

The Law Commission

(LAW COM. No. 18)

TRANSFER OF LAND

REPORT ON

LAND CHARGES AFFECTING UNREGISTERED LAND

*Laid before Parliament by the Lord High Chancellor
pursuant to section 3(2) of the Law Commissions Act 1965*

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The Honourable Mr. Justice Scarman, O.B.E., *Chairman*.

Mr. L. C. B. Gower.

Mr. Neil Lawson, Q.C.

Mr. N. S. Marsh, Q.C.

Mr. Andrew Martin, Q.C.

Mr. Arthur Stapleton Cotton is a special consultant to the Commission. The Secretary of the Commission is Mr. J. M. Cartwright Sharp, and its offices are at Lacon House, Theobald's Road, London, W.C.1.

Commissioners of the Law Commission
Theobald's Road, London, W.C.1

THE LAW COMMISSION
THEOBALD'S ROAD, LONDON, W.C.1

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THE LAW COMMISSION

Item IX

Transfer of Land

REPORT ON LAND CHARGES AFFECTING UNREGISTERED LAND

*To the Right Honourable the Lord Gardiner,
the Lord High Chancellor of Great Britain*

A. INTRODUCTION

1. Under Item IX of our First Programme we stated that consideration of the system of transferring unregistered land and expediting the procedure must take into account, among other things, the Report of the Committee on Land Charges (the Roxburgh Committee).¹ We accordingly embarked on a study of Land Charges and we now submit our Report on this subject. In doing so, we think it necessary at the outset to explain the scope of the study which we have undertaken and to define some of the terms which are used in this Report. As the Report of the Roxburgh Committee is out of print, and may not be readily available, the appropriate part is reprinted as Appendix II.²

2. Section 1 of the Land Charges Act 1925 requires the Chief Land Registrar to keep at H.M. Land Registry the following registers:—

- (a) a register of pending actions ;
- (b) a register of annuities ;
- (c) a register of writs and orders affecting land ;
- (d) a register of deeds of arrangement affecting land ; and
- (e) a register of land charges ;

and to keep an alphabetical index of all entries made in these registers. The registers and the alphabetical index are, in fact, kept at a separate part of the Land Registry at Kidbrooke in South East London, which is properly called the Land Charges Department of H.M. Land Registry but is commonly and conveniently known as the Land Charges Registry. Entries in these registers can effectively be made only in respect of land the title to which is not registered under the Land Registration Acts 1925 to 1966.³ Where the title to land is registered under those Acts entries are made on the register of title.

¹ Cmd. 9825 (1956).

² It will be seen that three questions were referred to the Roxburgh Committee but only the first two are relevant here.

³ Special provisions apply as to bankruptcy.

3. Certain land charges affecting unregistered land in any of the three Ridings of Yorkshire are registrable in the Land Charges Department of the appropriate local deeds registry instead of the Land Charges Registry.⁴

4. The Land Charges Act 1925 also provides for registers of local land charges to be kept by the proper officer of the local authority of the area in which the land is situated. These registers originally dealt with a few charges acquired by local authorities but their scope has since been enlarged to include certain restrictions on the use of land and other matters which may or may not concern local authorities. Although "land charge" is defined in section 20 of the Land Charges Act 1925 to include a local land charge, local land charges are matters of a different character from those dealt with in the five registers referred to in paragraph 2 above and are subject to different rules. They differ in another important respect since they relate both to registered and unregistered land. We do not deal with them in this Report as they are the subject of a separate study and references herein to land charges do not include local land charges.

5. The system of registration and searching under the Land Charges Act 1925, which we discuss in this Report, is basically the same for all the five registers referred to in paragraph 2 above (and for the registers of land charges maintained in Yorkshire). Of these five registers by far the largest is the register of land charges which contains entries of matters registrable under section 10 of the Land Charges Act 1925. It is also with regard to land charges that the problems discussed in this Report principally arise both because they are more numerous and because many of them are likely to be effective for a longer period than the matters contained in the other registers. We think, therefore, that it is convenient to deal with these problems specifically in relation to land charges, but to bear in mind that they can arise, in theory at any rate, in relation to any matters registrable under the Land Charges Act 1925 except local land charges.

6. The scope of this Report, therefore, extends to all matters (other than local land charges) which are registrable under the Land Charges Act 1925. In the interests of brevity we use the following terms :—

"the Act" means the Land Charges Act 1925,

"the Land Charges Registry" means the Land Charges Department of H.M. Land Registry, and in relation to Yorkshire includes the Land Charges Department of a local deeds registry, and

"Land Charges" means primarily the matters registrable under section 10 of the Act, but, unless otherwise indicated, includes other matters registrable under the Act except local land charges.

7. The subject of Land Charges is fairly self-contained and for that reason we have decided to put forward our proposals for changes in the law relating to them whilst other aspects of conveyancing are still under consideration. The extension of compulsory registration of title under the Land Registration Act 1925 will reduce the importance of the Land Charges Registry; but so long as compulsory registration occurs only on the first conveyance on sale of the freehold, or on the grant or first assignment of a long lease, after

⁴ Land Charges Act 1925, s. 10(6).

an area has become subject to compulsory registration, and so long as short leases are incapable of registration, many freehold and leasehold titles will remain unregistered. Changes in the law relating to Land Charges may, therefore, be necessary in order to improve the procedure of unregistered conveyancing and to provide protection for purchasers and others.

8. We have been assisted in our work by the Council of The Law Society, who in 1966 submitted to us Memoranda⁵ dealing with many aspects of conveyancing reform including proposals for changes in the law relating to Land Charges. These Memoranda and the subsequent discussions we have had with members of The Law Society's Working Party on Conveyancing have been most useful to us.

9. In May 1967 we issued a Working Paper⁶ containing certain provisional proposals for changes in the law relating to Land Charges and we have received a number of valuable suggestions from those who studied it. We have also received assistance from the Chief Land Registrar, who is responsible for the administration of the Land Charges Department at Kidbrooke.

10. This is a technical subject and unlikely to be of interest to those who are not conversant with it already. We are, nevertheless, bound to describe the system and its workings in some detail in order to explain our proposals.

⁵ The Memorandum dated November 1966 is referred to as "The Law Society's Second Memorandum".

⁶ Published Working Paper No. 10: Proposals for Changes in the Law Relating to Land Charges Affecting Unregistered Land and to Local Land Charges.

B. THE SYSTEM OF LAND CHARGE REGISTRATION

Generally

11. As we have already mentioned, this Report is principally concerned with those Land Charges which are registrable under section 10 of the Act.⁷ They relate only to unregistered land and represent encumbrances or obligations which may burden a piece of land or restrict the owner's power of dealing with it. They may, for example, be restrictive covenants, estate contracts (such as contracts to sell or options to purchase) or certain mortgages. Some of these may be lasting burdens and of vital concern to a prospective purchaser or mortgagee of the burdened land.

12. The broad scheme of the 1925 property legislation so far as it affects Land Charges is that the person entitled to the benefit of such a charge should be able to register it. Unless registered in the appropriate register the charge is thereafter void against a purchaser (including a lessee or mortgagee);⁸ if it is registered, a purchaser takes the land subject thereto since, by virtue of section 198 of the Law of Property Act 1925 he is deemed to have notice of it. The legislation contains provisions designed to enable a prospective purchaser to ascertain the contents of the register by obtaining an official search.⁹

13. Land charges affecting unregistered land are registered in the Land Charges Registry, not against the burdened land, but against the name of the estate owner of that land at the time when the charge was created.¹⁰ To make a complete search in the Land Charges Registry, therefore, it is necessary to know the name of every person who has owned a legal estate in the relevant land since 1 January 1926¹¹ when this legislation came into force.

14. Nevertheless, the terms of section 198 of the Law of Property Act 1925 are such that registration under the Land Charges Act is deemed to constitute actual notice of the registered matter to all persons and for all purposes connected with the land affected. This provision applies even to those who have not the information which would enable them to search the register.

⁷ Land Charges registrable under s. 10 of the Act are as follows:—

Class A: charges imposed by certain statutes which are created upon the application of some person;

Class B: charges imposed by certain statutes and created automatically by the statute;

Class C: (i) puisne mortgages
(ii) limited owners' charges
(iii) general equitable charges
(iv) estate contracts;

Class D: (i) charges for death duties
(ii) restrictive covenants and certain statutory restrictions
(iii) equitable easements;

Class E: annuities created before 1926;

Class F: charges by virtue of the Matrimonial Homes Act 1967.

⁸ Ss. 13 and 20 of the Act.

⁹ S. 17 of the Act. He is also entitled to make a personal search (s. 16 of the Act) but this does not give him the protection of an official search certificate.

¹⁰ S. 10(2) of the Act.

¹¹ In the case of Class A Land Charges the relevant date is 1 January 1889.

A person who has registered a charge is thus given protection for his charge ; but the system can create difficulties for a purchaser.

15. The sale of unregistered land in most cases consists of two stages. In the first stage the parties negotiate the price and the other terms of the sale and normally sign a contract under which the vendor agrees to sell the land free from encumbrances other than those which have been brought to the purchaser's attention. (At this stage the purchaser usually knows nothing of the vendor's title nor the names of any previous estate owners in the land). In the second stage the vendor deduces his title over a period of years and the purchaser investigates the title documents over that period before completing the transaction and paying the purchase price. In the course of investigating the title he will discover the names of previous estate owners in the land during that period and can search against them in the Land Charges Registry ; but unless the vendor is willing and able to deduce a title back to 1926, the purchaser may not discover the names of all the estate owners against whom a Land Charge could have been registered. It would now be rare for a vendor to deduce so long a title, for the minimum period provided by statute in the case of an open contract is 30 years and shorter titles are sometimes accepted.¹² The purchaser may, therefore, be prejudiced in two respects. First, he may have to sign a contract without being able to search for Land Charges registered against the vendor's predecessors in title ; and secondly, even after a proper investigation of title, he may still fail to discover Land Charges registered against estate owners whose names do not appear from that investigation. These difficulties stem from the basic defect of a system which provides for registration against names rather than the land. The first of the difficulties is discussed in Part C of this Report and the second in Parts D and E. Neither arises in relation to land the title to which has been registered under the Land Registration Acts.

16. The recent case of *Oak Co-operative Building Society v. Blackburn*¹³ has focused attention on other weaknesses of a system based on registration against names and in particular the difficulties which a person wishing to make a search may encounter because his information as to an estate owner's name may not correspond with the way in which that name has been shown in the registration of the Land Charge, with the result that his search may not reveal it. The implications of this case are discussed in Part E of this Report.

Possible Solutions

17. The existence of a fundamental defect in the system has led us to consider whether it would be practicable to alter the whole basis of registration of Land Charges, either by converting the "names" register into a "land" register or by combining the registers of Land Charges and of Local Land Charges into a single register for each area, or possibly by providing that from a specified date Land Charges should become registrable against land either in a new Land Charges Register or in the existing Registries of Local Land Charges, where the entries are already against land.

¹² We have recommended that the statutory minimum period for commencement of title should be reduced to 15 years. (LAW COM. No. 9, para. 47(1)(a)).

¹³ [1968] Ch. 730.

18. An important factor which has to be borne in mind is that unlike the register of title at the Land Registry, the Land Charges register consists of the actual forms of application that are lodged, supplemented by an alphabetical index of all entries made in the Register. The Registrar is not concerned to inquire into the accuracy or validity of the application.¹⁴ The accuracy of the particulars registered and the amount of detail given, therefore, depend on the applicant and vary from application to application. In many cases it is quite impossible from the particulars lodged clearly to identify the exact boundaries of the land affected by a charge.

19. Another important factor is the sheer bulk of the existing entries. At the end of 1967, there were over three million entries in the Land Charges Department at Kidbrooke. These were contained in 20,966 volumes of registrations made up as follows : —

	Volumes in 1967	Volumes in 1954 ¹⁵
Land Charges	17,235	10,099
Pending Actions	114	70
Writs and Orders	123	68
Deeds of Arrangement	5	5
Cancellations	3,489	1,845
	20,966	12,087

20. The Roxburgh Committee's Report further stated that there were also 148 volumes of annuities and registrations effected from 1855 to 1923.

21. These factors seem to render quite impracticable both the suggestion that the Land Charges Register should be reconstituted *ab initio* as a "land" register and the alternative suggestion that all the existing entries in the Land Charges Registry should be transferred to the registers of Local Land Charges.

22. Another solution for dealing with existing entries which has been canvassed, but which we also reject,¹⁶ is that persons entitled to the benefit of registered Land Charges should be required to re-register them in some other register constituted as a "land" register. Apart altogether from the problems of administration and expense that this would entail, it would be impossible to ensure that every person entitled to the benefit of a charge would take the steps, however simple, that would be required to have the charge re-registered. The only possible sanction to ensure that the new register was complete would be to provide that persons who did not re-register would lose the benefit of the charges to which they were previously entitled. This sanction in our opinion would be too drastic.

23. The solution that seems to present, in principle, the least difficulty is that, as from an appointed day, no further entries relating to Land Charges registrable under section 10 of the Act would be accepted for the existing

¹⁴ Land Charges Rules 1926, Rule 1(6).

¹⁵ The figures for 1954, which are shown for the purposes of comparison, are taken from paragraph 10 of the Roxburgh Committee's Report.

¹⁶ It was rejected by the Roxburgh Committee. (Cmd. 9825, para. 18.)

“names” register but that thereafter those Land Charges (and possibly some of the other matters now registered against names at the Land Charges Registry) should be subject to a different system. The choice would appear to lie between registration in the appropriate register of Local Land Charges and the setting up at the Land Charges Registry of a new system of registration against land. These suggestions do not, of course, solve the problem of existing entries.

24. The expense and upheaval that would be involved in setting up a wholly reconstituted Land Charges register for dealing only with future Land Charges would be considerable and would, in our opinion, rule out that possible solution. The attraction of using the registers of Local Land Charges is that they are already in existence and the creation of a new system would not be required. Nevertheless, the registration of Land Charges in Local Registers would cause considerable extensions in the size and scope of such Registers with the consequent increase in the numbers of the staff and the responsibilities cast upon them.

25. The extension of compulsory registration is an important factor in deciding whether at this stage it is desirable to make any fundamental change in the Land Charges system. When the whole of England and Wales is subject to compulsory registration of title, on every sale of unregistered land another title will come on to the Land Register and in respect of that title the Land Charges Registry will no longer be relevant. Moreover, as Land Charges are mostly created at the time of a sale, their creation will increasingly coincide with the registration of the title affected.

26. If compulsory registration of title were unlikely to be extended, we would be inclined to recommend using the Registers of Local Land Charges for registration of Land Charges in the future. Their use in this way would perhaps mean that solicitors acting for purchasers would have to make local searches on two occasions in respect of each transaction as well as a search at the Land Charges Registry. One would be made before exchange of contracts and the other immediately before completion of the purchase. This would slightly add to the work and cost of conveyancing and there might be difficulty in ensuring that all the certificates relating to a particular transaction were issued on the same day. There is also the point that the structure of Local Government is under review and its ultimate shape could affect the Local Land Charges system. Despite these possible objections, we feel that this alternative is one which has some merit. If it were to be adopted it would be essential to ensure that local registrars had the means and facilities to enable the registration and search procedures to be carried out both speedily and efficiently throughout the country.

Conclusion

27. Our conclusion is that we are bound to accept, as did the Roxburgh Committee, that it is not now possible to set up a wholly new Land Charges system. They recommended a policy of pressing on as quickly as possible with the extension of the system of compulsory registration of title until it covers all England and Wales, and in that we wholeheartedly agree with

them. The only alternative which commends itself to us is the possible transfer of the function of registering Land Charges to Registrars of Local Land Charges in respect of Land Charges created after a specified date. That alternative offers only a partial solution to the problem because it has no effect on existing entries. We think, nevertheless, that consideration should be given to it if the present curtailment of the plan to extend the compulsory registration system to the whole of England and Wales is likely to be prolonged.

28. In the remainder of this Report certain specific matters are discussed on the footing that the Land Charges system remains substantially in its present form.

C. LAND CHARGES DISCOVERED BETWEEN CONTRACT AND COMPLETION

29. A vendor and a purchaser of land generally desire that a firm bargain should be concluded at the earliest possible moment, subject to the purchaser's right to rescind if the vendor cannot show a sound, unencumbered title.¹⁷ As a result, under normal practice, the purchaser does not investigate the vendor's title before contract. It was not at first apparent that the 1925 property legislation necessitated any modification in that practice. It was assumed that in spite of section 198 of the Law of Property Act 1925¹⁸ a purchaser would be able to rescind if a registered Land Charge were discovered after contract. Doubt was, however, thrown on the position by dicta in *Re Forsey and Hollebone's Contract*¹⁹ to the effect that by virtue of section 198 of the Law of Property Act 1925 a purchaser must be deemed to have contracted with actual notice of the existence of matters registered under the Act. According to Eve J., section 198 of the Law of Property Act 1925 fixes a purchaser at the date of the contract with knowledge of Land Charges (and Local Land Charges) by reason of their registration, whether in fact he knows of them or not. If that is the law, then it operates unfairly because a purchaser will not at the pre-contract stage normally know the names of all the persons against whom a search should be made. He may, therefore, find himself bound to complete a purchase of land affected by Land Charges the existence of which he has not been able to discover. To overcome the difficulties arising from the decision in *Re Forsey and Hollebone's Contract*, the Roxburgh Committee recommended²⁰ that section 198 of the Law of Property Act 1925 should be

¹⁷ Subject to any disclosed defect of title.

¹⁸ "(1) The registration of any instrument or matter under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, in any register kept at the land registry or elsewhere, shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration or other prescribed date and so long as the registration continues in force.

(2) This section operates without prejudice to the provisions of this Act respecting the making of further advances by a mortgagee, and applies only to instruments and matters required or authorised to be registered under the Land Charges Act, 1925."

¹⁹ [1927] 2 Ch. 379.

²⁰ Cmd. 9825, para. 33.

amended so as to ensure that while, for the protection of the chargee, registration should constitute notice to all the world, registration should not as between vendor and purchaser be deemed to give the purchaser knowledge *at the date of the contract* of any matters of which he was in fact ignorant.²¹ The Committee further recommended that the parties should not be at liberty to “contract out” of this provision. For the reasons given by the Committee, we agree with these recommendations and consider that they should be implemented.

D. “OLD LAND CHARGES” DISCOVERED AFTER COMPLETION

30. The Roxburgh Committee’s recommendations which we support in Part C of this Report would provide a satisfactory remedy for a purchaser who discovers a Land Charge after contract but before completion. They would not, however, help a purchaser who has carried out a full and proper investigation of title but nevertheless discovers, after completion, that he is bound by Land Charges registered before the commencement of the vendor’s title. We refer to these as “Old Land Charges”.

31. To ensure that this problem does not arise it would be necessary to provide that a purchaser of land was entitled to a list of all estate owners in the land since 1 January 1926. The Roxburgh Committee considered, but rejected, this suggestion.²² They did this for two reasons: first, because it would be impracticable, since many vendors would be unable to comply with the obligation and, secondly, because even if practicable it would prolong the period of investigation of title. The latter is contrary to the trend of modern property legislation.

32. Although the possibility of loss being suffered through this defect in the system has existed for a number of years, cases where a purchaser has been “caught” by an Old Land Charge are in practice rare and we have heard of no case where loss has been suffered. The possibility will theoretically be increased if legislation is introduced to implement our earlier recommendation that the minimum period for commencement of title should be reduced to 15 years.²³ That cases are almost unknown may, we imagine, be due to the practice of most conveyancers of stating expressly in each conveyance the burdens—particularly restrictive covenants—to which the land conveyed is subject. If this practice is continued and perhaps extended, then the problem will, we hope, remain a very small one. A practice which does, we are informed, sometimes lead to restrictive covenants being overlooked is that of expressing land to be conveyed subject to restrictive covenants “contained or referred to” in a certain deed. The covenants “contained” in the deed are traced but those “referred to” may be overlooked. We think, therefore, that this practice should be avoided and that if land is conveyed subject to restrictive covenants the conveyance should specify all the documents which imposed them.

²¹ The Roxburgh Committee’s recommendation also covered Local Land Charges (which are not dealt with in this Report) but would have allowed “contracting out” in respect of them. We are here only recommending that the law should be changed in relation to Land Charges.

²² Cmd. 9825, para. 20.

²³ LAW COM. No. 9, para. 47(1)(a).

33. The problem of Old Land Charges is caused by a defect in the law which governs the registration of Land Charges and it does not arise in regard to registered land. Its permanent cure depends on registering the title to all the land in the country. Under the present system this will not be achieved in the foreseeable future. As we have previously suggested,²⁴ justice requires that provision should be made for compensation to be paid in certain circumstances where a person suffers loss through the existence of an Old Land Charge. The number of cases should, in our opinion, be small. Since the risk of loss being so suffered stems from a defective system established by Act of Parliament it is our view that such compensation should come from public funds. We therefore recommend the introduction of a statutory right to compensation on the lines discussed in the next part of this Report.

E. COMPENSATION FOR LOSS OCCASIONED BY "OLD LAND CHARGES"

34. The proposed introduction of a statutory right to compensation for persons suffering loss through the emergence of Old Land Charges raises a number of questions which are discussed in this part of our Report. The questions are as follows:—

- (a) Should there be any departure from the general rule that an Old Land Charge which comes to light after completion should be binding on the purchaser?
- (b) In what circumstances should a purchaser who has suffered loss be able to obtain compensation?
- (c) How is the purchaser's claim to compensation to be assessed?
- (d) By whom should compensation be paid?
- (e) Should the compensating authority have any right of recovery against a vendor on the grounds of his failure to disclose an Old Land Charge to the purchaser?
- (f) What can be done to facilitate the discovery of an Old Land Charge in future transactions?

Question (a) Should there be any departure from the general rule that an Old Land Charge which comes to light after completion should be binding on the purchaser?

35. In our view it is preferable to maintain the principle that registration affords complete protection to the chargee, so that a chargee who has done all that is required of him by the 1925 legislation is not deprived of his vested rights. We therefore agree with the Roxburgh Committee²⁵ and with the Council of The Law Society²⁶ that a Land Charge which has been properly registered should in all cases bind the purchaser.

Question (b) In what circumstances should a purchaser who has suffered loss be able to obtain compensation?

²⁴ LAW COM. No. 9, para. 46(1).

²⁵ Cmd. 9825, para. 4.

²⁶ The Law Society's Second Memorandum, para. 47(b).

36. We think that a purchaser who has suffered loss should be entitled to compensation if he can satisfy the following requirements:—

(i) *that his purchase was completed after a specified date ;*

In preparing the draft clause which appears in Appendix I²⁷ it has been assumed that this date should be that on which any legislation based on our present proposals comes into force.

(ii) *that he purchased without actual knowledge of the Land Charge ;*

The purchaser should clearly not be entitled to compensation if he actually knew of the existence of the charge, nor should he be so entitled if his solicitor or other agent had knowledge of it acquired in the course of the transaction.

(iii) *that the Land Charge was registered against the name of a person who did not appear as an estate owner in the abstract of the title which the purchaser was entitled to require or would have been entitled to require under an open contract, if the latter title is the longer.*

If the purchaser did not know of the Land Charge and he could not reasonably be expected to have discovered it by making searches against the names of the estate owners shown in the abstract of title, we think he should be entitled to compensation. Nevertheless, if he accepts an inferior title to that which he was entitled by law he should not, in our view, be compensated for the adverse effect of Land Charges which he might have discovered had he insisted on a full title. It may sometimes be difficult to determine what title the purchaser could have required had the property been acquired under an open contract since the relevant documents or abstracts may not be in the purchaser's possession. This is, however, a difficulty which exists at present and is one which will have to be accepted in this context. If the 15-year title period is adopted there should be less likelihood of purchasers being offered or having to accept less than a full and satisfactory title.

37. Under an open contract for the grant or assignment of a lease or underlease, the lessee or assignee is not entitled to call for the superior reversionary titles²⁸ but he may nevertheless be bound by properly registered Land Charges affecting those titles. Whether the rule that a lessee or assignee is not entitled to call for the reversionary titles is right or not is a matter which we will be considering at a later date, but it does not properly fall within the scope of a report on Land Charges affecting unregistered land since the rule also applies in relation to registered land. Any hardship there may be has nothing to do with the system of registration of Land Charges but flows from a general rule of long standing. We do not think, therefore, that compensation should be payable under our present proposals to a lessee or assignee, who has been "caught" by a Land Charge affecting a reversionary title which he is not by law entitled to call for.

²⁷ P. 28.

²⁸ Law of Property Act 1925, s. 44(2), (3) and (4).

Question (c) How is the purchaser's claim to compensation to be assessed?

38. Compensation should be for the financial loss suffered by the purchaser as the result of being bound by the Old Land Charge. As we have already indicated, cases where the compensation provisions will be needed are expected to be rare. On the other hand, there are many different types of Land Charge and an almost infinite variety of circumstances that could prevail if and when a claim for compensation arises. We think, therefore, that it might well be unhelpful both for the compensating authority and claimants in attempting to settle claims, and for the court in deciding them, if an attempt is made in any legislation to spell out in detail the exact measure of compensation in all the possible cases that could arise. Accordingly, we think it preferable not to make such an attempt and to leave the assessment of compensation to be governed by general principles. The claimant should, however, be able to include in the computation of his loss:—

- (i) the amount of any expenditure reasonably incurred in seeking to have the charge discharged or modified, for example, by an application to the Lands Tribunal under section 84 of the Law of Property Act 1925, and
- (ii) his costs.

Question (d) By whom should compensation be paid?

39. We think that claims of this nature should be dealt with by the Chief Land Registrar but we see no need to set up a special fund on the pattern of the Insurance Fund from which indemnity is paid under certain provisions of the Land Registration Acts. All that seems to be necessary is to confer a statutory right to compensation from public funds on a purchaser who can show that the necessary conditions are satisfied. As the need for compensation arises out of defects in the Land Charges system, we consider that an unsuccessful claimant should not be required to pay the Chief Land Registrar's costs unless the court considers that it was unreasonable for proceedings to have been commenced.

Question (e) Should the compensating authority have any right of recovery against a vendor on the grounds of his failure to disclose an Old Land Charge to the purchaser?

40. It must be remembered that we are dealing here with a faulty system of which vendors are victims as well as purchasers. We do not wish, therefore, to introduce any provision which might be thought to impose on a vendor a new obligation that would make his task more difficult than it is at present. From a practical point of view it would be wrong to expect the vendor—or in reality his solicitor—in effect to guarantee that the pre-root title was “land charge free”. To be certain that the solicitor was not involving his client or himself in liability he would have to go through all the pre-root deeds and abstracts of title back to 1925 and make Land Charge searches against all estate owners in respect of whom he did not already hold certificates of search made at the appropriate time. That, even if possible, would be a formidable task in some cases now, and the longer the time since 1925 the worse the position will become. In many cases it could not be carried out since the documents would not be

in the vendor's possession. Moreover, the introduction, in the context of our proposals, of an additional burden on a vendor might, we think, substantially detract from our recommendation²⁹ that the normal period for investigation of title be reduced from 30 to 15 years—a recommendation that is intended to save unnecessary work for vendors as well as purchasers. Compensation should be available to meet loss which arises from a defect in the law. It is not our intention to introduce any new principle which might affect the liability of vendors.

41. On the other hand, if the purchaser would have had knowledge of the Old Land Charge but for the fraud of any person, we see no reason why the Crown should not be able to recover from that person.³⁰ We accordingly recommend that in such circumstances, but in no other, the Chief Land Registrar, on behalf of the Crown, should be able to recover from the person who is guilty of the fraud the amount of any compensation that has been paid to the purchaser.

Question (f) What can be done to facilitate the discovery of an Old Land Charge in future transactions?

42. In order that a subsequent purchaser should not be “caught” by an Old Land Charge in respect of which compensation has been paid and to avoid public funds again being put on risk, we think that there should be some procedure for facilitating its discovery in future transactions. It may be that the most satisfactory method would be to make a note in the alphabetical index that would draw the attention of a searcher to the existence of the Old Land Charge. We think, however, that the procedure can best be worked out by the Chief Land Registrar and that the rules should authorise him to make use of the alphabetical index for that purpose.

F. REGISTRATION AND SEARCH PROCEDURES

Discrepancies in estate owner's names and descriptions of land

43. Two recent cases³¹ have drawn particular attention to the hazards which surround the operation of the registration and search procedures of the Land Charges system and in particular the difficulties which may be encountered by a person who wishes to make a search. His information as to the name of the estate owner or the description of the relevant land may not correspond with the way in which those particulars were shown on the application for registration, with the result that his search may not reveal a subsisting entry.

44. With regard to names, section 10(2) of the Act provides that a Land Charge must be registered in the name of the estate owner whose estate is intended to be affected. The Act and Rules, however, give no real guidance as to what is meant by “name” in this context, though the forms of application for registration and for official search require the “Surname

²⁹ LAW COM. No. 9, para. 47(1).

³⁰ cf. s. 83(9) of the Land Registration Act 1925.

³¹ *Du Sautoy v. Symes* [1967] Ch. 1146 and *Oak Co-operative Building Society v. Blackburn* [1968] Ch. 730.

and Christian names” of the estate owner to be stated in relation to a specified piece of land. As Russell L.J. pointed out in one of the recent cases³² “The real problem is, what is meant by the name or names of the estate owner in this legislation?” For example, does registration have to be in a person’s full names or will it suffice if it is in some but not all of his forenames in addition to his surname? Are initials of some or all of his forenames sufficient? Is it enough for a registration to be made in a name by which a person is commonly known if that differs from his “correct” name or is a shortened version of it permissible? What, in fact, really is a person’s “correct” name, bearing in mind that many people are known by names which differ from those on their birth certificates?

45. These problems are well illustrated by the facts in *Oak Co-operative Building Society v. Blackburn*³³ in which the correct names of the estate owner were agreed to be Francis David Blackburn. By an exchange of letters he had contracted to sell the relevant property to a purchaser, who some time later registered a Land Charge of Class C(iv) in respect of that property against the names Frank David Blackburn. These were the names under which the estate owner carried on business. Some years later a prospective mortgagee of the property made a search in respect of it against the name of Francis Davis Blackburn, (the error in the second name being apparently a clerical slip on the part of the mortgagee’s solicitor) and the search produced, so far as relevant here, a clear certificate. The questions for decision, therefore, were whether the incorrect registration was valid and, if so, whether it should prevail against a person who had searched in some version of the estate owner’s name other than that in which the registration was effected. The Court of Appeal decided that on these facts the registration was valid, although it would not have been effective against a person who searched in vain against the correct names. They declined to lay down any rule as to what amounted to a sufficient registration but reached their decision on general grounds as appears in the following passage :—

“We take a broader view that so far as possible the system should be made to work in favour of those who seek to make use of it in a sensible and practical way. If a proposing purchaser here had requested a search in the correct full names he would have got a clean certificate and a clear title under section 17(3) of the Land Charges Act, 1925, and would have suffered no harm from the fact that the registration was not in such names: and a person registering who is not in a position to satisfy himself what are the correct full names runs that risk. But if there be registration in what may be fairly described as a version of the full names of the vendor, albeit not a version which is bound to be discovered on a search in the correct full names, we would not hold it a nullity against someone who does not search at all, or who (as here) searches in the wrong name.”

46. It has been suggested that these difficulties would be removed if it were expressly provided by statute that the correct name for the purpose of registration should be the name shown in the document under which the

³² *Oak Co-operative Building Society v. Blackburn* [1968] Ch. 730 at p. 741.

³³ [1968] Ch. 730.

estate owner acquired his title. This suggestion has some attraction but it would be quite impracticable to apply it to existing entries (which number over three million) and unless that could be done it would not be of great value. And even as regards future registrations it would be difficult to apply where the matter to be registered was an agreement of an informal nature such as that which was involved in the *Blackburn* case, or, indeed, to any other case where it is not now the practice to examine the chargor's title prior to registration of the Land Charge. We confess that we can see no general rule which would be an improvement on the practical approach adopted by the Court of Appeal in the *Blackburn* case.

47. The other main difficulty arises in relation to the descriptions of properties affected by Land Charges. Registrations and searches can only be based on applications as they are submitted and, as with names, they may contain discrepancies, if not actual mistakes, in the descriptions and locations of the properties affected. Moreover, the description or postal address of a property may change but such changes are not reflected in the registration, which remains the same. Discussions which we have had with the Chief Land Registrar have led to improvements in the forms of application for official search. They are designed more emphatically to draw attention to the need to provide previous descriptions of the land and its location. Beyond that we do not think that we can suggest any method whereby the system can be improved in this respect to assist those making searches.

48. In the result, therefore, although we have given careful consideration to these problems, we do not think that anything substantial can be done about them. They stem from defects in the system itself and so long as it exists these defects will remain. Serious though these may appear to be they seem, in fact, to have given rise to very little litigation. Since the system was instituted in 1926, the only reported cases in which these problems have been exposed seem to be the two which are referred to above.³⁴ Reduction of the area in which the problems can arise is one of the benefits which will follow from the spread of compulsory registration of title. We would, however, like to put on record that, whatever may be the defects of the system, the search procedures are, so far as the Registry is concerned, carried out with commendable speed and efficiency.

Mistakes by the Land Charges Registry

49. It can happen that mistakes occur in official certificates of search through errors or omissions at the Registry. These mistakes are extremely few in relation to the enormous number of names searched annually.³⁵ Although there is no express provision in the Act for compensating persons suffering loss as the result of mistakes at the Registry, we understand that the Chief Land Registrar does, in appropriate cases, accept responsibility and we have no information that the absence of such a provision causes hardship in practice.

³⁴ See para. 43 above.

³⁵ Official searches against over 3,000,000 names were made in 1967, but only 78 instances came to light in which the Registry staff was considered to have been at fault.

50. The Chief Land Registrar has told us that very few claims arising out of mistakes at the Registry have ever been made. Since 1959 the number of claims has been eight and payments were made in three cases. The problem seems, therefore, to be a very small one and although the question of putting the liability for mistakes at the Registry on a statutory footing may need to be considered at some stage it does not seem to be one of any urgency. Moreover, it raises also the question of liability for mistakes in Local Land Charges Registries which is outside the scope of our present study. Accordingly, we do not propose in this Report to make any recommendation with regard to it.

G. UNREGISTERED LAND CHARGES

51. The view has been expressed that one of the features contained in the 1925 property legislation which might be reconsidered is the rule which applies in relation to unregistered land that a registrable but unregistered Land Charge is void against a purchaser even if he has actual notice of it. It is said that this rule "is unreasonably severe and the inequitable result outweighs the advantages on the score of simplicity."³⁶

52. Although the procedure for protecting land charges affecting registered land is somewhat different from the procedure under the Land Charges Act, the effect is similar in that the general rule is that a purchaser of registered land takes free from a land charge which could have, but has not, been protected in the appropriate manner under the Land Registration Acts and Rules. This general rule is, however, subject to an important qualification which in some cases substantially mitigates its apparent severity. The qualification is that a purchaser of registered land takes subject to the rights of persons in occupation of the land because they are overriding interests.³⁷ Thus it has been held³⁸ that the rights of a person entitled to the benefit of a matter capable of protection as a land charge will, if that person is in occupation, be good as against a purchaser, even though the necessary procedural steps to protect it have not been taken.

53. This difference between the law relating to registered and unregistered land is one of the matters which we are considering in the enquiry which we are at present carrying out into the working of the Land Registration system in the context of conveyancing. We think, therefore, that it would be premature to deal with it here.

H. TIME LIMITS ON REGISTRATION

54. It has been suggested that time limits on the effectiveness of a registration of Land Charges registrable under section 10 of the Act, or on some of them, should be imposed. *Prima facie*, this seems attractive, but the practical difficulty of providing effective machinery for re-registration,

³⁶ See Megarry and Wade, *The Law of Real Property*, 3rd Ed., p. 1128.

³⁷ Land Registration Act 1925, s. 70(1)(g).

³⁸ *Woolwich Equitable Building Society v. Marshall* [1952] Ch. 1. (Agreement for tenancy). *Bridges v. Mees* [1957] Ch. 475. (Contract for sale). *Webb v. Pollmount* [1966] Ch. 584. (Option to purchase in a lease).

in appropriate cases, on the expiration of the time limit seems insuperable. Chargees or their successors could not reasonably be expected to remember expiration dates; nor could the solicitors who had acted for them. To be of much practical use, it would be necessary for re-registration to be brought forward and be against the names of the appropriate estate owners at the time of re-registration; but a chargee might have no means of knowing who they were. Furthermore, we find it difficult to justify the additional work and expense which would be entailed in the re-registration of a still subsisting charge.

55. Estate contracts seemed a special case for consideration in this context since they are often registered merely to provide temporary protection to a purchaser or other interested party. In an attempt to find a suitable means of separating registrations of this kind from registrations of estate contracts intended to be of long duration (e.g., purchases of land by instalments, options to purchase or to renew leases, and sales not yet completed by conveyance for some specific reason) we considered sub-dividing Class C(iv) into short-term registrations at a reduced fee and perpetual registrations at a higher one. But we concluded that unless the fee for the latter were raised to a relatively exorbitant level, no use would be made of short-term registration.

I. REMOVAL OF ENTRIES

Entries no longer effective

56. Although large numbers of cancellations of entries in the Land Charges Registry do take place,³⁹ there is no doubt that the registers contain many entries of charges which are no longer effective. It has, therefore, been suggested⁴⁰ that one possible way of reducing these dead entries would be to provide an easier procedure for cancelling them. At present the normal procedure is for the application form to be signed by the person entitled to the benefit of the charge (or if that person is a corporation, sealed by it) and for the applicant's solicitors to support the application with a certificate. In some cases the applicant's title must be proved, for example, where he is not the original chargee.⁴¹ The suggestion is that this procedure should be supplemented by the following methods:—

- (i) application on a form signed by the chargee's solicitor, or
- (ii) application on a form signed by the chargor's solicitor supported by adequate evidence of discharge, e.g., the document of discharge or a statutory declaration.

57. The suggestion that the chargee's solicitor could be authorised to sign the application to cancel a Land Charge entry seems to us to raise no difficulty and we, accordingly, recommend its adoption in relation to any

³⁹ There were 51,559 cancellations in 1967. (This figure includes pending actions, writs and orders and deeds of arrangement cancelled pursuant to an application).

⁴⁰ The Law Society's Second Memorandum, paras. 55 to 57. The suggestion did not apply to Class D(ii) Land Charges (restrictive covenants).

⁴¹ Special provisions apply to the cancellation of a Class F Land Charge under the Matrimonial Homes Act 1967. See s. 5 of that Act.

class of Land Charge. We do not think that an exception need be made in respect of restrictive covenants since the Registry will not vacate an entry without evidence that the covenants have been effectively released or discharged and it is of little significance that the actual form of application is signed by the chargee's solicitor rather than by the chargee himself.

58. Non-financial charges, especially estate contracts, can frequently be or become the subjects of dispute and we think it would be wrong, as a matter of principle, to alter the present procedure for their cancellation as Land Charges except to the limited extent mentioned in the last paragraph. The same considerations do not usually apply in relation to financial charges, such as puisne mortgages, but we understand that the introduction of the suggested procedure for cancellation of entries on the chargor's solicitor's application would cast an undue burden on the Registry in examining the evidence of discharge and, in some cases the title of the chargor. Accordingly, we do not recommend the cancellation of any class of Land Charge at the instance of the chargor or his solicitor.

59. It should perhaps be pointed out that much work and expense can be saved if the chargee's solicitor causes the registration of a Land Charge to be cancelled as soon as it becomes quite clear that the charge has been discharged or has ceased to be effective. We consider it a matter of good conveyancing practice for him to do so.

Disputed entries

60. So far in this part of our Report we have discussed the cancellation of entries of charges which are no longer effective. Sometimes, however, questions can arise as to whether an entry was properly made in the first place.

61. We have already referred⁴² to the fact that the Registrar is not concerned to enquire into the accuracy or validity of an application to register a Land Charge and that applications are filed in the form in which they are lodged. Inevitably, therefore, some applications are lodged and accepted for registration which relate to matters which are not registrable as Land Charges at all or to matters which should not be registered for some other reason, such as an "estate contract" where no binding contract, in fact, subsists. The presence of an erroneous registration can clearly be a source of embarrassment to the owner of the land which appears to be effected by it because he may find it difficult to deal with his land so long as the entry remains on the Register. It would not be practicable within the framework of the existing system to require a person wishing to register a Land Charge to have to prove its validity before it is registered. Where no *prima facie* case can be made to support a registration the courts have granted summary applications to vacate the entry and, although, from the point of view of the owner of the land, it is unfortunate that he should be put to any expense, it appears that this summary method is the only practicable solution for dealing with such cases.⁴³ In other circumstances, there seems to be no alternative to the matter being determined at the trial

⁴² Para. 18 above.

⁴³ *Heywood v. B.D.C. Properties Ltd.* (No. 1), [1963] 1 W.L.R. 975. *Thomas v. Rose* [1968] 1 W.L.R. 1797.

of an action commenced by writ, since the question whether the entry of a Land Charge should be vacated can usually be determined only by a decision as to the effect of the instrument or matter which is the subject matter of the entry.⁴⁴

62. With a view to preventing erroneous entries proposals have from time to time been made for changes in the registration procedure. These involve obtaining the consent of the chargor before an application could be registered or some procedure under which, in the absence of such consent, the issue could be determined by the Chief Land Registrar. The adoption of any such proposals would involve a major alteration in the operation of the system and we feel unable to recommend any change of this kind.

J. REDUCTION OF CLASSES OF CHARGES IN SECTION 10 OF THE ACT

63. The Roxburgh Committee suggested that all mortgages unprotected by deposit of documents of title might perhaps with advantage be registered in Class C(i) and that Class C(iii) might be abolished.⁴⁵ They also suggested that options contained in leases should no longer be capable of registration as Estate Contracts (Class C(iv)). We are told that the former suggestion would not effect any saving in time and expense and we agree with The Law Society that the present division of charges in Class C into sub-classes is helpful to those investigating titles.⁴⁶ In making the other suggestion the Roxburgh Committee were influenced by the fact that it was thought that options contained in leases would be "squarely on the title" and that registration was unnecessary. This has subsequently been shown not always to be the case.⁴⁷ In all the circumstances, therefore, we think that these suggestions of the Roxburgh Committee should not be implemented.

K. EXCLUSION OF CERTAIN LAND CHARGES FROM REGISTRATION

64. We have also considered whether any useful purpose would be served in eliminating from the ambit of section 10 of the Act any class or classes of Land Charge to which it now applies. Clearly some types of Land Charge very seldom arise. For example, over the last twelve years registrations under Classes B, C(ii) and D(i) have been minimal and under

⁴⁴ *In re Engall's Agreement* [1953] 1 W.L.R. 977.

⁴⁵ Cmd. 9825, para. 13.

⁴⁶ The Law Society's Second Memorandum, para. 52.

⁴⁷ See *Weg Motors Ltd. v. Hales* [1962] Ch. 49. For a case affecting registered land see *Webb v. Pollmount Ltd.* [1966] Ch. 584.

Class E non-existent.⁴⁸ Nevertheless, no practical advantage arises administratively or otherwise in excluding them from registration and as most of them could still arise we think that they should not be so excluded.

65. The Roxburgh Committee,⁴⁹ however, suggested for consideration that Class D(iii) (Equitable Easements) might be abolished and in support of this pointed out that contracts to grant legal easements can and should be registered as estate contracts. Registrations in this class now run at an annual rate of 2,500–3,500, a substantial number of which are registered after prior registration of a priority notice.⁵⁰ Our present view is that registration does serve a useful purpose as the number of registrations demonstrates and should be retained.⁵¹

66. Another suggestion put forward by the Roxburgh Committee was that restrictive covenants made after an appointed day should no longer be capable of registration⁵²—a suggestion which would involve reverting to the pre-1926 doctrine of notice. A recommendation which would also involve reverting to that doctrine was made in the Report of the Committee on Positive Covenants Affecting Land (The Wilberforce Committee). That Committee recommended that positive covenants *in rem* affecting unregistered land should not be registrable unless it should prove possible to set up a new register containing entries against land.⁵³ In our Report on Restrictive Covenants⁵⁴ we proposed that land obligations affecting unregistered land should be registered in the Land Charges Register. We there said that to revert for a limited period to the pre-1925 doctrine of notice would cause confusion and should be avoided. We remain of that opinion.

(48) The figures for the years 1965, 1966 and 1967 were:—

	1965	1966	1967
Class B (A rent or sum of money charged upon land otherwise than pursuant to the application of some person)	11	6	11
Class C(ii) (Limited owners' charges)	1	1	9
Class D(i) (Charges for death duties)	18	36	36
Class E (Annuities created before 1926)	Nil	Nil	Nil

⁴⁹ Cmd. 9825, para. 16.

⁵⁰ In a different context we are examining the impact of the decision of the Court of Appeal in *E. R. Ives Investment Ltd. v. High* [1967] 2 Q.B. 379 upon the law relating to equitable easements generally. We are also considering it specifically in relation to registered land in the light of observations of Cross J. in *Poster v. Slough Estates Ltd.* [1968] 1 W.L.R. 1515 at p. 1521.

⁵¹ The Council of The Law Society (The Law Society's Second Memorandum, para. 53) thought that if equitable easements ceased to be registrable in relation to unregistered land, it would make the un-registered procedure out of step with the corresponding registered land procedure whereby equitable easements should be noted on the register.

⁵² Cmd. 9825, para. 7.

⁵³ Cmnd. 2719 (1965), paras. 23 to 27.

⁵⁴ LAW COM. No. 11, Proposition 7.

L. CHARGES CREATED BY COMPANIES

67. Section 10(5) of the Act provides that registration under section 93 of the Companies (Consolidation) Act 1908 (now section 95 of the Companies Act 1948) of Land Charges created by a company, for securing money, should be sufficient registration and have effect as if the charge were registered under the Act. Nevertheless, it is clear that the protection of an Official Certificate of Search issued by the Land Charges Registry is of no value to a purchaser in respect of company charges registered only under the Companies Act; and that the priority notice procedure provided by the Law of Property (Amendment) Act 1926 cannot be made to operate in relation to such charges. It has, therefore, been suggested in regard to unregistered land⁵⁵ that section 10(5) of the Act should be repealed, so that Land Charges created by a company for securing money should need registration in the Land Charges Registry in order to be effective against a purchaser.⁵⁶

68. Our inquiries have revealed that at the present time there is a substantial number of registrations in the Land Charges Registry of Class C(i) and (iii) charges against companies.⁵⁷ We also know that 30,000–40,000 registrations of company charges under section 95 of the Companies Act 1948 take place annually in the Companies Registry. These obviously include numerous charges upon registered land owned by companies and charges secured by deposit of title deeds, to none of which does section 10 of the 1925 Act apply. It is, therefore, difficult to reach any firm estimate of the additional work which would fall on the Land Charges Registry if the proposal to repeal section 10(5) were adopted; but we do not think that the number of additional registrations would be significant in relation to the number of Land Charge registrations at present dealt with.⁵⁸

69. For others the proposal would involve the slight additional work and cost involved in the registration but set against the advantage of the official search and priority procedure this, we think, is a small price to pay. No more work or expense would be involved in making searches since a purchaser of land from a company already makes a Land Charges search against the company vendor to ascertain whether any other charges may be registered.

70. Two arguments (apart from possible administrative difficulties) have been put forward against the repeal of section 10(5) of the Act. The first is that the Land Charges Registry has now only a limited life. This is not strictly true since there are estates in land (e.g., leases for 21 years or less)

⁵⁵ The Law Society's Second Memorandum, para. 64.

⁵⁶ It is important to remember that charges affecting registered land owned by companies, including floating charges, do require entry in the Land Register to be effective against a purchaser.

⁵⁷ These consist of puisne mortgages and general equitable charges. A sample check revealed 74 registrations in 22 days against companies.

⁵⁸ The number of Land Charge registrations dealt with in 1967 was 182,897. (This figure does not include registrations of pending actions, writs and orders affecting land and deeds of arrangement).

which are not at present registrable under the Land Registration Acts and Land Charges affecting such estates will have to be registered in the Land Charges Registry even when the whole country is subject to compulsory registration. Moreover, it will, as we have noted above,⁵⁹ be many years before the Land Charges Registry ceases to be of major importance. We do not, therefore, find this argument convincing. The second argument is that purchasers of land from companies should, in any case, search at the Companies Registry for other purposes. While that is true, it must be borne in mind that there is, as we have pointed out, no official search procedure available at the Companies Registry and if by the simple expedient of repealing section 10(5) that procedure can be extended even to a limited extent we do not see why it should not be done, particularly as it would not involve people in making searches that they would not make already.

71. In our opinion, therefore, section 10(5) of the Act should be amended so that in relation to unregistered land a Land Charge for securing money, created by a company otherwise than as a floating charge, should require registration at the Land Charges Registry if it is to be effective against a purchaser.⁶⁰

72. It will be observed that we recommend the exclusion of floating charges. This we do primarily in order to reduce the work which might otherwise be imposed on the Land Charges Registry and on lenders and their advisers. At the time when a floating charge is created there may or may not be any land affected by it and during the life of the charge there may be changes in the properties owned by the company as some are acquired and others disposed of. We think that it would be difficult, therefore, to ensure that the entries at the Land Charges Registry were always kept up to date so that a Land Charge search against the chargor company would reveal both the existence of the floating charge and the properties then affected by it.

⁵⁹ Para. 7 above.

⁶⁰ Failure to register a charge at the Companies Registry under section 95 of the Companies Act 1948 renders the charge, so far as security is concerned, void against a liquidator or any creditor of the company. Failure to register a Class C Land Charge at the Land Charges Registry renders it void against a purchaser. (S. 13(2) of the Act). Since, in that context, a purchaser of the property affected by the charge includes a mortgagee (s. 20(8) of the Act) and a mortgagee is also a creditor, it follows that if registration of certain company charges is required in the Land Charges Registry as well as at the Companies Registry, a mortgagee would not be bound by a charge registered under the Land Charges Act unless it is also registered under section 95 of the Companies Act 1948. On the other hand a purchaser who was not a mortgagee would be bound whether or not it is registered under section 95 if it were registered under the Land Charges Act. This apparent anomaly, which is caused by the fact that the two Registries are performing different functions, would not appear to cause any injustice. A similar position exists now in relation to registered land, in that a charge by a company should be registered both at the Companies Registry and at the Land Registry. Rule 145(2) of the Land Registration Rules 1925 provides that if the certificate of registration of the charge at the Companies Registry is not produced when the charge is registered at the Land Registry a note is to be made in the Register that the charge is subject to the provisions of section 95 of the Companies Act 1948.

M. LAND IMPROVEMENT CHARGES AFFECTING UNREGISTERED LAND

73. Among the Land Charges comprised in Class A in section 10(1) of the Act are land improvement charges. These are rentcharges in favour of the statutory Agricultural Mortgage Corporation or the Lands Improvement Company.⁶¹ Such rentcharges do not confer upon the chargee a power of sale or a right to sue on the personal covenant. Nevertheless under the provisions of section 11 of the Act, Class A charges take effect "as if created by deed of charge by way of legal mortgage". From this provision there come two unfortunate results; first the chargee acquires, contrary to the intention of the parties, a power of sale, and secondly it may make it difficult for the owner of the land to obtain advances on the security of his land from the normal sources. We consider, therefore, that section 11 of the Act should be amended so that it would not apply to land improvement charges registered after a certain date. The status of charges registered before that date should not, we think, be affected save that corporate lenders who are at present precluded from lending on the security of land affected by such a charge because of the effect of section 11, should no longer be so precluded.

N. GENERAL

74. We are conscious that our recommendations do not solve the basic defects in the existing Land Charges system. As the Roxburgh Committee pointed out, we are inheritors of a defective system and it is not now possible to put the clock back to 1925 and start all over again. All that can now be done is to patch the system and to try to alleviate some of its worst consequences. Our proposals are, therefore, directed to that limited objective. We recognise, however, that if the present delay in extending compulsory registration of title to the whole of England and Wales were to be prolonged, it might well be that substantial changes would be required in the system of registering Land Charges.

75. We set out in Appendix I draft Clauses which could be included in a Bill to implement those of our proposals which require legislation.

⁶¹ Both of these bodies make loans under the Improvement of Land Act 1864.

O. SUMMARY OF RECOMMENDATIONS

1. No basic change in the Land Charges system is recommended. If, however, the present curtailment of the plan to extend compulsory registration of title to the whole of England and Wales is likely to be prolonged, consideration should be given to the possibility of registering new Land Charges in the Registers of Local Land Charges. (Paragraph 27)

2. In relation to all Land Charges (other than Local Land Charges) the law should be amended to ensure that, while for the protection of the owner of a registered Land Charge registration shall constitute notice to all the world, registration shall not, as between vendor and purchaser, be deemed to give the purchaser knowledge at the date of the contract of any matters of which he was in fact ignorant. Parties should not be at liberty to contract out of this provision. (Paragraph 29. Clauses A and C in Appendix I)

3. Persons suffering loss through the emergence of Land Charges, registered before the root of title, of which they are unaware and which they could not be expected to discover, should in certain circumstances have a statutory right to compensation out of public funds. (Paragraph 33 and paragraphs 34 to 42. Clauses B and C)

4. An application to cancel a Land Charge entry, which must now be signed by the chargee himself, should in future be acceptable if signed either by the chargee or by his solicitor. (Paragraph 57)

5. Section 10(5) of the Land Charges Act 1925 should be amended so that in relation to unregistered land a Land Charge for securing money, created by a company (otherwise than as a floating charge) should in future require registration at the Land Charges Registry if it is to be effective against a purchaser. (Paragraph 71. Clause D)

6. Section 11 of the Land Charges Act 1925 should not apply to land improvement charges registered after a certain date and corporate lenders should no longer be precluded, because of the effect of that section, from lending on the security of land affected by a land improvement charge registered before that date. (Paragraph 73. Clause E)

(Signed) LESLIE SCARMAN, *Chairman.*

L. C. B. GOWER.

NEIL LAWSON.

NORMAN S. MARSH.

ANDREW MARTIN.

J. M. CARTWRIGHT SHARP, *Secretary.*

31 January 1969.

APPENDIX I

DRAFT CLAUSES

(with Explanatory Notes)

Contracts for
purchase of
land affected by
land charge, etc.

A.—(1) Where under a contract for the sale or other disposition of any estate or interest in land the title to which is not registered under the Land Registration Act 1925 or any enactment replaced by it any question arises whether the purchaser had knowledge, at the time of entering into the contract, of a registered land charge, that question shall be determined by reference to his actual knowledge and without regard to the provisions of section 198 of the Law of Property Act 1925 (under which registration under the Land Charges Act 1925 or any enactment replaced by it is deemed to constitute actual notice).

(2) Where any estate or interest with which such a contract is concerned is affected by a registered land charge and the purchaser, at the time of entering into the contract, had not received notice and did not otherwise actually know that the estate or interest was affected by the charge, any provision of the contract shall be void so far as it purports to exclude the operation of subsection (1) above or to exclude or restrict any right or remedy that might otherwise be exercisable by the purchaser on the ground that the estate or interest is affected by the charge.

(3) In this section—

“ purchaser ” means a purchaser in good faith for valuable consideration, including a lessee, mortgagee or other person who for such consideration acquires or intends to acquire an estate or interest in land ;

“ registered land charge ” means any instrument or matter registered, otherwise than in a register of local land charges, under the Land Charges Act 1925 or any Act replaced by it ; and

“ valuable consideration ” includes marriage, but does not include a nominal consideration in money.

(4) This section does not apply to contracts made before the coming into operation of this section.

EXPLANATORY NOTES

Clause A (Contracts for purchase of land affected by land charge, etc.)

Subsection (1) gives effect to the substance of recommendation 2 by reversing the so-called rule in *Re Forsey and Hollebone's Contract*, under which a purchaser is deemed to have knowledge at the date of the contract of registered land charges whether he knows of them or not.⁶² The effect of the clause is to make the question whether a purchaser had knowledge at the date of the contract of a registered land charge depend solely on his actual knowledge. The fact of registration will, for that purpose, be irrelevant. The clause applies only to unregistered land and "registered land charge" is defined in subsection (3) to exclude local land charges but to include any other matter registered under the Land Charges Act 1925.

Subsection (2) makes it impossible to "contract out" of subsection (1) or to restrict any remedy that the purchaser might have in respect of registered land charges of which he was not aware at the date of the contract. A vendor will not be able, therefore, by contract, to deprive the purchaser of the right to rescind on the ground that the land was, unbeknown to him, affected by an irremovable land charge at the date of the contract.

Subsection (3) defines "purchaser" in wide terms which include a lessee, mortgagee or any other person who acquires an interest in land for valuable consideration.

Subsection (4) provides that the clause is not to operate retrospectively.

⁶² For a summary of the recommendations, numbered 1 to 6 inclusive, see Part O of this Report at page 24.

Compensation
in certain cases
for loss due to
undisclosed
land charges.

B.—(1) Where a purchaser of any estate or interest in land under a disposition to which this section applies has suffered loss by reason that the estate or interest is affected by a registered land charge, then if—

- (a) the date of completion was after the coming into operation of this section ; and
- (b) on that date the purchaser had no actual knowledge of the charge ; and
- (c) the charge was registered against the name of an owner of an estate in the land who was not as owner of any such estate a party to any transaction, or concerned in any event comprised in the relevant title ;

the purchaser shall be entitled to compensation for the loss.

(2) For the purposes of subsection (1)(b) above, the question whether any person had actual knowledge of a charge shall be determined without regard to the provisions of section 198 of the Law of Property Act 1925 (under which registration under the Land Charges Act 1925 or any enactment replaced by it is deemed to constitute actual notice).

(3) Where a transaction comprised in the relevant title was effected or evidenced by a document which expressly provided that it should take effect subject to an interest or obligation capable of registration in any of the relevant registers, the transaction which created that interest or obligation shall be treated for the purposes of subsection (1)(c) above as comprised in the relevant title.

(4) Any compensation for loss under this section shall be paid by the Chief Land Registrar out of moneys provided by Parliament, and the amount thereof shall include the amount of any expenditure (so far as it would not otherwise fall to be treated as compensation for that loss) reasonably incurred by the purchaser of the estate or interest in question for the purpose—

- (a) of securing that the estate or interest was no longer affected by the registered land charge or was so affected to a less extent ;
or
- (b) of obtaining compensation under this section.

(5) In the case of an action to recover compensation under this section, the cause of action shall be deemed for the purposes of the Limitation Act 1939 to accrue at the time when the registered land charge affecting the estate or interest in question comes to the notice of the purchaser.

EXPLANATORY NOTES

Clause B (Compensation in certain cases for loss due to undisclosed land charges)

This clause gives effect to recommendation 3.

Subsection (1) entitles a purchaser of land, under a sale completed after the clause comes into operation, to compensation in certain circumstances for loss he may suffer owing to the land being affected by a registered land charge of which he had no actual knowledge. The qualifications for compensation are set out in paragraphs (a) to (c) of this subsection. The intention is that compensation should be paid if the land charge is registered against a name that would not appear on a normal investigation of the title as a party to a transaction or as being concerned in an event (e.g. a marriage or death) included in the abstract of title.

As explained in paragraph 38 of this Report compensation for loss will be assessed in accordance with general principles. Accordingly, it follows that a purchaser will not normally be obliged to consider whether he has a possible right of action against his vendor before he can present his claim for compensation.⁶³

Subsection (2) makes it clear that in considering the purchaser's knowledge under subsection (1), the fact of registration is to be disregarded.

Subsection (3). This provision is necessary to ensure that a purchaser who does not investigate title for the full "statutory period" is not to be compensated for the effect of a continuing obligation referred to in any document which he would have seen in the course of an investigation of the title for the full period.

Subsections (4) to (6). Any loss to which this clause applies will have arisen from a defect in the system and not through any fault of the Registry. The Chief Land Registrar is named as the Crown's representative to receive and deal with claims. He will be a party to the proceedings referred to in subsection (6).

⁶³ *Pilkington v. Wood* [1953] Ch. 770.

(6) Any proceedings for the recovery of compensation under this section shall be commenced in the High Court ; and if in such proceedings the High Court dismisses a claim to compensation it shall not order the purchaser to pay the Chief Land Registrar's costs unless it considers that it was unreasonable for the purchaser to commence the proceedings.

(7) Rules under the Land Charges Act 1925 may include provision—

- (a) requiring the Chief Land Registrar to take steps in relation to any registered land charge in respect of which compensation has been claimed under this section which would be likely to bring the charge to the notice of any person who subsequently makes a search, or requires a search to be made, of the relevant registers in relation to the estate or interest affected by the charge ; and
- (b) authorising the use of the alphabetical index kept under that Act in any manner which will serve that purpose, notwithstanding that its use in that manner is not otherwise authorised by or by virtue of that Act.

(8) Where compensation under this section has been paid in a case where the purchaser would have had knowledge of the registered land charge but for the fraud of any person, the Chief Land Registrar, on behalf of the Crown, may recover the amount paid from that person.

(9) This section applies to the following dispositions, that is to say—

- (a) any sale or exchange and, subject to the following provisions of this subsection, any mortgage of an estate or interest in land ;
- (b) any grant of a lease for a term of years derived out of a leasehold interest ;
- (c) any compulsory purchase, by whatever procedure, of land ; and
- (d) any conveyance of a fee simple in land under Part I of the Leasehold Reform Act 1967 ;

but does not apply to the grant of a term of years derived out of the freehold or the mortgage of such a term by the lessee ; and references in this section to a purchaser shall be construed accordingly.

EXPLANATORY NOTES

Subsection (9) lists the dispositions to which the clause applies. They are those on which the title to land would normally be investigated. Excluded are those transactions, such as the grant of a lease out of the freehold, where the lessee is not normally entitled to investigate the superior title.

(10) In this section—

“date of completion”, in relation to land which vests in the Land Commission or another acquiring authority by virtue of a general vesting declaration under the Land Commission Act 1967 or the Town and Country Planning Act 1968, means the date on which it so vests ;

“mortgage” includes any charge ;

“registered land charge” means any instrument or matter registered, otherwise than in a register of local land charges, under the Land Charges Act 1925 or any Act replaced by it, except that—

(a) in relation to an assignment of a lease or underlease or a mortgage by an assignee under such an assignment, it does not include any instrument or matter affecting the title to the freehold or to any relevant leasehold reversion ; and

(b) in relation to the grant of an underlease or the mortgage by the underlessee of the term of years created by an underlease, it does not include any instrument or matter affecting the title to the freehold or to any leasehold reversion superior to the leasehold interest out of which the term of years is derived ;

“relevant registers” means the registers kept under section 1 of the Land Charges Act 1925 ;

“relevant title” means—

(a) in relation to a disposition made under a contract, the title which the purchaser was, apart from any acceptance by him (by agreement or otherwise) of a shorter or an imperfect title, entitled to require ; or

(b) in relation to any other disposition, the title which he would have been entitled to require if the disposition had been made under a contract to which section 44(1) of the Law of Property Act 1925 applied.

EXPLANATORY NOTES

Subsection (10) contains definitions.

“registered land charge” has a similar meaning to that in Clause A in that it excludes local land charges but includes any other matter registered under the Land Charges Act. Also excluded are land charges affecting those superior titles which the grantee or purchaser of a lease or underlease is not entitled, under the general law, to require to be deduced.

The definition of “relevant title” takes into account the various cases that can arise, on the basis that, whatever title a purchaser agrees to accept, he will not be compensated for the effect of land charges which he should have discovered if he had investigated the full title which he could have required under an open contract.

Paragraph (a) of the definition covers cases where there is a contract. Any provision for a title inferior to that obtainable under an open contract is to be disregarded. If the contract provides for a longer title, that will be the relevant title. If the contract provides for any other length or quality of title, or makes no provision as to title, the relevant title will be that obtainable under an open contract.

Paragraph (b) covers any case where there is no contract, such as compulsory purchase or a transaction taking effect under the Leasehold Reform Act 1967. In such a case the relevant title will be that which a purchaser could have required if the transaction had been effected under an open contract.

Provisions supplementary to sections A and B above.

C.—(1) For the purposes of sections A and B above any knowledge acquired during the course of a transaction by a person who is acting as counsel, or as solicitor or other agent, for another in the transaction shall be treated as the knowledge of that other.

(2) Any reference in sections A and B above to any other enactment is a reference to that enactment as amended, and includes a reference thereto as extended or applied, by or under any other enactment, including this Act.

Registration of land charges created by companies.

D. Section 10(5) of the Land Charges Act 1925 (by virtue of which registration under section 95 of the Companies Act 1948 takes effect, in the case of a land charge for securing money created by a company, as if it were registration under the Land Charges Act 1925) shall not apply to any charge created after the coming into operation of this section other than one created as a floating charge, and accordingly in that subsection, after the words "created by a company", there shall be inserted the words "before the coming into operation of section D of the Act 1969 or so created at any time as a floating charge".

Land improvement charges.

E. After section 11 of the Land Charges Act 1925 (under which certain land charges take effect as charges by way of legal mortgage) there shall be inserted the following section:—

“Registered land improvement charges. 11A.—(1) The following provisions shall have effect with respect to land improvement charges registered as land charges of Class A:—

- (a) if the charge is registered after the coming into operation of section E of the Act 1969, section 11 of this Act shall not apply to it ;
- (b) if the charge was registered before the coming into operation of that section, any body corporate which, but for the charge, would have power to advance money on the security of the estate or interest affected by it, shall have that power notwithstanding the charge.

(2) In this section "land improvement charge" means any charge under the Improvement of Land Act 1864 or under any special improvement Act within the meaning of the Improvement of Land Act 1899."

EXPLANATORY NOTES

Clause D (Registration of land charges created by companies)

This clause gives effect to recommendation 5 and amends subsection (5) of section 10 of the Act. Under that subsection registration at the Companies Registry of land charges affecting unregistered land, created by a company for securing money, takes the place of registration at the Land Charges Registry. The effect of the amendment will be that in the case of such a land charge created (otherwise than as a floating charge) after the clause comes into operation, the charge should be registered at the Land Charges Registry in order to be binding on a purchaser. Registration at the Companies Registry will still be required.

Clause E (Land Improvement Charges)

These charges are described in paragraph 73 of the Report. Clause E gives effect to recommendation 6 by amending section 11 of the Land Charges Act. Under that section a Class A land charge takes effect, when registered, as if it had been created by a charge by way of legal mortgage. The amendment will remove from the scope of the section land improvement charges registered after the clause comes into operation. Land improvement charges which were already registered when the clause comes into operation will remain subject to the section, but bodies corporate, such as building societies, who may have been precluded from lending money on unregistered land affected by a land improvement charge, because of the notional legal charge which the section implies, will no longer be so precluded. Paragraph (1)(b) of the new section 11A is limited to bodies corporate because the powers of trustees to invest on land subject to a land improvement charge are already dealt with by section 6 of the Trustee Act 1925.

APPENDIX II

REPRINT OF PART OF THE REPORT OF THE ROXBURGH COMMITTEE ON LAND CHARGES

(Cmd. 9825)

1. On the 1st October, 1954, we were appointed by your predecessor, Lord Simonds, a Committee with the following terms of reference—

“To consider the position which will arise on or after the 1st January, 1956, under the Law of Property Act, 1925, particularly sections 43, 44, 198 and 199 and the Land Charges Act, 1925, when the Land Charges Register will have been in existence for more than 30 years and a purchaser of land under an open contract may not be entitled to call for a root of title earlier than that period of time; and to advise whether any, and if so what, amendments of the law ought to be made before the said date.

To consider the judgment of Eve, J., in *Re Forsey and Hollebhone's Contract* [1927] 2 Ch.D. 379 and to advise whether, in the light of the dicta therein contained, any, and if so what, alteration in the law affecting vendors and purchasers of land is requisite, with particular reference to the proposals in the Report of the Committee on Local Land Charges (Cmd. 8440) for enlarging the scope of matters registrable as local land charges.

To advise whether any, and if so what, amendments should be made in the law affecting the liability of lessees and assignees of leases in respect of land charges registered against their landlords.”

2. We have held 11 meetings and have received written evidence from the bodies and individuals listed in the Appendix—from some of them several times at our request. We should like to record here our gratitude to them all for the care they bestowed on the technical and difficult subjects referred to us and for the help they gave us. We are also indebted to the authors of a number of learned articles in legal publications, in particular *The Land Charges Act, 1925—Some Defects and Some Remedies* by the late R. Ainscough in the *Law Quarterly Review* (Vol. LI) of 1935, and more recent articles appearing in the *Cambridge Law Journal*, the *Law Times* and elsewhere.

Question One

3. The problem raised by Question One is peculiar to charges registered centrally in the Land Charges Department of the Land Registry at Kidbrooke and affecting unregistered land. This is so because such charges are registered against the names of owners of land, and not against the land itself. Local land charges and charges affecting registered land are registered against the land, and not against owners of land, and accordingly do not contribute to the problem. But in the case of charges registered against owners, it is impossible to search adequately without knowing the names

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of the successive owners of the land in question. Section 198 (1) of the Law of Property Act, 1925, provides that the registration of any instrument or matter under the provisions of the Land Charges Act, 1925, or any enactment which it replaces, in any register kept at the Land Registry or elsewhere, shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration or other prescribed date and so long as the registration continues in force. By section 44 (1) of the Law of Property Act, 1925, 30 years was substituted for 40 years as the period over which title had to be shown unless a contrary intention was expressed in the contract. The Law of Property Act, 1925, came into force on the 1st January, 1926, and accordingly after the 1st January, 1956, it became possible for a purchaser of land to be deemed to have actual notice of a charge registered against a previous owner whose name the purchaser had no means of finding out. It is true that section 44 (8) provides that a purchaser shall not be deemed to be affected with notice of any matter or thing of which, if he had investigated the title or made enquiries in regard to matters prior to the period of commencement of title fixed by that Act, by any other statute or by any rule of law, he might have had notice unless he actually makes such investigation or enquiries; but, although the point has never been decided, the better opinion is that this subsection provides no defence against the situation which has now arisen and which cannot be defended upon any basis of jurisprudence. We do not suppose that the framers of the 1925 Acts were blind to this shortcoming in their system. We assume that they regarded the registration of charges against the unregistered land itself as unnecessary in the belief that the title to all land would be registered within the next 30 years. Now we are at the end of that period and it is open to doubt whether registration of all titles will be completed even within the next 30 years.

4. The situation which has now arisen is theoretically wrong, and ought to be amended unless any practicable amendment would be likely to produce ills more serious than that which it was designed to cure, and in that spirit we have investigated this problem. If even one case occurred in which a purchaser suffered loss owing to the existence of a charge which he had no means of discovering, that would be an injustice. On the other hand, it would be unjust to deprive owners of registered charges of rights which the Act of 1925 has given to them, unless proper safeguards could be devised. Our investigation has convinced us that the framers of that Act have posed for us a problem which is insoluble until it solves itself upon completion of the registration of all titles to land; and we must content ourselves with pointing out that few cases of injustice are in practice likely to occur and that any general attempt to forestall them now would give rise to more serious and widespread injustice.

5. For, in practice, very many purchasers have before 1st January, 1956, been willing to accept by contract less than 30 years' title and thus voluntarily to take the risk which purchasers under an open contract cannot now avoid. And yet no case has come to our notice where any charge registered before the commencement of the title and not referred to in the later

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documents of title has afterwards come to light. This circumstance compels us to scan very closely the risks involved in any proposed remedy.

6. Moreover the various classes of charges registered in the Central Register do not involve the same degree of risk of hardship. Before 1926 all the charges capable of registration (except annuities) related to matters which did not happen very often and were unlikely to affect the land for an indefinite period of time. Such were pending actions, writs, orders and deeds of arrangement affecting land and the statutory charges corresponding to the present class A*. There is no likelihood of any case of hardship arising through ignorance of any charges belonging to these types of charges and registered more than 30 years before.

7. But the Acts of 1925 introduced a much more ambitious scheme of registration, embracing many common and enduring transactions such as puisne mortgages, limited owner's charges, options and restrictive covenants, and they did so without making any provision for the solution of the problem which now confronts this Committee or for lightening by compulsory cancellation the enormous bulk of registrations to which the Land Charges Registry is condemned. Doubtless they regarded this fundamentally unsound system as only transitory, but in our view it is now too late to put the clock back to where it stood on 1st January, 1926. We are unable to suggest any commendable alleviations of the risk of hardship which will operate within the next 30 years or so. We doubt whether it is safe to assume that registration of title will be universal by then. If not, we make one suggestion which, if adopted, would by then have a beneficial effect upon the problem referred to us, though we hesitate to describe it as a recommendation. This is that restrictive covenants made after an appointed day should no longer be capable of registration.

8. Restrictive covenants form the most numerous class and are long-lasting and therefore involve the greatest risk of hardship.

9. There were 92,194 registrations in the Land Charges Department during the year ending 31st December, 1954, distributed as follows:—

Class A	Statutory Charges	...	...	532
Class B	Statutory Charges	...	...	30
Class C (i)	Puisne Mortgages	...	...	20,830
Class C (ii)	Limited Owner's Charges	...	...	1
Class C (iii)	General Equitable Charges	...	...	2,745
Class C (iv)	Estate Contracts	...	...	13,360
Class D (i)	Inland Revenue Charges	...	...	8
Class D (ii)	Restrictive Covenants	...	...	46,791
Class D (iii)	Equitable Easements	...	...	1,933
Writs and Orders other than Bankruptcy		...	...	236
Bankruptcy Writs and Orders		...	...	2,391
Pending Actions other than Bankruptcy		...	...	210
Pending Actions (Bankruptcy)		...	...	2,942
Deeds of Arrangement		...	...	185
				92,194

* The land charges now to be registered under section 10 of the Land Charges Act 1925, are divided into five alphabetical classes and the third and fourth classes are divided into numerical sub-classes.

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It will be seen that more than half the registrations were of restrictive covenants.

10. At the end of 1954 there were 12,087 volumes of registrations and cancellations in the Central Land Charges Registry made up as follows:—

Land Charges	...	...	...	...	...	...	10,099
Pending Actions	...	...	...	...	...	...	70
Writs and Orders	...	...	...	...	...	...	68
Deeds of Arrangement	...	...	...	...	...	...	5
Cancellations	...	...	...	...	...	...	1,845
							12,087

There were also 148 volumes of annuities and registrations effected from 1855 to 1923.

11. Restrictive covenants are almost always created as part of the terms of a disposition of the land affected and are therefore shown in the abstract of title. Doubtless there are exceptional cases (such as restrictions created in favour of the National Trust) where the covenants are contained in a deed collateral; but covenantees in such cases could in our opinion be adequately protected in future by being given, by an extension of section 200 of the Law of Property Act, 1925, the right to have notice of the collateral deed endorsed on the appropriate deed of disposition of the land affected. Restrictive covenants do not tend to be forgotten when the instrument creating the covenant is older than the root of title, because a vendor of restricted land may be liable either under the original covenant or under his covenants of indemnity, unless he protects himself adequately when he comes to sell. The innumerable restrictive covenants made before 1926 (which are still not capable of registration) depend upon this circumstance for their security. Undoubtedly cases do sometimes occur in which the vendor overlooks the necessity to mention the restriction, and in such a case the system introduced in 1926 gives the covenantee additional security at the risk of hardship to a purchaser. We do not feel, however, that this shift of balance has any particular justification, still less that it justifies the administrative burden which it involves, and it is worthy of consideration whether Class D (ii) should not be closed and the system applicable before 1926 reinstated for the future.

12. This would no doubt involve the repeal of section 44 (5) of the Law of Property Act, 1925, and the restoration of the rule in *Patman v. Harland*.* Otherwise owners of restricted land could evade the restrictions by granting long leases.

13. The next largest class consists of mortgages not protected by the deposit of documents of title; if legal, they fall into Class C (i) as puisne mortgages and, if equitable, into Class C (iii) as general equitable charges. We cannot make any suggestion with regard to these which would tend to the solution of our problem now or ever. But we may throw out a

* This subject is discussed in our Report on Question Three (see para. 36 *et seq.*).

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suggestion in passing that all unprotected mortgages, whether legal or equitable, might perhaps with advantage be registered in Class C (i) and that Class C (iii) might be abolished, if an opportunity for amending legislation occurred.

14. We would also suggest consideration of some changes in relation to the next largest class. Estate Contracts (Class C (iv)) must for the present purpose be divided into three groups:—

- (1) Ordinary contracts for sale or lease ;
- (2) Contracts providing for payment of purchase money by instalments ; and
- (3) Options in leases.

15. Ordinary contracts for sale or lease are transitory and do not contribute to our problem, but a practice has grown up in some areas, particularly in Essex, of allowing purchasers to take possession under a contract providing for payment of the purchase money by instalments spread over a number of years and not executing a conveyance until all the instalments have been paid. Estate contracts of this class may well be in operation for many years, but the period is not likely to exceed 30 years. Options for renewal or purchase contained in leases may, however, well be in force for more than 30 years, yet they play no part in our problem because they are squarely on the title. Indeed to operate a system of registering them seems to involve a burden without much benefit, because a purchaser too lazy to inspect a lease would probably be too lazy to search. Accordingly we suggest that options for renewal or purchase contained in leases should no longer be capable of registration.

16. We think that any convenient opportunity might be taken to make it clear that an agreement to create a mortgage, if protected by deposit of documents of title and for that reason not registrable as an equitable charge, is not capable of registration upon the footing that it constitutes an estate contract, as suggestions to that effect have emanated from responsible quarters and raised doubts. But this has no bearing on our problem. Nor has the further suggestion which we throw out for consideration. It is that Class D (iii) (Equitable Easements) might be abolished. Contracts to grant legal easements can and should be registered as estate contracts.

17. These suggestions do not of course provide a solution of the problem referred to us, and we now proceed to explain why none appears to exist.

18. An apparent solution of the problem which naturally first comes into view would be to convert the existing system from a system of registration against the names of owners into a system of registration against the land affected within the central registry itself. But this is impracticable without reregistration if only because the evidence recorded at the Registry does not sufficiently identify the land concerned. If reregistration were an acceptable policy, it could be carried out either at the central registry or in local registries, but we are of opinion that such a policy would produce evils greater than those which it is designed to cure. It would give rise to a costly and laborious administrative problem. As it would be manifestly unjust to deprive a chargee of vested rights through failure

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to reregister in response to advertisement alone, individual notices would be required. There are some 2,000,000 land charges of the five alphabetical classes on the registers. If a clerk filled in 100 notices a day, this alone would involve 20,000 days of work spread over the available staff and the cost (including wages, accommodation, stationery and postage) is estimated by the Chief Land Registrar at not less than £50,000. These considerations are not, however, in our view conclusive. But over the period of 30 years very many of the applicants who have registered charges have died or become bankrupt or insane, or changed their addresses, or transferred the benefit of their charges to others, and we are quite satisfied that it is impossible to ensure that the notices will actually reach a sufficient proportion of the persons who would be entitled to reregister. We are also of opinion that many who did receive notices would omit to reregister on account of expense or inadvertence or for other reasons. We feel that it would be unjust to allow such carelessness to impair vested rights and *a fortiori* unjust to abrogate rights without receipt of individual notice, in order to remedy a situation which is certain to involve less hardship and may indeed involve little or none.

19. This conclusion rules out the possibility of converting the existing central registration system from a "names system" to the system adopted for local land charges. Professional opinion as voiced by the Institute and by the Council of the Law Society is unanimous that this would be the only satisfactory solution and we agree with them. But in our view it is not practicable for the reasons which we have given.

20. We now proceed to consider some other suggestions which have been made.

(1) It has been suggested that a vendor under an open contract for sale should be bound to produce a list of estate owners of the land since 1st January, 1926. But as many purchasers have already been content to accept less than 30 years' title, they would be unable as vendors to comply with this newly imposed obligation and would therefore be unable to sell at all without contracting out of it. In cases in which the vendor could discharge the obligation, it would prolong the period for investigation of title by one year annually, contrary to the tendency of all modern real property legislation. We cannot advise such a course.

(2) It has also been suggested that a vendor under an open contract should be bound to produce the originals or abstracts of certificates of the result of official searches, but this proposal is in our opinion open to similar objections.

(3) It has also been suggested that a vendor should be liable in damages if a purchaser suffered loss through an undisclosed charge registered before the date for the commencement of title. This would be fair if the vendor knew of it. But often enough he would not, and indeed might not have been able to discover it, if his title did not relate back to 1st January, 1926, and no steps had been taken to invoke the charge against him, and in such a case Peter would be robbed to pay Paul for something for which neither was to blame.

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21. Sir Francis Enever, the Deputy Treasury Solicitor, has suggested to us that, as regards charges centrally registered at Kidbrooke, where title is shown from a date not later than the date of the statutory period for the commencement of title, there should be excluded from the ambit of section 198 of the Law of Property Act, 1925, any instrument or matter the registration of which took place before the date of the instrument constituting the root of title, and this is the change which the Chief Land Registrar also advocates, if any change is to be made. Sir Francis Enever points out that it has never been decided that section 44 (8) does not override section 198. That is true. But he shares our view that it does not. We think that this proposal merely transfers the hardship from the purchaser to the chargee, and we do not know why the chargee, who has done all that is required of him by the Act of 1925 to acquire his vested right, rather than the purchaser, should pay the price of a fault in the system.

22. The only policy which we can recommend is to press on as quickly as may be with the extension of the system of compulsory registration of title (to which Parliament seems by this time to be irrevocably committed) until it covers all land in England and Wales; whereupon this first question referred to us will automatically solve itself. We are the inheritors of a transitory system which was bound to disclose this defect after 30 years of transition and it seems too late to disclaim our inheritance.

Question Two

23. In order to appreciate the problem which faced Eve, J., in the case of *Re Forsey and Hollebone's Contract* [1927] 2 Ch. 379, it is necessary to bear in mind the rules established by courts of equity in the 19th century as to the effect on the obligations of a vendor under a contract of sale of land of the purchaser's knowledge, when he entered into the contract, of some defect in the vendor's title to the property to be sold which is not mentioned in the contract and which the vendor cannot remove. If, for example, A contracts to sell B land which is subject to a restrictive covenant which is not mentioned in the contract but of the existence of which B is aware when he signs the contract, is B to be at liberty to refuse to complete the contract if the covenantee is unwilling to release the covenant or can A oblige him to purchase the property subject to the covenant? Before 1926 it was well established that the answer to such a question depended on whether the contract was silent as to the title which was to be shown by the vendor and the purchaser's right to a good title was merely implied by law or whether, on the other hand, the contract expressly provided that a good title should be shown, as, for example, by providing that the property was to be sold "free from incumbrances". In the first case the purchaser's knowledge that the property was subject to some incumbrance which the vendor could not remove prevented the implication in his favour of a right to a title free from that incumbrance. In the latter case, on the other hand, the purchaser's knowledge of the incumbrance did not affect the right expressly given him by the contract to have a conveyance free from it (see e.g. In *Re Gloag and Miller's Contract* 23 Ch. D. 320: *McGrory v. Alderdale Estate Company Ltd.* [1918] A.C. 503). The reason generally given for the distinction was that to allow an express provision that a good title should be shown to be affected

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by the purchaser's knowledge that the title was subject to an incurable defect would be to allow a term of a written contract to be contradicted by parol evidence.

24. In the case of *Re Forsey and Hollebone's Contract* Eve, J., had to consider the impact on these rules of section 198 of the Law of Property Act, 1925, which provides that "the registration of any instrument or matter under the provisions of the Land Charges Act, 1925, or of any enactment which it replaces, in any register kept at the Land Registry or elsewhere, shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected as from the date of registration or other prescribed date and so long as registration continues in force". The facts were that by a contract in writing made on the 10th December, 1926, a vendor agreed to sell certain property to a purchaser "free from incumbrances". In the course of investigating the title the purchaser discovered that the property was included in an area in respect of which the local authority had resolved to prepare a Town Planning Scheme under section 2 of the Town Planning Act, 1925, and that notice of such resolution had been registered in the register of local land charges under section 15 of the Land Charges Act, 1925. Neither the vendor nor the purchaser was aware of the existence of the resolution at the date of the contract. The purchaser contended that it constituted an incumbrance which the vendor could not remove and that she was entitled to refuse to complete. Eve, J., decided the case in favour of the vendor on two alternative grounds. The first ground (upon which his judgment was upheld by the Court of Appeal) was that a mere resolution to prepare a Town Planning Scheme was not an incumbrance at all. The second ground (upon which the Court of Appeal expressed no opinion) was that, even if the resolution was an incumbrance, section 198 of the Law of Property Act was an answer to the purchaser's claim. He arrived at this latter conclusion by two stages. First he held that, as section 198 provided that the registration of the resolution should be deemed to constitute actual notice of it to all persons and for all purposes connected with the land affected, the rights of the purchaser must be ascertained as though she knew of the existence of the resolution at the date of the contract, although in fact she did not. Then he went on to hold that the fact that the vendor expressly contracted to sell the property "free from incumbrances" did not preclude her from relying on the purchaser's "notional" knowledge of the existence of the resolution, since that knowledge did not have to be proved by parol evidence, but was conclusively imputed to the purchaser by section 198. Accordingly, in his view, it overrode even the express provision in the contract that the sale should be "free from incumbrances".

25. It is, of course, with the second ground for the decision—the effect of section 198—that we are concerned. Although this part of the decision has been criticised from time to time in text books and legal periodicals (see e.g. a recent article by Mr. H. W. R. Wade in the *Cambridge Law Journal* for April 1954), it has never been commented on in any other reported case and it would no doubt be followed by any other Judge of first instance. Naturally,

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therefore, it has been accepted as good law by the legal advisers of prospective purchasers and it has in fact led, or at least contributed, to a far-reaching change in conveyancing practice.

26. Before 1926 a prospective purchaser did not normally make any enquiries as to the title of his vendor before he entered into a contract to purchase. The maxim *caveat emptor* applies, generally speaking, to defects in the condition of the property to be sold and a prudent purchaser always inspects the property which he is going to buy before he contracts to buy it. But it is for the vendor to prove his title to the property according to the contract and, if on investigating the title after contract the purchaser discovered some flaw in it, of which he previously knew nothing, his right to object to it and to claim, in an appropriate case, to rescind the contract would not, before 1926, have been in any way prejudiced by the fact that he had made no enquiries about the vendor's title before entering into the contract. But, in the light of section 198 of the Law of Property Act as construed in *Re Forsey and Hollebone's Contract*, the position since 1925 is very different. If an incumbrance which the vendor cannot remove has been registered under the provisions of the Land Charges Act, 1925, a purchaser may find himself obliged to take the property subject to it though he did not know of its existence when he entered into the contract and even though the contract expressly provides for the property being conveyed "free from incumbrances". Since 1925, therefore, a purchaser who is well advised will either search for the relevant registers (so far as he can) before entering into his contract or (if he can) obtain the insertion in the contract of an express provision enabling him to rescind it if the property proves to be subject to some registered incumbrance which the vendor cannot remove and which is not referred to in the contract.

27. As local land charges are registered against the land affected a purchaser can make an effective search for them in the local registers before he signs a contract and, after the decision in *Re Forsey and Hollebone's Contract*, solicitors acting for prospective purchasers came gradually to adopt the practice of making such searches before contract. This practice is now invariably followed unless the contract contains a condition which makes such preliminary searches unnecessary. But as land charges, other than local land charges, are registered against the names of former owners of the land and not against the land itself, no purchaser, however well advised, is likely to be able to make a complete search in the central register before contract. He will probably know the name of his prospective vendor but he is not likely to know the names of the former owners back to the date of the root of title. Where the purchaser is professionally advised this difficulty is normally met by the insertion of an appropriate condition in the contract. Thus Condition 20 (3) of the *Law Society's General Conditions of Sale* (1953 Edition) provides *inter alia* that, if any land charge (other than a local land charge) which the vendor cannot remove has been registered before contract, the purchaser can rescind unless before contract he had notice in writing of its existence, either by the contract itself or otherwise. But, of course, some purchasers enter into contracts to buy land before they

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have consulted their solicitors. Such purchasers are not likely to think of making preliminary searches in any registers or of inserting conditions in the contract making such searches unnecessary and for them the decision in *Re Forsey and Hollebone's Contract* may well constitute a trap.

28. We must next consider a matter to which our terms of reference tell us to have particular regard—namely the Report of the Committee on Local Land Charges (Cmd. 8440). Under section 15 of the Land Charges Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, and by the Town and Country Planning Act, 1947, the matters which are registrable against land as “local land charges” are, broadly speaking, either (a) charges for securing money recoverable by local authorities from the land or successive owners of the land under public health legislation, or (b) prohibitions of or restrictions on the user of the land imposed by a local authority under planning legislation. But, as the Committee point out in paragraphs 9 and 10 of their Report, a number of other Acts passed since 1925 have provided for the registration in the register of local land charges of various matters which would not have been registrable under the Land Charges Act itself, either because they were not charges or prohibitions or restrictions of the type envisaged by that Act or because they were not imposed or enforceable by a local authority. There are, however, many other matters of a more or less analogous character arising under various modern statutes for the registration of which no provision is made. In practice solicitors acting for a prospective purchaser accompany their requests for preliminary searches of the appropriate local registers with elaborate questionnaires addressed to the registrar making enquiries as to many such matters which, though not registrable as local land charges, may nevertheless affect the value of the land to the purchaser. Although under no statutory duty to do so the registrars habitually answer these supplementary enquiries to the best of their ability and, indeed, sometimes volunteer information which is not specifically asked for. The Committee on Local Land Charges considered whether the present system (under which some of the matters affecting land which arise under modern legislation are registered as local land charges while others are left to be dealt with by informal enquiries) should continue or whether it would be better to make all such matters registrable or alternatively to abolish registration altogether (save with regard to charges for securing money) and make everything else the subject of informal enquiry. The recommendations of the Committee which are most relevant for our purpose are (a) that a number of matters which are not at present registrable as local land charges should be made so registrable (see paragraph 79 (3)), but (b) that many of the matters at present dealt with by supplementary enquiries are not suitable for registration and that the practice of making supplementary enquiries should continue and, indeed, should be extended to various additional matters (see paragraph 16 and paragraphs 79 (1) and (2)). The chief bearing of these recommendations on the question which we are considering is, we think, that, if more matters are made registrable as local land charges, the effect of the decision in *Re Forsey and Hollebone's Contract* will become more far-reaching and the possibility of hardship resulting from it will be increased.

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29. We now turn to consider whether the law as laid down by Eve, J., in *Re Forsey and Hollebhone's Contract* should be amended. The decision applies, of course, both to land charges registered against names in the central register and to local land charges registered against land in the local registers. It does not, however, follow that if the law requires amendment in the one case it also requires any—or the same—amendment in the other, and we shall consider each separately.

30. So far as concerns land charges registered in the central register, the law as laid down in *Re Forsey and Hollebhone's Contract* is, we think, indefensible. So long as the central register remains a register against names (and we have unwillingly been forced to the conclusion that it must so remain) a purchaser is not only deemed to know things which he does not know but is deemed to know things which he could not possibly have discovered. In the great majority of cases this injustice is avoided, since the conditions of sale governing the contract exclude the application of the rule. We have no hesitation in recommending that the rule itself should be abolished so far as concerns land charges registered in the central register. Furthermore, we think that any provision in a contract of sale purporting to fix the purchaser in advance with notice of any matters unknown to him which may be registered against the vendor or his predecessors in title in the central register should be declared to be void. No purchaser who was properly advised would ever agree to the insertion of such a provision and no honest vendor would desire its insertion.

* 31. The question with regard to local land charges is very different. As they are registered against the land, a purchaser can always discover them before entering into the contract and, as we have said, it has become the invariable practice for solicitors acting for purchasers to make preliminary searches in the local registers. It is, therefore, only in cases in which the purchaser does not employ a solicitor before entering into the contract—that is to say in cases of open contracts and of sales by auction—that the law as laid down in *Re Forsey and Hollebhone's Contract* can work injustice so far as local land charges are concerned. It is certainly desirable to prevent any such injustice, if possible, but at the same time it is important to do nothing which would interfere with the procedure which obtains at present when both vendor and purchaser are represented by solicitors before the contract is signed. As things are it is not necessary for a vendor to search the local registers before offering his property for sale, because under the decision in *Re Forsey and Hollebhone's Contract* the purchaser will be deemed to have actual notice of anything contained in them. But if the law was altered with regard to local land charges in the same way as we have recommended that it should be altered with regard to land charges registered in the central register, the result might well be that in many cases two searches would be made instead of one. Vendors might feel obliged to search the local registers before offering their property for sale for fear that, if they did not, the purchaser might be entitled to rescind the contract on account of some undisclosed incumbrance; while the purchaser's solicitor would still make preliminary enquiries on his own account, because under modern legislation it is always possible that there may be some matters—either registrable or non-registrable—affecting the land adversely which

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might be discovered by preliminary searches or enquiries but which would not amount to an incumbrance which would entitle the purchaser to rescind if discovered after contract. While, therefore, we think that the rule laid down in *Re Forsey and Hollebone's Contract* should be abolished in the case of local land charges as well as in the case of land charges registered in the central register, we think that in the former case, unlike the latter, the parties should be at liberty to provide in the contract that the purchaser, whether or not he makes preliminary searches, shall be deemed to have notice of any local land charges registered against the property at the date of the contract. A vendor who is advised by a solicitor before entering into the contract will no doubt usually wish to insert a clause in the contract fixing the purchaser with notice of local land charges, and a purchaser who is himself advised by a solicitor before contract will have nothing to fear from such a clause, because his solicitor will make preliminary searches as he does today. But in the case of "open contracts" containing no such express provision the purchaser will not be fixed with notice of undisclosed local land charges and will be able to rescind the contract if the land proves to be subject to an undisclosed incumbrance.

32. It remains to consider sales by auction. If a vendor who offers property for sale by auction is at liberty to insert in the conditions of sale a provision fixing the purchaser with notice of undisclosed local land charges, he will probably usually avail himself of his right to do so. But purchasers at auctions do not usually consult their solicitors before bidding for the property. Probably in many cases they would not in fact read the relevant condition of sale (which might well not be a special condition but one of a number of general conditions incorporated in the contract) and would not be aware that they were taking a risk in not searching the local registers before bidding. The position of purchasers at sales by auction could be safeguarded by providing that in the case of such sales—as opposed to sales by private contract—any condition fixing the purchaser with notice of undisclosed local land charges should be void. On the whole, however, we do not recommend the insertion of such a provision in the amending legislation. Purchasers at auctions have for the last 30 years been exposed to the risk of finding that the property which they buy is subject to undisclosed local land charges, but none of us has come across a case where this has happened and none of our witnesses has mentioned such a case. It appears, therefore, that the risk of hardship is rather theoretical than real, and in any case it may be said that, as under the amending legislation which we propose the purchaser will not be fixed with notice of undisclosed local land charges unless the contract provides that he shall be, there can really never be a question of hardship at all.

33. In the result, therefore, we recommend that section 198 of the Law of Property Act, 1925, should be amended so as to ensure that, while for the protection of the owner of the registered charge registration shall constitute notice to all the world, registration shall not as between vendor and purchaser be deemed to give the purchaser knowledge at the date of the contract of any matters of which he was in fact ignorant. We further recommend that the parties shall be at liberty to "contract out" of this provision in the case of local land charges, but not in the case of land charges registered in the central register.

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