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THE LAW COMMISSION

PUBLISHED WORKING PAPER

NO: 24

First Programme - Item IX

TRANSFER OF LAND

RENTCHARGES

2 September 1969

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LAW COMMISSION

FIRST PROGRAMME: ITEM IX

TRANSFER OF LAND: RENTCHARGES

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TRANSFER OF LAND: RENTCHARGES

I INTRODUCTION

1. As indicated in paragraph 76 of the Law Commission's First Annual Report, early in 1966 we commenced an examination of the subject of rentcharges. Progress of this study was held up for the reasons indicated in paragraph 71 of the Law Commission's Second Annual Report (Law Com. No. 12), but the stage has now been reached when we are in a position to submit a Published Working Paper on this topic.

2. Although this paper is primarily addressed to those who are acquainted with the operation of the rentcharge system, we have endeavoured to summarise the main features of rentcharges in such a way as, we trust, will give a sufficient indication of their characteristics and incidents to those readers who find themselves in unfamiliar territory.

3. The paper is concerned only with the study of legal rentcharges which consist of annual sums issuing out of land (otherwise than as incidents of tenure) the due payment of which is secured by a right of distress.[1] For further information reference may be made to Halsbury's Laws (3rd Edition, Volume 32, p. 530, paragraph 890). The paper is, therefore, not concerned with annual sums of rent (commonly called ground rents) payable under long leases. Although the terminology used[2] tends in practice to be confusing, rentcharges, as defined above, are a distinct legal interest possessing widely different characteristics from ground rents, particularly since they do not involve landlord and tenant relationships.

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1 Subject to the Payne Committee's recommendation that distress should be abolished (1969 Cmnd. 3909, paras. 923, 928 and 929).

2 For example, in Manchester the rentcharges here referred to are called "chief rents" whereas in Bath they are spoken of as "ground rents".

4. The striking feature of rentcharges is that their appreciable incidence is practically confined to two main geographical areas in England; these are the Manchester area, East Lancashire and adjoining parts of Cheshire in the north-west and the Bath and Bristol area in the south-west. In other parts of England and Wales rentcharges are rare, although there is some tendency in those parts towards the creation of new rentcharges in estate development.[3]

5. There are in existence a substantial number of rentcharges, usually very small in amount, created for the benefit of charities. Such rentcharges are subject to a special compulsory redemption procedure at the suit of the rentowner provided by section 27 of the Charities Act 1960. But the expense and labour involved in utilising this procedure is disproportionate to the redemption sum normally involved.[4]

6. In the course of examination, we have received assistance from the Treasury, the Solicitor of Inland Revenue, the Controller of the Inland Revenue Tithe Redemption Office, the Ministry of Housing and Local Government, the Department of Education and Science, the Charity Commission, the Chief Land Registrar, the Manchester Law Society (who submitted to us a detailed memorandum) and the Chartered Land Societies Committee which has a Joint Working Party on rentcharges and ground rents.[5] We have received invaluable help from Sir Philip Dingle, Mr Humphrey Easton of Manchester and from a number of individual solicitors and chartered surveyors practising in the main rentcharge areas. We are greatly indebted to all those who have assisted us in this examination.

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3 See Report of the Committee on Positive Covenants affecting Land (the Wilberforce Report), 1965 Cmnd. 2719, para. 14(ii). See further para. 20 below.

4 Since 1960 the Charity Commission has in fact only served one notice to treat under s. 27(2). The Department of Education and Science has served only three such notices.

5 This Joint Working Party is composed of members of the Societies practising in areas where rentcharges are common.

II FEATURES OF RENTCHARGE SYSTEM

(a) General

7. Where a rentcharge is created it is normally on a sale of freehold land where a purchaser is required to enter into an obligation to pay a perpetual annual sum as a rent charged on the land, as the whole or part of the consideration for the sale.[6] In the early part of the last century the rentcharge was frequently the only consideration for the sale, particularly when the purchaser was buying an extensive site which he proposed in whole or part to develop and sell in plots as actual or potential individual units for owner-occupation. More recently, however, the creation of a new rentcharge is found in company with the payment by the purchaser of a full market price.[7] Thus, for example, in modern estate development the builder-developer in the "rentcharge areas" sells his houses freehold at or about current market prices, but also imposes a perpetual rentcharge upon the land sold.[8]

8. Since legal rentcharges are legal interests in land they are binding upon any person who becomes entitled to the legal estate in the land or any part of the land upon

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6. A rentcharge can also be created for a term of years, but this appears unusual. It can also be created so as to affect leasehold property but this too appears rare. Since 1925 it is possible in law to create a rentcharge upon a rentcharge, but this is rarely done.

7 Occasionally rentcharges of very substantial amounts payable annually for a limited period are found to be created as part of the financial arrangements upon the purchase of freeholds or long leaseholds. In special circumstances such transactions were believed to carry taxation advantages either to the rentowner or to the landowner. Such cases are believed to be rare and their taxation advantages seem now to be illusory in the light of the recent decisions of the House of Lords and the Court of Appeal (reversing courts below) in the cases of Inland Revenue Commissioners v. Land Securities Investment Trust [1969] 1 W.L.R. 604; [1969] 2 All E.R. 430 (House of Lords) and McGregor &c. v. Littlewoods Mail Order Stores [1969] T.R. 215 (Court of Appeal).

8 We are told that the average annual amount this involves is about ½% of the purchase price. A new house selling at £3,000 is not unlikely to bear a rentcharge of £15 p.a.; one selling at £4,000 one of £20 p.a.

which they are charged quite regardless of any notice to, or knowledge on the part of a purchaser. It is of their nature that they "issue out of the land" in which the legal estate is owned, thus the remedy of distress is available for their recovery. But the rentowner has a variety of other remedies, by common law, by statute or by agreement[9] available to him. The creation of a new rentcharge is also, in practice, accompanied by covenants imposed on the landowner "for the security of the rentcharge" such as a covenant to insure or to keep the property in repair.[10] Finally, since a rentcharge operates as a burden upon each and every part of the land out of which it issues, where land subject to a rentcharge is later subdivided into different ownerships, each subdivided part will bear the full burden of the rentcharge vis-à-vis the rentowner, unless he has consented to an apportionment.[11] A purchaser upon such a subdivision is not, however, without a means of escape from any potential hardship flowing from this principle. Since 1925, under section 191 subsection 7 of the Law of Property Act 1925, the owner of a subdivided part who wishes to redeem a rentcharge upon his part may apply to the Minister of Housing and Local Government for apportionment for the purpose of redemption. Further, since 1927, under section 20 of the Landlord and Tenant Act 1927, he may apply in such case to the Minister for an apportionment which, if ordered, will operate to exonerate him from any liability to pay otherwise than in

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9 See primarily s.121 of the Law of Property Act 1925; including in most modern cases an express power of re-entry effective to extinguish the interest of the landowner in default (subject to relief against forfeiture).

10 Many attempts have been made to impose covenants, e.g. restricting user, in association with rentcharges; but it is generally considered that such covenants, where they do not go to securing the rentcharge, are ineffective except as between the immediate parties. See para. 20 below.

11 As between the owners for the time being of the subdivided parts and their vendor their mutual rights and obligations are normally regulated by the provisions of s. 190 of the Law of Property Act 1925.

accordance with the apportionment.[12] Before making an order for apportionment, the Minister must be satisfied that it is expedient to do so. An apportionment, whether under the 1925 or the 1927 Acts, does not, however, relieve the landowner concerned of any liability which he may be under by reason of a covenant with the rentowner in respect of an overriding rentcharge on his and other properties.[13]

9. Except where the rentowner is a charity,[14] the rentowner has no right to have his rentcharge redeemed against the wishes of the landowner. The landowner can, however, under section 191 of the 1925 Act redeem a rentcharge against the wishes of the rentowner. Redemption may follow a landowner's application for apportionment under section 20 of the Landlord and Tenant Act 1927. In such a case where the rent so apportioned does not exceed £2 a year in the exercise of his discretion, the Minister on the rentowner's application may order its redemption.[15] But this does not compel the landowner to redeem, as the form of order made in such a case incorporates a condition providing that until redemption is effected the land continues charged with the whole rent. This in effect gives the landowner the option to redeem the apportioned rent or to continue subject to the whole of the rent.

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12 Section 20 of the 1927 Act in fact extended the operation of ss.10-14 of the Inclosure Act 1854 under which apportionment could be ordered if all the persons affected agreed. The difficulties experienced in obtaining such agreement resulted in few orders being made under the 1854 Act.

13 In this Paper the term "overriding rentcharge" is used to describe a prior rentcharge which remains binding in law on each subdivided part of land, where the entire land which was originally burdened with the rentcharge has been disposed of in plots. The overriding rentcharge may be paid by only one of the landowners affected and the other landowner may not be aware of the existence of the overriding rentcharge.

14 See s.27 Charities Act 1960; see also para. 5 above.

15 We understand that this discretion is usually exercised in favour of the rentowner except where the landowner cannot afford to redeem and where he would be caused serious personal hardship if denied an order of apportionment. There were 19 of such hardship cases in 1967 and 3 cases in 1968.

(b) The Manchester area

10. We now summarise the results of our inquiries concerning this area. Most privately owned residential property there is affected by the rentcharge system. In the case of lands developed in the last century, properties are usually affected by more than one rentcharge, since it was the practice of developers when selling land already subject to a rentcharge to impose second (also called improved) rentcharges upon the parts disposed of, and, where purchasers of parts of the original site also bought for development purposes, and had been made subject to second rentcharges, they, in their turn, would impose further rentcharges on the plots which they themselves sold off. An alternative technique was for the developer to sell off parts of the whole land affected by the rentcharge created on the sale to him subject to liability for an apportioned part of that rentcharge, but imposing upon the purchaser of the last plot sold either liability for the full amount of the rentcharge or a covenant to collect the sums charged on the other plots. In either case the last purchaser would have the right, if called upon to pay the full amount of the rentcharge, to obtain contribution, according to their apportioned liabilities, from the owners of the affected plots previously sold off.[16] Even in modern conditions one of these procedures, which result in the proliferation of rentcharges, has to be followed where a developer's land is subject to rentcharges which he is unable to extinguish.

11. Under modern conditions developers in this area prefer, where possible, to free the land they have acquired by redeeming any rentcharge to which it is subject before they proceed to sell off. In such cases it is customary for the developer to create a new rentcharge on each plot sold and

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16 Thus, an area of land is first sold to a developer, subject to a rentcharge of £40 p.a. In the simplest case the developer builds 40 houses, the first 39 are sold off, each subject to a rentcharge of £1 - i.e., the apportioned part of £40; the fortieth house is sold subject to the rentcharge of £40 and its purchaser is entitled to a contribution of £1 p.a. from each of the earlier 39 purchasers. But such apportionments are informal, i.e., not binding on the rentowner who is thus free to proceed against any sub-purchaser to enforce the overriding rentcharge of £40.

thus the complications of proliferating rentcharges and of apportionment are avoided until such time as redevelopment or subdivision may occur. The position thus reached is that there is one rentcharge per unit of ownership and the landowner affected can, at any time, redeem the rentcharge without difficulty, assuming that he is willing and able to pay the redemption price which is calculated according to a statutory formula (at present, Summer 1969, 11.5 years' purchase) based upon the annual yield of prescribed government securities.[17]

12. It is worthy of mention that the areas mainly affected by the rentcharges created in the last century become increasingly subject to clearance programmes. When these are undertaken by local authorities all rentcharges affecting the properties in these areas come to be extinguished by compulsory acquisition. Thus, it may be said that some of the worst problems created by the proliferation of rentcharges on the same property are solving themselves.

(c) The Bath and Bristol area

13. We now summarise the results of our inquiries concerning rentcharges in this area. In contrast with the position in the Manchester area, the system as it affects properties in the Bath and Bristol area is, for historical reasons, simple. Although it is estimated that 80% of the owner-occupied residential property in the area is held upon rentcharges, it is unusual to find any such property which is subject to more than one rentcharge. The position is thus broadly similar to that found in modern estate development in the Manchester area, i.e.,one rentcharge per ownership unit.[18] At present, problems arising from

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17 Section 191(2) of the Law of Property Act 1925 and 1960 S.I. No. 2068. But there is usually no inducement for the landowner to seek redemption because the fact that his property becomes rentcharge free does not mean that he is likely to command a better price if and when he comes to re-sell.

18 We understand, however, that in Bath rentcharges informally apportioned between two or more properties are not unknown.

overriding rentcharges and from apportionment are thus rare and the houseowner has a simple right of redemption at any time, under the provisions of section 191 of the Law of Property Act 1925. But as time passes and when residential areas fall in for re-development even these rentcharges may come to present serious problems.

III ADVANTAGES CLAIMED FOR THE RENTCHARGE SYSTEM

14. Under the rentcharge system the landowner does at least enjoy ownership of his land in perpetuity, whereas the interest of the owner of a long leasehold (subject to statutory rights of enfranchisement or renewal) wholly terminates by effluxion of time, when the land reverts to the freeholder.[19] So far as residential property is concerned, we understand that long leaseholds are comparatively rare in the Manchester and Bristol areas. Further, where redemption presents no difficulties (as in the case of the rentcharge affecting one unit of land ownership) the landowner who desires to do so can extinguish the rentcharge by a simple procedure and at a statutory redemption price which may compare favourably, at present, with the market price for rentcharges themselves (see paragraph 15 below). For the landowner who is a high rate taxpayer, redemption possesses financial advantages. It is, however, the fact that comparatively little use is made of the statutory redemption provisions.[20]

15. From the rentowner's point of view the main advantage of the rentcharge, under modern conditions, is that, having sold his land, he is left with a capital asset which will produce him an income or, as more commonly happens, can be sold. Thus, a developer who has a parcel of well-secured modern rentcharges can find an investor who is prepared to

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19 Where, however, a long lease is for 999 years, the additional benefits arising from owning the freehold are of less significance.

20 Applications to the Minister for redemption have shown some tendency to increase. See Table (Col. C) appended.

pay an average price of 12 years' purchase (cf. the redemption cost of approximately 11.5 years' purchase). Old rentcharges (e.g., those created in the last century) tend to be of doubtful value, because of their relatively low level (approximately £2 to £5 per unit) and the ever-increasing costs of their collection. There are, nevertheless, purchasers for parcels of these old rentcharges (which attract an average of 4 or 5 years' purchase); it is, for example, not unusual for a retired person living in the locality to buy such a parcel and himself to occupy his time in collecting from the landowners affected - the high rate of return is, in such cases, attractive.

IV SUGGESTED DISADVANTAGES OF THE SYSTEM

16. There is no doubt that, particularly in the case of the older rentcharges, some landowners resent performing the obligation to pay annually these sums to the rentowner - although they are frequently trifling in amount - when they own the freehold of their own property. A greater, and perhaps more understandable, resentment can arise when the landowner, having bought subject to a rentcharge of a small amount (as, for example, upon an informal apportionment), finds himself exposed to a demand for the payment of a much larger sum in respect of the overriding rentcharge which is possibly several years in arrears; this he must pay and seek to recoup by relying upon his rights of contribution or indemnity against the other landowners affected by the same rentcharge. It is true that the right to apply for apportionment either under the Inclosure Act 1854 as extended by section 20 of the 1927 Act or, with a view to redemption, under section 191 subsection 7 of the 1925 Act exists in these cases and that, more recently, probably owing to increased publicity given to its existence, greater use is made of the 1927 Act procedure.[21]

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21 See Table appended (Col. A).

17. Mention has been made of the various remedies available to rentowners to enforce their rights. There is an increasing tendency, upon the creation of new rentcharges, for the rentowner to provide for an "absolute power of re-entry" [22] (i.e., upon default of payment to re-enter with the effect of terminating the landowner's interest). The existence of such a power may be considered objectionable even though its apparent harshness is mitigated by the power of the court to relieve against forfeiture, as well as by the redemption provisions available.[23] There is virtually no evidence of the exercise of such powers of re-entry. The normal remedies used are the common law action of debt against the terre-tenant and the remedy (now statutory) of distress. Apart from the unattractive "self-help" character of the latter, there are practical difficulties affecting the use of distress - its availability against the goods of strangers on the premises, its high cost in relation to the normal amount of arrears and the difficulty of finding certificated bailiffs to undertake this type of work.

18. From the rentowner's point of view the disadvantage of the system is that the amount of the rentcharge is fixed by reference to the value of money current at the time of its creation. As the value of money falls, so does the real worth of the annual payment, whilst the costs of collection rise. In the case of some rentcharges created during the last century, the point has already been reached where the costs of collection exceed the amount of the annual payment. It is possible to foresee the same situation arising in future with more recently created rentcharges. For the rentowner of an overriding rentcharge these disadvantages are less serious as its amount is more likely to be significant and because it is probable that at least one of the landowners affected (e.g., a small shopkeeper or the owner of the terraced house which is well maintained) will be financially able to discharge the full amount, though to him it may be a hardship and an inconvenience to enforce his rights of contribution.

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22 We are told that this is the invariable practice in the Bristol area.

23 As to redemption see paras. 22 and 23 below.

V ECONOMIC REASONS FOR CREATING RENTCHARGES

19. Against this background, rentcharges seem an unattractive proposition both for the rentowner and landowner, yet we are told that there is little falling off - in the areas mainly affected - in their creation. Of course, when a developer acquires or owns land which is already subject to a rentcharge, and where he is unable, for practical reasons - financial or otherwise - to extinguish the rentcharge by redemption, he must necessarily pass on its burden to those who buy his plots or houses. But this necessity does not explain why entirely new rentcharges are so often created upon the sale by developers of freehold land which (by redemption or otherwise) is under no such burden at the time of the sale. There are doubtless cases where the creation of rentcharges plays a part in the financial arrangements of developers but the information we have received strongly tends to support the view that their creation does not keep down the capital costs of purchasing property[24] but rather has the effect of providing a bonus for the developer (particularly when he is left with a good parcel which he can sell at, say, 12 years' purchase).

20. There is some evidence to show that new rentcharges are, from time to time, created in an attempt to build up a fund to be available for the maintenance of "estate amenities" or, in the case of buildings constructed for multiple unit ownership, of the structure or its common parts. But, for this purpose, rentcharges are not really advantageous, since the figure at which they are imposed, under present-day conditions, rapidly becomes disproportionate to the costs of work or services[25] and since the landowner

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24 An exception has to be made where a developer offers some properties free of rentcharge and similar properties in the same area subject to rentcharge. The asking price of the latter must, of course, be lower than that for the former.

25 Attempts to create rentcharges of variable amounts have from time to time been made. Assuming that such a rentcharge is legally valid, purchasers, in normal cases, would find it unattractive to accept variable rentcharge obligations and purchase finance would not be easily obtainable in such a situation.

cannot by any simple means be burdened with the obligations of maintenance. Rentcharges are also from time to time created where buildings are constructed for multiple unit occupation where the interest of the unit owner will be a freehold to the ownership of which obligations of or relating to maintenance and repair of parts of the whole structure are sought to be attached. In these cases the theory is that such obligations of the freeholder being expressed in the form of covenants, can be treated as security for the rentcharge, so that the rentowner may use his statutory or other remedies to ensure their enforcement. The weakness of the rentowner's position, however, is that the burden of such positive covenants does not normally "run with the land" so that they cannot be enforced against the original covenantor's successors in title. Further, if and in so far as such obligations are properly to be regarded as securing the rentcharge and therefore enforceable against successors in title, the redemption of the rentcharge - which can be simply and unilaterally achieved - will extinguish the covenants which are designed to secure it. The use of rentcharges in these cases must, in our view, be regarded as a temporary expedient in attempting to overcome the present principle that positive covenants do not run with the land. The problems which arise in these estate amenity or multi-ownership situations will become less intractable when the recommendations on the enforceability of positive covenants made in the Report of the Committee on Positive Covenants affecting Land[26] are implemented.

21. As has been mentioned, rentcharges do not (save perhaps in very special cases) benefit purchasers by enabling them to buy houses at a smaller capital cost, but at the same time the liability to a rentcharge, unless it is of the overriding class, does not adversely affect purchasers in securing financial assistance for their purchase (unless the prospective lender is without experience of advancing upon property subject to a rentcharge).

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26 See n.(3) above.

VI REDEMPTION

22. Reference has been made to section 191 of the Law of Property Act 1925 and the comparatively little use which is made of its provisions. To some extent this limited use of redemption may be due to the fact that the statutory redemption price, which must be paid as a capital sum upon redemption, in past years has been high, compared with the market price. But we are told that landowners are prepared, in certain special cases, to redeem by agreement at prices far above the statutory formula (20-25 years' purchase has been mentioned) because rentcharges may be a "nuisance" to the landowner. To the ordinary houseowner, however, there is normally no real benefit in redemption, since, we are told, it will not add to the sale value of his property. We do not, therefore, consider that any great increase in redemption under the statutory provisions would result if the redemption price were aligned with the market price, or were made payable by instalments, with interest, which latter would, in any case, be hardly fair to the rentowner. Our inquiries lead us to believe that landowners, on the whole, tend to "put up" with the system[27] and only use redemption when, as in the case of developers, they wish to rid their land of the complications of old rentcharges so that they can create new and modern ones. We have also been told that some landowners regard redemption as a means of freeing their property from restrictions as to user which were attached, in the form of landowner's covenants, to the rentcharge when it was originally created. There may be rare cases where it is clear that such covenants were imposed for securing the rentcharge, and where redemption would extinguish them. But we believe that in the majority of cases obligations imposed on landowners affecting user of their property are more likely to take effect as true restrictive covenants possessing a life independent of the rentcharge in relation to which they are imposed. Where this is the case redemption of the rentcharge clearly leaves the burden of such covenants unaffected.

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27 The exception is the newcomer into a rentcharge area who will doubtless desire to redeem this strange, to him, burden.

23. The Minister charges no fees for handling redemption applications under section 191 of the Law of Property Act 1925 but although the relevant Rules (Redemption of Rent Rules 1930 S.I. No. 355) and the forms required to be used are relatively simple, the legal questions which arise are such that many landowners are unlikely to embark on redemption applications without legal assistance.[28] The unavoidable costs which will thus be incurred will often - since rentcharges are normally for comparatively low annual amounts - be out of proportion to the benefit of redemption. We consider that this is a further reason which explains the little use made of the statutory rights to redeem where there is no special further purpose in mind (such as is indicated in paragraph 22 above) in effecting redemption.

VII APPORTIONMENT

24. Although apportionment binding upon the rentowner could be effected under section 10 of the Inclosure Act 1854, the power to apportion under that Act was dependent upon the concurrence of the rentowner and of all the landowners interested in the relevant rentcharge. Thus the section was little used. Section 191(7) of the Law of Property Act 1925 first introduced the landowner's right to apply to the Minister for apportionment with a view to redemption but the procedure under this provision has been infrequently employed. The reasons for this are, we think, twofold: first, the need (which, where apportionment is involved, is even greater than in simple redemption cases) for the landowner to engage legal, and possibly other professional,[29] advisers; secondly, the difficulty which may occur where the landowner applicant is liable under covenant to the rentowner in respect of moneys charged on lands other than his own or under a similar liability to other landowners in respect of rents charged on their lands. In the second case, if an effective apportionment is to be obtained the applicant has to deal with the position of the other, non-applying, landowners affected by the rentcharge in question or covenants associated with it.

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28 Of a sample of 32 recent cases, 13 applications were submitted by the landowners themselves.

29 E.g., it may be necessary to provide plans.

25. The extension of the application of sections 10-14 of the Inclosure Act 1854 by section 20 of the Landlord and Tenant Act 1927 provided a more simple procedure for apportionment under which the need to obtain the concurrence of the other landowners affected, as well as of the rentowner, is specifically dispensed with. The exercise of this right is not conditional upon compliance with any statutory regulations or upon the use of prescribed forms - although the Minister has produced an appropriate - and simple - form of which the applicant normally makes use. Legal assistance in these circumstances is less necessary than in cases under section 191(7) of the 1925 Act but, for obvious reasons, the Minister endeavours, in the exercise of his section 20 jurisdiction, to ensure, so far as he can, that other landowners concerned in the matter are "brought in" upon the application. This may or may not happen and if and so far as they do not "come in" the position is unsatisfactory since associated covenants are untouched.

VIII THE EFFECT OF RENTCHARGES ON CONVEYANCING

26. To solicitors normally practising in rentcharge areas the conveyancing problems which arise upon the creation of new rentcharges on the transfer of properties affected by subsisting rentcharges are familiar. Some extra work is involved where there are rentcharges but the extent of this extra work depends upon the number and character of the rentcharges affecting the particular property concerned. In cases where numbers of old rentcharges are involved the extra work is substantial. The cost to the client will normally be slightly greater than if there were no rentcharges and where the title is registered there will be additional fees payable to the Land Registry. The increased cost is small in each individual case but in sum is not inconsiderable. We believe that in many individual cases the small extra cost to the client does not provide reasonable remuneration to the solicitor for the work which he is required to and does undertake. This is particularly so where the market price of the property is low, as often happens. It has been represented to us that the actual

additional cost to the client where a new rentcharge is created is at least compensated for by the fact that there will be a saving of stamp duty in the instant and subsequent dealings with the property subject to the rentcharge. Even, however, if it were correct to assume that properties affected by rentcharges possess a lower market value than those not so subject (which is contrary to our information) we believe that such a saving would be minimal, if indeed it applied at all.[30] Similarly, on the same assumption the saving of Land Registry fees would also be very small.[31] To solicitors not normally practising in rentcharge areas but becoming involved in a rentcharge transaction in one of those areas, the problems are novel and thus time- and labour-consuming. We think that solicitors unfamiliar with rentcharge conveyancing not infrequently engage local solicitors with the expertise to undertake the additional work on an agency basis.

27. Compulsory registration of title came into force in Manchester in October 1961 and in Bristol in December 1967. The experience of the Land Registry, based mainly on transactions taking place in the Manchester area, is that the complexities of rentcharge conveyancing add considerably to their work. We are told that, on the first registration of a title that is subject to a number of rentcharges, the examination of the title and the setting out of the details of the rentcharges on the register can often be difficult and time-consuming - so much so that the present fees receivable by the Registry are wholly uneconomic. It sometimes happens that overriding rentcharges to which an unregistered title is subject, but which were created long before the commencement of the title deduced to the Land Registry, do not appear on the registered title and thus

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30 Many properties subject to rentcharges are sold at prices less than £5,500 and thus, at present, do not attract any stamp duty.

31 E.g., if a property is sold with registered title at £4,000 instead of £4,250 because of a rentcharge, the Land Registry fee would be reduced from £10. 12s. 6d. to £10. 0s.0d., effecting a saving of 12s. 6d.

involve serious problems. It has, therefore, been suggested to us that the title to all rentcharges in areas of compulsory registration should be brought on to the register in the same way that new rentcharges created out of a registered title are required to be completed by registration. But the difficulties of title examination where rentcharges are involved, to which we have referred, seem to us to preclude support to this proposal unless it were accompanied by an appropriate increase in trained staff at the Land Registry and a substantial increase in the registration fees. Having regard to the small sums which are normally involved in old rentcharges, such increases would, we believe, be unacceptable.

28. It has been suggested to us that if it were not possible to create rentcharges there would be an increase in the use of long leaseholds and that this would be undesirable because, it is said, leasehold conveyancing is at least as complex as rentcharge conveyancing. While we do not think that the abolition of rentcharges would, in fact, necessarily lead to a considerable increase in leasehold conveyancing, it must nevertheless be considered how solicitors and the Land Registry would be affected if that did happen. So far as solicitors are concerned, leases, unlike rentcharges, exist in all parts of the country and the complexities of leasehold conveyancing, even if as great as those of rentcharge conveyancing, which we doubt, are well known to conveyancers generally. We do not think that a switch from rentcharges to leaseholds would, therefore, materially increase the burden on solicitors. So far as the Land Registry is concerned, we understand that the result of such a switch would often be likely to reduce, rather than increase, the complexity and volume of their work.

29. We also believe that the extra work and costs involved in rentcharge conveyancing and title registration should be considered not in relation to each individual transaction but in relation to the numbers of transactions which will be involved in future when a rentcharge exists or comes to be created. Extra work and costs will be

involved in every relevant transaction and if it is correct to assume, as is generally believed, that residential property in built-up areas changes hands on an average once every eight years, it is clear that the total burden of the additional costs involved in rentcharge conveyancing etc. will be not inconsiderable if a period of thirty years is taken. If, as a result of improvements, which are later proposed, in the procedures for apportionment and redemption of rentcharges, more frequent use comes to be made of such procedures by landowners, further additional costs will be involved.

IX SUGGESTIONS FOR REFORM

(a) Abolition of Rentcharges

(1) General view

30. Although our inquiries suggest that the social and economic utility of rentcharges (which are in general use only in two relatively small geographical areas) is open to doubt, we would not wish, as lawyers, to base our conclusions upon these considerations. In the absence of strong social or economic reasons for the retention of the rentcharge system of conveyancing, we consider that its abolition would be desirable. It is increasingly being suggested that land law is in need of radical reform on account of its complexity and the expense which is involved in dealings with land. In this respect we agree that appropriate steps should be taken to reduce unnecessary complications or expense. From this point of view, the main arguments against allowing the continuation of the rentcharge system are:-

(i) that it adds complexities to the law and such complexities are likely to recur as re-development of property proceeds in future; and

(ii) that it increases the overall legal cost to the public, to solicitors and to the Land Registry.

We consider that the purpose of the land law should be to provide as simple and inexpensive a means as possible of giving effect to the legitimate transactions and desires of the public. On this footing, we suggest that the rentcharge system is unnecessary. In our view the needs of the public are adequately met by the facilities which exist for disposing of unencumbered freeholds or for the creation of long leaseholds at ground rents (with, in the case of a dwellinghouse, such rights of enfranchisement or extension as are provided by the Leasehold Reform Act 1967). Accordingly, we consider that a prima facie case for prohibition of the creation of rentcharges in the future and the extinction of existing rentcharges is established. Even if, owing to practical difficulties the abolition of existing rentcharges were not considered to be possible, the creation of new rentcharges would not, in our view be desirable. This would at any rate avoid any further multiplication of the problems in those parts of the country where rentcharges are at present in common use and would prevent the system from spreading to other areas.

31. We confess that, as later appears, the selection of an appropriate method for the extinction of existing rentcharges encounters substantial difficulties. These difficulties are exacerbated by the fact that the money sums involved are, most frequently, relatively small so far as individual landowners are concerned, so that any solution must necessarily avoid introducing processes which will involve undue expense, whether to the public generally or to those persons who are particularly concerned.

32. The prohibition of new rentcharges would not present any legal problem. The extinguishment of existing ones would be less simple but is in our view vital if simplicity is to be achieved, especially as it is the older rentcharges which in practice are the more liable to lead to complications. Experience of voluntary redemption of rentcharges suggests that one could not rely on this method to produce any substantial rate or volume of extinction.[32] Even where

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32 See Table appended (Col. C).

there are special statutory provisions favouring redemption, that is under the Charities Act 1960 and the Tithe Acts 1936 and 1951, no substantial volume of voluntary redemptions of rentcharges (including tithe redemption annuities) has been effected even though extensive campaigns designed to achieve this object have from time to time been mounted by the Charity Commission and the Tithe Redemption Office. In our view it is clear that mandatory provisions will be required if this object is to be achieved.

(2) Methods of extinguishing existing Rentcharges

33. Extinction of existing rentcharges could be effected by three different methods:

(A) extinction once and for all on an appointed day, which would we think involve a State financed redemption scheme on the lines of the Tithe Act 1936; or

(B) gradual extinction by providing for mandatory redemption either upon a disposal of the rentcharge or of the interest of the landowner affected;[32] or

(C) extinction over a specified period of years which would operate by increasing the annual burden of all rentcharges to such a figure as to provide for redemption on an annuity basis. This could be coupled with a power to redeem or order redemption.

Both (B) and (C) could be without prejudice to the existing procedures for redemption or apportionment with or without redemption under the Acts of 1925 and 1927.

(A) Extinction on an appointed day

34. Method (A) would extinguish the rentcharge liability as between landowner and rentowner on the appointed day. It would involve the State in paying the redemption price (in prescribed Government securities or otherwise) to the

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32 Cp. compulsory redemption of tithe redemption annuities under s.32 (1) of the Finance Act 1962.

rentowner and thereafter in collecting over a selected number of years a redemption annuity from the landowners affected until the rentcharge was extinguished. Attractive as this method prima facie appears, we doubt whether the State could reasonably be expected to provide the immediate financial support or the manpower for the collection of a large number of small sums, which this method would necessitate.

(B) Redemption on disposition

35. Method (B) would initially involve defining the event upon the occurrence of which redemption of a rentcharge would become compulsory. Such event could be either a disposition of the rentcharge itself or a disposition of the land charged. On this question we do not believe that it would be acceptable that a disposition of his interest by the rentowner, over which the landowner has no control, should automatically involve the landowner in the financial burden resulting from compulsory redemption. In any event, there would be many cases (such as those where one landowner finds himself burdened with the obligation to pay the whole amount of a rentcharge which affects lands extending beyond his own) in which financial hardship would be caused and when the affected landowner's right to contribution against other landowners would be of little practical value.

36. Assuming, therefore, that a disposition of the landowner's interest became the event attracting compulsory redemption, it would then be necessary to define what, for this purpose, should constitute a disposition. We think that, in this respect, the precedent provided by section 32(1) of the Finance Act 1962, in relation to the compulsory redemption of tithe annuities, could be followed, and that the relevant disposition could be the disposal or creation for a consideration in money or money's worth of an estate or interest in the land or part thereof which brings about a change in ownership.[34] This would eliminate all leases

34 The grant of a lease for more than 14 years at less than a rack rent brings about such a change. See s.17 of the Tithe Act 1936.

not exceeding 14 years and those leases which are granted for more than 14 years at a rack rent; it would also eliminate dispositions which occur involuntarily (as on death or bankruptcy) or dispositions by way of gift. The use of this method of compulsory redemption would necessarily operate on dispositions affecting only part of the land charged for two reasons: first, unless such transactions were included further fragmentation of existing rentcharges would occur; secondly, if dispositions of part of the affected land were free of the obligation to redeem, a landowner who desired to avoid payment of redemption money would be presented with a ready means of doing so (i.e., by retaining a minimal part of the charged land in his ownership).

37. Experience of the working of compulsory redemption of tithe annuities supports, in principle, the adoption of Method (B). The Tithe Redemption Office of the Inland Revenue has provided us with statistical information of compulsory redemption under section 32 of the Finance Act 1962 (i.e., extinction on a disposition resulting in a change of ownership of the land charged). This shows that over the period October 1962 to March 1968 about 16 per cent of landowners affected by tithe redemption annuities obtained relief by compulsory redemption and that the total amount of annuities on charge was reduced by some 10 per cent by this means (i.e., by £228,374). But the measure of success of this method appears to be attributable to the imposition of an obligation, which is normally discharged, on the transferor of land subject to a tithe redemption annuity to give a statutory notice of change of ownership to the Tithe Redemption Office. This notice procedure works because the Tithe Redemption Office is the sole owner of tithe redemption annuities and its ownership is a matter of public knowledge. We think that it would be difficult to impose an effective obligation upon a landowner affected by a rentcharge to give notice of change of ownership of his land to the rentowner or owners affected, except in the simple case of the land being affected by a single rentcharge limited to that land, where the identity of the rentowner is known. Particularly in the case of rentcharges created during the last century, with all the complications which ensue on subsequent division of the land, the identity of the rentowners concerned or of some of them, is often unknown to the landowner.

38. Identification of the rentowner concerned is not the only difficulty which would arise if a compulsory redemption scheme comparable to that governing tithe annuities were to be applied to rentcharges in private ownership. Tithe redemption annuities are free of the problems of overriding rentcharges and of informal apportionments; in their case, therefore, there is only one annual payment to be extinguished and the amount of the redemption money is easily ascertainable. Where, however, land is affected by an overriding rentcharge as well as one which is immediately payable or where, as is common wherever ownership of land subject to a rentcharge has been subdivided, a landowner is subject to the legal effects of informal apportionments, there is no clear basis upon which the sum to be paid on redemption can be calculated. It would not be satisfactory to provide only for the extinction by compulsory redemption of actually payable[35] rentcharges, leaving the owner of the land charged with the continuing burdens of overriding rentcharges and the consequences of informal apportionments, and thus perpetuate these features of the rentcharge system which cause the greatest difficulties. Yet to require the landowner on a disposition to redeem all rentcharges affecting the relevant land whether payable or overriding and without regard to informal apportionments would be intolerably burdensome unless some means could be found of adjusting the effects of redemption between all the affected landowners. Of course, a landowner may take advantage of the statutory rights of apportionment with or without redemption and of redemption; but since Method (B) ties compulsory redemption to a disposition of land, the time factor which affects the completion of such transactions would hardly permit of the use of these procedures unless the processes of apportionment and redemption under the statutory provisions could be very substantially expedited. The manpower required for this would, we think, be considerable.

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35 The expression "actually payable" is used to describe a single rentcharge on a single plot of land.

39. The suggestion has been made that the difficulties of applying Method (B) so far as the identification of rentowners and affected landowners is concerned, could be alleviated by the compilation of registers of rentcharges. Whilst the Land Registry, in relation to areas of compulsory title registration, is doubtless assembling a great deal of information as to existing rentcharges and the lands which they affect, the experience of the compilation of registers of annuities under section 1(2) of the Tithe Act 1951 suggests that the cost of this process is wholly uneconomic.[36] In any case the existence of registers of rentcharges would not solve the problems discussed in paragraph 38 above.

(C) Extinction on annuity basis

40. Method (C) would be relatively simple in technique. Its difficulties are: first, the selection of a fair redemption period; secondly, estimating the hardship which its adoption might cause to certain sections of the community. As to the "fair period", if, for example, twenty years were selected, the burden of every existing rentcharge would be increased by approximately 7/0d. in each £1; if, however, the period were taken as fifty years, that burden would be increased only by 8d. in each £1. It may be that the period to be selected, in order to be fair to both rentowners and landowners, should fall somewhere between these two extremes.[37] As to the question of hardship, it is known that many landowners affected by the rentcharge obligations (particularly those created in the last century) are persons of some age and small resources. The longer the redemption period selected under this method, the less benefit would flow to those landowners; the shorter the period, the heavier the intermediate financial burden. We see no way to avoid this dilemma if Method (C) were adopted.

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36 Registers under s.1 of the 1951 Act were only compiled for 40 out of some 11,500 districts and no new registers have been undertaken since 1960.

37 Even a thirty-year period would mean an increase of about 3/0d. in the £1.

41. A further point which would require consideration if Method (C) were adopted would be the nature and incidents of the increased rentcharge into which existing rentcharges would be converted. We see no reason why this conversion should involve any changes. Apart from the increased sum which over the selected period the rentowner is entitled to receive, and the landowner obliged to pay, this conversion would not, of itself, justify other changes in the law. The common law and statutory rights and obligations which are attracted to rentcharge situations would, we believe, be unaffected save that their extinction would follow upon the last payment of the increased rentcharge. It would, however, be essential that the rentowners and landowners concerned should be made aware of this by appropriate publicity.

42. Finally, if Method (C) were adopted, consideration would need to be given to the apportionment of the increased rentcharge between capital and income. This question would arise not only in relation to the administration of trusts but also in connection with revenue matters.

(D) Conclusion as to method

43. Of these three methods we consider that either (A) or (B) would be preferable in theory; but the problems of finance in relation to (A) and the practical difficulties involved in (B), indicate that they may both have to be rejected. It seems, therefore, that Method (C), which for reasons given above we find the least attractive, may prove to be the only practicable means of extinguishing existing rentcharges.

(3) Partial Extinction

44. As an alternative to abolition, a less radical solution could be the extinction of all rentcharges other than actually payable rentcharges subsisting, or hereafter to be created, in relation to freeholds in single units of ownership. This solution would be designed to produce a situation of "one property one rentcharge" - which does frequently exist

in Bristol and in the modern estate developments in the Manchester area. Thus the complications which arise from the proliferation of rentcharges upon subdivisions of land would for the time being be avoided as long as no sales of parts of the land affected by such rentcharges took place; moreover, a proposed sale in such a case could, theoretically, be made to attract compulsory apportionment and redemption of the rentcharge attributed to the land sold. Here again, the delay which it might cause on sales presents a practical objection to this solution. But an attempt to introduce a plan of partial extinction aimed at all rentcharges other than those actually payable would encounter the same difficulties as those discussed in paragraphs 37 and 38 above respecting the identification of the rentowners and the calculation of redemption payments in the case of overriding rentcharges and rentcharges affected by informal apportionments. At the same time it would lack the advantages of extinguishing the primary liability of landowners for actually payable rentcharges. For these reasons we would not, therefore, favour a scheme of partial extinction.

(4) The position of informal apportionments pending extinction of rentcharges

45 Informal apportionments of rentcharges (i.e., those to which the rentowner is not a party and which, therefore, do not affect his rights) normally occur when part only of the land affected is conveyed for valuable consideration.[38] If the extinction of existing rentcharges were accomplished by Method (B) (i.e., compulsory redemption on disposition for value of the whole or part of the land charged) the occasion for informal apportionments would not normally arise. If, however, Method (C) (i.e., extinction on annuity basis) were adopted, it would be necessary to consider what, if anything, should be done to curb informal apportionments once the scheme is under way. For this purpose it may be postulated that the landowner upon a given date becomes subject to a liability to pay the increased rentcharge on the whole of his land. Thereafter he sells off part of that land; so far as the rentowner

38 See s.77 and Second Schedule Part VIII and s.190 of the Law of Property Act 1925.

is concerned, this sale (unless he agrees to the contrary) in no way affects his rights to go against the vendor or the purchaser of part of the land charged for the whole of the amount due to him. In this subsequent transaction, therefore, the immediate parties will be concerned, on the pattern of the present law and practice, to incorporate cross-covenants and indemnities regarding the informally apportioned parts of the rentcharge affecting the whole land. This seems to us to be sensible and, indeed, inevitable and we see no reason why such apportionments should be curbed since they do not adversely affect the rentowner, though they may increase the numbers of persons against whom he may exercise his remedies.

46. It would not be practicable to prohibit landowners from selling off parts of their land which is subject to an increased rentcharge if Method (C) were adopted. Nor do we think that it would be right to affect the rentowner's rights by, for example, making an informal apportionment to which he is not a party binding upon him. An attempt to produce this result would in any case, we think, need to be accompanied by the introduction of a system of registration of rentcharges against land. This we regard as quite out of the question, since the sums secured by rentcharges (and even by increased rentcharges) are normally so relatively small that the work and expense in operating any system of registration in this area would be quite unjustified.

(5) Provisional proposals

47. We come now to set out our provisional proposals for the abolition of rentcharges. Our view is that -

(i) whether or not a satisfactory method of extinguishing existing rentcharges can be found, no further legal rentcharges should be capable of creation (paragraph 30);

(ii) if a satisfactory method can be found, existing legal rentcharges should be extinguished (paragraph 30);

(iii) the extinction of subsisting rentcharges could be accomplished by the following methods:-

(A) extinction once and for all on an appointed day (Method (A)); or

(B) by compulsory redemption upon a disposition of the land affected (Method (B)); or

(C) by their conversion into increased rentcharges extending over a period to be fixed, upon the expiration of which they would be extinguished (Method (C)) (paragraph 33);

(iv) since the use of Method (A) may have, for reasons of national financial policy, to be rejected, the choice of Method (B) should only be made if effective solutions can be found to the difficult practical problems which that method involves (see paragraphs 34 to 39);

[We are particularly anxious to receive suggestions to this end, confessing that solutions have so far eluded us.]

(v) if no solutions are seen to emerge to the problems arising from the choice of Method (B), Method (C) would provide a practicable solution; since we have no means of assessing the extent of the hardship which the choice of this method might create, we seek information which would help in its determination (see paragraph 40).

(b) Improvements in redemption and apportionment rights and procedures

(1) General view

48. We now turn to the question of possible improvements in the existing statutory provisions relating to redemption and apportionment. The practical working of these provisions has attracted some adverse criticism and, as has been said, landowners appear to avail themselves infrequently of their use. Methods (B) and (C) of extinction, whether total or partial, postulate that in the meantime the landowners' rights to compel redemption, or apportionment with redemption, under section 191 of the 1925 Act or without redemption under section 20 of the 1927 Act (except in the case of apportionment not exceeding £2) should continue to be available. Whether or not legal rentcharges should come to be abolished, we believe that the relevant procedures should be improved. Consideration of these matters leads us to two conclusions:-

(i) that certain minor changes, mainly of an administrative character, would improve the effectiveness of the Minister's orders, e.g., the statement of an operative date for apportionment;

(ii) that, having regard to changes in the value of money, the £2 ceiling regulating compulsory redemption upon apportionment is now too low and should be increased (subject to the Minister's discretion to forbear from a redemption order). In the case of old overriding rentcharges, particularly in the Manchester area, we are told that informal apportionments have frequently resulted in rentcharge burdens being apportioned in sums of from £2 to £5. Higher amounts are unusual. Since it is, in our view, desirable to get rid of these, the raising of the £2 limit would encourage this process.

49. The process of extinguishing rentcharges could be substantially accelerated by the introduction of a rentowner's right to seek an order from the Minister compelling redemption

of his rentcharge, particularly if the redemption price were fixed by reference to the formula used for that purpose under the Acts of 1925 and 1927 and were made payable in a lump sum. Although this would represent a radical departure from the existing system (except in the case of charitable rentcharges) we think it is worth while examining its implications. First, we think the introduction of such a right would have to be contingent upon and related to the apportionment of the rentcharge between, and its redemption by, all the landowners affected, thus eliminating the difficulties which arise from covenants which survive apportionment and/or redemption under the present system. Secondly, if the statutory formula for calculating the redemption price were employed, its use would, not infrequently in the case of older rentcharges (which have a far lower market value than 11 or 12 years' purchase), provide the rentowner with an unforeseen benefit; yet to introduce a formula involving a selection between the statutory formula and market price, would create an element of uncertainty and a need, at some expense, to obtain professional valuations, which the amounts normally involved hardly seem to justify. Thirdly, as the purpose of introducing orders of redemption on the application of rentowners is to assist in the more rapid extinction of rentcharges, it limits the value of any suggestion that the redemption price should be payable by instalments; but even if landowners were, in these circumstances, allowed to pay by instalments, this would involve the land being charged with the instalments and necessitates registration of the instalment liability as a land charge. The experience of the working of section 27 of the Charities Act 1960 in this context suggests that it would be unsatisfactory to make such provision. We, therefore, think that a proposal to introduce rentowners' rights to compel redemption of rentcharges would have to be subject to a financial limit - which perforce would be a low one[39] - above which the right should not be available. Even with such a limit, however,

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39 We have in mind either some fixed sum as, say, £5 a year or such sum as the Minister might from time to time by order prescribe.

it must be accepted that hardship to landowners subjected to the compulsory redemption process would be entailed in individual cases, but we have no means of estimating its extent. Particularly where there are old rentcharges, the affected landowners are not infrequently retired persons whose resources would make it difficult for them to find or borrow in the normal way even a small capital sum and even though its provision would free their land from the burden of the rentcharge. It would, therefore, be necessary to provide a power in the Minister to withhold consent to an order of redemption in such hardship cases.

(2) Provisional Proposals

50. Our provisional views regarding redemption and apportionment are therefore:

(i) subject to (ii) below, the provisions of section 191 of the Law of Property Act 1925 and sections 10-14 of the Inclosure Act 1854, as amended by section 20 of the Landlord and Tenant Act 1927, should continue to operate (paragraph 48);

(ii) improvements should be made to the operation of section 20 of the Landlord and Tenant Act 1927 and in particular -

(a) as to the operative date of an order under that section; and

(b) to increasing, above £2, the yearly amount of a rentcharge which may be subjected to compulsory redemption (subject to a discretion in hardship cases) (paragraph 48).

[We would welcome other suggestions for improvements in existing procedures.]

Our enquiries have not enabled us to make any assessment of the hardship which might be caused to certain categories of landowners if provisions enabling rentowners to compel redemption were introduced, even if a comparatively low ceiling were set above which this procedure would not be available (paragraph 49).

[We are particularly anxious to receive information and views on this matter.]

Year	A Landlord and Tenant Act 1927 Section 20 Apportionments[a]			B Law of Property Act 1925 Section 191 (7) Apportionments			C Law of Property Act 1925 Section 191 (1) Redemptions		
	Applications Received	Cases Completed	Applications Withdrawn or Cancelled	Applications Received	Cases Completed	Applications Withdrawn or Cancelled	Applications Received	Cases Completed	Applications Withdrawn or Cancelled
1959	15	15	15	7	7	4	20	27	1
1960	23	10	10	8	4	2	27	25	10
1961	15	11	12	7	5	4	43	23	2
1962	13	11	3	14	6	-	36	48	5
1963	14	16	3	10	15	4	55	43	5
1964	65	28	4	11	7	2	55	39	1
1965	741	218	49	11	6	1	71	62	1
1966	502	575	18	12	12	1	120	112	2
1967	437	395	4	4	5	-	67	73	-
1968	510	426	4	10	8	1	112	66	9

(a) The figures for 1927 Act apportionments do not distinguish between ground rents (under long leases) and rentcharges. Approximately one-third of the Applications, however, relate to rentcharges.