. (a) of L.R.A. 1925, s. 83(5) is set out in Appendix C as substituted by the Land Registration and Land Charges Act 1971, s. 3(1). Parliamentary debates on the Bill included the following exchange (*Hansard* (H.C.), 19 May 1971, vol.817, cols. 1483-4):

The Solicitor-General: On Clause 3, the hon. Member for Kensington, North and the hon. and learned Member for Dulwich raised the question whether it is right for lack of care to be an absolute bar to indemnity. It has been so since about 1897, which may be a good reason for saying that it should be looked at. The point will be looked at by the Law Commission in the context of its general view.

Mr. Douglas-Mann: The Solicitor-General may be incorrect in saying that it has been so since 1897. Section 83(5) of the Land Registration Act, 1925, excluded entitlement to indemnity where the applicant or his predecessor in title had been guilty of fraud. Negligence was introduced in the 1966 Act.

The Solicitor-General: For the benefit of those hon. Members who may be interested in the statutory history, the words were in in 1897. They went out in 1925, and came back again in 1966. Quite why, I cannot explain.

notification of a claim for indemnity, as is required in the field of commercial insurance. However, we feel that this requirement is adequately covered at present by section 83(11) as proposed below⁶⁶ and that no amendment is needed.

3.27 The crucial words excluding indemnity are: "the applicant ... caused or substantially contributed to the loss by ... lack of proper care".⁶⁷ They appear imprecise,⁶⁸ and unfair.⁶⁹ As was stated in the relevant working paper:⁷⁰

An applicant for indemnity who is disqualified because he has caused or substantially contributed to the loss by lack of proper care is wholly disqualified, even if, in fact, some other party or the Registry were partly to blame. At an early stage in our study of this topic it seemed to us, and it has since been suggested by others, that this feature of the indemnity provisions in section 83 of the Act is not altogether satisfactory. If a person is only partly to blame, and he is innocent of fraud, it does not seem right that he should be wholly debarred from obtaining compensation; fairness would seem rather that compensation should be reduced having regard to his share of responsibility for the loss.

That paper proceeded to mention certain perceived practical difficulties⁷¹ before concluding that "on balance, they are probably not so great that something which seems to be clearly right in principle should not be implemented".⁷² What was envisaged were provisions analogous to those contained in the Law Reform (Contributory Negligence) Act 1945.⁷³ Indeed the position presumably may already be analogous where the applicant's negligence or carelessness has contributed to the loss but not substantially.⁷⁴ Accordingly we now recommend that, in substance, indemnity payments to compensate for losses suffered by reason of rectification or non-rectification⁷⁵ should be reduced where the applicant lacked proper care (i.e. was at fault or negligent)⁷⁶ to such an extent as is thought just and equitable having regard to the applicant's share in the responsibility for the loss.⁷⁷

3.28 Another, comparatively minor, aspect is that no provision is made for paying indemnity to a party in whose favour the register has been rectified. The explanation is that, even if the effect of the rectification falls short of restoring him to the position in which

⁶⁶At para. 3.31.

⁶⁷See para. (a) of L.R.A. 1925, s. 83(5).

⁶⁸As to the non-technical meaning of "lack of proper care", see above para. 3.14.

⁶⁹See e.g. S. Cretney and G. Dworkin at (1968) 84 L.Q.R. 528 at p. 545.

⁷⁰(1972) No. 45, para. 97.

⁷¹*Ibid.*, para. 98; primarily indicated was the possibility that the Chief Land Registrar would become inexplicably reluctant to settle small claims for indemnity.

⁷²*Ibid.*, para. 99.

⁷³*Ibid.*, para. 98; see also Cretney & Dworkin (1968) 84 L.Q.R. 528 at p. 555: "Provisions similar to those in the Law Reform (Contributory Negligence) Act 1945 ought to apply". Section 1(1) of that Act provides:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Note that this provision preserves the concept of blameworthiness since the damages are not to be reduced simply on the basis of causation: see per Denning L.J. in *Davies v. Swan Motor Co. (Swansea) Ltd.* [1949] 2 K.B. 291 at p. 326. Thus in *Sayers v. Harlow U.D.C.* [1958] 1 W.L.R. 623 at p. 633 Ormerod L.J., in applying the Act, agreed: "that it is impossible in the circumstances to acquit the plaintiff of some carelessness in putting her right foot, as she did, on the toilet roll, and that she should bear one-quarter of the blame" (see also per Lord Evershed M.R. at pp. 628-30 and per Morris L.J. at p. 632). Mutatis mutandis this approach could be operated in the present context and indeed there is an approximate precedent in a (now repealed) subsection of L.R.A. 1925, s. 75(4) concerning acquisition of title by possession:

If, in the opinion of the registrar, any purchaser or person deriving title under him whose title, being registered or protected on the register, is prejudicially affected by any entry under this section, ought, in the special circumstances of the case, to be compensated, the registrar may award to him indemnity of such amount as he may consider just, in like manner as if such purchaser or person had suffered loss by the rectification of the register.

Cp. the approach adopted by the Land Registration (Scotland) Act 1979, s. 13(4).

If a claimant to indemnity has by his fraudulent or careless act or omission contributed to the loss in respect of which he claims indemnity, the amount of the indemnity to which he would have been entitled had he not so contributed to his loss shall be reduced proportionately to the extent to which he has so contributed.

⁷⁴We understand that it is the practice of H.M. Land Registry to settle claims by negotiation where there is lack of proper care: semble this implies that the contribution to the loss was insubstantial.

⁷⁵See precise terms of L.R.A. 1925, s. 83(2).

⁷⁶Cf. para. 3.14 above.

⁷⁷See also as to this effect Cretney and Dworkin at (1968) 84 L.Q.R. 528 at p. 555.

he would have been had there been no error, he will still not have suffered loss *by reason of rectification*. We consider that making rectification and indemnity truly complementary involves that they should not be mutually exclusive.⁷⁸ Accordingly we recommend that, where rectification by itself would not be a complete remedy, there should be a power to be exercised either by the Registrar or by the court, in appropriate cases, to award indemnity to an applicant who has succeeded in obtaining rectification. This would accord with the present practice of the Land Registry in making payments in such cases.

3.29 In Part II of this report,⁷⁹ we recommend that the indemnity scheme be extended to the retained overriding interests. As a matter of substance, a registered proprietor will automatically take subject to any overriding interests. As a matter of machinery, we recommend that a registered proprietor against whom an overriding interest is asserted should be able to apply for indemnity but the Registrar may, as a discretionary condition precedent to paying indemnity, rectify the register by entering the overriding interest in it. This procedure should have the twin advantages of encouraging the creation of a more complete register of title and of enabling a proper consideration of the claim to an overriding interest before paying indemnity. Although the entitlement to indemnity would not be subject to any discretion, the registered proprietor's claim would not succeed in full or perhaps at all if he had contributed to the loss suffered by lack of proper care.⁸⁰ Indeed, we do not anticipate that extending indemnity to overriding interests will prove very expensive. Most of the remaining heads of interests will involve some physical presence on the land for their validity. Very often therefore there will be actual knowledge by the relevant parties. It will also be remembered that we see it as the duty of those purchasing interests in land to inspect the land and enquire of those who are there.⁸¹ To proceed despite actual knowledge or without making necessary inspections and enquiries would involve, we apprehend, not taking proper care. It should be emphasised however that the person with the benefit of an overriding interest need not himself or herself seek any entry on the register in order to enforce it.

3.30 There are two final aspects which we mention. The present indemnity provisions include limits on the payment of indemnity. The working paper contained the following paragraph:⁸²

Subsection (6) of section 83 has been criticized as being capable, where paragraph (a) applies, of producing unfair results. Suppose that X, through no fault of his (or of the Registry), is wrongly registered as the proprietor of a piece of land belonging to Y. At the time of registration the land was worth £500. The error is not discovered for five years, by which time the land is worth £1500. If rectification of the register is refused, then under paragraph (a) of subsection (6) the indemnity payable to the true owner, Y, is restricted to the value of the land at the time of registration, £500: whereas if rectification has been ordered he would have received back the land, then worth £1500, and the dispossessed registered proprietor X could be paid indemnity up to the

⁷⁸See similarly the view taken in (1972) Working Paper No. 45 at para.96:

We have already mentioned that rectification and indemnity are complementary remedies. Thus the pattern of sections 82 and 83 of the Act is that, in principle, an applicant will, if he establishes his case, either succeed in his claim to have the register rectified or will obtain compensation. What does not seem to have been envisaged, however, is that rectification by itself may not be an adequate remedy and that there may conceivably be cases where compensation may be required in addition to rectification. What we have in mind may be demonstrated by taking a somewhat extreme example. Assume that A is the true owner of a piece of freehold unregistered land on which there are a number of valuable trees. B in good faith purchases land from C the title to which purports to include that part of A's land on which the trees stand. The deeds have, however, been forged by C who later becomes untraceable. B registers his title at the Registry and obtains an absolute title. Subsequently he cuts down and sells the trees and, too late, A finds out what has happened. A succeeds in an application to rectify the register to restore his title. Under the present law that exhausts A's effective remedies. He will not be entitled under section 83 to any compensation from the State although the land may be worth less, as the result of the trees having been cut down, than it was when B was registered; nor has A any right of action in tort against B, because at the material time B was the registered proprietor of the land and was accordingly entitled to cut down the trees. It may, perhaps, be said that A ought to have applied, not for rectification, but rather for indemnity, and might then have received full compensation. That, however, could possibly be unfair to A. The land on which the trees stood may be an essential part of his estate and he may think that he would rather have it back, without the trees, than let it go. It seems to us that in appropriate cases a successful applicant for rectification should be entitled to look to the State for indemnity in addition, especially where it is the Act itself which has effectively deprived him of the right to recover consequential loss (not made good by rectification) from any other person.

⁷⁹Para. 2.14.

⁸⁰See also para. 3.14 as to this wording, also paras. 3.26-3.27.

⁸¹See Part II, para. 2.59.

⁸²(1972) No. 45, para. 105.

figure of £1500 for the loss of his registered estate. Consideration of problems of this kind has led us to question whether it is right for the Act to contain any express restriction on the amount of indemnity payable for the loss of an estate, interest or charge on land. In principle, it seems to us that if it is right that the State should give persons prejudiced by a wrong registration an indemnity for the loss they suffer, then the indemnity ought not to be calculated on a basis that is arbitrarily restricted. It would, we think, be right, however, for it to be made clear that, in accordance with ordinary principles of assessment of damages, indemnity might be limited where the applicant has not taken steps to mitigate his loss or has stood by in the hope that his loss might increase.

Allowing for inflation and multiplying the figures appropriately, we recognise the force of this and recommend repeal of the restrictive provision.⁸³

3.31 Secondly, another problem with the present indemnity provisions is section 83(11) which creates a six year limitation period for most claims for indemnity (running from when the claimant knew or ought to have known of the existence of his claim). The impracticality and capriciousness of this period, particularly its commencement, have been fully discussed by the Law Reform Committee,⁸⁴ with whom we are in respectful agreement. The text of the relevant paragraphs of their report is as follows:

3.71 The Law Commission drew our attention to three points on the law of limitation in relation to registered land. Of these the first relates to rectification and the remaining two to indemnity.

(i) *Rectification*

3.72 There is no express period of limitation for claims for rectification of the land register and we consider that no such period is required. If there is an error in the land register and the "owner" of the land has been dispossessed of it for 12 years, then in practice the "owner" will not be successful in attempting to have the register rectified, since his substantive right to the land itself will by then have disappeared. If, however, the owner of the land is still in possession, there seems to us to be no reason for denying rectification of an error relating to his title at any time: any period of limitation would either be unnecessary or else would prevent correction of a faulty register, even though the substantive right itself was still enforceable, though incorrectly registered. We also think that in cases falling between these two extremes the court has sufficient powers to prevent any injustice arising through the absence of a limitation period for claims for rectification; it can refuse rectification either through the application of its statutory discretions, or through the equitable principles such as laches or acquiescence which, it seems, apply to an issue of rectification even when the question is whether effect should be given to an overriding interest.

(ii) *Indemnity*

3.73 The Law Commission's second and third points concern the rights conferred by the Land Registration Act 1925 to indemnity out of public funds for injury suffered through the operation of the land registration system. We have, therefore, had to consider first what sort of limitation period or periods ought to be prescribed for such claims; and, secondly, how long any such period or periods should be.

3.74 At present a claim to indemnity can arise where the register is rectified; or where there is an error or omission in the register which is not rectified; or where there has been an administrative error which occasions loss.

3.75 For the first and third of these categories the present limitation is six years from the date when the claimant knows, or but for his own default might have known, of the existence of his claim. This we think is broadly right, although we think that it would be both simpler and more consistent with principle that the six-year period for the first category should run from the date of rectification rather than from the date of the claimant's knowledge.

3.76 The second category (where the register is not rectified and the claimant thus loses his title to the land in dispute) is much more difficult. The present law is

⁸³*i.e.* L.R.A. 1925, s. 83(6).

⁸⁴Twenty-First Report (Final Report on Limitation of Actions) (1977), Cmnd. 6923.

contained in the very complex proviso to section 83(11) of the Land Registration Act 1925 and we are much indebted to the present Chief Land Registrar and to his predecessor for the help which they have given to us over the history and purpose of this provision. In short, leaving aside special cases (such as claims by an infant or a remainderman under a trust) the claim to indemnity is statute-barred after six years from the date of the erroneous registration, whether or not the claimant knew of the error at the time it was committed. The Law Commission thought that a period of 12 years, rather than six, running from the erroneous registration, might be appropriate, since a claim for indemnity when the register is not rectified is in some respects analogous to a claim for damages in a real property action. We think that this would represent some improvement, but that the present law contained in section 83(11) is open to the much more fundamental objection that it would deny a claim to indemnity after a period running from registration when the substantive right itself would not (but for the erroneous registration and the subsequent refusal to rectify) have been lost. It seems to us that a person who loses his title because someone else's title has been wrongly entered on the register and the register is not rectified, ought not to be put in a worse position than he would have been if the land had been unregistered and that accordingly he should be fully compensated for any loss he suffers even if the error was committed more than six (or 12) years before the claim for rectification was made. A change in the law to this effect may, it is true, make it more difficult in some cases to determine whether an indemnity should be paid, since in place of the relatively simple rule providing for a fixed period from the commission of the mistake, there would be a test which depended solely on whether the error in respect of which rectification was refused was the cause of loss to the claimant; and this in turn might involve inquiring whether his title would, apart from the error, have been extinguished by adverse possession, a problem which has given rise to considerable difficulties in the past in the case of unregistered land. To some extent, however, this problem is already to be encountered in rectification cases because the Land Registration Act 1925 relies on the concepts of "actual occupation" and a "proprietor who is in possession"; and the question whether the title of a proprietor of registered land would have been extinguished by adverse possession had the land not been registered is one which may arise for decision by the registrar under the existing provisions of the Act. In any event, we do not think that any argument about complication should be allowed to stand in the way of the removal of a provision which is capable of working considerable injustice and which, when fully analysed, stands out as one of the very few places where it can be said that the present English system of land registration is inferior to the unregistered system which it is in course of replacing.

3.77 We therefore recommend that the proviso to section 83(11) should be repealed and replaced by a provision which would ensure that a claim for indemnity is not to be defeated by a defence of limitation except in a case where (had the land not been registered) a claim to the right itself would have been lost. In recommending the repeal of the proviso we have not lost sight of the fact that it contains special provisions for claims relating to restrictive covenants: such claims should, we think, in future be governed by the general principle which we favour for other refusals to rectify, as should claims in respect of other third party rights (such as easements, estate contracts or options).

3.78 Section 83(6) imposes an upper limit on the amount of indemnity payable which, in a case where the register is not rectified, is not to exceed the value of the estate, interest or charge of the claimant at the time when the error or omission which caused the loss was made. Since we consider that the date of the error or omission should be treated as irrelevant to the claimant's right to indemnity, it follows that, if any upper limit is required, it should be expressed by reference to the value (if rectification had been ordered) of the estate, interest or charge immediately before rectification is refused: and we so recommend.

3.79 This subject is complex and we think that it would help the readers of our report if we were to set out succinctly what we propose by way of a replacement for section 83(11), though we do not wish to suggest that this formulation should necessarily find its way verbatim into any Bill that may be put forward to implement our report. We suggest that section 83(11) could with advantage be reframed on the following lines:-

“83(11). A liability to pay indemnity under this Act shall be treated as a simple contract debt, and for the purpose of the law relating to limitation:-

(a) the cause of action in any case of loss suffered by reason of rectification shall be deemed to arise on the date of rectification;

(b) the cause of action in relation to a claim arising under subsection (2) of this section shall be deemed to arise on the date when the court or the registrar determines that the register is not to be rectified: provided that the question whether the claimant has suffered loss by reason of the error or omission in the register in respect of which rectification is refused shall be determined on the same principles which would have been applicable if the land had been unregistered and as at the date on which he brought an action for rectification or applied to the registrar for rectification whichever is the earlier;

(c) the cause of action in relation to any other claim to indemnity arising under this Act shall be deemed to arise when the claimant knows, or but for his own default might have known, of the existence of his claim”.

3.32 We propose that this recommendation should be adopted in order to clarify the position in relation to claims for indemnity made as a result of the refusal to rectify the register. This recommendation also supports our view already mentioned of section 83(6)(a).

3.33 Finally, there is one connected matter we wish to propose in order to mitigate to some extent the increased burden of indemnity. This is that the rights of recourse in section 83(9) and (10) should be clarified and strengthened so as to achieve, in substance, a more generally workable subrogation to the rights of those indemnified in favour of the Registrar. Subrogation is a well recognised legal right of one who stands in the position of insurer with regard to his insured's rights of action.⁸⁵ The reference in section 83(1) to “any express or implied covenant” must comprehend any covenants for title given by a transferor or other person.⁸⁶ The subsection also contains the words “or other right” but it is not clear how far these words extend.⁸⁷ We propose that the section should refer to “any rights” which would embrace the reference to covenants for title as well as other rights.⁸⁸ The sums recovered by H.M. Land Registry appear to be relatively small.⁸⁹

3.34 In summary we propose rectification and indemnity provisions basically along the following lines:

- (1) Where the register does not reflect, whether through error or omission, the title to the land according to the rules of land law which prevail apart from registration of title then, if it is just to do so, the register may be rectified on application either to the registrar or the court.
- (2) For these purposes the rules of land law include land registration procedural requirements and the requirement to protect on the register or as a land charge (where relevant) where failure to protect leads to the defeat of the right
- (3) Any such rectification may affect estates and interests already registered or protected or any existing overriding interest.
- (4) However, there is to be no rectification against a registered proprietor who has taken the care of a prudent purchaser and who is a bona fide purchaser in actual

⁸⁵Cp. Land Registration (Scotland) Act 1979, s. 13(2) and (3):

(2) On settlement of any claim to indemnity under the said section 12, the Keeper shall be subrogated to all rights which would have been available to the claimant to recover the loss indemnified.

(3) The Keeper may require a claimant, as a condition of payment of his claim, to grant, at the Keeper's expense, a formal assignation to the Keeper of the rights mentioned in subsection (2) above.

⁸⁶See L.R.A. 1925, s. 38(2) and L.R.R. 1925, rr. 76 and 77; also L.R.A. 1925, s. 24. Note that para. 1(b) of r. 77 excludes from the implied covenants “any overriding interests of which the purchaser has notice and subject to which it would have taken effect, had the land been unregistered”.

⁸⁷Semble they should extend to negligence claims against solicitors or other persons acting in conveyancing transactions.

⁸⁸However, we propose that the covenants for title should be clarified, particularly as they apply to registered land only, by means of incorporation by reference to the L.P.A. 1925.

⁸⁹See, e.g., Annual Report of Chief Land Registrar 1984-85, para. 38, stating that £848.16 had been recovered as against gross indemnity payments of £162,682.71; a sum of £1,306.68 was also recovered in respect of a claim met in March 1980. But £10,000 appears to have been recovered in 1985-86: Annual Report 1985-86, para. 46.

occupation of the land unless the rectification is in favour of a trustee in bankruptcy.

- (5) Where the register is rectified, any person suffering loss by reason of or despite such rectification should, subject as follows, be entitled to be indemnified in full.
- (6) Where an error or omission has occurred in the register, but the register is *not* rectified, any person suffering loss by reason of such error or omission should, subject as follows, be entitled to be indemnified in full.
- (7) Where an overriding interest is asserted against a registered proprietor or chargee, then he may apply for indemnity alone but, as a condition precedent to payment, there may be rectification of the register.⁹⁰
- (8) There should still be provisions for indemnity in respect of an error in an official search or loss of documents or inaccuracy of an office copy.⁹¹
- (9) No indemnity should be payable where there is rectification in respect of fraud, mines or minerals, or legal costs incurred without consent.⁹²
- (10) Any indemnity payable should be reduced by such amount as may be just and equitable in respect of any lack of proper care by the applicant.
- (11) The limitations on the recovery of indemnity dealt with in paragraphs 3.30 and 3.31 should be repealed and amended as there recommended.

⁹⁰This proposal is more realistic than expecting a registered proprietor to seek rectification of the register, as it were, against himself, but would enable the interest to be noted on the register thus preventing any future claims from subsequent proprietors in respect of the same interest. See also Part II, paras. 2.10-2.12, where the correlation of rectification and indemnity with overriding interests is discussed.

⁹¹See L.R.A. 1925, ss. 83(3) and 113.

⁹²See L.R.A. 1925, s. 83(5).

PART IV

PROTECTION AND PRIORITY OF MINOR INTERESTS (AND OF MORTGAGES AND CHARGES)

1. Introduction

4.1 In this Part of the report, minor interests are discussed. These may be considered as the counterpart of overriding interests. As has been explained, the latter are a class of incumbrance that prevail without entry in the register. Minor interests are the class of incumbrance that prevail through entry in the register. The expression "minor interests" is the creation of the Act and it is necessary to say a few words in explanation of it.

4.2 The register of title being in the nature of an official record of title to land, it has to make provision for incumbrances and burdens affecting land. These have already been mentioned in Part II at paragraph 2.1 as follows: overriding interests, registered charges and minor interests. Of these, overriding interests have already been considered. Registered charges correspond with the legal mortgage in unregistered conveyancing. Charges share certain points of similarity with minor interests (in particular, until a charge is registered it ranks as a minor interest) but currently receive sui generis treatment in the land registration system. The protection and priority of charges is discussed in this report in paragraphs 4.62 to 4.93 below. "Minor interests" is the generic expression used by the Act to mean either rights adversely affecting the title to the land which do not prevail against a purchaser of the legal title unless they are protected by entry on the register, or rights which, whether protected on the register or not, are overreached on a sale of the legal title.¹

4.3 Of the description of minor interests given in the last paragraph, we shall examine two aspects in this Part. These are, first and in paragraphs 4.4 to 4.19, how far minor interests should have a property basis before they are protected on the register, secondly and in paragraphs 4.20 to 4.61, the choice of the various methods of protection available, their deficiencies and how these might be eliminated. Paragraphs 4.94 to 4.104 deal with the priority of minor interests inter se and paragraphs 4.105 to 4.116 deal with production of land and charge certificates.

2. What is a minor interest?

4.4 The description given earlier may be expanded by reference to section 3(xv) of the Act as follows:

"Minor interests" mean the interests not capable of being disposed of or created by registered dispositions and capable of being overridden (whether or not a purchaser has notice thereof) by the proprietors unless protected as provided by this Act, and all rights and interests which are not registered or protected on the register and are not overriding interests, and include:

- (a) in the case of land held on trust for sale, all interests and powers which are under the Law of Property Act 1925 capable of being overridden by the trustees for sale, whether or not such interests and powers are so protected; and
- (b) in the case of settled land, all interests and powers which are under the Settled Land Act 1925 and the Law of Property Act 1925, or either of them, capable of being overridden by the tenant for life or statutory owner, whether or not such interests and powers are so protected as aforesaid.

4.5 Registered dispositions are defined in section 3(xxii) to mean dispositions taking effect under a proprietor's powers "by way of transfer, charge, lease or otherwise". The powers to transfer and lease are contained in sections 18 and 21 of the Act. The power to charge is found in section 25.²

4.6 Despite the definition's infelicities, the intention seems to be that it should embrace, first, those interests which in unregistration conveyancing are susceptible to "overreaching" under the Law of Property Act 1925 or the Settled Land Act 1925. That is

¹ See s. 3(xv) quoted at para. 4.4.

² It is considered that "or otherwise" refers to the other matters authorised by ss. 18 and 21 such as the creation of annuities or rentcharges, (but see Rentcharges Act 1977) not amounting to a transfer or lease of the land. Note that certain sorts of disposition are not registrable (ss. 19(2) and 22(2)). Apart from any overriding interest status, these necessarily take effect as minor interests.

to say, equitable (or other) interests which, from the moment of sale, are shifted from the land to the purchase money in the hands of the trustees and so do not concern the purchaser.³ Secondly, the definition embraces those interests which in unregistered conveyancing would be void for non-registration under the Land Charges Act 1972. As we shall see, however, the class of interest rendered void through non-registration in registered conveyancing extends beyond those matters capable of protection as land charges in unregistered conveyancing.

4.7 In paragraph 4.2 above we mentioned the classes of incumbrance in registered conveyancing. These classes do not, however, represent watertight compartments. That is to say, an incumbrance can either move from one class to another or be a member of two classes simultaneously. The position of the unregistered but registrable charge has already been noticed.⁴ A further point is that, notwithstanding the definition in section 3(xv), the House of Lords in *Williams and Glyn's Bank v. Boland*⁵ confirmed that a minor interest, if coupled with actual occupation of the land⁶ by the interest owner, can be protected through its status as an overriding interest. This protection, examined in Part II, is independent of and runs alongside the possibility of protection by the conventional methods discussed in this Part of the report. As discussed,⁷ no change is proposed to this state of affairs.

4.8 Further provision affecting minor interests is made by section 101(1) to (4) in Part IX of the Act which reads as follows:

Dispositions off register creating "minor interests"

101.—(1) Any person, whether being the proprietor or not, having a sufficient interest or power in or over registered land, may dispose of or deal with the same, and create any interests or rights therein which are permissible in like manner and by the like modes of assurance in all respects as if the land were not registered, but subject as provided by this section.

(2) All interests and rights disposed of or created under subsection (1) of this section (whether by the proprietor or any other person) shall, subject to the provisions of this section, take effect as minor interests, and be capable of being overridden by registered dispositions for valuable consideration.

(3) Minor interests shall, subject to the express exceptions contained in this section, take effect only in equity, but may be protected by entry on the register of such notices, cautions, inhibitions and restrictions as are provided for by this Act or rules.

(4) A minor interest in registered land subsisting or capable of taking effect at the commencement of this Act, shall not fail or become invalid by reason of the same being converted into an equitable interest; but after such commencement a minor interest in registered land shall only be capable of being validly created in any case in which an equivalent equitable interest could have been validly created if the land had not been registered.

The effect of these provisions is limited by section 109, also in Part IX:

Restriction on exercise of powers off the register

109. Subject to the express provisions relating to leases and mortgages nothing in this Part of this Act shall be construed as authorising any disposition of any estate, interest, or right or other dealing with land to be effected under this Part of this Act if the disposition or dealing is one which could be effected under another Part of this Act, and any such disposition or dealing shall be effected under and in the manner required by such other Part of this Act, and when so required shall be registered or protected as provided by this Act or the rules.

4.9 The above sections elucidate the scope and operation of the definition of minor interests. Whenever rights and interests are created for which specific provision is not made

³ See the L.P.A. 1925, s. 2, and the Settled Land Act 1925, s. 72 ("overreaching", not "overriding", is apt here); also R.E. Megarry and H.W.R. Wade, *The Law of Real Property* 5th ed., (1984), pp. 136-9.

⁴ At para. 4.2 above.

⁵ [1981] A.C. 487. For an account of this case, see Part II above at n.55.

⁶ Or, presumably, receipt of the rents and profits. Abolition of this limb of s. 70(1)(g) is proposed in Part II at para. 2.58.

⁷ See Part II, paras. 2.67-2.70.

elsewhere in the Act, then such rights and interests rank as minor interests and provision is made for their protection by entry in the register.⁸ However, by contrast with the Land Charges Act 1972 which enumerates each class of interest capable of protection, these sections draw the classification in general terms, and it follows that in registered land *all* equitable rights⁹ must, where they are to affect a purchaser for value of the title, be protected by registration. Minor interests are therefore a far more comprehensive substitute for the doctrine of notice than the Land Charges Act 1972.

4.10 We draw attention to two points relating to the definition of minor interests. The first point concerns the alternate nature of rights arising under registrable dispositions. Registered dispositions have already been mentioned as excluded from minor interests.¹⁰ However, until registration, the holders of registrable rights will have an equitable estate or interest only,¹¹ and this may be so even where the disposition is voluntary.¹² Pending registration, therefore, these subsist as minor interests and may be protected as such.

4.11 The second point relates to the effect of the Land Registration Act 1986 on the sorts of lease which constitute minor interests.¹³ Under the 1925 Act, leases containing an absolute prohibition against assignment and sub-letting were, regardless of length, incapable of registration.¹⁴ If they were granted at a rent without taking a fine and did not exceed twenty-one years, they were overriding interests. All other sorts of inalienable leases were protectable by entry in the register and, if not so protected, were overridden on a sale of the estate affected. These leases and, for similar reasons, leases granted in consideration of a premium for a term of twenty-one years or less, whether inalienable or not, were considered to be minor interests.¹⁵ Having regard to the sections mentioned and to section 2(1) of the Act, these leases, in regard to registered land, took effect only in equity. However, the new Land Registration Act,¹⁶ by extending the classes of lease which constitute registrable or overriding interests, will effectively abolish this category of minor interest. Thus, inalienable leases of twenty-one years or more will now be registrable,¹⁷ and gratuitous leases and leases granted at a premium for less than twenty-one years will now be overriding interests.¹⁸ It is to be noted, however, that with the exception of inalienable leases,¹⁹ the 1986 Act has prospective effect only, and so the 1925 Act will continue to apply to dispositions created prior to the commencement of the 1986 Act.

4.12 To summarise thus far, minor interests comprise:

- (1) those matters in unregistered land capable of protection under the Land Charges Act;
- (2) the rights of beneficiaries under a trust for sale;
- (3) the rights of those interested as beneficiaries in settled land;
- (4) any other equitable rights under the general law in or over land not included in the foregoing;
- (5) the rights, until registration, of those entitled to be registered in respect of a disposition to them;

⁸ Cp. subs.(3) of s. 1 of the L.P.A. 1925 enacting that all estates and interests in land other than those mentioned in subs. (1) and (2) take effect as equitable interests.

⁹ Examples of equitable rights which are not also land charges in unregistered land include the right of the tenant to remove fixtures from the holding after the expiry of his lease (*Poster v. Slough Estates Ltd.* [1969] 1 Ch. 495; this answers the doubts of Cross J. at p. 507) and the right of re-entry by the assignor of a lease on breach of covenant by the assignee (*Shiloh Spinners Ltd. v. Harding* [1973] A.C. 691); also included are the rights under the constructive trust found to exist in *Re Sharpe* [1980] 1 W.L.R. 219.

¹⁰ See paras. 4.4 and 4.5 above.

¹¹ ss. 19(1) and 22(1) of the Act.

¹² *Mascall v. Mascall* (1985) 50 P. & C.R. 119, C.A. (unregistered gift valid in equity).

¹³ The Act implements the recommendations of our first Report on Land Registration (1983) Law Com. No. 125.

¹⁴ L.R.A. 1925, s. 8(2).

¹⁵ Equally, where the reversionary title only is registered, any derivative estate, not being an overriding interest, would appear also to be a minor interest.

¹⁶ The Act received the Royal Assent on 26 June 1986 and will be implemented by statutory instrument: *ibid.*, s. 6(4).

¹⁷ *Ibid.*, s. 3.

¹⁸ *Ibid.*, s. 4.

¹⁹ *Ibid.*, s. 3(2).

- (6) leases containing an absolute prohibition on assignment and sub-letting²⁰ and leases granted in consideration of a premium for a term of twenty-one years or less, if created prior to the commencement of the Land Registration Act 1986;
- (7) those matters which in Part II of this report are to lose their status as overriding interests and are not to become general burdens.

Regardless of the diversity of minor interests, they share the feature that, if they are to prevail against subsequent registered proprietors taking under a disposition for valuable consideration, they must be protected by some form of entry in the register of title.²¹ However, it was never intended that rights which are overreachable on a purchase should actually so prevail; the intention must have been that the entry in the register would ensure that the overreaching machinery is operated correctly.

4.13 As a matter of policy, we entirely endorse this state of affairs. Quite apart from any question of the registration of equitable interests in substance being the certain statutory substitute for the uncertain doctrine of notice, our approval follows from the principle that the register should be as complete and accurate a record of information relevant to the title to a particular estate in the land as is possible. This necessarily involves a change in the nature of some legal rights²² but the price of greater indefeasibility is a corresponding modification in the rights of others.

3. The position of the unprotected minor interest

4.14 As it is, in effect, only a purchaser of a legal estate for value who will take free of an unprotected minor interest, it follows that unprotected minor interests will always prevail against the original grantor or creator of the rights and also against anyone taking from such person otherwise than by purchase for value. This is supported by sections 20(4) and 23(5). However, the Act is not entirely free from ambiguity because sections 20(1) and 23(1) refer to a "transferee" for valuable consideration taking free, whereas other sections in the Act²³ provide that a "purchaser" takes free. "Purchaser" (but not "transferee") is defined in section 3(xxi) to include the requirement of good faith. In *Peffer v. Rigg*,²⁴ the provisions were reconciled by importing good faith into sections 20 and 23, but the justification for doing this, as a matter of strict statutory interpretation, may seem slender.

4.15 We do not find it necessary to express a concluded view on the correct construction of these provisions because we *recommend* that it should be a statutory requirement that all transferees and other purchasers who wish to take free from unprotected minor interests must take "in good faith and for valuable consideration". Adoption of this recommendation would bring the Land Registration Acts into line with the Law of Property Act 1925 and the Settled Land Act 1925 which each define "purchaser" as necessarily involving "good faith". It would be out of line, however, with the Land Charges Act 1972 (referred to by section 199 of the Law of Property Act 1925) where good faith is not made an element, but the consequences of omitting this element do not seem to us acceptable.²⁵ Where the property legislation does involve a requirement of "good faith", it has not yet been found necessary to enact a definition of the expression.²⁶ This appears to be in sharp contrast to the Sale of Goods Act 1979²⁷ which provides: "A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not". We see no harm, if no great help either, in adopting this definition. However we *recommend* an express addition to the effect that a transferee or purchaser should not be deemed dishonest merely because he had actual knowledge of the unprotected minor interest in question.²⁸ Otherwise, it would not in our view be desirable to fetter the courts in their application of the concept of "good faith" to the facts in front of them.

²⁰Except where registered under L.R.A. 1986, s. 3(2).

²¹ss. 20 and 23 of the Act. Rectification will not avail in respect of an unprotected minor interest, see para. 3.18 above.

²²e.g. the position of the rights now omitted from s. 70(1). See generally para. 2.18. above.

²³ss. 59(6), 61(6) and 110(7).

²⁴[1977] 1 W.L.R. 285.

²⁵See *Midland Bank Trust Co. Ltd. v. Green* [1981] A.C. 513. The difficulties there envisaged by Lord Wilberforce do not seem to have materialised in the reported cases: cp. *Capital Estates (Belgravia) Ltd. v. Woolgar* [1972] 1 Q.B. 48 at p. 55.

²⁶Though there is no shortage of judicial guidance, see *Waring v. London and Manchester Assurance Co. Ltd* [1935] Ch. 310; *Dowager Duchess of Sutherland v. Duke of Sutherland* [1893] 3 Ch. 169; *Middlemas v. Stevens* [1901] 1 Ch. 574. See also the annotation in *Wolstenholme & Cherry's Conveyancing Statutes* 13th ed., (1972), vol. 1, p. 340.

²⁷s. 61(3).

²⁸Cp. *Peffer v. Rigg* [1977] 1 W.L.R. 285 and *Lys v. Prowsa Developments Ltd.* [1982] 1 W.L.R. 1044; see also *De Lusignan v. Johnson* (1973) 117 S.J. 854 and generally *Emmet on Title* 19th ed., § 5.144.

4.16 One specific situation, however, also requires mention. Where the purchaser is not a single individual but two or more persons, then the absence of good faith of one of them should be sufficient for the minor interest to prevail.²⁹ Otherwise, it would be a very easy thing for those intent on defeating an unprotected incumbrance to join an innocent party in the purchase expressly for that purpose. This would not, however, seem to be any different from the present position under section 59(6) with regard to joint purchasers.

4.17 The introduction of the requirement of good faith must be seen in its proper context. As we have said, it is for a minor interest owner to protect his rights by entry in the register. Failing protection, he will be overridden by a transferee or purchaser in good faith for valuable consideration. It follows that the burden of showing absence of good faith ought to be on the minor interest owner and we so *recommend*. As will be discussed in paragraphs 4.20 to 4.61, if a protected minor interest is disputed by the registered proprietor, it is for the interest owner to make his case; thus, requiring him to disprove good faith is only consistent with this principle.

4.18 Finally, there is a practical point. No difficulty arises where protection of a minor interest is effected against the grantor or creator of the right. But where protection against someone taking otherwise than in good faith or for value is sought, we have considered whether presence or absence of value should be entered in the register. The practice of entering value given in the register was, no doubt for good reasons, stopped in 1976.³⁰ However, we do not consider that a note on the register of any case where the registered proprietor did not give value serves a useful purpose. The existence of valuable consideration is a contentious issue and should be decided by the courts, not by the Registrar or his staff. The proprietor may, if he wishes, request the Registrar to enter on the register the price paid or value declared,³¹ and we have been told that this information will be available from the Registry's files to anyone entitled to it.

4.19 We now turn to look at the existing machinery under the Act for the entry and protection of minor interests.

4. The mechanics of protection

4.20 In paragraphs 4.14 to 4.19, we pointed out the need for minor interests to be protected. Now we look at the different ways this protection is effected.

4.21 At the outset, we would draw attention to two different routes by which minor interests may find their way onto the register. First, the Chief Land Registrar, who is under a general duty³² to keep an accurate register of title to estates in the land, has certain powers and duties to make entries in respect of various minor interests, whether requested or not. The Registrar's powers are, with the exception of bankruptcy entries,³³ limited to those occasions when some transaction is being processed in the Land Registry and the land or charge certificate is available for alteration. These powers are most extensive on first registration of title to the land. Where an application for any other sort of disposition is being entertained, and, as can happen, the transfer or other deed is expressed to be subject to an unprotected minor interest, it is the Land Registry's practice either to require its entry in the register or to request its removal from the deed.

4.22 Secondly, the other route is via the incentive, already discussed, which the interest holder has to ensure that his rights are protected on the register. The Act and Rules make quite extensive provisions for this eventuality.³⁴ This report will concentrate mainly on this second route because, in practice, it is of the two the more common; it is also our view and the view of those we consulted that, whatever may be the position with regard to the duties of the Land Registry, third parties must in the final analysis be expected to take steps themselves to protect their own interests, and there ought to be proper and adequate machinery to enable this to be done.

²⁹Cf. *Oppenheimer v. Frazer and Wyatt* [1907] 2 K.B. 50.

³⁰See r. 247 as amended by Land Registration Rules 1976 (S.I. 1976/1332).

³¹See *ibid.*

³²See ss. 1 and 127 and rr.39-41.

³³See s. 61.

³⁴See Part IV of the Act and rr. 56, 104, 186, 190, 215 and 235.

4.23 Before examining the methods of protection, brief mention must be made of the land certificate and the charge certificate.³⁵ These are issued to the proprietor of registered land and proprietors of registered charges respectively. But before a charge certificate can be issued, the land certificate must be deposited with the Land Registry under section 65 of the Act. Both sorts of certificate are therefore never outstanding at the same time. As will become apparent, certain sorts of entry in the register may only be made if the certificate is either produced to the Land Registry or is deposited as aforesaid. We shall use the word "lodged" in this report to mean cases where the land certificate is with the Land Registry for either of these reasons.

4.24 Section 101(3) mentions four methods³⁶ of protecting minor interests. These are protection by notice, caution, restriction or inhibition for each of which Part IV of the Act makes provision³⁷ depending on, for example, who makes the entry and whether the registered proprietor's certificate is available. Each requires a short explanation.

(1) NOTICE

4.25 A notice is entered in the charges register of a registered title. The charges register contains a list of the incumbrances and other matters adversely affecting the land. The entry will generally give a statement of the interest it protects and the name of the person in whose favour it is.³⁸ The Registrar is empowered to enter a notice in certain circumstances³⁹ without there having been a specific application therefor. A notice may, it seems, only be entered in respect of an interest affecting the land and not an interest affecting exclusively a registered charge.⁴⁰ The land or charge certificate, if outstanding, must be lodged with the Land Registry before entry of a notice can be made.⁴¹

Practical effect of a notice

4.26 A notice, once entered, operates by way of notice only and does not otherwise validate the interest it protects.⁴² Nevertheless, a notice may, from the interest holder's point of view, be considered the most efficient form of protection because no further action is required to ensure that purchasers are bound by it. Nor is a registered proprietor/vendor concerned to obtain any consent from the interest owner when he comes to sell. As is explained in the following paragraphs, a registered proprietor/vendor is so concerned in relation to cautions and restrictions. It follows from this that cancellation of a notice on the register is done only after an investigation of the merits of the claim or interest protected.⁴³ This is not an inference that can always be drawn from the cancellation of a caution.⁴⁴

(2) CAUTION

4.27 A caution against dealings with the land is entered in the proprietorship register which contains the name and address of the owner of the land. A caution does not show on the face of the register the nature of the interest protected but, by rule 215, an application for a caution must be accompanied by a statutory declaration by the applicant or his solicitor which will reveal the interest. The declaration is filed in the Land Registry but is not part of the registered title, and at present may only be inspected with the authority of the registered proprietor.⁴⁵ The entry of a caution will generally show the date

³⁵These are explained in greater detail in paras. 4.105-4.116 below.

³⁶See para 4.8 above.

³⁷A fifth method, the notice of deposit, is dealt with in paras. 4.62-4.86 below.

³⁸Where notice of a restrictive covenant is entered, the covenant is, where possible, set out or referred to and the entry will, again where possible, indicate the land for the benefit of which it is taken. See s. 50(4).

³⁹See s. 50 and r. 40.

⁴⁰A notice may protect an equitable incumbrance affecting another minor interest, e.g. an equitable mortgage of an agreement for a lease. However, it is the Land Registry's view that a notice can be entered in respect of an interest affecting exclusively a registered charge. In its view, ss. 48 and 49 and r. 190 seem wide enough for this, having regard to the definition of "registered land" in s. 3(xxiv).

⁴¹Except a notice under the Matrimonial Homes Act 1983; see s. 64(5) of the L.R.A. 1925 as inserted by s. 4 of the Matrimonial Homes and Property Act 1981. Although the notice cannot be in respect of an incumbrance against a charge, this does not mean that the charge certificate need not be lodged where the incumbrance in effect adversely affects both land and charge; see s. 64(1) of L.R.A. 1925.

⁴²s. 52(1).

⁴³See r. 16.

⁴⁴See *Holmes and another v. Kennard & Son* (1984) 49 P. & C.R. 202.

⁴⁵r. 288(2); in our second report q.v. we propose changes as to inspection of the register of title and other documents.

of its registration and the person in whose favour it is registered. The Registrar has no power to enter a caution of his own motion: it may only be entered pursuant to an application. A caution may protect an incumbrance against a registered charge, in which case it is entered in the charges register. The land or charge certificate need not be lodged.

Practical effect of a caution

4.28 The presence of a caution on the register entitles the cautioner to receive notice whenever any dealing⁴⁶ with the land (or charge if the caution is against the charge) is presented for registration.⁴⁷ The notice gives the cautioner a limited period—usually two weeks⁴⁸—in which to object to the proposed dealing. If there is an objection and the matter is not disposed of by agreement, the question of whether the interest protected by the caution should prevail over the rights to be conferred by the proposed dealing is determined by the court or the Registrar, subject to an appeal to the court.⁴⁹ This procedure (which is called “warning off a caution”) may, alternatively, be set in motion at any time and without the need for a dealing by the registered proprietor requesting the Land Registry to serve the notice on the cautioner. Thus it is that a caution gives notice of a cautioner’s rights. In the case of a lease taking effect as an overriding interest, the Act provides that it takes effect subject to the rights protected by a caution.⁵⁰ Apart from this, the Act says⁵¹ that “a caution ... shall have no effect whatever except as in this Act mentioned”,⁵² making it clear that, failing agreement, only when a cautioner’s case has been determined do his rights prevail.

(3) RESTRICTION

4.29 A restriction is also entered in the proprietorship register and it operates to limit the powers of disposition of a registered proprietor. It does this by, for example, providing that no disposition, or no disposition of a particular kind, shall be registered without the consent of a named person or the proprietor of another incumbrance or registered charge. More rarely, it prohibits all dealings with the land. Its most common use is to protect the rights of beneficiaries interested under a trust for sale⁵³ or settlement,⁵⁴ although the nature of the interest protected is not generally ascertainable from the entry. In limited circumstances, a restriction is entered by the Registrar of his own motion.⁵⁵ Whether entered in this way or applied for, the land or charge certificate must be lodged with the Land Registry. If a restriction is entered against the proprietor of a registered charge, it appears in the charges register.

Practical effect of a restriction

4.30 The practical effect is, in the end, similar to that of a caution, except that there is no provision for the service of notice on the restrictioner: anyone applying for the registration of a prohibited dealing will themselves be told by the Land Registry to obtain the restrictioner’s consent. Furthermore, a restriction does not always protect a property interest. For example, a restriction entered by the Registrar will often simply reflect the limited powers of disposition of the registered proprietor.⁵⁶

(4) INHIBITION

4.31 An inhibition is entered in the proprietorship register in consequence of an order of the court or Registrar, and it operates to restrain a proprietor’s powers of disposition either for a specified period or until further order or until the occurrence of an event named in the order.⁵⁷ An inhibition may be entered against the land or a registered charge and the certificate need not be lodged in the Land Registry. As for all types of entry, the Land

⁴⁶The word “dealing” is used in ss. 54 and 55 but is not defined in the Act; it is understood that it is taken to include a transfer, lease, charge or other registrable disposition.

⁴⁷s. 54.

⁴⁸See r. 218.

⁴⁹See rr. 220 and 229.

⁵⁰ss. 18(3) and 21(3).

⁵¹s. 56.

⁵²ss. 59(6) and 110(7) where the notice effect of a caution is enacted.

⁵³s. 58 and r. 213.

⁵⁴s. 86..

⁵⁵s. 58(3); r. 39.

⁵⁶e.g. a corporation.

⁵⁷s. 57.

Registry must be satisfied that the application is in order before making the entry.⁵⁸ However, in the case of an application for an inhibition, the onus of investigation of the applicant's rights or entitlement to apply is placed on the court or Registrar.⁵⁹ It follows from this fact that rights protected by inhibition receive a greater degree of official recognition. Doubtless this is why section 57(4) permits protection by notice or restriction if, on investigation, the application turns out to be better suited to be treated in that way. Inhibitions are not frequently encountered other than in bankruptcy.

4.32 The above information may be shown by a table thus:

Method of protection	Can the entry affect either the land or a charge?	Is method available to the Registrar?	Must the Land or Charge Certificate be lodged?	Is the nature of the interest protected shown on the Register?	Is the person in whose favour the entry is made shown on the Register?
NOTICE	No, only land	Yes	Yes, except for the Matrimonial Homes Act notice	Yes	Generally, Yes
CAUTION	Yes	No	No	Generally not*	Yes
RESTRICTION	Yes	No	Yes	No	Generally, yes
INHIBITION	Yes	Yes	No	No	No

* The exception being the Matrimonial Homes Act caution; now no longer used: s.64 (5) of the Act.

4.33 Matters do not stop there, however, because the Act attempts to indicate that certain minor interests can only be protected by particular methods. A discussion of the relevant provisions in Part IV of the Act, and the sometimes confusing way in which they operate, is to be found at Appendix E of this report.

4.34 Leaving out of account for the moment the inhibition, we consider that the statutory provisions are ambiguous, overlapping and out of balance. Express provision is made for the protection of interests of the least importance, whereas the more important matters have to be inferred from general words. In many instances the subject appears to have been treated in a rather aimless way. This is, we think, unacceptable. For instance, running through the way the system operates, but nowhere explicitly stated in the legislation, is the sensible principle that if an interest requiring protection is disputed or not accepted by the registered proprietor of the land or charge, then the appropriate protection is the caution, whilst, if it is accepted by him (demonstrated by the certificate being produced to the Land Registry), the notice or the restriction is to be used. But against this, the legislation theoretically permits the use of the notice to protect a disputed interest. Thus, if the land certificate is on deposit in the Land Registry under section 65 because the land is charged to a registered chargee, then it does not require production for the entry of a notice. That this does not often happen is, we suspect, because the incumbrancer does not know whether the land is charged or not and will therefore generally protect by caution *ex abundanti cautela*.⁶⁰

4.35 Again, such attempt as there has been to provide that the broad subgroups of minor interests (outlined in paragraph 4.12 above) attract protection by a particular method is ineffective and contradictory. This is all the more surprising as the consequences of protection are very different depending on whether its purpose is to ensure the correct operation of the overreaching machinery or to ensure that the interest prevails against successive proprietors. An illustration of this would be the way in which both the notice and the caution are available to protect beneficial interests under a trust for sale, whereas the restriction is the proper and *more* efficient device to this end. The restriction is of course available, but no provision is made for a restriction to be entered without the assent of the registered proprietor.

⁵⁸e.g. for cautions, see ss. 53(2) and 54(2),

⁵⁹s. 57(1)

⁶⁰This may be less true if the register is open to public inspection, as recommended in our second report.

4.36 As it happens, these difficulties are overcome in practice chiefly because the machinery has been made to work through the good sense of its users and operators. Our conclusion is that the system, as operated, is basically sound and works reasonably well. For this reason our proposals are directed in the main to bringing the statutory provisions into line with practice.

4.37 The working paper and the consultation following it support this approach and, although the changes hereinafter outlined were foreshadowed in the working paper, we have modified our conclusions in the light of that consultation.

Outline of scheme

4.38 Subject to what is said in paragraph 4.58 below about the inhibition, we think that the general principles governing choice of protection should be clearly stated at the outset of the relevant part of the Act on the following lines:

- (i) A person having or claiming a minor interest in registered land or in a registered charge should be entitled to apply for a protective entry on the register relating to that interest.
- (ii) Unless the interest arises under a trust (or is a charge on such an interest), the entry may be by notice or by caution only.
- (iii) It follows therefore that it should be possible to enter a notice against a charge as well as against the land.
- (iv) Whether notice or caution is entered should depend upon whether or not the interest is acknowledged by the registered proprietor: if acknowledged, a notice will be appropriate; otherwise, especially if disputed by him, a caution will be appropriate.
- (v) The agreement of the registered proprietor of the land or charge to the entry of a notice (i.e. his acknowledgment) should as a rule be signified either by the production by him of the land or charge certificate or by written consent.
- (vi) Interests arising under a trust for sale or settled land or behind a bare (or nominee) trust or otherwise overreachable should be capable of protection by restriction only.
- (vii) It follows that the restriction should be available without the need for production of the certificate.
- (viii) As at present, the entry of a notice, caution or restriction is not in itself to confer validity on the interest protected.

4.39 In the following paragraphs we discuss some of the details of the above changes including the new role of the restriction. We shall also mention the inhibition. Before doing this, however, there are two particular matters relevant to the above classification which must be dealt with.

4.40 The first is the rights given to a spouse by the Matrimonial Homes Act 1983; the second is the protection of a charging order obtained under the Charging Orders Act 1979.

(i) Spouse's rights under the Matrimonial Homes Act 1983

4.41 This Act provides that the spouse's rights of occupation conferred by it should always be protected by notice, regardless of questions of production of the land certificate. This position was recommended in our Third Report on Family Property,⁶¹ so as to accord, for the sake of simplicity, with another recommendation therein, namely, that production of the land certificate be dispensed with in relation to the entry of a restriction corresponding to a Class G land charge under the proposed statutory scheme for co-ownership of the matrimonial home.⁶² Consistently with this, we proposed that the power to enter cautions to protect spouses' rights of occupation should be ended;⁶³ the power was redundant, because it had also been proposed that a spouse could apply to enter a notice without obtaining the other spouse's consent. However, a spouse may not always be recalcitrant about giving his consent to a notice and for this reason, we now feel that spouses' rights under the Matrimonial Homes Act 1983 should be governed by the principles we propose as regards the choice of a notice or a caution; in other words, such rights will also only be protected by notice if acknowledged by the proprietor: if not so acknowledged, then by caution. In any event, the availability of a choice of the means of protection will not prejudice the holder of those rights.

⁶¹(1978) Law Com. No. 86, paras. 2.35 and 2.36.

⁶²*Ibid.*, para 1.329.

⁶³*Ibid.*, para 2.36.

(ii) *Charging orders*

4.42 A charging order is obtainable under the Charging Orders Act 1979 by a judgment creditor against any land of the debtor and has effect as an equitable charge given under hand by the debtor. As an equitable charge and, therefore, a minor interest, it obviously requires protection. At present, the 1979 Act provides for registration of a notice or caution where the legal title is affected. Applying *Elias v. Mitchell*,⁶⁴ the caution may be registered where the interest affected is merely an undivided share. A charging order is the creation of statute and, as will be appreciated, will only arise as a result of court proceedings. To choose the form of protection to give it by reference to whether the proprietor of the land formally acknowledges the charge or not is, therefore, a little unreal. Accordingly, we *recommend* that, with one exception, a notice is always entered in respect of a charging order.⁶⁵ The reason is that there will always have been an opportunity for the debtor to dispute the charging order before it is made by the court and, once made, there is no point in continuing that state of affairs on the register.

4.43 The exception referred to is a charging order taking effect exclusively against the debtor's beneficial interest as the beneficiary under a trust of the land. In paragraph 4.38 above at (vi), we recommended that the rights of beneficiaries under trusts of land should be capable of protection only by restriction.⁶⁶ We also recommended that a restriction should be available without production of the land certificate. Although qualified by a recent Court of Appeal decision,⁶⁷ the principle remains that a beneficiary's rights are overreachable,⁶⁸ and the restriction is, in our view, the most apt form of protection for them.⁶⁹ It follows that the restriction must be equally apt to protect an interest derived out of the interest of such a beneficiary. We therefore *recommend* that the only form of protection for this sort of charging order should be by restriction.

4.44 It follows from the proposals in paragraph 4.38 that sections 48, 49 (including especially the ambivalent provision in section 49(2) permitting protection of certain beneficial interests by notice) and 59 no longer have any function. We *recommend* their repeal. Such repeal would be prospective only; it is our intention only to provide an improved system for the future and not to undo that which, however inaptly, has already taken place.

4.45 The broad classification we have given is that interests which are overreached on a sale should, in registered conveyancing, find protection only through the restriction. This means that certain of the less frequently encountered land charges have to fall within this group. These include a land charge of Class C(iii)⁷⁰ and

⁶⁴[1972] Ch. 652.

⁶⁵In fact, this is potentially the position at present. It seems most probable that someone, against whom there is a judgment debt and charging order, will already have raised money on the security of a mortgage. Where the charge is a registered charge the land certificate will be on deposit in the Land Registry and, theoretically, a notice may be entered in respect of a subsequent charging order. It is not however clear how often this happens because, as an equitable charge, there is no certain way of finding out in advance of application if the land certificate is on deposit.

⁶⁶Following Form 75 in Sched. to the Rules.

⁶⁷*City of London B.S. v. Flegg* [1986] 2 W.L.R. 616 (petition for leave to appeal allowed).

⁶⁸See L.P.A. 1925, s. 2. This form of protection is already directed in the case of settled land: s. 86(3) and r. 56.

⁶⁹This is so even though someone claiming the benefit of a charging order against a beneficial interest is at one further remove from the legal estate than the beneficiary himself. A helpful precedent for protecting equitable derivative rights against the legal title is to be found in *Barrett v. Hilton Developments Ltd.* [1975] Ch. 237.

⁷⁰Land Charges Act 1972, s. 2(4):

A Class C land charge is any of the following (not being a local land charge) namely —

- (i) a puisne mortgage;
- (ii) a limited owner's charge;
- (iii) a general equitable charge;
- (iv) an estate contract;

and for this purpose—

- (i) a puisne mortgage is a legal mortgage which is not protected by a deposit of documents relating to the legal estate affected;
- (ii) a limited owner's charge is an equitable charge acquired by a tenant for life or statutory owner under the Inheritance Tax Act 1984 or under any other statute by reason of the discharge by him of any inheritance tax or other liabilities and to which special priority is given by the statute;
- (iii) a general equitable charge is any equitable charge which—
 - (a) is not secured by a deposit of documents relating to the legal estate affected; and
 - (b) does not arise or affect an interest arising under a trust for sale or a settlement; and
 - (c) is not a charge given by way of indemnity against rents equitably apportioned or charged exclusively on land in exoneration of other land and against the breach or non-observance of covenants or conditions; and
 - (d) is not included in any other class of land charge;
- (iv) an estate contract is a contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption or any other like right.

Class E⁷¹ and also an annuity.⁷² All of these are overreachable interests by virtue of section 2(3)(v) of the Law of Property Act 1925.⁷³ We *recommend* their protection by restriction only.

4.46 In paragraphs 4.27 to 4.28 above we set out briefly the way the caution machinery operates. Given the proposal that the caution should be a true alternative to the notice we consider that the machinery requires one consequential alteration. The benefit of a caution is not assignable.⁷⁴ However, a caution gives notice, in the manner we have described, of an interest and it ought to perform this function, subject to any challenge to its status, with as near as possible the same legal efficacy as a notice or indeed a land charge. A notice or land charge gives notice of the interest for all time, and if the interest is assigned, it still stands protected by the entry. So it should be with the caution. At present, if the interest protected by a caution is assigned, the only way of ensuring that any warning off notice is sent to the assignee is to withdraw the original caution and to apply to register a fresh one in the assignee's name. This is clumsy, but it is all the more unacceptable because if a dealing has been lodged for registration between the moment the interest is assigned and the moment the fresh caution is requested, it may defeat an assignee's rights as the warning off notice in respect of the pending dealing will go to the former and now uninterested cautioner.

4.47 We accordingly *recommend* that it should be possible to apply simply to substitute for the name and address of the cautioner shown in the register the name and address of an assignee without the need to withdraw and re-enter the caution itself. There are two further aspects of technicality. First, an application for substitution will have to be accompanied either by evidence of the assignment of the interest protected or some sort of authority from the cautioner authorising it. This simply follows from the fact that title to the interest devolves off the register and, to guard against fraud, should therefore be produced. Secondly, we *recommend* appropriate extension of this procedure for substitution to cases where the protected interest is assigned as to part only of the land.

Restrictions

4.48 The dual nature of a restriction was pointed out in paragraph 4.29. Given that the registered proprietor's consent is always necessary, a restriction prohibiting dispositions without the consent of the restrictioner may be entered in respect of any matter, whether it relates to the land or not, provided only that it is not unreasonable or calculated to cause inconvenience.⁷⁵

4.49 Other than for the special case of floating charges⁷⁶ we do not think that the features of the restriction mentioned in paragraph 4.29 above make it suitable as a general method of protection of third party interests. However, we doubt whether there is much to be gained by providing any absolute prohibition of such use. With one exception, we consider that the restriction should be available only where both the registered proprietor and applicant agree that a restriction should be applied for, rather than the more usual notice. There seems no reason to interfere unduly with people's freedom of action, and if it is desired to protect something which may not be or may only later become a property right (for example a right of pre-emption)⁷⁷ by restriction (as an alternative to protection by notice), then there should be no bar on the parties arranging for its entry.

⁷¹*Ibid.*, s. 2(6). A class E land charge is an annuity created before 1 January 1926 and not registered in the register of annuities.

⁷²*Ibid.*, s. 1(1)(e) and Sched. I.

⁷³The reason for their being overreachable is the fact that they can all be satisfied out of the proceeds of sale.

⁷⁴Ruoff and Roper 5th ed., (1986), p. 824.

⁷⁵See s. 58(2).

⁷⁶See paras. 4.87–4.93 below.

⁷⁷See *Pritchard v. Briggs* [1980] Ch.338. A right of pre-emption is expressly registrable as a land charge (Land Charges Act 1972, s. 2(4)(iv)) the moment it is granted. Registered land adopts the land charge position (s. 59). Nevertheless the case cited holds that it does not become an interest in land until a later moment.

4.50 The one exception referred to is the role, already briefly mentioned, of the restriction in relation to trusts. It is a cardinal feature of the 1925 legislation that interests arising under trusts should not appear on the legal title.⁷⁸

4.51 In the case of settled land, since the legal estate is as a rule vested in the tenant for life, he or she is the registered proprietor of any title comprised in the trust assets. In the case of land held on trust for sale, or otherwise by trustees, the trustees and not the beneficiaries hold the legal estate and are registered as proprietors.⁷⁹ In all these circumstances, it is essential to indicate on the register that the proprietors' powers are limited. The limitation may be that capital money must be paid to at least two persons or a trust corporation, or that consents are required before the proprietors can deal with the legal estate. Whatever the limitations, a restriction is the appropriate way and, in our view, should in the field of minor interests be the only way of indicating the fact that such proprietors have limited powers.

4.52 Where beneficial interests under a trust are actually or potentially overreachable, it does not seem to us appropriate that they should be protected on the register by notice or caution. It is consistent with the treatment given to rights under trusts elsewhere in the Act⁸⁰ to say that such a beneficiary's rights should be protected by a restriction only. Indeed, the Act itself contemplates that there should always be a restriction where land is held on trust for sale for tenants in common, and the standard advice⁸¹ where the joint tenancy is severed in equity, is to apply forthwith for the entry of a restriction. Accordingly, we *recommend* that it should be made clear that a restriction is the only form of protection available for these interests.

4.53 There is one change necessitated by this proposal: in order to register a restriction, the consent of the registered proprietor and the production of the land certificate is required. Normally this will not be a problem, since it is obviously the duty of trustees to apply for appropriate restrictions to be entered. However, there may be cases where the land is held by a sole trustee who disputes a beneficiary's claim;⁸² or where an equitable joint tenancy is severed without reference to the trustees. We have considered whether it would be right to enable a restriction to be entered in such cases without production of the land certificate. Precedents for this proposal were contained in clause 24 of the Bill which accompanied our Third Report on Family Property⁸³ in relation to a wife's rights in the matrimonial home. Those rights were to be capable of protection by restriction and the land certificate was not to have been produced on application by the wife for a restriction.

4.54 We think that this principle could be applied generally in favour of any beneficiary (not merely in the matrimonial context) so that any beneficiary under a trust should have the right to apply for an appropriate restriction and the entry of such a restriction would no longer depend upon the registered proprietor producing the land certificate. Thus, where joint proprietors are registered without a restriction and the joint tenancy is subsequently severed, a beneficiary will be now able to apply *ex parte* for the entry of the appropriate restriction. However, the question of whether there is a beneficial interest to protect or not may be disputed. As with notices and cautions, therefore, it is necessary to make provision for the case where the restriction is applied for without the certificate and the interest is not accepted by the proprietor. We consider that this situation is best met by the Land Registry being required to serve notice of such an application for a restriction on the proprietor or proprietors. As with the caution, whether the matter is disputed or not can be tested at this point and if necessary referred into court.⁸⁴

4.55 Furthermore, we *recommend* that the power to enter a restriction without the proprietor's consent should be extended to all cases where it appears to the Registrar that the proprietor's powers of disposition are limited by reason of his holding on trust for sale.

⁷⁸See s. 74:

Notice of trust not to affect registered dealing

74. Subject to the provisions of this Act as to settled land, neither the registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express, implied or constructive, and reference to trusts shall, so far as possible, be excluded from the register.

⁷⁹s. 94.

⁸⁰s. 86(3) and (4).

⁸¹Ruoff and Roper 5th ed., (1986), pp. 444.

⁸²*Elias v. Mitchell* [1972] Ch. 652.

⁸³Matrimonial Homes (Co-ownership) Bill appended to (1978) Law Com. No. 86.

⁸⁴See r. 298.

It is unsatisfactory that a proprietor may refuse the entry of a restriction, to the detriment of third parties. It is also unsatisfactory that section 58(3) should provide only a partial solution to registered proprietors being required to work the overreaching machinery if they are to pass an unincumbered title. It is to be noted that the proposed power would be exercisable only on the Registrar's motion.

4.56 Entry of the normal trustees for sale restriction, while calling attention to the existence of beneficial interests, does not prevent disposal of the property and should not have the effect of unduly delaying conveyancing transactions. In the case of a sole registered proprietor who is a bare trustee (as opposed to a trustee for sale), that restriction would be inappropriate, since generally such a trustee would hold the property on trust only to convey as directed by the beneficiary. In such a case, therefore, the beneficiary should be able to apply for a restriction preventing dispositions without his or her consent, again without production of the certificate, though if the certificate is available it will no doubt be produced. As before, the Land Registry will be bound to serve notice of the application on the registered proprietor; there will therefore be an opportunity to lodge the certificate or to contest the entry of the restriction if need be.

Inhibitions

4.57 We have not hitherto discussed the inhibition because most cases can, we believe, be provided for by use of the other three methods. We have been told that the inhibition is rarely encountered in practice, other than the bankruptcy inhibition provided for by section 61. That it can operate to protect a minor interest in much the same way as a restriction does, seems clear. Nevertheless, given the particular role we have given the restriction, we do not consider the inhibition should be merged with it.

4.58 Furthermore, we consider that the inhibition is potentially useful as a means of protecting Mareva (or similar) injunctions on the register. At present the effectiveness of a Mareva injunction against registered land depends on the purchaser (broadly construed) having notice of the existence of the injunction. It has also been established that anyone who, with knowledge of the order, knowingly assists in a breach is guilty of contempt of court.⁸⁵ It has been put to us that the Registrar or an officer in the Land Registry might find himself in contempt if, having been told of the injunction, he permitted the registration of a disposition of the defendant's land in favour of a third party. This puts a Mareva injunction for all practical purposes in the position of an entry in the register of the title restraining dispositions; but no provision has been made for its entry. This amounts to an unfortunate lacuna in the reliability of the register. In these circumstances, the Mareva injunction becomes a candidate for some sort of entry in the register. Of the existing methods of protection, we feel the inhibition is fundamentally appropriate and, with some minor amendments, could usefully be applied to protect Mareva injunctions. As for contempt it may be suggested that any officer of the Land Registry could not be liable having regard to section 131 as follows:

131. The Chief Land Registrar shall not, nor shall a registrar or assistant registrar nor any person acting under the authority of the Chief Land Registrar or a registrar or assistant registrar, or under any order or general rule made in pursuance of this Act, be liable to any action or proceeding for or in respect of any act or matter done or omitted to be done in good faith in the exercise or supposed exercise of the powers of this Act, or any order or general rule made in pursuance of this Act.

4.59 The required amendment would be to section 57 of the Land Registration Act 1925, to make it clear that the phrase "upon the application of any person interested" should include the injunctor and not just persons who have an *interest in* land (since of course the injunctor does not).

4.60 Mareva injunctions can be drawn in terms of a general restraint against dealing with the defendant's property. To protect an injunction in such terms could, we believe, be administratively inconvenient for the Land Registry. It would involve them in the task of finding out which properties the defendant owns and entering an inhibition on the register of each. The index of proprietor's names is not sufficiently complete to yield this information in all cases.⁸⁶ We feel that it should be for the inhibitor to specify in his application to the court and possibly by way of title number, each title he seeks to inhibit.

⁸⁵*Z Ltd. v. A* [1982] Q.B. 558 dealing with the position of the clearing banks.

⁸⁶See r. 9(1) (corporate proprietors of land not shown prior to 1972).

Regarding any unspecified and therefore uninhibited registered land, the effectiveness of the injunction would then depend, as at present, on whether or not the purchaser has notice. This amounts to an imperfection in the cover supplied by an inhibition which can only be cured with time. Nevertheless, Mareva injunctions have, and are intended to have, very far-reaching consequences, and we consider it right that even with imperfections they should have an established place in registered land.

4.61 Apart from this, the inhibition is also potentially a useful addition to the powers of the court at an interlocutory (or final) stage of legal proceedings concerning registered land or a registered charge or charges. We *recommend* the continued existence of the inhibition.

5. The creation and protection of mortgages and charges

4.62 In paragraphs 4.20 to 4.61, we considered the protection of minor interests excluding mortgages and charges; now we consider the protection of mortgages and charges exclusively. It has already been pointed out⁸⁷ that mortgages and charges may, until registration, be minor interests. However, their nature and status is not quite so simply or briefly described, and hence it is necessary to deal with them as a subject in their own right. We start by setting out the different types of mortgage and charge and how they are protected in registered land. We then propose some improvements to the present wide choice of protection. Finally we discuss a particular type of equitable charge: the floating charge.

4.63 The working paper pointed out that much of the complexity of the law and practice of the creation of mortgages and charges stemmed from an apparent desire to preserve in the registered system every method of charging land that was available in the unregistered system. However, we do not intend to embark upon a review of the present law of mortgages here: our analysis is confined to the various methods of protecting such mortgages of registered land. First, it may be helpful to recall very briefly the different types of legal and equitable mortgage and charge.

Legal mortgage

4.64 A legal mortgage is a conveyance of land by way of security for a debt by the owner of a legal estate in the land. Nowadays, a mortgage of freehold land takes effect under section 85 of the Law of Property Act 1925, either as a demise for a term of three thousand years, subject to a proviso for cesser on redemption, or a charge by deed expressed to be by way of legal mortgage.⁸⁸

Equitable mortgage

4.65 There are three different sorts of equitable mortgage.

- (a) A "legal" mortgage which is deficient in some formality as to its creation. Although such a mortgage cannot be legal, it may still take effect as a contract to create a legal mortgage and, by reason of the rule in *Walsh v. Lonsdale*,⁸⁹ it gives the mortgagee an equitable interest in the land.⁹⁰ A different route to the same result is the creation of an equitable lien.⁹¹ Thus, where there is no purported charge, but simply a deposit of the title deeds or land or charge certificate (sometimes accompanied by a memorandum under seal)⁹² with the mortgagee in return for the advance, an agreement for a mortgage is inferred and, relying on the doctrine of part performance,⁹³ is enforceable in equity. We shall refer to these as "informal mortgages".
- (b) A mortgage of an equitable interest, such as the interest of a tenant in common under a trust for sale or rights under an estate contract. These are necessarily equitable mortgages whatever form they take. We shall refer to these as "a mortgage of an equitable interest".

⁸⁷Para. 4.2 above.

⁸⁸Where leasehold land is mortgaged the mortgage takes effect as a sub-lease for the term of the lease less the last day thereof.

⁸⁹(1882) 21 Ch.D. 9.

⁹⁰*Parker v. Housefield* (1834) 2 My. & K. 419 at p. 420.

⁹¹See L.R.A. 1925, s. 66; para. 4.67 below.

⁹²The seal is important because without it the mortgagee cannot bring himself within s. 101 of L.P.A. 1925.

⁹³See *In re Wallis & Simmonds (Builders) Ltd* [1974] 1 W.L.R. 319 at p. 395 citing *Coote on Mortgages* 9th ed., (1927); see also L.P.A. 1925, s. 40(2).

- (c) Where an otherwise unexceptionable legal mortgage of registered land is entered into then, until it is registered as a registered charge under section 26 of the Act, it can only take effect in equity.⁹⁴ We shall refer to this as “an unregistered charge”.

Equitable charge

4.66 The juridical nature of a mortgage is that it is a conveyance of property to the creditor, subject to a right of redemption. A charge, by contrast, conveys nothing but merely gives the creditor certain rights in or over the property which may, usually following legal process,⁹⁵ approximate to the rights given to a mortgagee. It is not possible to create a charge at common law; a charge can only subsist in equity⁹⁶ or by virtue of statute, such as the charge expressed to be by way of legal mortgage.⁹⁷ One frequently encountered form of equitable charge is the rights given to a creditor by a charging order under the Charging Orders Act 1979, although an equitable charge may be created in other ways.⁹⁸ Somewhat confusingly, the Act refers throughout sections 25 to 36 to “charges”, where it is clear that what is being dealt with is what would be referred to in unregistered conveyancing as legal mortgages. In this report, we shall use the word “charge” in the Land Registration Act sense and the words “equitable charge” for the sense of the term in this paragraph.

4.67 The rules provide several specimen⁹⁹ forms for creating a legal charge of registered land but, in view of section 25(2) of the Act, none of these is mandatory. In practice, the prescribed forms are very rarely used, institutional lenders generally being keen to have their own standard form of charge adaptable to both registered and unregistered land with the minimum change. No form is prescribed for the creation of an equitable charge. Equitable charges of registered land take effect, it would seem, under section 101 of the Act. Informal mortgages are dealt with in part by section 107, in part section 66 where they are, again confusingly, called “liens”. Section 66 provides for comparable consequences in the case of the deposit of a land or charge certificate with the deposit of unregistered land title deeds. A mortgage of an equitable interest is created and takes effect outside the registered system.

Protection of charges and mortgages

(i) *Legal charges*

4.68 The approach to protection in the legislation is curious; charges are dispositions and require registration under section 26. It would thus be logical to expect separate registration, rather in the manner of a rentcharge, together with a note on the charged title by way of protection. But charges are excepted from the straightforward application of section 19. Instead, an entry is made in the charges register of the charged title, which, in the case of a registered charge, serves the dual purpose of being both the act of registration and the entry of notice. Protection for a registered charge therefore takes the form of registration.

(ii) *Informal mortgages*

4.69 These are land charges within section 2(4) of the Land Charges Act 1972 and may be protected¹⁰⁰ by notice under section 49(1), by any such other notice as may be prescribed¹⁰¹ or by a caution under section 54. Protection by notice of deposit¹⁰² or by restriction¹⁰³ is also available.

⁹⁴See *Grace Rymer Investments Ltd. v. Waite* [1958] Ch. 831; see also s. 106(4).

⁹⁵e.g. L.P.A. 1925, s. 90.

⁹⁶See Megarry and Wade 5th ed., (1984), p. 926.

⁹⁷L.P.A. 1925, ss. 85 and 86.

⁹⁸*Cradock v. Scottish Provident Institution* (1893) 69 L.T. 380.

⁹⁹r. 139; Forms 45, 46 and 47.

¹⁰⁰s. 106; as substituted by the Administration of Justice Act 1977, s. 26.

¹⁰¹No notice had been prescribed at the time of this report.

¹⁰²This is explained in para. 4.74 below.

¹⁰³As mentioned in para. 4.49 above

(iii) *Mortgages of an equitable interest*

4.70 A mortgage of an undivided share in registered land would seem, following *Elias v. Mitchell*,¹⁰⁴ to be capable of protection by a caution. A mortgage of a commercial equitable interest (such as the rights arising under an estate contract) is considered by the Land Registry to be a right which it is expedient to protect by notice within section 49(1)(f). Neither of these sorts of mortgage may be protected by a notice of deposit because the certificate will not normally be handed over and does not evidence title to the interest mortgaged.

(iv) *Unregistered charges*

4.71 As we have already mentioned,¹⁰⁵ these will constitute minor interests and may therefore be protected in accordance with our proposals in paragraph 4.38 onwards. Apart from this, they may be protected by any of the methods mentioned in section 106¹⁰⁶ or, if (because it is a first charge) the land certificate has been handed over, by notice of deposit. In addition, protection by restriction would seem to be available, if this were applied for by the registered proprietor or with his authority.¹⁰⁷

(v) *Equitable charges*

4.72 These may be protected by notice, caution or restriction (or less commonly inhibition) where the legal title is affected.¹⁰⁸ Where the equitable charge affects an interest under a trust, then protection may be by caution; where it affects a commercial equitable interest in land,¹⁰⁹ then notice under section 49(1)(f) is available. The information in paragraphs 4.64-4.72 may be shown in tabular form as opposite.

4.73 At this point, an explanation of the notice of deposit might be helpful. The notice of deposit is the creation of rules 239 to 244. It should not be considered apart from its close relation, the notice of intended deposit. Although section 66 does not refer to protection by way of notice of deposit, it follows from the wording of rule 239 that someone claiming under section 66 may avail themselves of protection by notice of deposit (or, where appropriate, intended deposit). This conclusion is reinforced by section 144(xi) which is expressly directed to those holding the certificate by way of security. In fact, as was pointed out in *Barclays Bank Ltd. v. Taylor*,¹¹⁰ a degree of protection is given simply by virtue of possession of the certificate.¹¹¹ However, entry of the notice obviates the possibility of the unscrupulous proprietor (or chargee) fraudulently asking for and obtaining a new certificate under section 67;¹¹² it may also be important for the preservation of priority.¹¹³

4.74 The notice of deposit is a hybrid because although it is termed a notice and is entered in the charges register, rule 239 states that it takes effect as a caution. The only distinction (apart from the name) between it and any other sort of caution is that, whereas any number of cautions may be registered against a title, all protecting different interests without the Registrar needing to set the "warning off" machinery in motion, application for a notice of deposit requires the Registrar to do just that. Given the very limited class of candidates eligible for notice of deposit, the reason for this is not easy to discern. The notice of intended deposit has precisely the same effect as the notice of deposit, except that it is lodged by the chargor at time of first registration or registration of a dealing in favour of the depositor.

4.75 Of the different forms of protection above mentioned, the important practical distinction between registration as a legal charge and any other sort of protection should be noted. The distinction is that a chargee or mortgagee has the full range of legal rights and remedies and priority only when the charge is registered substantively.¹¹⁴ Any other

¹⁰⁴[1972] Ch. 652.

¹⁰⁵Para. 4.2 above.

¹⁰⁶Viz. caution, notice or notice in specially prescribed form. See n. 101 above.

¹⁰⁷It seems to follow that s. 106 is not an exhaustive statement of the methods of protection. Cf. *Barclays Bank Ltd. v. Taylor* [1974] Ch. 137 on the old s. 106.

¹⁰⁸s. 101(3). Protection of a charging order by restriction will be unusual for the reasons discussed in paras. 4.42 and 4.43 above.

¹⁰⁹e.g. a protected estate contract.

¹¹⁰[1974] Ch. 137.

¹¹¹See s. 64.

¹¹²See r. 245.

¹¹³See *Barclays Bank Ltd v. Taylor* above.

¹¹⁴See s. 34.

Type of Mortgage	Method of creation	Choice of Protection/Registration					
		Registration	Notice of deposit	Notice	Caution	Restriction	Inhibition
LEGAL MORTGAGES [Para. 4.64]	Mortgage by demise	Yes. If not registered may be protected as an unregistered charge q.v.	*****	*****	*****	*****	*****
	Charge by way of legal mortgage						
EQUITABLE MORTGAGES [Para. 4.65]	Informal mortgage	No	Yes, where the certificate is handed over	Yes	Yes	Yes	Less commonly
	Mortgage of an equitable interest	No	No	Yes, if commercial equitable interest	Yes, if interest under trust	No, unless registered proprietor of legal estate affected by the equitable interest agrees	Less commonly
EQUITABLE CHARGES [Para. 4.66]	Unregistered charge	*****	Yes, if first charge	Yes	Yes	Yes	Less commonly
	Equitable charge on legal estate	No	No	Yes	Yes	Yes	Less commonly
	Equitable charge on equitable interest	No	No	Yes, if commercial equitable interest	Yes, if interest under trust	No, unless registered proprietor of legal estate affected by the equitable interest agrees	Less commonly

sort of protection merely ensures that the charge is not void against or postponed to a subsequent purchaser of the estate affected.¹¹⁵

4.76 That being the position, it seems to us that there are two considerations which should be addressed. First, is it really necessary to have such a great variety of different forms of protection (other than registration) for mortgages and charges generally? Secondly, might not the possibility of registering a legal charge be extended, with advantage to other types of mortgages? Taking the second question first, there is one improvement that strikes us immediately. Where in unregistered land an equitable mortgage by deed is taken, then, if the mortgagee is to have the power of sale given by section 101 of the Law of Property Act 1925, there must for entirely technical reasons also be a power of attorney or declaration of trust in favour of the mortgagee.¹¹⁶ However, with registered land even these technical devices do not have the effect of conferring on the informal mortgagee by deed the normal power of sale.¹¹⁷ Informal mortgages accompanied by a memorandum under seal are a fairly common form of security, and we consider that the obvious solution to this problem is that such mortgages should be capable of substantive registration as a charge and we *recommend*. Furthermore, as the power of attorney and declaration of trust are wholly technical devices, we *recommend* that they should not be a condition of registration. This improvement in the law relating to the powers of informal mortgagees of registered land will bring a much needed simplification to conveyancing, particularly in the commercial field. The necessity to "bolster" the powers of informal mortgagees with devices such as those mentioned should cease.

4.77 We have already described how the procedure for substantive registration of a charge operates, and our intention is that informal mortgages by deed should be accommodated within this with as little change as possible. It follows, therefore, that if the certificate is outstanding it will have to be deposited with the Land Registry when registration is requested. Generally, this will be where the informal mortgage by deed is to take effect as a first charge against the land or charge.¹¹⁸

4.78 The above proposal is not intended to prejudice the existing position of an informal mortgagee by deed; subject to what is said below, such mortgagees may continue to protect themselves by any method currently available to them. Section 66 will accordingly for the future remain relevant only to a deposit of the certificate by way of security unaccompanied by any document under seal. Again, as to these, there is no intention to prejudice their position.¹¹⁹

4.79 Another important distinction should be noted. We understand that some lenders are content with an unregistered legal charge which they then protect by one of the methods mentioned.¹²⁰ This arrangement is satisfactory, provided the borrower does not default on the loan; but, if this happens, the lender must then register the charge if he is to avail himself of any proprietary remedy.¹²¹ We intend no change to this state of affairs: we simply wish to admit other candidates to the category of registrable legal charges and these candidates, like legal charges themselves, may be registered or not as desired.

4.80 As to the first question raised in paragraph 4.76, we were pressed in the response to the working paper with the view that the commercial practice of the banks and building societies had adapted itself to the procedural quirks in the different forms of protection and that any disturbance risks causing more upheaval than it would be worth. We are sympathetic to this view, but we do not believe that it should prohibit simple and obvious reforms, particularly at a time when ways of simplifying the process of buying and selling land generally are being sought.¹²²

¹¹⁵See para. 4.15 for the meaning we intend for "purchasers".

¹¹⁶This is needed because an equitable mortgage by deed does not, it is thought, extend to the legal estate and the power of sale is in consequence limited (but *contra* Lord Denning in *Re White Rose Cottage* [1965] Ch. 940 at p. 951). These devices are a means of giving the mortgagee power over the legal estate.

¹¹⁷[1965] Ch. 940 at pp. 949 and 955.

¹¹⁸We deal with the case where the first charge is protected by notice of deposit, and the first chargee will not lodge the certificate to permit registration of an inferior charge, below at para. 4.82.

¹¹⁹But see further para. 4.81 below.

¹²⁰See para. 4.71.

¹²¹We make no comment on any difficulties there may be with priority over intervening incumbrances where late registration takes place.

¹²²See Second Report of the Government's Conveyancing Committee (1985); also "Simplifying House Buying" (1985), Department of the Environment.

4.81 In approaching this question, we think it helpful to recall the classification of the methods of protection proposed in paragraph 4.38 onwards of this Part of this report. This provided that the choice of method was to be dictated by whether the registered proprietor acknowledged the interest to be protected or not. Applying this to the protection of charges still leaves two methods of protection available when, as is most often the case, the charge is acknowledged: the notice and the notice of deposit. We consider that the notice of deposit is foreign to the classification of methods of protection we have given. It is anomalous in that it is called a notice but operates as a caution. It does nothing that we have been able to discern—except trigger the “warning off” of a prior caution and neither the value nor the purpose of this is clear to us—that a notice does not or could not do equally well. We therefore *recommend* that protection by notice of deposit should cease to be available. Similar reasoning applies to the notice of intended deposit. We understand that the notice of intended deposit was designed to meet the case where there was no certificate to be deposited, either because it had not yet been prepared or because it was not yet in the name of the depositor.¹²³ Yet a legal charge of the land is often entered into by the purchaser before he is registered as proprietor (and therefore before he obtains the legal title) without apparent difficulty. So it ought to be with a deposit of a certificate. This change will involve a deposit under section 66 being achieved by a request to enter a notice and a direction to the Land Registry to send the certificate to the proposed depositor. In practice, where the same solicitor or other agent is acting for both proprietor and depositor, the request for the entry of notice will achieve the section 66 deposit. In consequence of this, we *recommend* the abolition of the notice of intended deposit.

4.82 Protection of mortgages and charges of whatever sort which affect the legal title will therefore be achieved either by notice or by caution, according to whether the mortgage or charge is acknowledged by the proprietor.¹²⁴ We would qualify this in one respect. Where an unregistered charge or an informal mortgage is protected against a title otherwise free from incumbrances simply by a notice or a notice of deposit, this will mean that the land certificate is with such mortgagee or chargee. If the creation of a second mortgage or charge is later desired, then, although the registered proprietor accepts that it may be protected by notice, the production of the land certificate to the Land Registry is not a matter within his control. A second mortgagee might exceptionally therefore be constrained to protect by caution when his interest was not disputed. We therefore *recommend* that in this one instance a notice should be available, even though the land certificate is outstanding. It should be noticed that in the above example, were the first charge a registered charge, there would be no difficulty in protecting a second charge by notice without production of the charge certificate.

4.83 So far we have mentioned the protection of mortgages and charges affecting the legal title. These include informal mortgages, unregistered charges and some equitable charges. We now turn to mortgages affecting equitable interests. These include mortgages of an equitable interest and equitable charges. Consistently with what we said in paragraphs 4.20 to 4.61, we consider that these sorts of mortgage should be capable of protection only by a restriction. We deal first with a mortgage of an equitable interest under a trust. It is now clear that a mortgage by an equitable joint tenant of his interest operates to sever the joint tenancy.¹²⁵ The proper restriction to be entered is therefore the restriction in Form 62 of the Rules.¹²⁶ Similarly with the equitable interest of the tenant for life or remainderman interested in settled land—although adequate restrictions may already have been entered on registration of the tenant for life as proprietor.¹²⁷ Where land is held on a bare trust, then the proper restriction, in addition to any already entered, would appear to be one prohibiting all dispositions without the consent of the mortgagee.

4.84 Equitable mortgages of commercial equitable interests¹²⁸ do not in strictness require protection on the register because they are at one remove from the legal estate affected. It follows that any question of choice of protection by reference to whether the registered proprietor accepts the interest or not is unreal. We need therefore say nothing further about them.

¹²³See Ruoff and Roper 5th ed., (1986), pp. 625-6.

¹²⁴See para. 4.38 above.

¹²⁵*First National Securities Ltd. v. Hegerty* [1984] 1 All E.R. 139.

¹²⁶See r. 213.

¹²⁷See s. 86.

¹²⁸e.g. estate contracts.

4.85 Equitable charges¹²⁹ may affect equitable interests. Again, we see no reason not to apply the principle we have given; thus, equitable charges of interests under trusts should be capable of protection by the appropriate restriction only. An equitable charge of a commercial equitable interest, as with an equitable mortgage of such an interest, requires no protection against the legal title and we need say no more about them.

4.86 Those are our proposals regarding the protection of mortgages and charges. We think that they provide a more logical and ordered system of classification and protection than exists at present. This will constitute a needed administrative simplification.¹³⁰ We now turn to look at floating charges.

Floating charges

4.87 So far all that has been said applies whether the mortgage or charge has been created by a corporation or an individual. However, floating charges (which in practice are only entered into by corporations) are an important form of commercial security and cannot be readily accommodated by any of the means previously mentioned.¹³¹ The floating charge confers an immediate equitable charge over the whole of a company's undertaking¹³² although it does not attach to any asset in specie until crystallisation. Crystallisation may take place either following action taken by the creditor under, or automatically on the occurrence of an event specified in, the floating charge.¹³³ Crystallisation will also follow as a matter of law if, broadly speaking, the company's powers of management over its assets cease to be exercised or exercisable.¹³⁴ An analysis therefore of the floating chargee's protection in terms of whether the registered proprietor of land thereby affected consents or not is of limited value in the present context.

4.88 An additional feature of floating charges is that they must be registered in the register kept under section 401 of the Companies Act 1985. Failure to do so renders the floating charge void against the liquidator and any creditor of the company. Where the floating charge also affects registered land¹³⁵ section 60 of the 1925 Act seems to point to the need for the floating charge to be entered on the register of title where the company's acquisition of the land entails first registration; but not where the company acquires land (or a charge) already registered.¹³⁶

4.89 This position can cause difficulties. Where registered land is transferred to a company which has granted a floating charge over its undertaking, then it follows that the floating charge takes effect as some sort of incumbrance outside the register; it bears in this respect a similarity to an overriding interest without, however, being listed as one. Even less clear is the position where a floating charge is not, for whatever reason, entered on the register of title when the company is registered as first proprietor of the land. May a purchaser of the land legitimately draw the inference that absence of an entry in the register of title indicates that the land is free from the floating charge even though he may know of it through inspection of the section 401 register? We find the distinction in treatment of floating charges depending, as it does, on whether the land is already registered or the land is being registered for the first time an illogical one.¹³⁷ It is all the more unacceptable because the distinction is often not ascertainable from the face of the register.

4.90 It is helpful to recall the fundamental purpose of each register. The Companies Act register is primarily concerned to make a statement concerning the company's financial

¹²⁹Charging orders have already been discussed in paras. 4.42 and 4.43 above.

¹³⁰It is thought that our recommendation will affect only the type and not the amount of work carried out by the Land Registry officials and so an increase in manpower or resources will not be necessary.

¹³¹This report does not express any view on whether floating charges are an acceptable form of security in modern commercial conveyancing practice: it simply discusses improvements to machinery.

¹³²*The Governments Stock and Other Securities Investment Co. Ltd. v. The Manila Railway Co. Ltd. and others* [1897] A.C. 81; *Evans v. Rival Granite Quarries Ltd.* [1910] 2 K.B. 979; but see W.J. Gough, *Company Charges* (1978) at p. 196 arguing that it is a "personal equity".

¹³³*Re Brightlife Ltd.* [1986] 3 All E.R. 673.

¹³⁴The different possibilities are more fully discussed in R.M. Goode, *Legal Problems of Credit and Security* (1982), p. 34.

¹³⁵More commonly, of course, a creditor will take a fixed charge over the land. But where there is a turnover of land as part of a company's stock in trade, the floating charge may be the more convenient device.

¹³⁶The requirement is inferred from the elliptical reference in s. 60 to the Registrar not being concerned with charges registered under the Companies Act 1985 where registered land is involved.

¹³⁷Presumably all registered leases and sub-leases granted to companies as tenants require the entry of any floating charges but not subsequent assignments thereof: *sed quaere*.

status to, most often, a prospective creditor. The register of title is concerned to record authoritatively the status of the title to the land including priorities between chargees in order to facilitate the transfer of land. To this end a procedure for searching the register of title and obtaining a period of priority for most transactions exists.¹³⁸ How is the floating charge to be fitted into this structure?

4.91 We think it clear that at all points of its life the floating charge is relevant to the financial standing of the company and that therefore its appearance in the Companies Act register seems both sensible and correct. We do not think it right, however, simply to stop there and rely on Companies Act registration as sufficient for all land registration purposes.¹³⁹ Attention has already been drawn to the land registration search procedure for which no equivalent exists at Companies House. Elsewhere,¹⁴⁰ we hope we have convincingly shown that a register of title that is incomplete as respects an important class of incumbrance is to be considered deficient—particularly where the Companies Act register is not itself completely conclusive of the matter either.¹⁴¹

4.92 As far as the register of title is concerned, the practical distinction between a floating charge that has crystallised and one that has not can be drawn:

- (i) *Pre-crystallisation*: The characteristics of the floating charge prior to crystallisation have already been noticed.¹⁴² Recalling the purpose of the land register and conscious of the additional work for all concerned which requiring entry of all floating charges in the register of title would generate, we would lean against registration in two places unless it is absolutely necessary. Applying this, the only aspect of a floating charge prior to crystallisation which requires entry in the register of title is any clause in the instrument of charge restricting or excluding the company's freedom to create any fixed charges ranking in priority to or *pari passu* with the floating charge (often referred to as "a negative pledge clause"). There are two reasons for this. First, although there is no direct authority on the status of the negative pledge clause, it has been suggested that it amounts to an equity binding subsequent chargees with notice of it.¹⁴³ This view is convincing and the unacceptable consequences of leaving matters as they stand¹⁴⁴ lead us to recommend that provision is made for notice of the negative pledge clause to be given exclusively, as far as registered land is concerned, by the entry of a restriction; we envisage that the restriction would take the form of permitting registration of subsequent charges or other prohibited transactions only with the consent of the floating chargee. Secondly, it is understood to be the ordinary practice of the Land Registry to reflect any limits to the registered proprietor's powers of disposition, however arising, by entry of a restriction in the register. The proposal draws support from this.
- (ii) *Post-crystallisation*: The floating charge takes effect as a fixed equitable charge of the assets affected by it. In this capacity, it is no different from any other equitable charge of land;¹⁴⁵ the case for requiring its entry in the register on pain of invalidity against a purchaser is overwhelming and we so *recommend*.

4.93 There are a number of practical consequences of the proposal that has been made and these are listed below:

- (i) We see as an important benefit of the proposal the fact that the land register will now be conclusive of the practical effect in the context of title to land of a floating charge. If there is no restriction fettering a proprietor's powers, then subsequent potential mortgagees may accept the security offered safe in the knowledge that

¹³⁸See Land Registration (Official Searches) Rules 1986 (S.I. 1986/1536).

¹³⁹Cf. Land Charges Act 1972, s. 3(7).

¹⁴⁰Part II of this Report.

¹⁴¹This refers to the unsuitability of the Companies Act register as a means of giving notice of any equities in the floating charge. See further *Pennington's Company Law* 5th ed., (1985) p. 485.

¹⁴²Para 4.87 above. There is no shortage of authority emphasising the limited rights of the floating chargee prior to crystallisation: *Evans v. Rival Granite Quarries Ltd.* [1910] 2 K.B. 979, *Re Yorkshire Woolcombers Association Ltd.* [1903] 2 Ch. 284, C.A., *Biggerstaff v. Rowatt's Wharf Ltd.* [1896] 2 Ch. 93.

¹⁴³*English & Scottish Mercantile Investment Co. Ltd. v. Brunton* [1892] 2 Q.B. 700; see also Goode, *op. cit.*, p. 49 and J. Farrar writing in (1980) 1 Co. Law. 83 at p. 86.

¹⁴⁴See n. 141 above.

¹⁴⁵e.g. a charging order made under Charging Orders Act 1979, s. 1; see *ibid.*, s. 3(4).

this will be unaffected¹⁴⁶ by incumbrances appearing either from the Companies Act register¹⁴⁷ or elsewhere. Similarly, a floating chargee will now have at his disposal a guaranteed means of protecting his pre-crystallisation rights and of controlling the priority of subsequent charges.

- (ii) As for the floating chargee's other piece of protection, the certificate of non-crystallisation, we think this should be conserved.¹⁴⁸ When entry of the restriction is requested or made (as explained in (iii) below) then in addition to reflecting the company's limited powers of disposition, it ought further to recite that no disposition is to be registered without production of the usual certificate of non-crystallisation.¹⁴⁹
- (iii) It follows that, on any registration of a company as a proprietor of land or a charge, negative pledge clauses and floating charges will have to be investigated. The practical and only solution appears to be to require the applicant company to disclose at the time of application whether either of these matters is relevant.¹⁵⁰ Where disclosure does not take place, then on ordinary principles rectification of the register and indemnity will become available. In practice and having regard to what has been said earlier,¹⁵¹ this would appear to amount to indemnifying a subsequent mortgagee in respect of the diminution in value of his security, were he ever to need to enforce it.¹⁵² A case where a company grants a floating charge during the currency of its registered proprietorship (and unusually does not enter into a fixed charge of the land) appears no different from the creation of any other incumbrance which requires protection—in this case by restriction—and requires no further comment. No doubt floating chargees will take a covenant in the charge from the company that it will assist in perfecting the chargee's title by lodging any certificates that are needed for the entry of the restriction.¹⁵³
- (iv) We do not feel that the proposal will generate additional work for the Land Registry. True, entries will have to be made in the register where previously they did not, but we envisage the restriction taking a more or less standard form as we understand most negative pledge clauses do. It will not therefore be necessary to make lengthy individual entries by way of notice in the charges register as happens at present. Furthermore, attention has already been drawn¹⁵⁴ to the procedure of agreeing a form of entry with the Land Registry in advance.
- (v) Brief mention must be made of the floating charge that has crystallised. It is axiomatic that crystallisation does not operate with retrospective effect: any other formulation would be contrary to the fundamental object of the floating charge in permitting the company complete freedom to trade.¹⁵⁵ In this situation the immediate practical protection given to the chargee is that the certificate of non-crystallisation can no longer be given. Nevertheless, a greater degree of protection will be afforded by protection in the register of the equitable assignment by way of charge caused by crystallisation¹⁵⁶ in accordance with the scheme mentioned in paragraph 4.82.

¹⁴⁶Or, if affected, it will be through rectification of the register with the consequent possibility of indemnity; this is discussed in para. 4.92(iii).

¹⁴⁷It may of course still be necessary to search this register for other reasons e.g. the company having been struck off the register of companies for not having filed annual returns: Companies Act 1985, s. 652.

¹⁴⁸Despite criticism of the procedure as inappropriate (see e.g. (1976) 40 Conv. (N. S.) 397) it appears to work without difficulty in practice.

¹⁴⁹An analogous form of restriction was, we understand, formerly used to ensure that in cases where a limited company was registered as proprietor of land, a disposition by it was in accord with its Memorandum and Articles.

¹⁵⁰For companies regularly transacting in land, we understand there is a procedure by which the automatic entry of floating charges on registration of the company as first proprietor is agreed with the Land Registry. We would express the hope that this procedure could be adopted for the administration of the proposal.

¹⁵¹Part III of this report.

¹⁵²There would be the usual rights of recourse against the company; see para. 3.33 above.

¹⁵³Cp. Pennington, *op. cit.*, at p. 544.

¹⁵⁴n.150 above.

¹⁵⁵See *Evans v. Rival Granite Quarries Ltd.* [1910] 2 K.B. 979; *Hamer v. London City and Midland Bank Ltd.* (1918) 87 L.J.K.B. 973. It has been held in Australia that a floating charge does not relate back, on crystallisation, to the commencement of the winding-up: *Stein v. Saywell* [1969] A.L.R. 481 (High Court of Australia).

¹⁵⁶See *Rother Iron Works Ltd v. Canterbury Precision Engineers Ltd.* [1974] Q.B. 1.

- (vi) Finally, it should be noted that these proposed changes will apply prospectively only. This position is adopted with regret but we recognise that to require all existing floating charge registrations to be altered and many other floating charges to be entered for the first time would be an unacceptably large burden to impose.

6. Priority of minor interests and mortgages and charges

4.94 Hitherto, we have discussed the need to protect minor interests and mortgages and charges against the possibility of a purchaser claiming under a registered disposition. A slightly different way of putting that proposition would be to say that a protected minor interest or mortgage or charge has priority over a subsequent registered disposition. Now we discuss the priority of such minor interests inter se. First, we mention the leading case of *Barclays Bank Ltd. v. Taylor*,¹⁵⁷ then we state the scheme of priorities we propose for registered land and consider some possible objections to the new scheme.

4.95 In *Barclays Bank v. Taylor*, the Duxburys deposited their land certificate with the bank to secure an overdraft on their joint account and on the trading account of Mr. Duxbury. The bank protected the deposit by registering a notice of deposit. The deposit of a certificate was accompanied by a memorandum under hand. Later the financial arrangements changed and the Duxburys guaranteed the indebtedness of their own company which had taken over the trading liabilities of Mr. Duxbury. They also executed a legal charge in favour of the bank which the bank took no steps either to register or to protect. Some time after this, the Duxburys entered into a contract to sell the property to the Taylors who, having paid the purchase price, protected their contract by entry of a caution. In deciding that the bank was entitled to be registered as proprietor of the legal charge free from the rights of the cautioners, the Court of Appeal held that the unregistered charge took effect in equity, and that there was nothing in the Land Registration Acts which upset the established rule that equitable interests rank for priority in order of creation. Accordingly, since the Taylors had nothing more than an equitable interest under the contract, the bank was entitled to be registered as chargee free from their rights. It follows from this decision that, subject to loss of priority through misconduct,¹⁵⁸ the priority of minor interests inter se is governed by the temporal sequence of their creation and not by their date of registration.

4.96 It has been argued¹⁵⁹ that *Barclays Bank v. Taylor* is authority for the priority effect of a caution only and that the case says nothing about notices which do, on the true construction of section 52, have a priority effect. The proponent of this argument then proceeds to point out the unsatisfactory consequences of the legislation being in this state. We did not take this view in the working paper, and we still consider that the argument relies on a rather strained construction of section 52.¹⁶⁰ Nevertheless, all this serves to illustrate the confusing state of the present rules as to priorities. For this reason, we intend to propose a self-contained, comprehensive scheme for priorities of minor interests in registered land. It is therefore only necessary to take a side in any debate about section 52 to the extent that the old system of priorities is conserved in our proposals. As hinted, our view is that the notice has, like the caution, no priority effect. The view to the contrary is not put forward in any of the leading works on the subject¹⁶¹ and it is inconsistent with the wide principle on which Russell L.J. based the decision in the *Barclays Bank* case¹⁶²—although it is accepted that it was not necessary for the decision to have a principle of such breadth.

4.97 The working paper proposed that only financial charges should require to be noted in order to gain priority as against other protected minor interests. Such a proposal would, of course, leave a number of complicated issues concerning the relative priorities of unprotected interests. It would also have led to an additional set of legal rules which many institutional lenders who regularly lend on the security of registered or unregistered land

¹⁵⁷[1974] Ch. 137.

¹⁵⁸See *Snell's Equity* 28th ed., (1982), p. 58 ("Section 3. Fraud, Estoppel and Gross Negligence").

¹⁵⁹R.J. Smith, "The Priority of Competing Minor Interests in Registered Land", (1977) 93 L.Q.R. 541.

¹⁶⁰Viz. that the word "disposition" includes the creation of all interests.

¹⁶¹T.B.F. Ruoff and R.B. Roper, *Registered Conveyancing* 5th ed., (1986); H. Potter, *Registered Land Conveyancing* (1934); *Wolstenholme & Cherry's Conveyancing Statutes* 13th ed., (1972), vol. 6; R.E. Megarry and H.W.R. Wade, *The Law of Real Property* 5th ed., (1984); Hayton, *Registered Land* 3rd ed., doubts Smith's argument at p. 141, referring to this judicial approach not only in *Barclays Bank v. Taylor* (above) but also in *Kitney v. M.E.P.C. Ltd* [1977] 1 W.L.R. 981.

¹⁶²Particularly [1974] Ch. at p. 147 C-D.

might find a complication rather than a help. These considerations and our original unease about promoting a system which covered only certain minor interests have prompted us to look again at priorities. It seems to us that the only proposal which can be defended in the context of registration is that all minor interests, not merely financial ones, should rank for priority according to the date of their entry on the register.

4.98 The rules governing priority which we propose are set out below. In what follows, "a minor interest" includes a mortgage or charge (until registered) but does not include the rights given to spouses by the Matrimonial Homes Act 1983.

- (i) A minor interest will, as hitherto, come into existence and have validity when it is created, whether creation be by grant, statute, contract or any other method.
- (ii) Such a minor interest will on and from creation be enforceable in the usual manner against the grantor or other person thereby charged.
- (iii) Nevertheless, because other inconsistent interests may be created, the minor interest holder should protect his right by registration. The form protection takes should be governed by our proposals in paragraphs 4.38 onwards and 4.68 onwards. Although it is rarely used for protection,¹⁶³ we would not wish to exclude the inhibition from our scheme of our priorities.
- (iv) If the minor interest is not protected and an inconsistent interest, whether created later in time or not, is protected by registration or other entry in the register or is an overriding interest, then the protected interest or overriding interest will prevail over the earlier, unless either the parties agree otherwise or statute provides differently.¹⁶⁴ A note should be entered in the register of any revision in the order of priorities and, unless this is done, the chronological order of registration will continue to govern the position.
- (v) The order of registration rule is only liable to be upset where there has been fraud or estoppel on the part of an earlier protected interest holder. This is the extension of the principle already proposed in relation to overriding interests in Part II,¹⁶⁵ and the burden of proving fraud or estoppel is on the person seeking priority other than in registration order. It follows also that any change in priority order will have to be through rectification of the register.
- (vi) The new scheme for priorities will apply only to priority of minor interests coming into existence after the date the scheme is enacted. As between minor interests ante-dating the scheme and ones post-dating the scheme, the rules of equitable priority will continue to apply.
- (vii) Overriding interests will continue to take priority according to their date of creation or the date they become overriding interests, whichever is later. Accordingly, for priority purposes, minor interest holders will be in much the same position as persons who have registered their interest substantively. They will take subject only to matters mentioned on the register (being either registered estates or other minor interests) or overriding interests or notices under the Matrimonial Homes Act 1983, but nothing else.
- (viii) Given that registration entails priority, we consider that the search procedure¹⁶⁶ should be available to the intending grantee of a minor interest to confer complete priority in respect of it. There is little difficulty in the way of this proposal because we have already recommended¹⁶⁷ the opening of the register to the public in such a way that the existing procedures for searching and office copies are available. The only additional change is a minor alteration to the relevant rules.¹⁶⁸

4.99 As mentioned, Matrimonial Homes Act rights are an exception to this scheme of priorities. The Matrimonial Homes Act 1983, consolidating earlier legislation, enacts that spouses, who have no legal estate or interest by virtue of which they may occupy the

¹⁶³Except that bankruptcy inhibitions are, we understand, frequently used.

¹⁶⁴e.g. the relation back of the title of the trustee in bankruptcy; see Bankruptcy Act 1914, s. 37; Insolvency Act 1985.

¹⁶⁵At para. 2.75.

¹⁶⁶See Land Registration (Official Searches) Rules 1981 (S.I. 1981/1536).

¹⁶⁷See Second Report on Land Registration (1985) Law Com. No. 148.

¹⁶⁸An extension of the meaning of "purchaser" seems required; cp. L.C.A. 1972, s.11 (priority notices).

matrimonial home or else have only an equitable interest in it or in the proceeds of sale, have a statutory right of occupation ranking as an equitable charge created at the earliest on:

- (i) the date of the marriage, or
- (ii) the date the matrimonial home is acquired, or
- (iii) 1 January 1968.

The statutory policy of the Act appears to be that priority over any competing equitable interest should be given at the earliest possible moment. A discussion of the social policy of the 1983 Act is outside the scope of this report, and we therefore accept that, in this instance, equitable priority should continue to operate as heretofore. Note, however, that protection of the charge by entry of a notice is necessary to protect a spouse against purchasers of legal estates.

4.100 It is apparent from the statement of our scheme that the present rules of priority will continue to co-exist with our new rules. We recognise this as unfortunate because conveyancers will have to familiarise themselves with two different regimes which will, at least initially, be an added complication. Against this, we would say as follows. First, the continuing extension of land registration will mean that this problem will, albeit slowly, diminish. Secondly, the further we draw away in time from the date of the enactment of the scheme, so likewise, the overlapping of the two sets of rules will diminish. Thirdly, in our view, our scheme really only amounts to the substitution of one date order test for another, so that to graft it onto the existing rules of priority is not to add such a great barrier of complexity as might be supposed. Fourthly, our proposed rule for priorities already governs questions of conflict as to the priority of registered charges¹⁶⁹ (and, indeed, the priority of puisne mortgages affecting unregistered land).¹⁷⁰ Our proposal is therefore simply an extension to other matters of that which is already taking place.

4.101 An allied difficulty is the position of an equitable interest, for example an estate contract, which affects both registered and unregistered land. Such a contract will, as now, have to be protected by the registration of both a land charge and a caution or notice. If different rules of priority obtain in the two systems, curious results could follow where two competing equitable interests affecting both registered and unregistered land are concerned: in unregistered conveyancing, the order of creation would prevail; whilst in registered conveyancing it would be the order of entry on the register which determined priorities inter se. However, we do not accept this as constituting a sufficiently serious or enduring difficulty to deter us from recommending our new scheme for registered land. Indeed, it argues for the extension of compulsory registration as rapidly as may be permitted.

4.102 Another problem is how the conflict between two interests registered on the same day is resolved. This is not easy, but a similar problem is raised by applications made on the same day for the registration of two conflicting dispositions—in this case, the Rules¹⁷¹ provide that the matter should be dealt with by the Registrar under his judicial powers, but give him no guidance as to how these are to be exercised. It seems probable though that in this case attention would be paid to the order of creation. We consider that the same procedure should be adopted for conflicting minor interests, but that in exercising his judicial powers, the Registrar should be guided expressly by what would have been the position were priority not governed by the order of registration. To this extent the old rules as to priority will remain relevant.

4.103 We now turn to mention some possible objections to the substance of our proposals. The first is that it may force on to the register a large number of interests which at present are not protected in that way. We find it is common practice to protect financial charges by entry on the register pending substantive registration. We do not see any great increase in numbers here, and our suggested simplification of the methods of protection should tend to make the Land Registry's task in processing applications easier.

4.104 As to interests other than financial charges, we accept that our scheme may result in entries being made which, under present law and practice, are thought to be

¹⁶⁹See s. 27.

¹⁷⁰L.P.A. 1925, s.97.

¹⁷¹r.84; see also r.6 of the Land Registration (Official Searches) Rules 1986 (S.I. 1986/1536).

unnecessary. Nevertheless, we do not think there will be a great influx of applicants from any quarter. The two largest classes of minor interests are probably restrictive covenants and estate contracts. Restrictive covenants are, most commonly, entered on the register by way of notice; so, although there will rarely be a priority conflict between these and other minor interests, restrictive covenants will continue to be entered as they have been. Estate contracts, at first sight, present a different picture since, under the present law and practice, it is usual only to note these when either there will be a long delay between the date of contract and completion of the transaction or when the contract appears to be at risk, for example, a second contracting party. The question is whether the risk of the average contracting purchaser will be regarded as increasing under our proposed scheme, thus leading to mass registration of such contracts. We believe the answer is no; those who know themselves to be at risk will note (or caution) as they do now, but the average purchaser will not be at risk in this way and will be content, we think, to rely on the terms of his contract and the official search system to protect him against other intervening minor interests. That there will be some increases in entries on the register as a result of these proposals seems likely. It is impossible to predict the scale of the increase with any accuracy. However, we think it unlikely that the increase will be such as cannot be absorbed by the existing resources. It should be remembered that in paragraphs 4.20 to 4.61 we propose simplifications to the machinery for protection; this will offset any extra burden.

7. Production of land and charge certificates

4.105 In respect of every registered title, a certificate is issued. If the property is charged and the charge is registered, the issue is of a charge certificate to the chargee; if the property is not charged, a land certificate is issued to the registered proprietor. This is equally true of a registered title to a rentcharge or other incorporeal hereditament which may be the subject of a separate registration.¹⁷² A land or charge certificate may be issued to the proprietor of the land or charge as the case may require or, at his option, left on deposit in the Land Registry.¹⁷³ The Land Registry have told us that certificates are very rarely left on deposit, unless it is to meet some particular transaction, i.e. in respect of a title which is being actively processed.¹⁷⁴

4.106 The origin of land certificates and charge certificates is traceable to The Land Registry Act 1862.¹⁷⁵ In each case they were not issued unless requested; thus the position was the reverse of what obtains today.

4.107 Nowadays a land certificate consists of a cover with certain of the more important sections of the Act and rules printed inside and also, bound inside, an office copy of the register and the title plan. Copies of documents containing covenants, easements and other matters may also be bound inside the certificate. A charge certificate is identical to a land certificate (except for its heading) but it also contains the original charge. If there is a second or subsequent registered charge, a certificate is also prepared and issued in respect of this, but it is in a shorter form than a first charge certificate. All certificates bear the seal of the District Land Registry issuing them. We have no comments on the form or content of certificates.

4.108 It has been said¹⁷⁶ that the certificate for almost all purposes takes the place of the title deeds, and this has been confirmed judicially.¹⁷⁷ The analogy cannot be pressed too far, if only because the register, and not the certificate, constitute a person's title to the land. Nevertheless a certificate holder has the following privileges:

- (i) He may by deposit create a lien over the certificate similar to a deposit of title deeds in unregistered conveyancing. This has been discussed earlier in paragraph 4.73.

¹⁷²See r. 50 *et seq.*

¹⁷³See s. 63(1).

¹⁷⁴For this purpose, a very substantial number of certificates will be on deposit but there will also be certificates left with the Registry indefinitely in respect of dormant titles where they have been sold off and only roads and paths remain.

¹⁷⁵s. 68.

¹⁷⁶C.F. Brickdale and W.R. Sheldon, *Land Transfer Acts* 2nd ed., (1905), p. 151.

¹⁷⁷*A.-G. v. Odell* [1906] 2 Ch. 47.

- (ii) He is assured that certain sorts of entry may not be made in the register while he has custody of the certificate. These entries are those for which the certificate must be produced under section 64 of the Act. This is a form of protection against fraud.¹⁷⁸

4.109 The present position is that a certificate must be produced to the Land Registry every time someone wishes to register a disposition (as that expression is explained in sections 18(5) and 21(5) of the Act) of the land or a transfer of the charge. Where a proprietor charges his land, the land certificate is deposited in the Registry for the duration of the charge; but a charge certificate need not be produced and is not deposited on the registration of a second or subsequent charge. A land or charge certificate must also be produced to the Land Registry on the registration of any notice or restriction adversely affecting the title of the proprietor of the land or charge. In this way, it is possible to register a notice of certain matters more readily when the land is charged than when it is not; we have recommended changes to this state of affairs in paragraph 4.38 onwards of this report.

4.110 We have not examined the question of whether land certificates and charge certificates should be retained as part of the registration system and, for the purposes of this report, we assume that the existing practice of requiring production of the land or charge certificate on the registration of any disposition, including the grant of any derivative interest or dealing with part of the land in a title, should continue. On this basis and for the sake of fraud prevention, we *recommend* that the certificate also be produced when registration of a lease at a rent without taking a fine is sought.¹⁷⁹ We are reinforced in this view by the fact that the forgery of just such a lease has given rise to a substantial payment of indemnity in recent years,¹⁸⁰ which could have been avoided had there been power to insist on the production of the certificate.

4.111 Another feature of certificates is that, subject to paragraph 4.109 above, they permit the holder to signify his assent to certain sorts of entry in the register. We have considered but rejected the possibility of assent being signified by a proprietor's assent form, as an alternative to lodging the certificate. On the assumption that the practice of requiring the production of certificates should continue, we feel that the certificates should be as accurate and up to date as possible and that the option of a written consent would detract from this purpose.

4.112 As mentioned in the working paper, the prevention of fraud is an important feature of certificates. When it comes to the protection of minor interests, however, fraud is of less significance, because an entry protecting the minor interest does not imply its validity. It will also be plain from what has been said earlier in this report that we favour a certain degree of modification of the production provisions when it comes to minor interests. We may best summarise our proposals as follows:

- (i) It will be recalled that notices are, with two exceptions, to protect those interests which the registered proprietor acknowledges. Production of the certificate should, therefore, continue where entry of a notice is sought. Where the certificate is already on deposit, because, for example, the land is charged, then as mentioned in paragraph 4.38 the proprietor's assent in writing should accompany the application for a notice. A prior registered charge will generally be unaffected by the subsequent entry of a notice and so the charge certificate need not be produced. The exception to this is the entry of a charging order or other charge (which may prejudice the priority of further advances by a registered chargee), but this can be met by the service of notice under section 30.
- (ii) No production of the certificate should be needed on the entry of a notice of a charging order. See paragraph 4.42 above.
- (iii) No production of the certificate should be needed on the entry of a caution against dealings.
- (iv) No production of the certificate should be needed on the entry of a restriction (whether by the Registrar of his own motion or not) protecting a beneficial interest

¹⁷⁸See *Barclays Bank Ltd. v. Taylor* [1974] Ch. 137 at p. 147.

¹⁷⁹See s. 64(1)(c).

¹⁸⁰See Chief Land Registrar's report for 1980-81 at para. 15.

under a trust for sale or the rights of those interested in settled land¹⁸¹ or under a bare trust.

- (v) Otherwise, the certificate should always be produced, or consent signified in writing, whenever a restriction is applied for.
- (vi) No production of the certificate should be required where a local authority or other public body applies to be registered in respect of any charge arising under statute.¹⁸²
- (vii) No production of the certificate should be required when a second chargee wishes to protect by notice and the certificate is with the first chargee whose compliance with a request for production cannot be obtained (see paragraph 4.82 above).

4.113 We have indicated that the main distinction in our treatment of the protection of minor interests is between whether the registered proprietor of the land or charge assents or not. There is one recommendation we would make in order to eliminate the possibility of a proprietor creating a minor interest by agreement under hand or seal, then stultifying the grantee's right to apply for a notice by refusing to place the certificate on deposit. This is particularly important in view of our proposals as to the priority consequences of protecting a minor interest. In such circumstances, we *recommend* that the grantee claiming under a deed or other written instrument signed by the proprietor or chargee ought to have the right to compel the grantor to place his certificate on deposit. This right is at present given to a purchaser, other than a lessee or mortgagee, by section 110(6). Our present proposal simply involves extending that sub-section to those claiming under an instrument as aforesaid. Extending it in this way will, of course, have the effect of bringing a chargee and lessee within section 110(6). We entirely intend this consequence, without prejudice, of course, in the case of a lease to any need to obtain consent from a chargee of the reversion. No doubt, lessees were excluded from section 110 generally because of the very limited rights they have in regard to superior title under the general law.¹⁸³ But to give a lessee the right to insist on the production to the Registrar of his landlord's certificate is a long way from giving him the right to call for a *deduction* of title.¹⁸⁴ We see no objection to a lessee having such a right. Again, the reason for excluding a chargee from section 110 appears to be that lending is not normally done under contract so that the lender/chargee can always impose whatever terms he requires on the borrower for the purposes of the loan. There can, therefore, be little objection to giving the chargee a statutory right to insist on the deposit of the proprietor's certificate and we so *recommend*.

4.114 In a case where the consent of the proprietor is to be given in writing, this may obviously be inferred from the instrument effecting the transaction but would be subject to the Registrar's general powers to serve notice when he thinks fit.¹⁸⁵ All of the above proposals apply to charge certificates as they do to land certificates, subject only to the qualifications arising by reason of the difference in nature of a charge.

4.115 There would, of course, be nothing to prevent transactions being protected by caution. We envisage, however, that protection by notice will be more often applied for than protection by caution. In law, the caution may give as good a protection as the notice but there are practical drawbacks, such as the possibility that the "warning off" machinery, through error, does not function properly or the address for service of the notice is by mistake not kept up to date or one of the deadlines set by the notice is accidentally missed. These drawbacks add to the attractions of notice.

4.116 The proposed new procedure for notices is, we think, an improvement but one final point should be mentioned. If on an application for a notice there arises a difficulty unforeseen by the applicant when he applied, then we consider that the applicant should be given the option of requesting a caution in lieu of the notice, but with the priority and effective date of his original application for notice. This will involve amendments of rules 190 and 83 to 85.

¹⁸¹See para. 4.54 above.

¹⁸²See r. 155 *et seq.* We understand that it is already Land Registry practice to dispense with production, where it cannot be obtained, in these circumstances.

¹⁸³See L.P.A. 1925, s. 44.

¹⁸⁴See also (1985) Law Com. No. 148, Inspection of the Register, recommending that titles become open to the public anyway.

¹⁸⁵See r. 322.

SUMMARY OF PART IV

- 4.117 (i) Minor interest should embrace a wide variety of property interests and rights.
[Paragraphs 4.4-4.13]
- (ii) These rights and interests should be protected by entry in the register in order to prevail against a registered proprietor being a purchaser for value and in good faith.
[Paragraphs 4.14-4.18]
- (iii) Entry of a notice should be available to protect an interest in a registered charge as well as to protect an interest in land.
[Paragraph 4.38 at (iii)]
- (iv) The machinery for protection should distinguish between rights and interests which are acknowledged by the registered proprietor and those which are not.
[Paragraph 4.38 at (iv)]
- (v) Generally the notice should be used for acknowledged rights and interests and the caution for unacknowledged rights and interests.
[Paragraph 4.38 at (iv)]
- (vi) In accordance with this, whenever entry of a notice is requested, the land or charge certificate should be produced or, if either of these is already on deposit, the written consent of the registered proprietor of the land or charge to the entry.
[Paragraph 4.38 at (v)]
- (vii) A minor interest holder should have the right to require production of the land or charge certificate where the minor interest has been created by agreement under the hand or seal of the registered proprietor of the land or charge.
[Paragraph 4.113]
- (viii) It should be possible to apply to change the name and address of a person in whose favour a caution is lodged without the need to withdraw and relodge the caution itself.
[Paragraph 4.47]
- (ix) The only exception to the paragraph (v) policy is the protection of charging orders which should continue to be by notice only subject to paragraph (xiii) below.
[Paragraph 4.42]
- (x) The inhibition should not be abolished as it is a useful procedural device; section 57 should be amended to allow the inhibition to be resorted to by those seeking Mareva or other injunctions extending to land.
[Paragraph 4.59]
- (xi) The restriction should be the only entry used to protect the interest of a beneficiary under a trust of land, be it a trust for sale, settled land or other trust. To this end the Registrar should have power to enter a restriction of his own motion wherever it is apprehended that a registered proprietor holds the land on trust for sale.
[Paragraphs 4.38 at (vi), 4.50-4.53, 4.55]
- (xii) Equally for mortgages of an interest under a trust, the restriction should be the only method of protection.
[Paragraph 4.83]
- (xiii) Consistently with the preceding paragraphs, a charging order obtained against the beneficial interest under a trust of a debtor in any registered land should be capable of protection by restriction only.
[Paragraph 4.43]
- (xiv) It should not be necessary to require production of the land or charge certificate on the entry of a restriction.
[Paragraphs 4.38 at (vii), 4.53-4.54]
- (xv) The restriction should continue to be available for a particular interest or claim which the parties expressly agree should be protected by restriction.
[Paragraph 4.49]

- (xvi) The existing methods of creating charges of registered land should all continue.
[Paragraph 4.63]
- (xvii) Protection of a charge by substantive registration should be extended to include equitable mortgages created by deed, not being mortgages of an equitable interest.
[Paragraphs 4.76-4.78]
- (xviii) The notice of deposit should no longer be available as a method of protection.
[Paragraph 4.81]
- (xix) Except for the "negative pledge clause" which should be capable of protection by restriction only, floating charges should not be capable of protection on the register until they have crystallised. Once crystallised they are no different from any other equitable charge.
[Paragraph 4.92]
- (xx) Priority of minor interests inter se should be governed by their order of protection on the register subject to any agreement or statutory provision to the contrary.
[Paragraph 4.98(iii)]
- (xxi) Any revision in the chronological order of priorities by agreement should be the subject of an entry in the register.
[Paragraph 4.98(iv)]
- (xxii) There should be no charge to the occasions when production of certificates to the Land Registry is required for dispositions except that registration of a lease at a rent without a fine should also entail production.
[Paragraph 4.110]
- (xxiii) Otherwise the certificate need not be produced on the entry of a caution, a notice of a charging order or a restriction (whether applied for by the beneficiary or entered of his own motion by the Registrar) to protect a beneficial interest. Nor need it be produced where protection of a second charge by notice is desired and the certificate is with the first chargee whose compliance cannot be obtained.
[Paragraph 4.112 at (ii), (iii), (iv) and (vii)]
- (xxiv) Where a notice is applied for but the application is technically defective, protection by caution should be obtainable without loss of priority.
[Paragraph 4.116]

(Signed) ROY BELDAM, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

JOHN GASSON, *Secretary*
6 March 1987

APPENDIX A

PART I

LAND REGISTRATION

OVERRIDING INTERESTS, RECTIFICATION AND INDEMNITY

CONSULTATION ON DRAFT PROPOSALS

1. The Agricultural Mortgages Corporation, PLC
2. P.J. James (Assistant Secretary), The British Insurance Association
3. The Secretary, The Chancery Bar Association
4. M.J. Ware (Solicitor), Department of the Environment
5. The Life Offices' Association
6. The Mothers' Union
7. The Law Reform Committee
8. The British Bankers' Association
9. R.G. Armstrong, The Building Societies Association
10. The Committee of London Clearing Banks
11. Secretary, Non-Contentious Business, The Law Society
12. P.M. Harris, Lord Chancellor's Department
13. Sir John Arnold, President of the Family Division
14. Chief Land Registrar
15. The Vice-Chancellor, Royal Courts of Justice
16. The Chief Chancery Master, Chancery Judges' Chambers
17. Holborn Law Society
18. Church Commissioners
19. E.G. Nugee, Q.C.
20. Professor D.G. Barnsley, Department of Law, Leicester University
21. Professor A.M. Prichard, Department of Law, Nottingham University
22. Professor Paul B. Fairst, Society of Public Teachers of Law
23. Professor J.E. Adams, Queen Mary College, London
24. Dr. H.W. Wilkinson, Faculty of Law, University of Bristol
25. Dr. D.J. Hayton, Jesus College, Cambridge
26. Professor David Yates, University of Essex
27. D.W. Williams, Liverpool Polytechnic
28. Kevin J. Gray, Trinity College, Cambridge
29. Miss Pamela Symes, Lucy Cavendish College, Cambridge
30. Walter Merricks, New Law Journal
31. Ms. Jenny Levin, Faculty of Law, Southbank Polytechnic
32. Nick Smedley, Secretary to the Government Conveyancing Committee
33. Professor E.H. Scamell, Faculty of Law, Kings College
34. S.B. Edell, Messrs. Crossman Block & Keith
35. Professor S. Cretney, Faculty of Law, Bristol University
36. E.S. Solomons, Messrs. Crossman Block & Keith
37. E.W. Wills, The Treasury Solicitor

PART II

SEMINAR: 16 OCTOBER 1985

Professor Farrand	}	Law Commission
Mrs. Hoggett		
Mr. Aldridge		
Mr. Gasson		
Mr. Wear		
Mrs. Hand		
Mr. Smith		
Mr. Pryer	}	H.M. Land Registry
Mr. Wood		
Mrs. Totty		
Mr. West		
Dr. Hayton		Jesus College, University of Cambridge
Professor Cretney		University of Bristol
Professor Barnsley		University of Leicester
Professor Battersby		University of Sheffield
Dr. Wilkinson		of "The Conveyancer"
Mr. Armstrong	}	Building Societies Association
Mrs. Dakeyne		
Professor Prichard	}	Society of Public Teachers of Law
Mr. Gravells		
Professor Adams	}	Law Society's Land Law and Conveyancing Committee
Mr. Castle		
Mr. Collon	}	Lord Chancellor's Department
Mr. Saunders		
Mr. Levy, Q.C.		Chancery Bar Association
Mr. Payton		Committee of London Scottish Bankers
Miss Phillips		Department of the Environment

APPENDIX B

LIST OF OVERRIDING INTERESTS

Land Registration Act 1925, s. 70

70.—(1) All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act (that is to say):—

Liability of registered land to overriding interests

- (a) Rights of common, drainage rights, customary rights (until extinguished), public rights, profits à prendre, rights of sheepwalk, rights of way, watercourses, rights of water, and other easements not being equitable easements required to be protected by notice on the register;
- (b) Liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges (until extinguished) having their origin in tenure;
- (c) Liability to repair the chancel of any church;
- (d) Liability in respect of embankments, and sea and river walls;
- (e) ... payments in lieu of tithe, and charges or annuities payable for the redemption of tithe rent charges;
- (f) Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts;
- (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed;
- (h) In the case of a possessory, qualified, or good leasehold title, all estates, rights, interests, and powers excepted from the effect of registration;
- (i) Rights under local land charges unless and until registered or protected on the register in the prescribed manner;
- (j) Rights of fishing and sporting, seignorial and manorial rights of all descriptions (until extinguished), and franchises;
- (k) Leases for any term or interest not exceeding twenty-one years, granted at rent without taking a fine;¹
- (l) In respect of land registered before the commencement of this Act, rights to mines and minerals, and rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals or of property in mines or minerals, being rights which, where the title was first registered before the first day of January, eighteen hundred and ninety-eight, were created before that date, and where the title was first registered after the thirty-first day of December, eighteen hundred and ninety-seven, were created before the date of first registration:

Provided that, where it is proved to the satisfaction of the registrar that any land registered or about to be registered is exempt from land tax, or tithe rentcharge or payments in lieu of tithe, or from charges or annuities payable for the redemption of tithe rentcharge, the registrar may notify the fact on the register in the prescribed manner.

(2) Where at the time of first registration any easement, right, privilege, or benefit created by an instrument and appearing on the title adversely affects the land, the registrar shall enter a note thereof on the register.

¹See now Land Registration Act 1986, s. 4.

(3) Where the existence of any overriding interest mentioned in this section is proved to the satisfaction of the registrar or admitted, he may (subject to any prescribed exceptions) enter notice of the same or of a claim thereto on the register, but no claim to an easement, right, or privilege not created by an instrument shall be noted against the title to the servient land if the proprietor of such land (after the prescribed notice is given to him) shows sufficient cause to the contrary.

Land Registration Rules 1925, r. 258

258. Rights, privileges, and appurtenances appertaining or reputed to appertain to land or demised, occupied, or enjoyed therewith or reputed or known as part or parcel of or appurtenant thereto, which adversely affect registered land, are overriding interests within Section 70 of the Act, and shall not be deemed incumbrances for the purposes of the Act.

Adverse easements treated as overriding interests.

Coal Act 1938, s. 41

41. This Part of this Act shall have effect in relation to premises that are registered land within the meaning of the Land Registration Act, 1925, as if they had not been registered land, and all rights and title conferred on the Commission by this Part of this Act shall be overriding interests within the meaning of that Act.

Application of Part I to registered land.

Coal Act 1938, s. 3(3)

(3) On the vesting date all coal and mines of coal as existing at that date shall vest in the Commission for a title comprising all interests then subsisting in any such coal or mine other than retained interests.

N.B. Coal Industry Nationalisation Act 1946, ss. 5, 8 and Sched. 1, which transfer the assets of the Commission to the National Coal Board.

APPENDIX C

RECTIFICATION AND INDEMNITY

STATUTORY PROVISIONS

Land Registration Act 1925

Part VII

RECTIFICATION OF REGISTER AND INDEMNITY

82.—(1) The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases, but subject to the provisions of this section: Rectification
of the
register

- (a) Subject to any express provisions of this Act to the contrary, where a court of competent jurisdiction has decided that any person is entitled to any estate right or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required, and makes an order to that effect;
- (b) Subject to any express provision of this Act to the contrary, where the court, on the application in the prescribed manner of any person who is aggrieved by any entry made in, or by the omission of any entry from, the register, or by any default being made, or unnecessary delay taking place, in the making of any entry in the register, makes an order for the rectification of the register;
- (c) In any case and at any time with the consent of all persons interested;
- (d) Where the court or the registrar is satisfied that any entry in the register has been obtained by fraud;
- (e) Where two or more persons are, by mistake, registered as proprietors of the same registered estate or of the same charge;
- (f) Where a mortgagee has been registered as proprietor of the land instead of as proprietor of a charge and a right of redemption is subsisting;
- (g) Where a legal estate has been registered in the name of a person who if the land had not been registered would not have been the estate owner; and
- (h) In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register.

(2) The register may be rectified under this section, notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by any entry on the register, or otherwise.

(3) The register shall not be rectified, except for the purpose of giving effect to an overriding interest [or an order of the court],¹ so as to affect the title of the proprietor who is in possession—

- (a) [unless the proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care; or]²
- (b) [Repealed by the Administration of Justice Act 1977, s. 24]
- (c) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him.

¹Words in square brackets added by the Administration of Justice Act 1977, s. 24.

²Words in square brackets were substituted by *ibid.*

(4) Where a person is in possession of registered land in right of a minor interest, he shall, for the purposes of this section, be deemed to be in possession as agent for the proprietor.

(5) The registrar shall obey the order of any competent court in relation to any registered land on being served with the order or an official copy thereof.

(6) On every rectification of the register the land certificate and any charge certificate which may be affected shall be produced to the registrar unless an order to the contrary is made by him.

Land Registration Rules 1925, r. 14

14. Where it is proved to the satisfaction of the Registrar that the whole of the land comprised in a title, or too large a part to be properly dealt with under the last preceding rule, has been registered in error, the Registrar may enter notice of the fact in the register, and he may either—

Registrations
in error

- (a) with the consent of the proprietor and of all other persons appearing by the register to be interested in the land, or
- (b) after notice to the persons aforesaid and such inquiry, if any, as he may consider proper, and upon the production of such evidence as he may deem necessary;

cancel the registration wholly or to the extent required.

83.—(1) Subject to the provisions of this Act to the contrary, any person suffering loss by reason of any rectification of the register under this Act shall be entitled to be indemnified.

Right to
indemnity in
certain cases

(2) Where an error or omission has occurred in the register, but the register is not rectified, any person suffering loss by reason of such error or omission, shall, subject to the provisions of this Act, be entitled to be indemnified.

(3) Where any person suffers loss by reason of the loss or destruction of any document lodged at the registry for inspection or safe custody or by reason of an error in any official search, he shall be entitled to be indemnified under this Act.

(4) Subject as hereinafter provided, a proprietor of any registered land or charge claiming in good faith under a forged disposition shall, where the register is rectified, be deemed to have suffered loss by reason of such rectification and shall be entitled to be indemnified under this Act.

(5) No indemnity shall be payable under this Act in any of the following cases:—

- [(a) Where the applicant or a person from whom he derives title (otherwise than under a disposition for valuable consideration which is registered or protected on the register) has caused or substantially contributed to the loss by fraud or lack of proper care;]³
- (b) On account of any mines or minerals or of the existence of any rights to work or get mines or minerals, unless a note is entered on the register that the mines or minerals are included in the registered title;
- (c) On account of costs incurred in taking or defending any legal proceedings without the consent of the registrar.

³s.83(5)(a) substituted by Land Registration and Land Charges Act 1971 s. 3(1).

(6) Where an indemnity is paid in respect of the loss of an estate or interest in or charge on land the amount so paid shall not exceed—

- (a) Where the register is not rectified, the value of the estate, interest or charge at the time when the error or omission which caused the loss was made;
- (b) Where the register is rectified, the value (if there had been no rectification) of the estate, interest or charge, immediately before the time of rectification.

(7)

[(8) Subject to subsection (5)(c) of this section, as amended by section 2(2) of the Land Registration and Land Charges Act 1971—

- (a) an indemnity under any provision of this Act shall include such amount, if any, as may be reasonable in respect of any costs or expenses properly incurred by the applicant in relation to the matter; and
- (b) an applicant for an indemnity under any such provision shall be entitled to an indemnity thereunder of such amount, if any, as may be reasonable in respect of any such costs or expenses, notwithstanding that no other indemnity money is payable thereunder.]⁴

(9) Where indemnity is paid for a loss, the registrar, on behalf of the Crown, shall be entitled to recover the amount paid from any person who has caused or substantially contributed to the loss by his fraud.

(10) The registrar shall be entitled to enforce, on behalf of the Crown, any express or implied covenant or other right which the person who is indemnified would have been entitled to enforce in relation to the matter in respect of which indemnity has been paid.

(11) A liability to pay indemnity under this Act shall be deemed a simple contract debt; and for the purposes of the Limitation Act 1980, the cause of action shall be deemed to arise at the time when the claimant knows, or but for his own default might have known, of the existence of his claim:

Provided that, when a claim to indemnity arises in consequence of the registration of an estate in land with an absolute or good leasehold title, the claim shall be enforceable only if made within six years from the date of such registration, except in the following cases:

- (a) Where at the date of registration the person interested is an infant, the claim by him may be made within six years from the time he attains full age;
- (b) In the case of settled land, or land held on trust for sale, a claim by a person interested in remainder or reversion, may be made within six years from the time when his interest falls into possession;
- (c) Where a claim arises in respect of a restrictive covenant or agreement affecting freehold land which by reason of notice or the registration of a land charge or otherwise was binding on the first proprietor at the time of first registration, the claim shall only be enforceable within six years from the breach of the covenant or agreement;
- (d) Where any person interested is entitled as a proprietor of a charge or as a mortgagee protected by a caution in the specially prescribed form, the claim by him may be made within six years from the last payment in respect of principal or interest.

(12) This section applies to the Crown in like manner as it applies to a private person.

⁴s.83(8) substituted by Land Registration and Land Charges Act 1971, s. 2(4).

APPENDIX D

Extract from the Report to the Lord Chancellor on H.M. Land Registry for the year 1982-83 by the Chief Land Registrar

The following table shows details of indemnity payments that were made in 1982-83:

Nature of claim	Indemnity	Costs (when separately assessed)
	£	£
Loss through rectification		
Failure to cancel notice of right of way	11,275.75	799.25
Omission of entry of easements (5 claims)... ..	4,050.00	534.75
Erroneous inclusion of land on first registration (14 claims)... ..	36,960.00	5,473.98
Erroneous inclusion of the same land in two titles (2 claims)	3,945.97	375.00
Erroneous inclusion of land in transfer of part (3 claims)	975.00	859.71
Erroneous entry of rentcharge	1,635.00	265.50
Erroneous first registration (double conveyance)	1,000.00	—
Error in mapping (2 claims)	4,959.75	850.00
Minor corrections giving rise to costs associated with rectification for which the Land Registry accepted responsibility (67 claims)	—	5,038.23
Loss through non-rectification		
Registration of forged transfer	8,000.00	—
Registration of forged conveyance... ..	6,000.00	435.85
Erroneous inclusion of land on first registration (5 claims)	19,903.00	4,469.80
Erroneous inclusion of land in transfer of part (3 claims)	1,500.00	2,564.37
Erroneous cancellation of application to register caution and failure to notify application of rejection	8,000.00	—
Omission of restrictive covenant on register ...	500.00	507.94
Minor correction giving rise to costs associated with non-rectification for which the Land Registry accepted responsibility	—	75.00

Extract from the Report to the Lord Chancellor on H.M. Land Registry for the year 1982-83 by the Chief Land Registrar

The following table shows details of indemnity payments that were made in 1982-83:

Nature of claim	Indemnity	Costs (when separately assessed)
	£	£
Mistakes in official searches, etc.		
Error in official searches of Public Index Map (5 claims)	—	739.09
Error arising from issue of incorrectly approved estate plan	—	304.75
Error in official searches of register (7 claims) ...	—	1,147.15
Error in office copies (2 claims)	—	51.85
Lost documents, etc.		
Loss of documents and miscellaneous administrative errors for which the Land Registry accepted responsibility (70 claims)	—	3,000.83
	108,704.47	27,793.05
		108,704.47
Gross payments		136,496.52
Less sums recovered under Section 83(10) of the Land Registration Act 1925		271.25
		<u>136,225.27</u>

Extract from the Report to the Lord Chancellor on H.M. Land Registry for the year 1983-84 by the Chief Land Registrar

The following table shows details of indemnity payments that were made in 1983-84

Nature of claim	Indemnity	Costs (when separately assessed)
	£	£
Loss through rectification		
Failure to carry forward subjective right of way on transfer of part	—	329.50
Omission of entry of rights and covenants on first registration (2 claims)	26,100.00	4,014.86
Erroneous inclusion of land on first registration (25 claims including 5 arising from double conveyances)	9,793.15	10,959.32
Omission of entry of notice of right of way ...	1,522.90	517.50
Error in mapping of transfer of part (3 claims)	1,500.00	869.20
Erroneous registration arising from an ill-founded application	—	450.34
Erroneous mapping on first registration (2 claims)	750.00	1,388.72
Erroneous inclusion of the same land in two titles (6 claims)	4,000.00	1,535.25
Error in mapping of boundary	—	335.29
Minor corrections giving rise to indemnity payments for which the Land Registry accepted responsibility (39 claims)	575.00	4,039.81
Loss through non-rectification		
Failure to carry forward subjective right of way on transfer of part	—	350.00
Registration of forged transfer (2 claims)	7,377.80	719.75
Erroneous inclusion of land on first registration of part	1,084.00	450.00
Erroneous inclusion of land on first registration (3 claims)	2,750.00	1,168.05
Erroneous cancellation of entry of restrictive covenants	12,500.00	—
Omission of entry of restrictive covenant on first registration	—	1,423.12
Error in mapping of 3 transfers of part out of one title	—	109.25
Erroneous inclusion of the same land in two titles	—	5,194.25

Extract from the Report to the Lord Chancellor on H.M. Land Registry for the year 1983-84 by the Chief Land Registrar

The following table shows details of indemnity payments that were made in 1983-84:

Nature of claim	Indemnity	Costs (when separately assessed)
	£	£
Minor corrections giving rise to indemnity payments for which the Land Registry accepted responsibility (8 claims)	498.53	616.48
Mistakes in official searches, etc.		
Errors in official searches of the Public Index Map (7 claims)	4,611.64	987.06
Error arising from issue of incorrectly approved estate plan	—	190.00
Errors in official searches of the register (3 claims)	2,000.55	63.25
Inaccuracy of office copy of the register in not clearly disclosing existence of second charge	2,500.00	—
Lost documents, etc.		
Loss of documents and miscellaneous administrative errors for which the Land Registry accepted responsibility (86 claims)	78.03	4,358.71
	77,641.60	40,358.71
		77,641.60
Gross payments		117,711.31
Less sums recovered under Section 83(10) of the Land Registration Act 1925		23.43
		117,638.88

Extract from the Report to the Lord Chancellor on H.M. Land Registry for the year 1984-85 by the Chief Land Registrar

The following table shows details of indemnity payments that were made in 1984-85:

Nature of claim	Indemnity	Costs (when separately assessed)
Loss through rectification	£	£
Closure of title in error	131.23	—
Erroneous inclusion of land on first registration (19 claims including 2 arising from double conveyances)	10,576.76	19,901.61
Erroneous inclusion of land on registration of transfer	125.00	—
Erroneous inclusion of land on registration of transfers of part	—	30.00
Erroneous registration of appurtenant right of way on first registration (4 claims)	6,275.00	3,473.71
Error in extent of appurtenant right of way ...	—	836.75
Error in mapping of transfer of part, creating overlaps with adjoining titles (3 claims)... ..	9,250.00	740.12
Error in mapping extent of subjective right of way ...	150.00	740.12
Erroneous inclusion of the same land in two titles ...	10,230.00	—
Failure to cancel entry of determined appurtenant right of way	10,000.00	907.00
Failure to carry forward subjective right of way to transfer of part (2 claims)	5,029.43	960.25
Failure to enter notice of lease	—	337.00
Omission of entry of notice of lease on registration of transfer of part... ..	172.50	304.75
Omission of entry of subjective right of way on first registration	3,000.00	858.02
Minor corrections giving rise to indemnity for payments for which the Land Registry accepted responsibility (63 claims)... ..	801.57	6,853.23
Loss through non-rectification		
Erroneous cancellation of entry of restrictive covenants	—	3,300.00
Erroneous inclusion of land on first registration (5 claims including 3 arising from double conveyances)	3,750.00	1,639.35

Extract from the Report to the Lord Chancellor on H.M. Land Registry for the year 1984-85 by the Chief Land Registrar

The following table shows details of indemnity payments that were made in 1984-85:

Nature of claim	Indemnity	Costs (when separately assessed)
	£	£
Error in mapping extent of transfer of part on parent title... ..	500.00	511.40
Error in mapping of substituted filed plan (3 claims)	1,000.00	501.25
Error in mapping of transfers of part	14,500.00	1,735.50
Error in register resulting from a fraud	12,000.00	—
Errors on registration of charge	4,500.00	—
Incorrect information given regarding rear boundary of adjoining title	—	1,564.00
Mishandling by the Land Registry of application for first registration	343.00	57.50
Minor corrections giving rise to indemnity payments for which the Land Registry accepted responsibility (6 claims)	150.00	459.15
Mistakes in official searches, etc.		
Errors in official searches of the Public Index Map (5 claims)	2,532.45	2,531.12
Errors in official searches of the Register (2 claims)	12,222.89	—

Extract from the Report to the Lord Chancellor on H.M. Land Registry for the year 1984-85 by the Chief Land Registrar

The following table shows details of indemnity payments that were made in 1984-85:

Nature of claim	Indemnity	Costs (when separately assessed)
Lost documents, etc.	£	£
Loss of documents and miscellaneous administrative errors for which the Land Registry accepted responsibility (104 claims)	250.00	6,915.68
	107,489.83	55,192.88 107,489.83
Gross payments		<u>162,682.71</u>
Less sums received under Section 83(10) of the Land Registration Act 1925*	858.16	<u>161,824.55</u>

*A sum of £1,303.68 for a claim met by the Land Registry in March 1980 was also recovered in 1984-85 under Section 83(10) of the said Act.

Extract from the Report to the Lord Chancellor on H.M. Land Registry for the year 1985-86 by the Chief Land Registrar

The following table shows details of indemnity payments that were made in 1985-86:

Nature of claim	Indemnity	Costs (when separately assessed)
	£	£
Loss through rectification		
Erroneous entry of proprietor of title	—	1,833.46
Erroneous inclusion of land on first registration (21 claims including 2 arising from double conveyances)	14,020.58	12,394.60
Erroneous inclusion of land on registration of transfer of part (6 claims)	5,290.00	1,140.50
Erroneous inclusion of land on amendment of filed plan	14,000.00	4,762.57
Erroneous omission of entry of subjective right of way on first registration (2 claims)	—	327.75
Erroneous registration of appurtenant right of way on first registration (2 claims)	5,000.00	605.43
Error in mapping of boundary between 2 titles on first registration (2 claims)	—	1,094.87
Error in mapping of transfer of part creating overlap with adjoining title (2 claims)	500.00	809.77
Error in mapping of two titles on first registration (2 claims)	—	1,748.00
Error in mapping on first registration	250.00	—
Error in registration of extent of subjective right of way (3 claims)	5,500.00	3,810.95
Failure to enter notice of deed limiting use of appurtenant right of way on first registration	1,575.00	250.00
Failure to enter notice of lease	—	541.00
Registration of legal charge delayed by error in filed plan requiring rectification	693.66	—
Minor corrections giving rise to indemnity payments for which the Land Registry accepted responsibility (71 claims)	3,569.25	6,036.25
Loss through non-rectification		
Erroneous inclusion of land on first registration (4 claims including 1 arising from a double conveyance)	4,850.00	596.05

Extract from the Report to the Lord Chancellor on H.M. Land Registry for the year 1985-86 by the Chief Land Registrar

The following table shows details of indemnity payments that were made in 1985-86:

Nature of claim	Indemnity	Costs (when separately assessed)
	£	£
Erroneous omission of restrictive covenants on first registration	1,000.00	1,046.50
Erroneous registration of appurtenant right of way on first registration (2 claims)	1,000.00	1,269.15
Error in register resulting from fraud (2 claims)	—	4,750.37
Incorrect information given regarding rear boundary of adjoining title	246.00	287.50
Moiety of passageway erroneously included in title on amalgamation with other property	5,000.00	—
Minor corrections giving rise to indemnity payments for which the Land Registry accepted responsibility (5 claims)	758.60	457.37
Mistakes in official searches, etc.		
Error in office copy of entries in the Register (3 claims)	29,419.22	1,950.00
Error in the result of official search of the Public Index Map (4 claims)	19,923.83	2,357.00
Error in the result of official search of the Register (9 claims)	11,496.61	3,296.01
Lost documents, etc.		
Loss of documents and miscellaneous administrative errors for which the Land Registry accepted responsibility (99 claims)	707.49	4,990.20
	124,800.24	56,355.30
		124,800.24
Gross payments		181,155.54

APPENDIX E

CRITIQUE OF THE PRESENT MACHINERY FOR THE PROTECTION OF MINOR INTERESTS

Notices and cautions

1. Limited and occasionally confused guidance is to be found in sections 48, 49, 50, 54 and 59 of the Act as to which interests should be protected by notice and which by caution. We shall take section 59 first.

Section 59

2. This section is not without ambiguity. Subsection (1) provides that a writ, order, deed of agreement, pending action or other interest capable of protection under the Land Charges Act 1972 shall be protected only by lodging a creditor's notice, bankruptcy inhibition or caution. Bankruptcy is outside the terms of this report. For the present, it need only be noted that the creditor's notice and bankruptcy inhibition mirror an entry in the register of pending actions in respect of a petition in bankruptcy and an entry in the register of writs and orders affecting land of a receiving order in bankruptcy. All other writs, orders and pending actions are therefore capable of protection by caution. However, in *Webb v. Pollmount* it was suggested that "only" might simply be to emphasize that the Land Charges Act was irrelevant to protection in registered land. Section 59 was not, it was said, to be considered an exhaustive statement of the methods of protection.

3. There are also difficulties with the words "or other interest". They can only refer to a land charge, as that expression is later limited by section 59(5), because the other words of section 59(1) list all the other matters which may be protected under the Land Charges Act. In the light of this, it is curious that subsection (2) then goes on to provide a different choice of protection expressly for land charges, again using the word "only". Subsection (1) refers, it is true, to *protection* of a land charge and subsection (2) to *registration* of a land charge, but it is difficult to see any reason for registering a land charge other than for its protection. Subsection (2) has no better claim to be regarded as exhaustive either. Even if subsections (1) and (2) together were exhaustive, land charges still receive the attention of section 49(1)(c) (but including this time a puisne mortgage) which offers protection by notice. One distinction not drawn by the Act, but which might fairly be expected to be drawn, is between land charges requiring protection in order to affect the legal title and land charges requiring protection in order to ensure the correct operation of the overreaching machinery elsewhere in the 1925 legislation. As things stand, a land charge of class C(iii), such as an annuity for life affecting land held on trust for sale, may be protected by notice or caution, even though on a sale it is overreached. That the overreaching machinery should operate with the same effects in regard to registered land as unregistered land is, if not a matter of commonsense, plain from section 59(2) and (3). The caution, in particular, would seem out of place here.

4. Subsection (3) adds nothing to subsection (1) in terms of choice of protection. Its repeal is proposed in the Report on Inspection of the Register. Subsection (6), as explained in *Parkash v. Irani Finance*, ensures that notice of matters capable of protection by a caution is only by entry, of whatever type, on the register and not by any other means.

¹ Kept under L.C.A. 1972, s. 5.

² Kept under L.C.A. 1972, s. 6.

³ L.R.A. 1925, s. 61 (3); see now Part III Chap. II of Insolvency Act 1985.

⁴ For a recent illustration see *Clayhope Properties Ltd. v. Evans and another* [1986] 2 All E.R. 795.

⁵ [1966] Ch. 584.

⁶ Annuities ceased on 1 January 1926 to be entered in the register of annuities (see L.C.A. 1972, Sched. I). They were thereafter capable of protection as a Class C(iii) land charge, subject now to Rentcharges Act 1977.

⁷ See definition of land charge in s. 3(ix) and s. 59(5).

⁸ In *Webb v Pollmount Ltd* [1966] Ch. at p. 600 it was suggested that the words "... or other interest" might not include all land charges; but no alternative meaning was offered and the point was left undecided.

⁹ (1985) Law Com. No. 148.

¹⁰ [1970] Ch. 101.

Section 48

5. Section 48 provides for the entry of notice in respect of leases. Primarily, the section applies to those leases which contain an absolute prohibition against alienation and leases granted for a term not exceeding twenty-one years either gratuitously or in consideration of a premium. Such leases do not need to be completed by registration, but they may be protected by notice if the lessee so wishes. Alternatively, section 48 may be relevant to the lessee who, not being one of the foregoing, for one reason or another wishes for no more than protection of his interest by notice. Where the lease is required to be completed by registration and application is made therefor, the machinery for entering notice against the reversion is automatic. Equally the lease is automatically noted as an incumbrance on first registration of the reversion.

6. For those leases to which it does apply, section 48 does not provide an exclusive method of protection. Subsection (2) provides for the possibility of the registered proprietor not concurring in the entry of notice and, as a consequence, not producing his certificate to the Land Registry. We are not clear why this provision should be needed involving, as it does, an application to the court, when the far quicker solution of registering a caution is available. It is therefore no surprise to learn that subsection (2) is rarely used.

Section 49

7. The terms of section 49(1) are facultative rather than mandatory as to the method of protection. Paragraph (a) is, we consider, otiose in view of the sections in the Act dealing with the creation of rentcharges by a registered proprietor. Where a rentcharge is in existence when the land is first registered, then it is the duty of the Registrar to enter notice of it and, if through error, no notice is entered, the correct course is to seek either rectification under section 82 or correction of the register under rule 13, depending on how the mistake has arisen and is discovered. It is difficult to see that the word "annuity" adds anything to paragraph (a). The word is not defined in the Act. At common law, it meant an annual payment granted to another in fee simple, for life or for years, charged on the person of the grantor. If it is charged on land it is also a rentcharge. In a land registration context, an annuity must, we consider, be limited to periodical payments charged against land. It therefore means nothing that is not already included in the word "rentcharge".

8. Mines and minerals which feature in paragraph (b) sit oddly with the other minor interests in the section. Where the mines and minerals are held separately from the surface, the correct view is that they no longer form part of the land in the registered title—just as if a proprietor had severed his holding in any other way. Such a state of affairs is already provided for by sections 19(1) and (2) and 22(1) and (2). Paragraph (b) therefore seems to be directed at the case where, on first registration of the title, nothing is said on the register about the mines and minerals and it later turns out that they are and always have been held separately from the surface. Even so interpreted, it is curious to find this type of severance of a holding dealt with alongside incumbrances and burdens of a very different type. Moreover, the use of the word "notice" in this context is confusing. It would be more accurate to speak of a note qualifying the description of the land comprised in the registered title.

¹¹ The first Report on Land Registration (1983) Law Com. No. 125 proposed changes to this classification; see also Land Registration Act 1986, ss. 3 and 4.

¹² ss. 19(2)(a) and 22(2)(a).

¹³ One reason for this may be the saving in the fee payable; see Land Registration Fee Order 1986 (S.I. 1986/1399).

¹⁴ r. 46.

¹⁵ r. 40.

¹⁶ The High Court, see s. 3(ii).

¹⁷ ss. 18(1)(b), 19(2), 21(1)(b) and 22(2).

¹⁸ r. 40.

¹⁹ Co. Litt. 144b.

²⁰ *Theobald on Wills* 14th ed., (1982), p. 515.

²¹ In unregistered land certain annuities, as defined in L.C.A 1972, s. 17(1), charged on land are registrable; see *Wolstenholme & Cherry's Conveyancing Statutes* 13th ed., (1972), vol. 2, at p. 14 (commenting on the predecessor to L.C.A. 1972).

²² Having regard to the Land Registry's duty in r. 196 to enter a note of any severance, this will presumably be unusual. See also s. 70(1)-(3).

²³ See r. 196.

9. Paragraph (c) has already been mentioned.²⁴ The right to require at least two trustees, referred to in paragraph (d), is, in effect, given by section 27(2) of the Law of Property Act 1925 and section 94(1) of the Settled Land Act 1925. Again, we would only comment that protection of these rights by notice seems clumsy when the restriction, provided for by section 58(3), is a neater way of achieving the same result. Nor does there seem to be any practical advantage in providing that the notice might be used pending a restriction, because in both instances the land or charge certificate must be lodged with the Land Registry; the assent of the registered proprietor is therefore still needed.

10. Section 49(1)(e) contains a rarely encountered provision about rights under the Intestates Estates Act 1890 and other like rights. The Intestates Estates Act was repealed, except in relation to deaths occurring before 1 January 1926, by the Administration of Estates Act 1925.²⁵ The 1890 Act gave widows the sum of £500 which, together with interest, became a charge on the real property of the deceased husband until payment. It follows that no new rights can arise under the 1890 Act and there can be few, if any, charges still outstanding. A right to freebench was the right of a widow on an intestacy to an interest, according to the custom of the manor, in the copyhold realty of her deceased husband. Freebench, except for accrued rights thereto, was abolished along with the other incidents of copyhold tenure on 1 January 1926 by the Law of Property Act 1922.²⁶ Except in respect of such accrued rights and those of unsound mind on 1 January 1926 who subsequently died intestate without recovering testamentary capacity, the repeal of freebench is repeated by Administration of Estates Act 1925.²⁷ These Acts are doubtless what was contemplated by the expression in section 49(1)(e): "any statute coming into force concurrently with this Act".

11. The "other like rights saved by such statute" are dower and curtesy. Dower was the right of a widow at common law on an intestacy to a life interest in, generally, one third of her deceased husband's realty, not being copyhold land. Curtesy was the converse, but generally gave the widower an interest in the whole of the deceased wife's land.²⁸ Dower and curtesy received the same treatment in 1926 as freebench,²⁹ except that accrued rights were not preserved.

12. From this brief analysis, it can be seen, first, that since 1925 all these rights except the widow's statutory charge necessarily take effect behind a trust and, secondly, that the class of rights capable of protection under section 49(1)(e) is shrinking and will eventually disappear. In this sense, it is not a "live section". Paragraph (e) rights can and ought properly to be entered on first registration under the general duty of the Registrar to register a title in the manner authorised by the Act.³⁰

13. The words "creditors' notices" in paragraph (f) are of no assistance. Quite apart from the infelicity of referring to "[notices of] creditors' notices", a creditor's notice is the creation of section 61 and may only be entered by the Registrar following the presentation of a petition in bankruptcy. We understand that following registration of the petition in bankruptcy in the register of pending actions held under the Land Charges Act 1972, the machinery for the registration of a creditor's notice, where appropriate, is automatically set in motion. There seems little point in there being a reference in section 49(1)(f) to creditors' notices. The remainder of paragraph (f) provides the general words authorising the entry of notice in respect of a wide range of matters. These general words are so wide as to make much of the earlier classification worthless.

Section 50

14. Section 50 deals with the entry of notice of restrictive covenants. This section is linked by rule 212 to section 40 which deals with the creation and discharge of restrictive

²⁴Para. 3 above.

²⁵s. 56 and Sched. 2.

²⁶Sched. 12.

²⁷ss. 45(1) and 51(2).

²⁸For further details of the nature of dower, curtesy and freebench, see *Challis on Real Property* 3rd ed., (1911), p. 342 *et seq.*

²⁹L.P.A. 1922, Sched. 12 and Administration of Estates Act 1925, s. 45.

³⁰r. 41; cp. the practice in relation to pre-first registration easements discussed at para. 2.34 above.

covenants. A restrictive covenant is also a land charge of Class D(ii) and we have already noted in paragraph 3 of this Appendix the unsatisfactory treatment these have received. Section 50 simply repeats with more detail what has been provided for elsewhere.

Section 54

15. Section 54 is also relevant. This provides that anyone interested under any unregistered instrument or as a judgment creditor or otherwise howsoever in any registered land or charge may apply to enter a caution in respect of their interest. This on the face of it gives the caution a very wide catchment area. It covers most matters that might also be protected by notice and further weakens any classification of notices and cautions. The reference to a judgment creditor would now seem to be irrelevant. It appears to be directed to the old section 195 of the Law of Property Act 1925, whereby a judgment creditor automatically had a charge on the land of the judgment debtor. Nowadays, the Charging Orders Act 1979 requires an express application before an order charging the land is made by the appropriate court. Where this happens the judgment creditor is, in strictness, interested under the order and not as a judgment creditor.

Restrictions

16. Restrictions are governed by section 58 and rules 39, 213, 235 and 236. Again they have, potentially, a wide application. In particular, they may be used to protect a minor interest, and are used to indicate a limitation on a proprietor's powers of disposition without necessarily being plain from the entry which sort of restriction they are; and this is so even though the conceptual basis for each of these is quite distinct.

17. It would seem necessary to construe the proviso to section 58(1) so as to mean that restrictions may nevertheless prohibit the *creation* of minor interests; this is so because, earlier in the subsection, a restriction is made applicable to the deposit by way of security of a certificate which, by section 66, gives rise to an equitable lien.

Inhibitions

18. Section 57 gives to the court or Registrar the power to inhibit registered dealings. The scope of application of inhibitions is potentially vast, depending as it does on the court's or registrar's discretion; but in fact, its use is extremely rare and has been confined to cases of fraud and of theft of the land certificate.

³¹ L.C.A 1972, s. 2(5).

³² It appears to include interests taking effect as overriding interests but we understand that it is the practice of the Land Registry generally not to allow protection of overriding interests by entry in the register.

³³ Repealed by Administration of Justice Act 1956.

³⁴ See para. 4.73 onwards for a discussion of mortgages by deposit of the certificate.

APPENDIX F

FRANCHISES

1. The definition of a franchise is a royal privilege or a branch of the Crown's prerogative subsisting in the hands of a subject.¹ It must arise by grant, or by prescription (which presupposes a grant). There are two different categories of franchise: one which arises out of the royal prerogative, and one which is created by an exercise of the prerogative. Rights of the former class are not properly termed "franchises" until they subsist in private hands, and consequently cannot be passed under the general term "franchise".² If rights of this class, having been granted to a subject, should return to the hands of the Crown, then they merge with the prerogative and are extinguished. Examples of this class are waifs, estrays, wrecks, royal fish, forests, swans and treasure trove. The latter class do not subsist as rights until they have been granted to a subject by the Crown in exercise of the prerogative. The most important example of this class (for our purpose) is that of markets and fairs.³ If a franchise of this category should return to the hands of the Crown, it would continue in esse in the Crown and not merge with the prerogative. This is because it is a "new" right created by the Crown and not part of the royal prerogative which had been given to a subject.

2. It can be seen from the above lists of franchises that there are not many which are relevant to land registration, and others which are no longer in existence. Those that need to be considered include wrecks, royal fish and swans,⁴ fairs and markets. It should be noted that franchises were protected from the general enfranchisement of copyhold land by virtue of Schedule 12 to the Law of Property Act 1922.⁵

3. The grant of a franchise does not confer the right to enter another's land; for example, the right to a wreck does not confer any interest in land, because prima facie the soil over which it is to be taken, and the right itself, belong to the Crown.⁶ If there should be a grant of a manor given with a right to wreck or royal fish, then there is a presumption that the Crown intended to grant the foreshore with the manor.⁷

4. Where franchises have been saved from the enfranchisement of the Law of Property Act 1922, a general note of this fact is entered in the register as a matter of course:

Wherever copyhold land has been enfranchised under any Act the deeds and the abstract should reveal the rights of the lord that are saved from its effect and this information has always been repeated on the register of title when land has been brought under the Land Registration Acts.⁸

This appears to be an application of section 70(2) of the Land Registration Act 1925 and is said to apply to subsisting manorial incidents.

5. The case of *Morris v. Dimes*⁹ shows that a franchise (in this case of free warren which formed part of the royal prerogative that has now been abolished by Wild Creatures and Forest Laws Act 1971) can be granted by the Crown "in gross" and need not be appended or appurtenant to the land. Many franchises, however, are appended or appurtenant to

¹ This should be distinguished from the modern commercial concept of a franchise business. The word is used there to denote the freedom granted to a business to use a trademark, registered design or some copyright belonging to the franchise-owner. The franchise is granted and governed by contract. However, there is a similarity between the franchise market arising from a grant by the Crown and the modern commercial concept in that both give the franchise owner a "monopoly" within a certain geographical area: i.e. by common law another market could not be held within 6 2/3 miles of a "franchise market", and a commercial franchise usually grants the holder a defined market area within which he can trade under the particular trade-name.

² *A.-G. v. Trustees of the British Museum* [1903] 2 Ch. 598. Farwell J. said, at p. 613, "Franchises which belong to the King by right of his prerogative cannot pass under the general word 'franchises' in a grant from the Crown, because they do not exist as such; until created by grant they are part of the prerogative; if created and resumed, they merge in the prerogative." This followed a reference to the case of *Duke of Northumberland v. Houghton* (1870) L.R. 5 Ex. 127.

³ Other examples are tolls, parks, warrens, ferries, pontage and murage, corporations, counties palatine, counties corporate and the cinque ports.

⁴ Preserved by the Wild Creatures and Forest Laws Act 1971.

⁵ This was repealed by the Statute Law (Repeals) Act 1969 following the recommendations of the Law Commission in our First Report on Statute Law Revision (1969), Law Com. No. 22. However, this repeal does not affect substantive rights which had already been preserved by the Schedule.

⁶ *Halsbury's Laws* 4th ed., vol. 8, (1974), para. 1508.

⁷ *Ibid.*, para. 1509.

⁸ Ruoff & Roper, *Registered Conveyancing* 5th ed., (1986), at p. 124.

⁹ (1834) 1 Ad. & El. 654.

manorial lands. Further support for the existence of a franchise "in gross" can be obtained from Elton and Mackay, *The Law of Copyholds* 2nd ed., (1893), which states that:

If the person having the right of free-warren alienes his lands, but reserves the free-warren to himself, such a reservation would be effectual, and the free-warren would then be a warren in gross, but if the lands are conveyed without any reservation or express mention of the right, it will be extinguished. A conveyance of the manor, "together with the appurtenances", will not carry a right of free-warren, unless the right of free-warren has actually become appurtenant by prescription.¹⁰

6. It should be noted that both the case of *Morris v. Dimes* and the text of Elton and Mackay were prior to the 1925 legislation, and therefore the effect of sections 62 (derived from section 6 of the Conveyancing Act 1881) and 63 of the Law of Property Act 1925 did not need to be considered. The effect of these sections applies to registered land by virtue of sections 19(3) and 22(3) of the Land Registration Act 1925. The sections relate to general words which are deemed to be included in all conveyances, unless there is expression to the contrary. However, there are difficulties as to whether these sections may be sufficient to transfer franchises with the land as the word "franchises" only appears in section 62(3) which relates to manors and which also contains a finite list of rights which are franchises. Therefore, in order to prevent any doubt it appears that in order to convey a franchise together with the land it is desirable to do so specifically. In practice this would enable the franchise to be registered as stated by Ruoff and Roper (see paragraph 4 above). Where the franchise is appurtenant to the land, then sections 5 and 9 of the Land Registration Act 1925 would apply. If the franchise is expressly reserved to the vendor, then this would be apparent from the conveyance, and the rights of the vendor could be entered on the register, providing that such a conveyance forms part of the abstract of title supplied to the purchaser.

7. A relatively recent Court of Appeal decision¹¹ held that a "fair" involves marketing and owes its origin to a royal franchise. The material facts of the case were that the defendant purchased a plot of building land in 1958 for which planning permission to build five bungalows had been granted. The abstract of title made available to him commenced in 1900 and made no reference to the right to hold an annual fair on the land which had been specifically preserved by an inclosure award of 1803, following a private Act of Parliament in 1799. That Act contained recitals which were sufficient evidence of the inhabitants' right to hold an annual fair on the plot of land purchased by the defendant. At page 855 Harman L.J. says:

The fact that the right has been allowed to fall into disuse is no ground for saying that a private owner of the soil can override it,

and later:

It does not, in my view, lie in the mouth of the defendant to claim to override the award through which he derives his title, even though under modern methods of conveyancing he had no notice of it before completion.

The judgment also considered the definition of a franchise of a fair,¹² distinguished it from a wake¹³ and compared it with a market.¹⁴ Reference was made to the enduring nature of the franchise.¹⁵ Such a right could not be lost by disuse or waiver, but could only be taken away by an Act of Parliament.¹⁶

¹⁰At p. 239.

¹¹*Wyld v. Silver* [1963] Ch. 243.

¹²*Ibid.*, at p. 261: "[a fair] arising usually by virtue of the presumption of a lost franchise or charter from the Crown allowing it to be held. A fair is only a market held at rarer intervals. The essential is a concourse of buyers and sellers. Without that there is no fair."

¹³*Ibid.*, at pp. 261-2 and 269. The definition given by Russell L.J.: "A wake is an occasion for sports and pastimes without marketing; it is attributable to customary law; of its nature it is a right over property of another—e.g., waste of the manor."

¹⁴*Ibid.*, at pp. 262-3.

¹⁵*Ibid.*, at p. 263: "if ... this was in law a fair created by franchise, it cannot be abandoned".

¹⁶This was considered in the recent case of *Gloucestershire C.C. v. Farrow* [1984] 1 W.L.R. 262 in which the case of *Wyld v. Silver* was not cited. Goulding J. at p. 268 said that it was "well settled that a franchise is not extinguished by failure to exercise it over even a long period, although non-user may afford grounds for proceedings by the Crown to repeal the relevant charter." He held, nevertheless, that the right to hold a weekly market in the market-place had been lost by the lapse of a 20 year period where no such market had been held and the market place had been used as a highway. He gave a broad interpretation to s. 31 of the Highways Act 1980, so as to avoid the need for "lengthy and expensive antiquarian investigations when highway rights are called in question." It should be noted that the loss of the franchise was due to interpretation of a statute, i.e. one way in which it was contemplated in earlier cases that a franchise could be lost.

8. A franchise of a market does not confer a right to the land on which the market is to be held; a franchise-holder may therefore need to obtain a licence from the owner of the land in order to enter onto the land and hold the market.¹⁷ According to Pease & Chitty's *Law of Markets and Fairs* there is no necessity for a market or fair to be held on land owned by the lord of the market, but he must be able to perform his duties of correcting the market and protecting the rights of the public.¹⁸

9. The grant of a market may specify the precise area of ground upon which the market is to take place.¹⁹ If the amount of land specified in the grant is too large for the market in the ordinary course of business, then the franchise owner "may lawfully appropriate a part of that space to other purposes".²⁰ If public demand is such that the whole of the space needs to be given over to the market then the franchise owner must do so. However, some franchises are granted for the holding of a market within an area, e.g. a town, city, borough or manor. Such franchises contain an incidental right to move the market or fair from one place to another within that area, and this right continues even though by custom the market has always been held in one place. Additionally, the right applies to parts of the market as well as the whole market.²¹

10. A market is an event which is held at regular intervals, usually once a week, although sometimes more often. In addition, if special provision has been made for the erection of stalls on the land, then a physical inspection of the land should reveal such activity. By contrast, as in the case of *Wyld v. Silver* above, a fair is held infrequently, usually on an annual or quarterly basis, and thus inspection of the land would not necessarily reveal the holding of such an event. Also the custom of holding the fair (or market) may have lapsed (as in *Wyld v. Silver*) but the franchise would not be extinguished by disuse. The franchise may not be apparent from the title deduced to the purchaser of the affected land. It is therefore possible for registration to occur without registering an existing franchise (as on the facts in *Wyld v. Silver*, although this case did not concern registered land) because it would not appear in the evidence of title supplied to the Land Registry.²²

11. Nevertheless, it is felt that franchises should no longer continue as a head of overriding interests for the following reasons:

- (i) There are very few categories of franchises remaining, following statutory repeals e.g. warrens.
- (ii) Very few franchises affect land, as many confer rights as to the possession of chattels e.g. treasure trove, swans, wrecks, and do not confer a right to enter onto land to collect these items.
- (iii) Franchises which do affect land are mainly markets and fairs and, as has been seen, the grant of a franchise to hold a market does not confer a right on a franchise-holder to enter on to land to hold the market. He must obtain a licence or permission from the owner of the land to do so.

¹⁷*A.-G. v. Horner* (1884) 14 Q.B.D. 245. Brett M.R. at p. 254 says:

I am therefore of opinion both on principle and authority that the grant of a franchise of a market has nothing to do with the ownership of the land by the person to whom it is granted.

and later (at p. 255) says:

if he cannot obtain the property on which to hold the market in that place, or he is prevented by the owner of the land on which he must hold the market from holding it there at all, then the only thing is that his franchise has become useless to him.

He then states that the grant continues in existence, and if the owner of the grant later acquires the opportunity and power to hold the market in the place specified in the grant, then there was no reason why the owner should not hold it there at any time.

Cotton L.J. supported the opinion that a grant of a franchise does not confer a right in land (at p. 260):

It is very true that as against the owner of land the Crown cannot by its grant enable anyone to take that land and use it either for the purposes of a market or anything else.

¹⁸§§ II-10.

¹⁹*Prince v. Lewis* (1826) 5 B. & C. 363, concerning Covent Garden Market.

²⁰Per Bayley J. at p. 371.

²¹Pease & Chitty's *Law of Markets and Fairs*, §§ II-8

²²r. 20.

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