
# The Law Commission

## Published Working Paper No 49
## Transfer of Land
## Rentcharges
## 18 April 1973

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The Law Commission will be grateful if comments can be sent in by the end of September 1973.

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THE LAW COMMISSION

Item IX

Transfer of Land

# LEGAL RENTCHARGES

(Second Working Paper)

## A Introduction

1. At an early stage in our review of the law relating to the transfer of land, we turned our attention to the subject of legal rentcharges. Very broadly, these are annual sums charged on areas of land in which the persons entitled to the sums have no other interest. The commonest occasion of their creation today is the sale of freehold land, the purchaser agreeing to pay as part of the purchase consideration an annual sum as well as an immediate capital sum; the annual sum is usually fairly small in amount, but payable for ever. As a species of interest in land,[1] rentcharges (and, in particular, perpetual rentcharges) have this peculiarity, that although they might, in reason, be expected to be found anywhere, they are in fact concentrated in certain parts of the country only. This suggested to us that the rentcharge system might not be fulfilling any useful purpose today, in that it seemed that there probably existed other and more widely used methods of achieving substantially the same ends. Duplication of systems does not

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1. Rentcharges often fall within statutory definitions of "land" itself: see e.g. Law of Property Act 1925 s. 205(1) (ix) and (xxiii); and Limitation Act 1939 s. 31(1).

simplify the law and we considered that the position of rentcharges should be looked into.

2. Having conducted a preliminary investigation, we published a Working Paper in September 1969[2] in which we expressed the opinion that a prima facie case existed for the abolition of the rentcharge system. We recognised, however, that difficulties stood in the way of total abolition, for while it would be relatively simple, as a matter of mechanics, to prohibit the creation of any further rentcharges, we found ourselves unable to endorse fully any of the methods of extinguishing existing rentcharges which we canvassed in the Paper.

3. That Working Paper evoked a considerable response. Some of those who had assisted us at an earlier stage made further contributions, and several organisations sent us not only their general views but also the particular views of their members practising in those areas where rentcharges are prevalent. Mr. Michael Cocks, M.P. (Bristol South), made available to us material which he had collected for the purpose of the Bills[3] which, on his own initiative, he has presented in the House of Commons in the last two Sessions.

4. One thing clearly emerged from that round of consultation: the subject of rentcharges is controversial. We are still inclined to think that rentcharges are not an essential part of a system of real property law but it may be that, having identified the problems, they can be solved by reforms without total abolition.

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2. Working Paper No. 24.
3. Both entitled: Rentcharge Abolition Bill.

5. It is not possible, when considering rentcharges, to avoid making frequent comparisons with the long leasehold system. In many respects, there is only a technical difference between a very long lease at a ground rent (and subject to the covenants usual to such a lease) and a freehold subject to a rentcharge and covenants to preserve its security; and the existence in the former case of a reversion (however remote) in favour of the ground landlord is hardly a sufficient basis on which to draw a distinction in principle between them. If anything, the social objections to leases may be greater than those to rentcharges. Although the rentcharge system may not be a central feature of the land law of England and Wales, the long leasehold system is; and it might be thought inconsistent to permit disposals for 999 years on terms including annual payments, but not to permit disposals of freeholds on similar terms.

6. Our main concern, however, is with the practical consequences of attaching to land liabilities to pay annual sums for long periods. Those consequences tend to be the same whether the annual sums are rentcharges or ground rents under long leases; and, logically, reforms designed to rid the law of any of the consequences which may be undesirable should apply to both. The fact that reform in the leasehold field would be a major task should not, however, be regarded as barring any attempt to deal with rentcharges on their own. There is some public demand for a review of rentcharges and, if reform is called for, we think that partial reform (in the sense that it would apply to rentcharges alone) would clearly be preferable to none at all.

7. There is no question but that the rentcharge system as we know it today has a number of unsatisfactory features, some of which can in certain circumstances create considerable inconvenience and, indeed, hardship. If it were impossible to remove those features through a reform of the system, the

only available solution of the problems would lie in its abolition; on the other hand, if the particular defects can be cured, any argument for abolition based on those defects loses much of its force. We have come to the provisional conclusion that the problems now incidental to rentcharges are not insuperable, and Part D of this Paper is devoted to the particular reforms which we would suggest are called for. These include, in particular, steps to enable certain very unattractive features in the field of collection to be eliminated: and several proposals are aimed at reducing the conveyancing complications which often exist. It also appears to us that a good deal of the controversy surrounding rentcharges arises from the fact that many rentpayers do not understand the reason for the payments. This may not, strictly speaking, constitute a defect in the law, but that it should be so is, we think, unsatisfactory. One of our suggested changes in the law is accordingly designed to make the purpose of rentcharges more apparent to the owners of the lands subject to them.

8. In considering the respective merits of reform and abolition as alternative solutions, it is also right to bear in mind that abolition may itself have undesirable results. Firstly, although the achievement of simplicity is one of the aims of law reform, it is an aim which should not be pursued to the point of putting the law into a straightjacket by eliminating options. A rentcharge may sometimes be a preferred alternative to a mortgage; and a freehold subject to a rentcharge may well be preferred to a leasehold title. One result of abolishing rentcharges altogether would thus be to restrict the field of choice. Secondly, to abolish the right to reserve rentcharges on sale, leaving open the long leasehold alternative, would seem to invite those who would formerly have sold freehold and reserved rent charges to grant long leases instead. As we have already indicated, the social objections to long

leases may, if anything, be greater than those to rentcharges. Finally, since many - indeed, perhaps, most - of the difficulties which arise on rentcharges are particularly connected with the older existing ones, it would be neither satisfactory in practice nor consistent in principle to legislate only for the future. If the objections to rentcharges were so marked that their creation in the future should be absolutely prohibited, the same considerations would suggest that all existing rentcharges should be brought to an end immediately, or in as short a space of time as possible, on some compulsory basis. Expropriation of property without compensation would, however, not be acceptable in this country and accordingly any legislation winding up existing rentcharges within a short period would have to provide for the compensation of the rentowners. Unless the compensation were paid out of public funds, there is, we think, no escape from the fact that it would have to be paid by rentpayers themselves, either by lump sums or by instalments over a period. If rentcharges were required to be redeemed over a twenty-year period, for example, it appears that every sum payable by-way of rentcharge would have to be increased immediately by at least 25%. (If the period were shorter, the increase would be greater). We are inclined to think that rentpayers generally would not regard that as an acceptable price to pay for the abolition of the system, especially if the worst features of the system could be removed without cost to them by carrying out particular reforms.

9. For those reasons it seems to us that there is a case for considering reforms to the rentcharge system that fall short of total abolition.

10. In coming to that conclusion, we have not overlooked the fact that the Scottish Home & Health Department has recently published a Green Paper, entitled "Land Tenure Reform in Scotland", which includes a proposal to abolish feuduty and ground annuals. These payments correspond in some ways to rentcharges. It is, however, essential to appreciate the context in which the Scottish proposal appears.

11. As we understand it, most of the land in Scotland is held under a feudal system of tenure containing both "freehold" and "leasehold" elements. The landowner has an estate which in point of duration is unlimited: nevertheless he holds the land under a "superior", and the relationship between him and his superior is analogous to that between the English tenant and his ground landlord under a long lease. (This relationship is of course a crucial factor in connection with covenants attached to the land.) On that analogy, the feuduty payable to the superior is equivalent to leasehold ground rent. The principal proposal set out in the Green Paper is not the abolition of feuduty as such, but the abolition of the whole system (and in particular of the superior - vassal relationship) of which it is a part, and upon which it is dependent for its existence.

12. The redemption of all existing feuduties in the manner suggested in the Green Paper would impose increased financial liabilities on those who pay them, but this may be regarded as a fair price to pay for the modernisation of the Scottish land tenure system. The Green Paper also recognises that, since the main objective of the proposals is to substitute freehold tenure for tenure in feu, steps would have to be taken to prevent evasion through the use of long leases. The long leasehold system is not at present strongly established in Scotland and the Green Paper suggests the imposition of

drastic restrictions on the creation of leasehold interests in residential property. Indeed, it proposes that new terms exceeding 20 years should not be permitted; and that existing longer terms should in some cases be capable of enfranchisement and in others subject (in effect) to compulsory enfranchisement.

13. It is we think significant that the Scottish Green Paper includes these proposals relating to leaseholds. Their presence reinforces our present view that it might well be fruitless to abolish rentcharges without taking parallel steps in relation to leaseholds. As we understand it, the implementation of the Scottish proposals as to leases would not in practice make a great deal of difference there, and the restriction of the leasehold system is seen as a minor (albeit necessary) consequence of the main proposal. The position in England and Wales is very different. There can be no doubt that any such proposals affecting leases south of the border would constitute major proposals which would have to be justified on their own merits. Radical reform of the leasehold system here could not be justified simply on the ground that it would facilitate the abolition of rentcharges.

14. As we have already indicated, the emphasis in our first Working Paper was on the abolition of the rentcharge system and the Paper was designed to further the search for an acceptable means of eliminating the rentcharges now in existence. It was plain that no system of voluntary redemption could be relied upon to achieve that end. Although the Paper contained a section entitled "Improvements in redemption and apportionment rights and procedures", nearly all the comments which we received related (not, perhaps, surprisingly) to the main issue of principle. In this Paper we discuss the aspects of the system which require to be reformed and the manner in which we suggest reforms might be

carried out. The procedures for the redemption and apportionment of rentcharges fall within this area, but so do a number of other matters which were not aired in the earlier Paper. Further consultation is therefore necessary, and we have no doubt that many of our earlier correspondents will be glad to help us again, directing their minds to the new issues. We think it will be helpful if we make this second Working Paper self-contained, and we accordingly include, in the immediately succeeding Part, a short description of the existing system.

## B The rentcharge system

15. Our first task is to define our subject-matter and to state some general facts about rentcharges.

16. A rentcharge is an annual sum of money payable to someone who is not entitled to a future interest or reversion in the land charged with its payment. This feature distinguishes it from ordinary rent[4] payable under a lease. As a matter of history, the separate existence of rentcharges seems to have arisen in consequence of the statute Quia Emptores, 1290. Prior to that date, a grant of freehold was apt to create a "lord and tenant" relationship between grantor and grantee in the same way as did a grant of a term of years, and it was a common law incident of such a relationship that the lord could distrain against chattels on the land for arrears of any rent reserved by the grant. The statute, however, stopped subinfeudation on the grant of freeholds, with the result that if the grantor reserved a rent the remedy of distress was no longer available to him at common law. In order to preserve the remedy, it became the practice to include in the deed a clause expressly charging the land with a distress for payment of the rent: hence the name "rentcharge".[5]

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4. Known to the common law as "rent service".

5. If the clause were omitted, the rent was known at common law as a "rent seck". The distinction between such a rent and a rentcharge was effectively abolished by the Landlord and Tenant Act 1730 which extended the remedy of distress to rents seck and it has not since been customary to include an express clause in the deed. See now the Law of Property Act 1925, s. 121(2).

17. The use of that name is not, however, universal. In some places a rentcharge is known as a "chief rent" (or a "chief") and in others as a "ground rent". The latter name is particularly confusing since it usually means rent payable under a long lease. A "fee farm rent", commonly found in Ireland, is also a rentcharge; and in Scotland, as we have already mentioned, corresponding forms of rent are to be found in "feuduty" and "ground annuals".

18. Rentcharges generally issue out freehold land, but they may be reserved out of a leasehold[6] or even out of another rentcharge[7]. They may be either legal or equitable,[8] but in the context of the transfer of land it is primarily legal rentcharges which are of consequence, and we shall accordingly be directly concerned with them alone. Legal rentcharges may be either "perpetual" (the commonest case) or "terminable" (that is to say, created for a term of years).

19. A rentcharge binds every part of the land out of which it issues. If A sells Blackacre to B, reserving a £20 rentcharge, the situation is straightforward and we will use the term "simple rentcharge" to describe it. If B then sells the whole of Blackacre to C the £20 payable annually to A will still be a simple rentcharge, as will also be any second (or "improved") rentcharge reserved by B in his own favour on the sale. In the latter case, the land would be subject in

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6. In practice, a leaseholder disposing of his interest in consideration of a rent is more likely to sublet for the remainder of his term less a short period, e.g. one day. The rent will therefore not be a rentcharge.

7. Law of Property Act 1925, s. 122. These are extremely rare.

8. Settlements providing annuities for dependant members of the family not uncommonly secured them by way of rentcharges.

C's hands to two simple rentcharges. Complications arise, however, if the land is divided. If, instead of selling the whole of Blackacre to C, B divides it into three separate plots which he sells to C, D and E, the whole of A's £20 rentcharge will be a charge on each of the plots. The liability for the whole of A's rentcharge falls in full on each of the purchasers and we will use the term "overriding rentcharge" to describe a rentcharge of that sort. If there have been several subdivisions, each of the resulting plots may have become subject to more than one overriding rentcharge, because it may form part of a larger area on which a second (or subsequent) rentcharge had been imposed, that area being itself part of a still larger area the whole of which is subject to a first rentcharge.

20. There are two ways of preventing an existing rentcharge from becoming an overriding one on a division of land. The first, of course, is to redeem the rentcharge altogether; and the second, essentially, is to get its owner to join in an apportionment of the rentcharge between the proposed plots (the apportioned sums then constituting simple rentcharges on the respective plots). Under such an apportionment part of the land may in fact be exonerated. Rentowners, however, tend to regard such apportionment (that is, legal apportionment) with disfavour because it is simpler and cheaper from their point of view to be able to collect the whole sum from any one or more of the plot owners and because legal apportionment tends to erode the security; a statutory procedure accordingly exists for obtaining a legal apportionment without the consent of the owner of the rent.

21. If the existing rentcharge is not dealt with in one of these ways, two general courses of action are open to the

landowner disposing of part of the land (or of all the land in parts). First, he can sell the land free from liability under the existing (and now overriding) rentcharge; such a sale does not, in fact, free the land from the rentcharge but it places on the vendor a liability, as between himself and his purchasers, to continue to discharge the rentcharge liability himself.[9] (In that event, he may well impose, for his own benefit, a new simple rentcharge on each of the parts disposed of, so that he is at least not out of pocket.) Alternatively, he may take indemnity covenants from his purchasers[10] (indemnifying him from the effects of earlier personal covenants given by himself) and apportion the overriding rentcharge between the newly-created separate plots.[11] Such an apportionment is called an equitable or informal apportionment because the owner of the overriding rentcharge is not a party to it. In addition, specific arrangements are often made to provide for the actual payment of the rentcharge, and one may find that one of the plot owners is obliged by covenant to act, in effect, as the rent collector (in return perhaps for a reduced equitable apportionment to his plot). None of these exonerations, indemnities, apportionments or collection arrangements, however, binds the rentowner who is not a party to them, and he may at any time demand the whole rent from the owner of any part of the land. The owner of that part will then have to resort to his rights of contribution (or indemnity) from the others,[12] or from his vendor, as the case may be.

9. Law of Property Act 1925, s. 77(2).
10. It is not usually necessary to take these expressly: Law of Property Act 1925, s. 77(1) (A) and (B), and 2nd Sch. Parts VII and VIII.
11. Again, such apportionment may be in a nil figure, i.e. exoneration.
12. See Law of Property Act 1925, s. 190.

22. We have already mentioned that perpetual rentcharges are common in certain parts of the country only. There are in fact two areas in which they can be said to be particularly prevalent - Manchester and other parts of the North West; and Bristol and Somerset. We understand that as high a proportion as 80% of owner-occupied residential property in the Bristol area may be subject to rentcharges. There is, however, a very significant difference between the two areas so far as the impact of the rentcharge system is concerned: overriding rentcharges are largely confined to the northern area. It seems that it has always been the general practice in the South West to impose rentcharges on individual plots rather than on substantial areas of land ripe for development, so that in that part of the country the pattern is "one plot, one rentcharge". Although the same policy is now commonly adopted in the Manchester area, the practice followed there in the past has left behind it an unhappy legacy of overriding rentcharges.[13]

Statutory procedures for the redemption and legal apportionment of rentcharges

23. Under section 191 of the Law of Property Act 1925[14] any rentpayer may at any time apply to the Secretary of State for the Environment for a certificate quantifying the statutory

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13. A corresponding divergence in practice exists in the leasehold field. In the north-west of England, a builder often disposed of developed plots by way of assignment of rights under a single head lease (rather than by way of underlease), thus giving rise to a proliferation of overriding leasehold groundrents. We understand that this situation is rarely encountered in the London area, or elsewhere in England.

14. As amended by the Finance Act, 1962.

redemption price of a rentcharge. The price in respect of certain perpetual rentcharges is arrived at by applying a formula designed to provide the owner of the rent with the same income, if he were to reinvest the money in certain prescribed Government Securities.[15] The statutory redemption price changes with the current market prices of those securities and it amounts, at present, to about eleven times the sum payable annually by way of rentcharge. On proof of payment of the redemption price the Secretary of State will issue a further certificate, which has the desired effect of conclusively freeing the land from the rent.

24. It is often necessary to carry out an apportionment before redemption can take place - usually because the rentcharge is an overriding one and only part of the land subject to the rentcharge is being freed from the liability - and this, too, can be effected by a certificate of the Secretary of State, under subsection (7) of section 191. Apportionment under section 191, does not, however, have the same effects as a legal apportionment of the rentcharge as described in paragraph 20 above. Indeed by itself it has no effect at all; it merely enables the redemption price to be quantified. If that price is subsequently paid, the land in respect of which the payment is made is freed from the entire rentcharge, but the apportionment has no effect if it is not followed by redemption in this way.

25. A rentpayer may also have an overriding rentcharge apportioned by the Secretary of State under Section 20 of the Landlord and Tenant Act 1927 (extending Sections 10-14 of the

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15. Law of Property Act 1925, s. 191(2); Perpetual Rent Redemption (Prescribed Securities) Instrument, 1960, S.I. 1960 No. 2068.

Inclosure Act 1854).[16] Apportionment under these provisions differs from that under Section 191 of the Law of Property Act 1925 in that it is not merely a preliminary to redemption of the charge on the land in respect of which the application is made; but the Secretary of State may, on the application of the owner of the rentcharge, make the apportionment conditional on redemption if the apportioned sum is £2 a year or less.

26. Comparatively little use is made of these provisions. In each of the years 1970 and 1971 there were about 100 applications to the Secretary of State for redemption in cases not requiring prior apportionment, and something over 200 applications for redemption following apportionment under the Landlord and Tenant Act.[17] There were also about 500 applications for apportionment under the latter Act (an unspecified number of which relate to leasehold rents rather than rentcharges), but only about a dozen under Section 191(7) of the Law of Property Act. The existence of the provisions may not be sufficiently widely known but even if a rentpayer is aware of them there is usually very little in them by way of incentive to their use.[18] If anything, the contrary is true. Some of

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16. The Secretary of State is required to be satisfied that apportionment is expedient.

17. These figures do not give any measure of the total number of perpetual rentcharges which, each year, cease to be payable. Rentcharges may be redeemed by agreement; they may be extinguished by merger (usually as the result of the exercise of compulsory purchase powers); and they may become barred under the Limitation Act.

18. The abolition in 1963 of liability to tax under Schedule A on owner-occupied residential property has, however, made redemption more attractive than it used to be. A rentcharge on such property is not now deductible for tax purposes, but annual interest on a sum borrowed in order to pay the redemption price is. The rentcharge and the interest would be similar in amount.

the practical considerations having a bearing on the matter may be stated in summary form as follows:

(a) A legal apportionment by itself may have no advantage over an existing equitable apportionment - the amount the rentpayer actually pays may well remain the same.

(b) A legal apportionment, even if followed by redemption, will not enable a landowner to escape the burden of a covenant to act as the rent collector.

(c) Even if the rentpayer can afford to redeem at the statutory price, it is often not considered economical in present conditions to convert a small (and, in real terms, depreciating) income liability into an immediate capital liability.

(d) A small annual liability is likely to be regarded by a future purchaser of the property as insignificant, so that redemption does not have the effect of enhancing the market value of the property.

(e) Although the application forms are fairly simple, many rentpayers may find difficulty in completing them without professional assistance. That is a discouragement in itself. Compared with the actual redemption price, the cost of such assistance is, moreover, likely to be high. There must be many rentcharges which could be redeemed (after apportionment) for £10 or so, but

the professional costs incurred might well be considerably higher. No charge is, however, made by the Department of the Environment for dealing with the application.

27. It will be seen that the initiative under the Law of Property Act and the Landlord and Tenant Act always lies with the rentpayer. There is no general statutory provision enabling a rentowner to initiate proceedings for compulsory redemption. Exceptionally, charities have this power,[19] but they rarely exercise it because too high a proportion of the redemption price would be consumed by costs.

Remedies

28. The statutory remedies for the recovery of arrears of rentcharges on land are contained in section 121 of the Law of Property Act 1925 and are (i) distress (ii) entry into possession and (iii) the right to create a term of years which may then be mortgaged or sold. We understand that distress is the only one of these remedies which is resorted to with any frequency.[20] The rentowner also has his common law right to an action in debt, and this seems to be the usual means of recovering arrears, except perhaps were the arrears are so small in amount that ordinary proceedings for the sum due would not prove economic. In such circumstances, distress is, from the rentowner's point

19. Charities Act 1960, s. 27.

20. The right to enter into possession, in particular, seems to be regarded as a remedy of last resort, reserved, for example, to cases where the land is derelict.

of view, the better alternative.[21] The statutory right to take possession is, it will be noted, limited to the case where payment of the rentcharge is actually in arrears; it is not available as a means of enforcing the performance of ancillary covenants[22] designed to provide security for the rentcharge. It is, however, usual to include in the deed reserving the rentcharge a right of entry on breach of such covenants. The enforcement of such covenants may thus be provided for by agreement between the original parties.

29. For the purposes of the Limitation Act 1939 a rentcharge is "land"[23] and in the absence of any acknowledgment of the liability by the rentpayer, non-payment of the rent counts as adverse possession. Time runs not from the date of a failure to pay the rent but from the date of the last payment[24] and if 12 years[25] have elapsed since the last payment the rentowner will have lost his right to the rentcharge altogether. Each annual sum, moreover, constitutes a debt due to the rentowner as it accrues due and it becomes uncollectable after 6 years.[25]

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21. The Committee on the Enforcement of Judgment Debts (the Payne Committee) has recommended the abolition of this remedy generally: see (1969) Cmnd. 3909 para. 929. And cf Law Com. No. 5, paras. 23-24.

22. e.g. to insure the building erected on the land subject to the rentcharge.

23. s. 31(1).

24. s. 31(6).

25. Extended in certain circumstances.

## C. Advantages and disadvantages of the system

### (i) Disadvantages

30. It will be convenient to consider first the opposition to the system. This comes in the main from owners of residential property subject to rentcharges, but (for quite different reasons) the system is also disliked by some bodies with specialised interets in land transfer. We will refer to these as the "lay" and the "professional" criticisms respectively.

31. The lay criticism is variously put but it is commonly suggested that because of the existence of a rentcharge on his property, the owner is unable to feel that the house really belongs to him. Thinking that he has paid for his house in full already, he sees no reason why he should have this additional liability to pay a further sum every year. We do not think that freehold owners have the same feeling if they have bought their homes with the assistance of mortgages, but between a mortgage and a rentcharge there is this important difference, that in the case of the former it is very much more obvious to the house-owner what the money is being paid for. He knows that he did not pay for the house in full when he bought it, that he is now paying the difference (with interest), and that when he has repaid the mortgage his payments will cease. There is seldom, on the other hand, anything to indicate to a purchaser that a rentcharge is really the annual interest on an additional capital sum which the vendor has lent on permanent loan and so represents part of the purchase price;[26] and from this stems what seems to us to be the

26. In the nineteenth century, the first rentcharge frequently constituted the whole and only consideration for the transfer of the land to the builder; and the second rentcharge constituted the whole of the profit made by the builder on the sale of the house. The reasons for which the rentcharges were payable were then more evident to the house-owner. The fact that those reasons may have been forgotten does not mean that they no longer exist: the original estate owner and builder have not yet been paid in full.

gravamen of the case against the system, namely, that it is simply a device enabling vendors (and particularly builders) to extract from purchasers too much by way of total price.

32. The precise nature of this accusation needs careful analysis, particularly since it is not always clearly framed. It might be said that the vendor, by imposing a rentcharge on the property, obtains for it a consideration which exceeds in total its market value. Put in this way, the accusation is, strictly speaking, unsound since by definition the "market value" of anything is the price which it will fetch in the open market. If there is an open market for houses subject to rentcharges and if a purchaser can be found who is prepared to pay for some particular house a capital sum of specified amount together with a rentcharge of specified amount, then, it may be said, the market value of that house consists of that sum together with that rentcharge.

33. That, however, is not the only way of expressing the view that, through the imposition of a rentcharge, a purchaser is made to pay too much. It may be that the total price including the rentcharge is not excessive in the sense that a purchaser can be found who is prepared to pay it, but it is still possible that if the vendor were not able to impose a rentcharge the capital price of the house would not in practice be affected. If that be true, it follows that a rentcharge enables a vendor to obtain a price (in total) higher than he would otherwise get.

34. In support of this argument, opponents of the system adduce by way of evidence the undoubted fact that two very similar freehold houses in the same district may well command the same capital price even if one of them is subject to a rentcharge and the other is not. This fact does not, however, prove conclusively that the rentcharge is paid for nothing or (and this is the more important point) that when the house subject to the rentcharge was first built the capital sum

received by the builder was the same as it would have been had there been no rentcharge.

35. Valuation is not an exact science and property valuation (especially in a rapidly changing market as at present) is no exception; and the fact that two substantially identical houses are put up for sale at the same time at the same price means no more than that they fall within the same price range. There may be many minor differences between the houses[27] which may be insignificant in money terms and have no material effect on the asking prices, although they may well make one house more attractive than another to a particular purchaser. Logic is a somewhat uncertain guide in this field. We suppose that most members of the public would regard it as axiomatic that the market value of a leasehold property would always be less than that of the same property freehold; but actual market experience shows that this is often not the case. The difference between the two interests is insignificant if the demand is high, if the ground rent attached to the leasehold interest is low, and if the term is long enough. We think that the difference between freehold subject to rentcharge and "freehold and free" is equally capable of being (and, for residential property, generally is) insignificant for valuation purposes. That opinion certainly appears to be accepted in practice by Building Societies. Modern rentcharges on residential property often lie in the £15 - £20 range, representing today a capital sum of less than £250; and an old rentcharge would probably both be lower in amount and command a lower number of years purchase, representing a capital sum of £50 or less. In relation to the value of the property,[28] even the larger of those figures is

27. e.g. the state of the interior decoration or of the garden.

28. Probably upwards of £5000 today.

quite small and may not put the house which is subject to a rentcharge into a price range different from that of a similar house, free of such a charge. These considerations may explain why two similar houses, only one of which is subject to a rentcharge, may be offered at the same price: moreover, such a price coincidence does not prove that the first purchaser of the property subject to the rentcharge was forced to pay a price which, in total, exceeded the market value. To prove that, it would be necessary to show that it is common to find two identical adjoining new properties placed on the market at the same time and at the same capital price, only one of which has a rentcharge added.

36. In our view, it is not possible to forecast the effect which abolition of rentcharges might have on house prices in the areas where rentcharges are prevalent. It may be that competitive forces would prevent capital prices from being increased on that account; on the other hand, it is perhaps inherently unlikely that builders would abandon the value of the customary rentcharge, and in present conditions it would be quite impossible to tell whether or not part of the increasing price of land and houses should be attributed to the absence of the usual rentcharge.

37. Up to this point, we have assumed that houses hitherto sold freehold subject to rentcharges would continue to be sold freehold if rentcharges were abolished. This is not a safe assumption. Vendors may have commercial reasons for not increasing capital prices, but when the market is in their favour they may well succeed in selling long leaseholds (at groundrents) rather than freeholds. Appropriate adjustment of the capital price for a term of years, in relation to the amount of the ground rent, can equally be made to operate as a sales incentive. The continuing availability of the leasehold system tends, in our view, to cast doubt on the proposition that, if rentcharges were abolished, purchasers in rentcharge areas could expect to be able to acquire freehold

titles without paying higher capital prices for them than they do now. The leasehold alternative is, on several grounds, less attractive than the present freehold and rentcharge arrangement.

38. The addition of a rentcharge may be a means of procuring the maximum total price for a house and we suspect that it might often be difficult in practice for a vendor to obtain more by way of capital payment than he is getting now. Further, a vendor may sometimes do well out of a rentcharge, if its capitalised value exceeds the amount by which the capital price of the house is lower than it would have been had the house been on the market rentcharge free. It is therefore impossible for us to say that the argument on prices put forward by opponents of the system is wholly without foundation. But in the great majority of cases the amounts involved are so marginal that it is not possible to establish the validity of the argument by fair comparisons; and we think that it is very uncertain what would actually happen if rentcharges were abolished. Put shortly, we just do not know whether, if the rentcharge system were abolished, the capital price demanded or the nature of the title offered by the vendor would be affected.

39. In addition to the general criticism which we have discussed above, there is a particular feature of the system to which rentpayers often take strong exception. The owner of an overriding rentcharge is likely to look to one of the landowners for the whole of the rent and it will then be up to that landowner to seek contributions from the others (or from such of them as have not got the benefit of an informal exoneration) in accordance with the equitable apportionments. This, as we have already mentioned, makes the rentpayer, in effect, a rent collector. The performance of this duty is frequently regarded as unpleasant; and even if there are no

actual difficulties in obtaining contributions from the neighbours, this feature of the system imposes a psychological and physical burden, particularly on elderly rentpayers. This seems to us to be a valid criticism of the system as it operates at present, and reform of the law is clearly called for.[29] But it does not raise fundamental issues and if it could be eliminated it would no longer constitute a criticism of the rentcharge system itself.

40. The professional criticism relates in the main to the complications to which rentcharges (and, in particular, overriding rentcharges) give rise in the process of investigating title: difficulties which are somewhat enhanced by widespread unfamiliarity with the system among practitioners living outside the rentcharge areas. This criticism is of an entirely different nature from that of the layman; objection is taken not so much to the system as such as to a particular vice to which it is prone (but which is not necessarily inherent in the system) namely, the overriding rentcharge, with all that it entails. The professional criticism should, therefore, be capable of being answered by reform of the law.

41. The solicitor acting for a purchaser of a house which appears to be subject to a rentcharge has first to satisfy himself that the land with which he is dealing is (or is part of) land on which a rentcharge was originally imposed. That, in itself, is not always a straightforward matter, involving as it often does the examination of deeds and plans over a hundred years old. If the land with which he is dealing is only part of the land charged, the solicitor will then (having discovered the legal liability) have to find out how the liability has been dealt with down the line

29. The Ground Rents (Collection) Bill, introduced by Mr. Arthur Davidson M.P., was primarily concerned with this aspect of the matter.

as between the various parts into which the charged land has been divided and sub-divided, in order to discover whether his client's house is exonerated, or whether it bears an apportioned liability. He will also have to consider the effect of any covenants associated with the liability. If the house is subject to more than one rentcharge, each of the rentcharges will have to be investigated separately.

42. In a complicated case, a quite disproportionate amount of time may be spent making these investigations relating, often, to trivial sums - which may, moreover, never actually be payable by the purchaser because of an exoneration in the past. Apart from the rentcharge, the solicitor's task (that of investigating the title to the house itself and effecting the transfer) may be quite simple because the root of title will usually be of comparatively recent date; but the additional work involved in checking the origin and subsequent history of the rentcharge liability, which may go back much further into the past, has not hitherto been reflected in the fee for the conveyance. Despite that, it appears that the majority of solicitors practising in the rentcharge areas are not against the system. The Building Societies (who are interested as mortgagees), and local authorities (who have to have regard to the rentcharge situation when, for example, apportioning compensation monies following compulsory purchase for slum clearance purposes) would, however, be glad to see the end of rentcharges; and the fact that the existence of rentcharges can involve considerable extra work is clearly supported by the evidence provided to us by the Land Registry which now has a very wide experience in this field.

43. It cannot be denied that the existence of a rentcharge will, to a greater or lesser degree, complicate the transfer of a piece of land if one is comparing the transaction with the transfer of an unencumbered freehold. But the difficulties are no worse than the corresponding problems arising in the nearest comparable situation, namely, the transfer of land which is only part of an old leasehold title. Indeed, any leasehold conveyancing is likely to involve more reading. As we have already mentioned, overriding rentcharges have not become a general feature of the system outside the North West and this conveyancing argument substantially relates to the older rentcharges in the northern area only.

44. We would also observe that as time goes on, an increasing number of properties which are subject to old rentcharges will have become registered land, and it will then be much easier for anyone examining the title to see what the rentcharge liabilities are. Taking a medium-term view, therefore, many of the technical difficulties connected with old rentcharges will make their presence felt for the last time on the occasion of first registration of title to the subject land. We do not think that a full investigation on that occasion can be avoided, whatever happens. Even if rentcharges on land not already registered were compulsorily redeemable over a term of years, the probability is that the title to the land would fall to be registered before the rentcharges had disappeared. It would not be particularly helpful to the Land Registry to require rentcharges to be redeemed immediately before the title to the subject land is due to be registered, because the Registry would have to be satisfied that the rentcharges had been properly redeemed.[30] Such a requirement

30. This corresponds in substance to Method (B) discussed in our first Working Paper.

would, moreover, be open to other objections of a practical nature, not least among which is the fact that to make the transfer of land conditional on the redemption of existing rentcharges (involving, in many cases, the prior apportionment of overriding rentcharges) would tend to add to the time taken and expense incurred in transferring the land. It seems to us that there is only one way in which the Land Registry could escape having to investigate the rentcharge position: namely, by making all rentcharges "overriding interests" under the registered land system.[31] To our minds, that would be quite unacceptable.

45. Although it is at present always possible for a modern simple rentcharge to become an overriding one on a division of the land, the chances of that happening are now much lower than they formerly were. We have no evidence that developers are able today to acquire building land on rentcharge terms, and that eliminates what, in the case of older titles, is the commonest first (and overriding) rentcharge. The development which takes place will, moreover, rarely consist of large houses set in even larger gardens as it did fifty years or more ago; the units are now much more likely to be of such a size that sub-division (giving rise to the conversion of a simple rentcharge into an overriding one) is hardly possible, save perhaps where it is necessary to provide strips of land for road widening or boundary adjustment.

46. Any reduction in the number of existing overriding rentcharges would, of course, be very welcome; but we have come to the conclusion that the professional criticism is not so weighty that steps must be taken to bring such rentcharges to an early end. Later in this Paper we do, however, suggest a means whereby they might be made ultimately to disappear.[32]

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31. That is to say, interests in the registered proprietor's land which are binding upon him although they are not noted on the register.

32. Paras. 67-72.

(ii) Advantages

47. Our interim conclusion that the rentcharge system might not need to be totally abolished is not reached on purely negative grounds. People often find it necessary to borrow money, and lenders not unnaturally look for security. Land has always been regarded as a good security for this purpose and in the majority of cases where it is so used the transaction is carried out by way of mortgage. But the transaction can equally be carried out by way of rentcharge (perpetual or not), and sometimes this is the simpler method. Examples of situations in which rentcharges are usefully employed in a role similar to that of mortgages are set out in the following four paragraphs.

48. First, whether it be ordinarily true of private sales between builders and house purchasers or not, the existence of the system has, in some cases which have been drawn to our attention, made it possible for houses to be sold freehold for capital sums lower than the full market value, making up the difference with a rentcharge. Certain public authorities have been known to adopt this policy for the benefit of house purchasers who, in effect, thereby get the assistance of a "mortgage" at a fixed rate which cannot be called in by the "mortgagee".[33] Where, on the occasion of the sale of a house, a loan is being made to the purchaser by the vendor himself it may (especially if the loan is a comparatively small one) be cheaper and simpler to provide the necessary security by reserving a rentcharge than by creating a separate mortgage.

49. Secondly, the system has been found to be of practical value in solving a problem which may arise in connection with the need to re-house owners of freehold premises in redevelopment areas. Since the freehold value of the new house offered

33. We are informed that in recent years Bristol Corporation has disposed of hundred of plots on this basis.

will normally exceed that of the old one, the owner may be faced with the prospect of having to be satisfied with a tenancy of his new home. His age (or income level) may prevent him from raising money on an ordinary mortgage in order to bridge the difference. But with a suitable rentcharge, he can be offered a freehold in exchange for a freehold.[34]

50. Thirdly, rentcharges (and, in particular, rentcharges for a fixed term) provide a means of securing the repayment of money lent for any purpose, where for some reason a mortgage is unsuitable. The system has, for example, been made use of by business enterprises for raising money, as an alternative to the adoption of a "sale and lease back" scheme; the borrower has the advantage of not having to part with his existing freehold (or leasehold) interest. (For tax reasons, the lender under such an arrangement would almost certainly be a charity or some other body not liable to tax on the rentcharge income).

51. Fourthly, Parliament has found in terminable rentcharges a convenient method of securing the payment of sums of money for a number of purposes connected with land, and in particular in connection with repayment of advances made for land improvement. In the latter category come the orders made by the Minister of Agriculture Fisheries & Food under the Improvement of Land Act 1864[35] and the corresponding provisions in the Land Improvement Company's private Acts; and charges under section 85 of the Settled Land Act 1925 for the

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34. This is known to be the origin of a number of rentcharges to be found in one of the New Towns.

35. ss. 49 and 51.

recoupment of capital monies expended on improvements. Orders may also be made by the Minister under the Agricultural Holdings Act 1948[36] to secure the payment of compensation in accordance with the provisions of that Act. There are other statutory rentcharges in existence given in consideration of the enfranchisement of copyholds[37] and the redemption of tithe rentcharges[38] before those matters were dealt with on a general basis.

52. On a quite different plane, rentcharges now play an important part in connection with the enforcement of positive covenants. It will be remembered that the burden of positive covenants cannot, at least at present,[39] be made to run with the land of the covenantor. If a developer continues to provide services or amenities which are shared by the owners of the freehold houses on the estate - and this is often the most efficient way of providing them - he is unable to secure the payment of contributions indefinitely by way of covenant. But he can achieve the desired result by reserving rentcharges when selling the houses.[40] Furthermore, by means of the covenants attached to the rentcharges, coupled with an appropriate power of re-entry in the event of default, the

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36. ss. 72-74 and 82.

37. See the Copyhold Act 1894, ss. 15 and 17.

38. See the Tithe Act 1918, ss. 4(2) and 6.

39. See, however, the Report of the Wilberforce Committee on Positive Covenants Affecting Land (1965) Cmnd.2719 para. 10; and our Working Paper No. 36 (Appurtenant Rights) para. 41. And see para. 73 below.

40. It appears that the rentcharge may be variable, at least if it is variable in accordance with a formula fixed at the outset: Beachway Management Ltd. v. Wisewell [1971] Ch. 610. In that case the rentcharges had been taken to provide for the cost of maintaining estate roads until taken over by the local authority.

developer may be able to secure the maintenance in good condition of the several parts of a building in multiple freehold occupation. These purposes may, of course, be frustrated by the redemption of the rentcharges; in any event, we hope that in the reasonably near future it will not be necessary to rely on the rentcharge system in this connection.

53. Having regard to the matters which we have mentioned in the previous five paragraphs, it seems likely that the abolition of the rentcharge system would be attended by actual inconvenience in a limited number of circumstances. This reinforces the suggestion that the continuance of the existence of the system, as such, might be permitted.

## D Suggestions for Reform

### The Option

54. As we have already indicated, we think that there is a legitimate part for rentcharges to play in the field of financing the purchase of freehold property. Essentially, their proper role is the same as that of mortgages.

55. If a purchaser obtains a mortgage on his house, he knows not only that part of the purchase price remains unpaid but also how much is outstanding. A rentcharge also constitutes a part[41] of the total purchase price and we consider that a purchaser ought to be able to see exactly what that part amounts to, and have a real opportunity of paying the whole price immediately if he so wishes. We suppose that purchasers would sometimes consider it to be to their advantage

41. At one time, it might well have constituted the whole of the purchase consideration.

to accept a rentcharge liability if one were offered,[42] but we take the view that this should be a matter of conscious choice. There is no reason why a purchaser should have less of a choice about accepting a rentcharge than he has in the matter of a mortgage.

56. We suggest therefore that whenever a vendor offers to sell property on terms which include a rentcharge as part of the consideration for the land, the purchaser should have a clear right at any time up to completion to require him to accept an immediate capital sum in place of the proposed new rentcharge. The purchaser exercising this right would thus, in effect, be anticipating the right which he already has to redeem the rentcharge immediately after its creation, but the trouble and legal costs involved in effecting the redemption would be saved. The capital sum payable would be the sum equal, at the date of contract, to the statutory redemption price of a rentcharge of the amount proposed.

57. In order that this option should be fully effective, it would seem to be important that a prospective purchaser should have the existence of this new right in mind early in the negotiating stage of the transaction; it may materially affect the total amount of the advance which he may have to seek from a building society or other mortgagee. At that stage, he may well not be acting under independent legal advice and it is therefore for consideration whether the law should impose on the vendor a positive duty, in advertising the property, to draw attention to the fact that any new rentcharge mentioned in the advertisement is commutable (and, if the proposed new rentcharge is quantified, to indicate the likely size of the commutation price). This duty, like those

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42. They would have to bear in mind that a rentcharge on owner-occupied residential property is not deductible for tax purposes. In this respect it differs from mortgage interest.

under the Advertisements (Hire Purchase) Act 1967, could be enforced by criminal sanctions; but (in line with the precedent provided by that Act) it could be made to apply only to persons engaged in the business of selling property, such as builders, developers and professional agents. Furthermore, in order to ensure that knowledge of the option has not been kept from the purchaser, it is also for consideration whether a conveyance or transfer containing a grant or reservation of a new rentcharge should be required to indicate on its face that the purchaser knew his rights (and, inferentially, decided not to exercise them). In the absence of any such indication, the rentcharge could be declared to be unenforceable.

58. Since a purchaser already has the right to redeem an existing rentcharge, the suggestion that he should be entitled to prevent the creation of a rentcharge by, in effect, redeeming it in advance, is one which we would not expect to be controversial. But whether that right should be supported in the ways set out in the preceding paragraph, or whether it should be left to the purchaser to discover the existence of the right for himself (or, more likely, as the result of advice from his own solicitor) is a question upon which we would like to receive the views of our readers. It would undoubtedly be more helpful to purchasers if the suggestions were implemented in full. On the other hand, the formalities mentioned in the preceding paragraph would in practice benefit only those purchasers who would wish to exercise the new right but who would otherwise remain ignorant of the right until it was too late; and it is for consideration whether it is desirable that the formalties should have to be observed in every case for the specific protection of purchasers in that category who, we suspect, might be few in number.

59. We do not think that we can suggest the adoption of the same rules in relation to sales of property subject to existing rentcharges. In effect, this would require the vendor to clear the title at the purchaser's request. The operation would lead to the incurring of some costs (especially if apportionment were required) and the vendor should be entitled to transfer the burden of these to the purchaser, since the redemption is for his benefit and at his request. The vendor will not wish to incur the costs before he has a contract binding the purchaser and is quite sure that the purchaser would want the rentcharge redeemed; and completion of the contract is likely to be seriously delayed. Moreover, the usual way of recovering the costs would be to add an estimate of their amount to the contract price of the property. Quite apart from the fact that estimates tend not to be accurate, the fixed relationship which we think should exist between the price subject to rentcharge and the price free of rentcharge would not in these circumstances be present.

New rentcharges - permitted term

60. In our view, if there is one existing feature of the rentcharge system which is more unsatisfactory than any other, it is the fact that it is possible to create rentcharges in perpetuity. From the strictly financial point of view, there is no substantial necessity to make a rentcharge perpetual because the sum lent (or forgone) by the owner of the rent can be recovered over a term of years by setting aside each year and accumulating part of the rent received; and (as we demonstrate later) the sum required to be so set aside is so small if the term is of the order of seventy years that it cannot be regarded as affecting the return on the capital sum outstanding. This being so, it is very difficult to prevent the payer of a perpetual rentcharge from gaining the impression that eventually the sum originally lent or forgone

will be repaid many times over (or even, in the case of an old rentcharge, that the owner of the rent has already received more than his due).

61. It is, moreover, the perpetual nature of the majority of rentcharges which is responsible for many of the conveyancing problems associated with old (and especially old overriding) rentcharges. If every rentcharge created on the sale of land had been limited to a reasonable term of years, examination of 19th century deeds would not now be necessary. We think that steps should be taken to prevent new rentcharges from becoming a source of difficulty in the future, and we accordingly suggest that it should not be permissible to create a new rentcharge for a term exceeding a certain number of years, and that any grant for a longer term, or of a rentcharge in perpetuity, should be construed as a grant for the maximum permitted term and no longer.

62. In deciding what that maximum term should be, several factors have to be borne in mind. It must be neither too short nor too long.

63. One of the reasons for retaining rentcharges is that they may provide a useful means of securing on land the repayment of money for a term longer than that usually obtainable by a conventional repayment mortgage. This advantage would be lost if the permitted maximum term were restricted to one for which a mortgage can normally be obtained, and this consideration suggests that the lowest maximum permitted term that we could envisage would be twenty-five years.

64. What, if any, are the arguments for fixing the maximum permitted term for new rentcharges at some number of years above twenty-five? First of all, since the yearly amount of a rentcharge relates to a particular capital sum lent (or forgone) by the rentowner for a number of years, the shorter

the period of its payment, the higher it is likely to be. We doubt whether it would be desirable to choose a term so short that it must have the effect of increasing the annual amounts. This point is particularly relevant in cases where the charge is expected to be paid out of the profits of the land on which it is imposed, and that land yields a relatively low profit: it is perhaps significant that many of the statutory terminable rentcharges to which we referred in paragraph 51 are for forty years. Secondly, it must be borne in mind that the shorter the period, the greater the risk that the vendor will not be able to achieve his ends through the rentcharge system and therefore the greater the risk that he will turn to the leasehold system instead.

65. On the other hand, if the term is very long, the whole object of the exercise would be defeated. It is desirable that a rentcharge should disappear from the title of the subject land after a reasonable period; and it is especially desirable that it should expire before the end of the anticipated life of the building from the erection of which the rentcharge probably dates, and thus before there is a serious risk of subdivision of the land. The aim should be to reduce the risk of the rentcharge becoming an overriding one when the site is redeveloped. These considerations seem to us to indicate that the maximum permitted term should not be more than, say, seventy years.

66. It is not necessary for us at this stage positively to suggest what the maximum permitted period should be. The previous paragraphs indicate that the extremes would appear to be twenty-five years at the lowest and seventy years at the highest; but where the term should lie between those extremes will depend on the weight to be attached to the considerations mentioned in paragraph 64. We would welcome the specific views of our readers on this question.

Existinguishment of existing rentcharges

67. If all future rentcharges were subjected to a maximum term, the question arises as to whether or not existing perpetual rentcharges (and terminable rentcharges with many years still to run) can also be cut down to a fixed term. If so, all existing rentcharges would be guaranteed in due course to disappear; but in considering the matter it seems to us that there would be little or no benefit in achieving this end if it involved the setting up of machinery (at the expense of the public at large, or of rentpayers) to compensate all the rentowners affected. This was the point on which the suggestions contained in our first Working Paper broke down.

68. It is a truism that the difference in value between a perpetual and a terminable rentcharge diminishes as the term lengthens, and we accordingly sought advice as to the term at which the difference could fairly be regarded as negligible. We have been informed by the Government Actuary that, based on an interest rate of 8%,[43] the effect of cutting a perpetual rentcharge down to seventy years would reduce its actuarial value to the rentowner by less than one-half of 1%.

69. We also asked the Government Actuary to state how much of each £1 of rentcharge received annually by a rentowner during a given period would have to be set aside by him and accumulated (at 8%) in order to provide him with a full £1 a year in perpetuity after the period had elapsed, independently of the rentcharge.

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43. This represents the yield which might reasonably have been expected from a fixed-interest investment in recent market conditions. If a higher yield is assumed, the extent to which the value of the rentowner's interest would be reduced would be even less than that stated in the text.

70. If the period were twenty years, the answer would be 27p., and it is plain that if existing rentcharges were to be extinguished over such a term, an increase in the sums payable during the period by rentpayers would be a necessary feature of the scheme. As is well known, tithe liabilities are in the process of being eliminated on the basis of increased payments but the tithe redemption scheme was rather special in that the State became (in effect) the sole tithe owner and all the former owners were compensated at the outset, so that they have not been concerned with the collection of the increased sums payable under the scheme. Any scheme involving increases in the amounts payable under rentcharges is likely to be unpopular with rentpayers and we think that if the tithe precedent were not followed in full such a scheme would be unpopular with rentowners as well. We have little doubt that individual rentowners (or their collectors) would meet with resistance at the point of collection of any increases; and the result of higher collection costs would be to deprive the rentowner of full compensation, despite the raising of the annual payments for the duration of the term.

71. As the number of years increases, the annual sum which a rentowner would have to put into his sinking fund rapidly diminishes. This can be seen from the following table which shows the amounts per £1 of rent on the basis of an 8% interest rate:

| Years: | 20 | 30 | 40 | 50 | 60 | 70 | 80 | 90 | 100 |
|---|---|---|---|---|---|---|---|---|---|
| Amount in pence: | 27 | 11 | 4.8 | 2.2 | 1.0 | 0.46 | 0.21 | 0.10 | 0.045 |

72. It seems to be clear from these figures that if existing perpetual rentcharges were converted into terminable rentcharges for a further sixty or seventy years, no useful purpose would be served by adopting a scheme under which rentpayers would pay increased sums during the term. The increases would normally be so small that it would hardly be economic for rentowners even to notify their rentpayers of the increases, let

alone actually to attempt their collection. Indeed, the figures in the table make it feasible to suggest that all existing rentcharges not due to come to an end by effluxion of time within the next sixty or seventy years might automatically terminate at the end of such a period, without compensation.[44] All the other methods of extinguishing existing rentcharges canvassed in our earlier Working Paper were open to serious practical objections; we are hopeful that the method now suggested will be found to be acceptable. Even with the benefit of our earlier consultation, we do not find it possible wholly to reconcile the views of those who seek early extinguishment of existing rentcharges with the legitimate rights of rentowners, by producing a scheme which could not, even as a matter of argument, be said adversely to affect either rentowners or rentpayers.

73. Before leaving this topic we must draw attention to the fact that if all existing rentcharges were made to disappear in time, the rentcharges to which we referred in paragraph 52 above, which are currently fulfilling the useful purpose of providing a means of enforcing positive covenants, would also disappear. (Furthermore, if limitations were to be imposed on the length of time for which any new rentcharge might be created, this use of the rentcharge system would be

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44. The amounts set out in the table assume an interest rate of 8%, which seems reasonable in present conditions. Any reduction in the ordinary interest rates would have the effect of increasing those amounts, and if a lower interest rate is appropriate at the date of the relevant legislation the period of 60 or 70 years which we mention could be correspondingly lengthened, so that the cost to the rentowner would remain about the same. Termination of the rentcharge without compensation is more important than the period chosen. It did not appear proper in 1936 to terminate tithe liabilities on that basis because the prevailing rates of interest were low and a period of 60 years only was chosen.

largely ruled out for the future.) Positive covenants entered into for the benefit of other land should, we think, be enforceable against the owner for the time being of the burdened land and at first sight it would seem that rentcharges created for this purpose should be exempted from any new provisions imposing time limitations. We are, however, concurrently working on proposals which would enable such positive covenants to be enforced as such against the owner of the burdened land[45] and if the law were changed along those lines it would no longer be necessary to rely on a rentcharge system for this purpose. The position of existing positive covenants supported by rentcharges will have to be closely watched. If new legislation in the field of such appurtenant rights does not operate retrospectively to improve the enforceability of existing positive covenants, it may be right to preserve indefinitely the enforceability of rentcharges which are supporting such covenants. That would be an untidy way of solving the problem and the definition of the special class of rentcharges to be exempted from the suggested new rules as to duration could present some difficulty. On the other hand it is perhaps doubtful whether it would be right to make any legislation in the field of appurtenant rights retrospective in order to take care of this problem. It may be that as the existing rentcharges would not in fact expire for quite a long time, the best way out of the difficulty would be deliberately to ignore the problem on the ground that after a further sixty or seventy years (or whatever the period may be) the usefulness of the positive covenants should in any event be reviewed and if they are still serving a useful purpose they might then be reimposed by agreement or otherwise in the new form as Land Obligations.

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45. See our Working Paper No. 36; and the report of the Wilberforce Committee on Positive Covenants Affecting Land (1965) Cmnd. 2719.

Legal apportionment on the subdivision of land

74. One of the effects of imposing a limitation on the period for which a rentcharge may be created in the future (and of converting existing perpetual rentcharges into terminable ones) will be that simple rentcharges will be less likely to become overriding ones. This is because it is less likely that the subject land will be split up in the course of re-development while the rentcharge is operative. Nevertheless, it would remain possible for a simple rentcharge liability to become an overriding one on, for example, the conversion of a house into freehold flats. The same result may be achieved, almost by accident, by boundary adjustments. Although an overriding rentcharge for a fixed term would not normally present conveyancing problems quite as serious as those presented by a perpetual rentcharge, we have considered whether steps might be taken to ensure that no existing or future simple rentcharge could in the future become an overriding one in any event.

75. As the law now stands, a landowner whose land is already subject to one or more rentcharges (simple or overriding), and who is proposing to dispose of part (or of the whole in parts), may obtain legal apportionment either by agreement with the rentowner or through the statutory procedure. The question is, whether the law should be changed in order to ensure that any such disposition would always lead to a legal apportionment of the liability among the separate parcels resulting from the division of the land; and if so, how this might be done.

76. We first examined the possibility of providing a statutory formula for apportionment which could be made to apply wholly automatically on any future division of land subject to a simple rentcharge. (It seems clear that "automatic" apportionment could not be applied to land which

is subject to an overriding rentcharge, because there are obvious difficulties in attempting to make a legal apportionment where the liability to be split up has itself never been established as a separate legal one). A basis for such a formula (and perhaps the only one which would be theoretically capable of working in all circumstances) would be area. Thus, on the division of a piece of land into two or more plots, the simple rentcharge on the whole would, on this footing, be treated as having been apportioned at law between the owners of the plots in exact proportion to their ownership of the surface of the soil. Similarly, if a single site were re-developed vertically into separate strata of ownership, the existing rentcharge could be split in accordance with the respective floor areas. There are, however, substantial difficulties in the way of achieving legal apportionment in this manner. First, since there is no necessary correlation between areas and value, it could result in an apportionment very different from that likely to be arrived at by following the present procedures. The major part of the existing rent could, for example, become charged exclusively on an undeveloped (and perhaps, on account of its position or inherent nature, undevelopable) portion of the land to the relief of the remainder of the land on which valuable properties are erected. Secondly, since conveyancing is almost never conducted on the basis of exact measurements (the ascertainment of which would mean that surveyors' fees would have to be incurred), "automatic" apportionment based on areas would lead to uncertainty and would be a fruitful source of minor disputes especially where the rent is being collected for the first time after a division of the land.[46]

46. In the case of a building in multiple ownership, any common areas would appear to add considerably to the problems.

None of the parties would know the precise extent of the various apportionments and the need to resort to some procedure in order to resolve the disputes would seem to rob the idea of "automatic" apportionment of its great advantage over other means of obtaining legal apportionment, namely, that it would not involve, as they do, having to approach a third party to act as an independent arbitrator.

77. "Automatic" apportionment based on values rather than on areas would overcome the first of those objections, but the second objection - uncertainty - would apply with equal force in any case where the division of the land took the form of a sale-off of part of the vendor's land, because there would be no call in such circumstances for a valuation of the retained land to be made. Moreover if arbitrary apportionments are to be avoided, "value" would have to mean "market value" and the consideration actually received by the vendor on the division of the land could not be relied upon as the measure of this.

78. Alternatively, a vendor proposing to divide land subject to a simple rentcharge could be effectively driven into using the existing procedures for obtaining legal apportionment by providing by law that no purchaser could acquire a legal title unless and until such an apportionment had been made. Another way of approaching the matter, achieving the same result in practice, would perhaps be to make unenforceable any future agreements creating equitable apportionments of (or exonerations from) simple rentcharges. No intending purchaser (or his mortgagee) would be likely to accept a conveyance of part of charged land which would not only make the purchaser legally liable to pay the whole amount of the rent (as at present) but which would also deny him any fixed rights to contributions from others. For his own protection (and to satisfy any mortgagee) he would demand legal apportionment, just as in similar circumstances he would require his vendor to arrange for the release of the land being sold to

him from an existing mortgage. We recognise that the legal sanctions contained in both these suggestions appear to be somewhat drastic, but that may be necessary if it is thought desirable that the obtaining of a legal apportionment of an existing simple rentcharge in anticipation of a division of the subject land should become standard conveyancing practice. And it could not be objected that a purchaser who inadvertently took a title without there having been a legal apportionment would be permanently prejudiced thereby: he would be able at any time to cure the defect in his title, or to limit his liability under the rentcharge, by obtaining a legal apportionment either by agreement with the rentowner or through the statutory procedure.

79. Two advantages lie in making sure that legal apportionment of simple rentcharges is, in practice, always obtained in advance of (or contemporaneously with) any sale of part of the land charged. First, no purchaser of part only of the land could find himself in the position of being liable to the rentowner for the whole of the rent; and secondly, apportionment would preserve the relative simplicity of the title to each part of the land affected during the remainder of the life of the rentcharge. But, as is so often the case, there are disadvantages as well. If the obtaining of legal apportionment became for practical conveyancing purposes a necessary step in every relevant case, there would be additional work and expense[47] involving resort to the statutory procedure or negotiation with the rentowner. Furthermore, the process of obtaining the necessary apportionment (if not carried out by the vendor before contract) would be likely to delay the completion of the purchase. In general, we hope that reform

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47. If the apportionment were by agreement with the rentowner, he would have to be a party to the conveyance (or transfer) and he would, no doubt, look to the vendor for payment of his solicitor's (and possible surveyor's) costs.

of the land law will simplify procedures and save time, particularly in connection with the buying and selling of houses; this particular suggestion would introduce a new complication. Legal apportionment is, of course, an operation for the benefit of the person acquiring part of the charged land, and he might say that he would be willing to forego the advantages of apportionment in order to avoid its disadvantages in terms of cost and delay, an attitude which he might indeed be expected to take if the rentcharge were due shortly to come to an end. He is always free to obtain a legal apportionment himself if he so wishes. For our part, we think that it is an open question whether, on the whole, it would be better to leave the law as it is in this respect, or whether there should be a change along one of the lines indicated in paragraph 78 above so that overriding rentcharges would not in practice feature in the system when the current ones have expired. This is a matter on which we would welcome specific advice.

80. If the general view is that there should be such a change, the question arises as to whether the consequences of non-apportionment on the occasion of a subdivision of land should apply where the rentcharge affecting the relevant land is already an overriding one. Where the existing rentcharge is a simple one, the practical necessity of obtaining an apportionment on the occasion of a division would not impose much of a burden on the owner of the land. But if the existing rentcharge is already an overriding one, the position is potentially very different. Land subject to an overriding rentcharge commonly has the benefit of an equitable exoneration from the effects of it, and after a number of years the owner of such land might have considerable difficulty in tracing the current rentowner; and he cannot obtain a legal apportionment unless he has traced him. Furthermore, legal apportionment is of very little advantage to someone who already has the benefit of an equitable exoneration. Since

the changes in the law which we have suggested in this field would have the effect of making the land more or less unmarketable unless a legal apportionment were obtained, it would not be right to make those changes apply to situations in which it would be either burdensome or inappropriate to have to obtain legal apportionment. On those grounds, we are at present inclined to think that if the law were changed along the lines indicated in paragraph 78, the new provisions should apply only to rentcharges which at the date of the division of the land are simple rentcharges.

The statutory redemption price

81. It will be convenient at this stage, before examining the statutory redemption and apportionment procedures, to discuss the price of redemption. Section 191(2) of the Law of Property Act 1925 contains a formula for ascertaining the price at which some perpetual rentcharges may be redeemed by rentpayers, but this is obviously not appropriate to the case of a rentcharge for a term of years (much of which may have expired before the rentpayer applies to redeem it). As originally enacted, that subsection also contained a formula for valuing terminable rentcharges, by reference to the price of a Government Annuity for the same term; but the Finance Act 1962 brought the power to create such annuities to an end and the relevant words in section 191 were repealed at the same time. If, as we have suggested, all rentcharges become terminable rentcharges, it will be necessary to recreate a formula for their valuation.

82. The existing formula under which perpetual rentcharges are valued for the purposes of their redemption in accordance with section 191 equates them with certain undated Government securities which, in these days, yield 9% or thereabouts. The statutory redemption price therefore lies between 10 and 12 years' purchase. In the market, however, rentcharges

compete with such securities on an unequal footing, because rentcharges are seldom paid regularly without demand, and the security is often very far from sound. Investors in rentcharges therefore look for a gross yield in excess of 9% (sometimes, with good reason, considerably in excess of 9%) and rentcharges accordingly command in the market a price equivalent to 8 or 9 years' purchase at most, and it is not unusual to find that they have changed hands at prices equivalent to 5 to 6 years' purchase.

83. It follows that it is possible for a rentowner to reap a capital gain in the event of a rentcharge being redeemed under the statutory provisions, since the sum paid by the rent-payer may exceed the price at which the rentowner acquired the rent in the open market. For the same reason it would be possible for a profit to accrue to a rentowner on the redemption of a terminable rentcharge if the formula were based on the current yield from Government securities, and this raises the question whether that should be the basis adopted.

84. The first observation which we would make on this is that although it is possible for a rentowner to make a capital profit on redemption, that is not very likely. In fact, it is probably true to say that the majority of owners of perpetual rentcharges realise a capital loss on redemption today because their rents were acquired at some date in the past when the ordinary rates of interest were 4 or 5% and they consequently paid 20 or more years' purchase for them. The chance of realising a capital profit on redemption would perhaps be even more remote if (as we suggest) all rentcharges were for terms of years.

85. We think, however, that to discuss this question in terms of capital profit or loss is to miss the real point. What matters is income. Rentcharges are acquired and held for the sake of the income which they produce and if investors

are to be deprived of the asset which they have chosen for income reasons they must receive in return a capital sum of such an amount as will enable them to obtain the same income after reinvestment. It is, in this connection, worth recording that among the holders of rentcharges are numerous charities and Friendly Societies and similar institutions; and many retired people of modest means (and low tax liability), who are attracted by the exceptionally high yield which rentcharges are capable of producing.[48] Furthermore, if instead of having a fixed formula the market value of each particular rentcharge had to be ascertained on its redemption, valuation costs of some order would necessarily be incurred, and if there were any dispute, litigation costs as well. The issue between the parties might amount either to several years' purchase of a small annual sum, or to one or two years' purchase of a larger sum (depending on whether the rentcharge in question were a sound modern one or not). Either way, the result would be much the same, and we are inclined to the view that it would not be helpful to require a specific valuation in every case because, although the actual price of redemption would almost certainly be reduced, any benefit which the rentpayer might derive from that would be seriously eroded by the costs involved. Indeed, if a rentowner did not wish to have a particular rentcharge redeemed, he could in practice effectively discourage the rentpayer from resorting to the statutory procedure by indicating that there would be no agreement as to price. For those reasons we suggest that there should be a fixed formula for ascertaining the redemption price of a terminable rentcharge, anchored to the value of an equivalent right to Government securities.

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48. On a man's retirement he may be able to acquire a parcel of rentcharges on land in his own district which he can collect himself, thus minimising the costs of collection the prospect of which may have depressed the value of the rentcharges in the market.

86. The question remains whether that formula should reflect the fact that some collection costs[49] can be expected in the case of even the best rentcharges, so that they are not quite worth their face value in income terms. This raises a question of policy. The collection cost element is sometimes very small and if the formula is aimed at protecting the rentowner's present income in all circumstances any deduction would have to be nominal in amount and it may not be worth while in practice to take this factor into account at all. On the other hand, even those rentcharges which are at present collected at insignificant cost to the rentowner may become more expensive to collect in the future, and the rentowner might therefore expect some account to be taken of this in arriving at a redemption price which will enable him to make a permanently secure reinvestment. Since most rentcharges do involve collection costs, there is perhaps a case for making an arbitrary deduction based on an average cost percentage, but it would appear that even if that percentage were of the order of 10 per cent a deduction of not more than one full year's purchase would be justified, and even that would depend on the length of the rentcharge term being redeemed. The present formula, which does not take this factor into account, is open to the charge that it gives a rentowner more than he is really entitled to. In some cases that accusation is well-founded but it would be impractical to isolate those cases and we invite views as to whether in all the circumstances anything need be done to deal with the point.

87. We have considered the possibility of suggesting that a rentowner offering a rentcharge for sale should be required to notify the rentpayer, so that he does not miss the opportunity thus presented of acquiring the rent himself at market

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49. In this context we use the phrase "collection costs" to comprehend all the difficulties of collection which are inherent in a security of this kind, compared with a Government stock on which the interest is paid automatically without demand.

value (thus extinguishing the charge by merger). Rentcharges are, however, generally marketed not individually but in parcels, and we think that it would not be right to require a rentowner to break up his rentcharge portfolio in order to enable some individual rents to be acquired piecemeal. Moreover, we think that the enforcement of any such requirement would present difficulties outweighing any theoretical advantages.

## Redemption and apportionment procedures

### (a) General

88. We consider it important that the actual procedures for the redemption and, if necessary, apportionment of rentcharges should be as simple as possible, in order to minimise the need for professional assistance and the incurring of costs. The existing legislation recognises this by providing executive rather than judicial procedures; and this aim should not be lost sight of in framing any regulations, and in particular in deciding what information must be provided by the rentpayer on his application form. Consideration must also be given to measures facilitating the obtaining by the applicant of essential information.

89. Our first suggestion in this field, however, is not directly concerned with details of that sort, but relates to the identity of the executive body to be responsible for issuing the all-important certificates. Originally, the statutory functions were carried out at the Ministry of Agriculture and Fisheries; then at the Ministry of Land and Natural Resources; then at the Ministry of Housing and Local Government; and now at the Department of the Environment. We have heard no criticism of the way in which these Government departments have, in turn, carried out their functions, but it seems to us that any rentcharge case which is other than straightforward might be more easily dealt with by local

authorities. In the nature of things, most of the applications come from the areas in which rentcharges are prevalent, and the officials of the local authorities in those areas are likely to have had greater experience of rentcharges than have the officials in London. We are inclined to think that a transfer of these functions to District Councils might, moreover, have two positive advantages. First, the Council is likely to be familiar with the land in question, and many of the facts which are relevant on an application for apportionment (and of which the Department of the Environment now has to be informed by the applicant) would be known to the Council or could be readily ascertained by inspection. Local authorities are, moreover, accustomed to working with the District Valuer and there may be occasions on which he could be of assistance. Secondly, local authorities are more readily accessible to applicants in person and we have little doubt that advice and assistance in completing the forms would be forthcoming. This would, we think, help to remove the psychological barrier in relation to technical legal matters to which many people are subject, although we recognise that there will always be some difficult cases in which it will be necessary for professional assistance to be obtained.

90. Although simplification of the procedure may encourage more rentpayers to make use of it, the fact remains that for most rentpayers apportionment and (even more so) redemption is not worthwhile, and we would not expect the implementation of the reforms suggested in this Paper to result in a substantial increase in the total number of applications. A District Council in an area in which rentcharges are common should, we think, have little difficulty in establishing an efficient system for dealing with the applications received by it. In other areas, applications may be made very rarely indeed and we have

considered whether it would be better to provide for partial devolution only, and that the Department of the Environment should retain its present responsibility, except in designated areas. On the whole, we suspect that the balance of convenience would be against this.

(b) Redemption

91. Redemption, by itself, is possible only if the rentcharge is a simple one, or has become a simple one through legal apportionment. In most cases, the rentpayer will know the identity either of the rentowner or of his agent, through the payment of rent in the past; and in any other case, he will have discovered who the owner is in the course of apportionment. But since the rentowner is not entitled to raise any objection to redemption, we see no reason why it should be necessary for the rentpayer to notify the owner that he is applying for a certificate of the amount of the redemption price.[50] In conformity with the suggestions which we have already made, we think that that certificate should be issued by the District Council, and that redemption should be effected by a further certificate issued by the Council, following payment to the Council of the redemption price. The Council would simultaneously notify the person named by the rentpayer in his application as the rentowner (or his agent) that the rent had been redeemed; and would subsequently pay the amount of the redemption price out to the rentowner on proof of title to the rentcharge. For this purpose, a statutory declaration should suffice, as at present. A

50. At present, in making his application, the rentpayer does not have to substantiate the figure claimed by him to be the amount of the rentcharge to be redeemed. The procedure which we suggest below should avoid the making of errors.

procedure along these lines would ensure that the owner of the rent could not cause redemption to be held up; and the cost of proving his title (which would probably be small) would fall on himself and not on the rentpayer. We think this not unreasonable, as the net redemption price will usually exceed the market value of the rent. The second half of the procedure would of course not have to be gone through if the District Council were itself the owner of the rent in question.

(c) Apportionment

92. Apportionment is a potentially more complicated matter because it is capable of affecting both the rentowner's security and the actual liabilities of the owners of the rest of the land subject to the same rent. We are, however, inclined to take the view that the present apportionment procedure might be simplified, notwithstanding the presence of these factors. Overriding rentcharges are often small in amount, and the rentowner's security is in practice unlikely to be prejudiced whatever the apportionment may be; certainly, we feel that he would not be adversely affected to any measurable degree so long as the apportionment made is a reasonable one. There can, moreover, be no dispute between the applicant and his co-rentpayers if there is an existing equitable apportionment of the overriding rentcharge, and the legal apportionment is made in accordance therewith.

93. It would, doubtless, greatly simplify matters if all existing equitable apportionments (including exonerations) were forthwith converted by statute into legal ones automatically binding the rentowners. We do not, however, suggest that that should be done because it is not unusual to find that on the making of an equitable apportionment parts of the land are exonerated (in equity)

altogether for special reasons, and not on the ground that such an exoneration constitutes an objectively reasonable apportionment in the circumstances. In particular, such a provision could not reasonably be made to apply where all or most of the land providing the rentowner's security had been equitably exonerated from the overriding rentcharge.

94. Although it is possible that a landowner who has the benefit of an equitable exoneration or an indemnity covenant may wish to apply to have his liability apportioned at law, it is to be expected that the majority of applicants for legal apportionment would be those landowners who are required to pay money and especially those who are called upon to pay not merely their equitable share but the whole sum. In our view, therefore, the basic procedure should be designed to fit the circumstances in which such landowners find themselves.

95. Since a legal apportionment in the figure of an existing equitable apportionment will very often be perfectly satisfactory, we suggest that a rentpayer should be able to apply for an apportionment without in the first instance having to involve either the rentowner or the other rentpayers. If he has been a "collector" of the rent in the past, he will know how the whole liability is apportioned among all the land owners; but in any other case he may not know this, and it seems to us that it may unduly complicate the making of an application always to require the applicant to set out the names, addresses and current equitable liabilities of all his co-rentpayers. This information may be required if it appears to the person or body making the apportionment that a part of the entire rent cannot reasonably be apportioned to the applicant's land on the basis of his own current equitable liability; and if that is the position, the additional information can be called for. Otherwise, such information

may not serve a sufficiently useful purpose to justify the difficulties which may be encountered in meeting the demand for it. (It may be that the particulars of the other rentpayers are at present called for in the hope that such rentpayers may thereby be encouraged to join in the application and have their own liabilities apportioned as well. This is a laudable aim in itself, but it is defeated if having to provide those particulars operates to discourage the making of the application in the first place).

96. As in the case of redemption, we see no reason why an applicant for apportionment should be required to deliver copies of his application to any other person. The application would be considered by (we suggest) the District Council, with a view to deciding whether the operation could reasonably be carried out without involving the other rentpayers. Further particulars may be called for at that stage. The Council would then make a draft Order, copies of which would be sent to the rentowner (or his agent) and, if (but only if) the proposed apportionment were not in line with an existing equitable apportionment, to all the rentpayers. A time limit would be imposed on the submission of observations which would include, in appropriate circumstances, a request by the rentowner that the apportionment be made conditional on redemption. Having considered the observations which have been made, the Council would make their definitive Order, copies of which would be sent to the applicant, to the rentowner and to any "collector" in any event, and to any other rentpayer affected.

(d) Forms of application

97. One of the features of the present procedure is that it is carried out without inspection by the Department of the Environment of the applicant's title documents. The

fact that it is often not easy for a rentpayer to make an application without obtaining professional assistance operates to some extent as a safeguard against error; and it is assumed that misstatements on the application form will be challenged by the rentowner or the applicant's co-rentpayers, with whom the Department enters into correspondence. Nevertheless, it is not unknown for errors to be discovered at a very late stage, and even after the issue of the relevant certificate.

98. Local authorities are not unaccustomed to examining documents of title on occasions other than their own property transactions. For example, they often do so when considering applications for improvement grants. We suggest that every application for redemption or apportionment, or both, should similarly be accompanied either by the applicant's documents of title[51] or, if they are in the custody of a mortgagee, the name and address of the mortgagee. In the latter case, the mortgagee should be placed under an obligation to transmit the documents to the District Council on demand, subject to indemnity against loss.

99. If the District Council has the documents of title, the application form itself could be greatly simplified, and the same form could be used for all purposes. The

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51. In the case of an unregistered title, these will consist of the conveyance to the applicant and the originals or abstracts of the earlier documents including the instrument creating the rentcharge and those effecting any apportionments or exonerations. Where the title is registered, they will consist of the Land or Charge Certificate or an office copy of the entries in the register and filed plan. (An authority to inspect the register may have to be given by the applicant or the mortgagee to enable office copies of filed documents or abstracts to be obtained).

Council would require to know:

(i) Whether the application is for redemption, or apportionment, or both.

(ii) The name and address of the rentowner or his agent. (We suggest that if this is not in fact known to the rentpayer, he should be entitled to require the person to whom he actually pays the rent to provide the information, and to withhold payment until that information is supplied.)

(iii) The name and address of the person who actually collects the rent (if different from (ii) above).

(iv) The amount of the rent actually paid by the applicant each year. (This would normally be the amount appearing from the title deeds as the sum payable, but we suggest that this should be checked.)

In addition, if the rentpayer is applying for apportionment of the rent between different parts of his own land (in contemplation perhaps of a part disposal) he should be required to give a description (preferably by reference to a plan) of the relevant parcels, and to suggest how the apportionment should be made.

100. Apart from the questions which are excluded because the answers can be more reliably ascertained directly from the documents of title, the suggested form would differ

from the existing one used for apportionment in two respects to which attention should be drawn. First, it would contain no details relating to the applicant's co-rentpayers. As we have already explained, the District Council may sometimes come to the conclusion that an apportionment cannot reasonably be made without involving these additional parties; but even in such cases the Council may be able to identify the co-rentpayers from its own resources without having to go back to the applicant. We suggest that it is preferable that the applicant should be asked for further information where necessary than that he should be asked for unnecessary information in the first instance. Secondly, the rentpayer is not asked to give any reason for his application. At present, apportionment under the Landlord and Tenant Act is conditional on the Secretary of State being satisfied that it is "expendient" and although we suspect that this is regarded in practice as little more than a formality today, we think that this particular requirement should not be a feature of the reformed system. The applicant's desire is reason enough.

(e) Appeals

101. Bearing in mind that the cost of any appeal against an apportionment would in most cases be wholly disproportionate to the amount at stake, the question arises as to whether the right to appeal should be restricted in any way. We suggest that it would be reasonable to provide that no rentpayer should be entitled to appeal against a decision which is in line with an existing equitable apportionment. Subject to that, there clearly ought to be some right of appeal against the manner in which an apportionment has been made (though not against the making of an apportionment as such) because the rentowner must be entitled to have his security safeguarded and any apportionment not in line with

an existing equitable apportionment inevitably prejudices either the applicant or the other rentpayers. It would be possible to avoid the risk of costs being incurred in financially insignificant cases by providing that an appeal should lie only where the apportionment made falls outside specified upper and lower limits; but we are inclined to the view that that argument is not sufficient to justify the imposition of arbitrary limits which could bear hardly in individual cases. At the same time, with costs in mind, we suggest that appeals might lie not to the High Court or County Court, nor to the Secretary of State, but to Local Valuation Courts (and thence, if necessary, to the Lands Tribunal): in other words, that they should follow as closely as possible the procedure for appeals against rating valuations. This suggestion is, of course, in line with our earlier one for devolving responsibility in this field onto local authorities; it might mean that in practice the District Valuer, who is already responsible for making rating valuations (and is therefore familiar with the appeal procedure) would be asked to carry out the apportionments on the local authority's behalf.

(f) Apportionments conditional on redemption

102. If, on an apportionment, the legal liability on any land were reduced to a low figure, the owner of the rent should, we think, be entitled to require the apportionment to be made conditional on redemption. The grant by statute of a right to apportionment which rentpayers would not otherwise have should, in justice, not extend in practice to relief from the liability altogether by rendering the apportioned rents uneconomical to collect. The necessity for a "small rents" redemption provision was recognised by the Landlord and Tenant Act 1927 (apportionment under section 191 of the Law of Property Act involves redemption in any event). If £2 was an appropriate ceiling

for the provision in 1927, a case obviously exists for increasing the figure now. It has been suggested that the redemption provision might apply to apportionments of £5 a year or less and we would be glad to receive views on that. It must be borne in mind that if the redemption level is pitched too high it might unduly inhibit the making of applications for apportionment, and we would not wish the provision to have that effect. It is also for consideration whether, in order that the figure may be kept reasonably up-to-date, the Secretary of State for the Environment might be given power to fix it from time to time by Statutory Instrument.

103. In some cases, hardship might be caused by requiring redemption of a small rent, and accordingly the Secretary of State is entitled under the Landlord and Tenant Act to make an apportionment without requiring redemption of a resulting small rent, notwithstanding the rentowner's request to the contrary. We feel that this may put the Secretary of State in a difficult position and we would prefer to see the law changed along the following lines. The District Council, in making an apportionment in a figure of £5 or less, should always make it conditional on redemption if the rentowner so requests; the rentpayer may appeal to the Secretary of State against the condition, on the ground that it would impose hardship upon him; and, if his appeal is upheld, the apportioned rent should be redeemed by the Council, which should thereupon be entitled to impose a local land charge on the property in question. The small rent would thus be redeemed in any event, but the burden of redemption would not, in appropriate cases, be made to fall on the rentpayer all at once. Indeed, we suspect that the situation would often arise in cases where the Council is likely to acquire the land itself in the not too distant future, and that the local land charge would come to be paid off when that happened.

### (g) Effect of apportionment applications on current demands for rent

104. A person liable to an overriding rentcharge may apply for apportionment at any time, and since the receipt of a demand from the rentowner may encourage the making of such an application, we think that the effect on any outstanding demand of the making of such an application should be made clear. We are inclined to the view that proceedings on the demand should be stayed pending the making of the apportionment, and that the applicant might then be liable only for his apportioned share of the whole rent demanded (including any arrears). It may be necessary to ensure that the rentowner's right to collect the balance of any arrears from the other rentpayers is not prejudiced by the operation of the Limitation Act.

### Collection Covenants

105. In order to keep his expenses to a minimum, a rentowner will often look to one person for the whole of the rent, leaving that person to collect contributions (in accordance with equitable apportionments or otherwise) from the owners of the rest of the land which is subject to the charge but which is not equitably exonerated. The ease with which these contributions are collected varies enormously, and at one end of the scale a social problem of some magnitude exists. Collection in person can lead to unpleasantness, and in any event may be beyond the physical capacity of an elderly rentpayer; and if such a rentpayer employs someone else to collect the contributions he will inevitably be out of pocket. In the result, the contributions may not be collected at all, so that the rentpayer who is the "collector" bears the whole of the rent.

106. In some cases, apportionment of the rent provides a means whereby a rentpayer can escape being put into this position. Once his land has, through apportionment, become

subject to a simple rentcharge, he cannot any longer be called upon, as owner of part of the larger plot of land, to pay the whole sum. But he is not always able to escape as easily as that. On the acquisition of his land, he may have become liable under covenant to act as "collector" in any event, so that he is called upon to account to the rentowner for the whole rent, not fortuitously as one of the owners of the land charged, but specifically under the covenant. In these circumstances, apportionment does not solve the rentpayer's difficulty.

107. There is, we think, only one way of solving the problem, namely by providing that on legal apportionment of his liability a rentpayer is released from any covenant relating to the payment of any but his own apportioned rent, and that he is no longer concerned with the rent under the unapportioned overriding rentcharge.[52] We appreciate that that will mean that the rentowner will have to make new arrangements for the collection of that other rent; and that the burden of payment (and of consequent collection of contributions) is likely to fall on one of the other rentpayers unless he also applies for apportionment. But we take the view that those consequences constitute the lesser of two evils. We also appreciate that the former "collector" may have had a smaller share of the overriding rentcharge equitably apportioned to his land because of his collection duties (indeed, his land may even have been equitably exonerated for that reason); but this factor, if it is an appreciable one in cash terms, can be taken account of in apportioning the former "collector's" share of the rent for the future. This would be one of the circumstances in which an adjustment of an existing equitable apportionment might be called for.

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52. This suggestion is associated with that made in para. 109 below which (by releasing a landowner from liability under a covenant to pay a rentcharge when he disposes of the land) would eliminate the taking of indemnity covenants.

Other Rentcharge Covenants

108. Every deed creating a rentcharge will include a covenant to pay it; and most will include three other ancillary covenants, namely, to keep the buildings on the land in repair, to insure them against fire (and to lay out any insurance monies on reconstruction), and to grant the rentowner access to view.[53] It has been suggested to us that these common form covenants could be made statutory and thus available for incorporation into deeds by short reference. We are, however, inclined to doubt whether universally acceptable statutory covenants could be devised and there is little point in providing forms which parties do not wish to use. Moreover, since the covenants in question are positive covenants it may be preferable that they be written out in full in the document creating the rentcharge.

109. It has also been suggested to us that the burden of the covenant to pay should be made to run with the land affected by the rentcharge, so that, if that land is no longer owned by the person originally liable to pay the rentcharge, the rentowner would be able to take proceedings on the covenant directly against the current owner. We doubt whether a change in the law limited to the covenant to pay would be of much value because although a subsequent owner may not be directly liable on the covenant as such, he is nevertheless liable to satisfy the debt.[54] The ancillary covenants, however, would not be enforceable in an action in debt, and we suggest that it might be helpful if the burden of covenants to pay rentcharges, and any supporting covenants relating to repair, insurance and access to view, were made to run with the land. We would

53. Where the rentcharge is imposed on building land, there will also be a covenant to build. This situation, common at one time, is now rare.

54. Thomas v. Sylvester (1873) LR 8 Q.B. 368.

also suggest that such covenants should be enforceable only against the owner or owners of the land for the time being; and that the ancillary covenants should be enforceable against any such owner only so far as they relate to his land. Previous owners of the land charged would thus be released from all their covenants connected with the rentcharge and their indemnification would no longer be necessary.[55]

Remedies

110. At common law, the landlord's or rentowner's right to distrain for arrears extended broadly to all the chattels found on the land, whether they belonged to the debtor or not. The scope of the remedy in the hands of landlords has, however, been considerably cut down by statute;[56] but, anomalously, these restrictions do not apply to distress for arrears of rentcharges.

111. As we have already noted,[57] the Payne Committee has recommended that the remedy of distress should disappear altogether in favour of a new recovery procedure; and although we appreciate that it is possible to make a case for the retention of distress as a means of recovering arrears of rentcharges (based on the smallness of the amount likely to be at issue and the disproportionate cost of pursuing the matter through the courts) our provisional view

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55. This accords with the general approach of the Wilberforce Committee in their Report on Positive Covenants Affecting Land (1965) Cmnd. 2719.

56. In particular, so far as chattels belonging to third parties are concerned, by the Law of Distress Amendment Act 1908.

57. Note 21 above.

is that the remedy should not be specially retained for rentcharge purposes if a replacement is found in all other fields.[58]

112. In addition to ordinary proceedings for the money debt, a rentowner has, under sub-sections (3) and (4) of section 121 of the Law of Property Act 1925, the right to enter into possession of the land charged, or to create (and deal with) a term of years in the land, for the purpose of recovering rent in arrear and for securing the payment of the rent in the future. These remedies are analogous to those of a mortgagee in similar circumstances, and we consider it appropriate that they should exist. We would, however, regard them as remedies of last resort, and, bearing in mind that rentcharge arrears often do not amount to any considerable sum, we would suggest that it is appropriate that these remedies should be exercisable only with the leave of the county court. We accept that this would introduce a distinction between the rights of a rentowner and those of a mortgagee, but, in practice, even a mortgagee may have to obtain a court order to get actual possession. In any event we take the view that the distinction may be justified on the ground that mortgage arrears are more likely to be substantial, so that the exercise of these extreme remedies is less open to criticism in mortgage cases.

Miscellaneous points

113. We wish, finally, to refer to three further matters put to us in the course of our earlier consultations. First,

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58. In our Interim Report on Distress for Rent (Law. Com. No. 5), published in 1966, we indicated that the remedy of distress might well be dispensed with if the deliberations of the Payne Committee resulted in the adoption of new enforcement procedures and machinery.

it has been suggested that the compulsory registration of title to rentcharges should be extended: at present, only rentcharges newly created out of registered land need themselves be registered. While registration is undoubtedly desirable as a general aim, the practical advantages will be less apparent if rentcharges are limited in their duration and it would seem more important that the Land Registry should be employed in extending the registration of title to land (in the ordinary sense of that word). Furthermore, if the title to the subject land is wholly or partly unregistered, registration of title to the rentcharge on it (whether on creation or transfer) would not be straightforward. It is, however, possible to think in terms of making compulsory the registration of title to a rentcharge created on an occasion which will itself induce first registration of title to the subject land. This, perhaps, deserves consideration. The second suggestion relates to the statutory procedure for redemption and apportionment, and is that the parties should be entitled to make joint applications to the Secretary of State (or, as we have suggested, the District Council). It seems to us that the sole effect of this would be to substitute an official certificate for the usual deed; it would not save any of the difficulties (or costs) involved in examining title and negotiating the terms of the agreement. We are at present inclined to think that this suggestion may not be worth pursuing. Finally, it appears that there is room for doubt whether, under the Limitation Act 1939, time can run against the rentowner where the subject land is unoccupied, or at any rate if there is no person in possession.[59] The Law Reform Committee is presently considering this area of the law and we have drawn their attention to this point.

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59. See an article by H.C. Easton in (1953) 215 L.T. 106.

## E. Summary

1. We issued a Working Paper on the subject of legal rentcharges in 1969, in which we expressed the view that such charges on land should no longer be capable of creation. We also discussed several methods of eliminating all existing rentcharges, but we were not convinced that any of them were wholly satisfactory.

2. The consultation which followed the publication of that Paper showed that the subject was very controversial. It did, however, help to clarify the grounds upon which objections to the rentcharge system were raised; and it brought to light instances in which the existence of the system had proved advantageous. After a careful review of the subject in the light of the opinions expressed by our correspondents, we have reached the following interim conclusions:

(i) that the main charge levelled against the system, namely, that the existence of a rentcharge makes a purchaser pay too much for the land in question, is (to put it no higher) not proved. We discuss this in paragraphs 31-38, and

(ii) that although the system as it now operates contains a number of very unsatisfactory features, those features are not inherently necessary to a rentcharge system.

3. Properly employed, rentcharges are one method of raising money on the security of land, and should be regarded as analogous to mortgages. They are simpler than mortgages to create and generally have the advantage of being at fixed rates for longer terms; they are, however, often

less advantageous to borrowers than mortgages from the taxation point of view.

4. Abolition of the rentcharge system (as distinct from its reform) would deprive vendors and purchasers (and lenders and borrowers) of the right to negotiate financial terms in a form which may sometimes be positively preferred to the available alternatives. It would tend to encourage resort to the long leasehold system, which contains disadvantages at least equal to those now to be found in the rentcharge system; and the compulsory redemption of existing rentcharges would (in the absence of Government subsidy) involve increasing the financial burden on rentpayers in a manner and to an extent unlikely to be acceptable. For those reasons, we now take the view that reform of the system, rather than its abolition, would probably be the better course.

5. The particular features of the system which are justifiably regarded as objectionable are, we consider, capable of being eliminated by reform of the law; and we suggest that such reform should be undertaken. Since our first Working Paper did not, in substance, consider the subject from this point of view, we have issued this Paper to lead to consultation on the particular reforms which we suggest are necessary. These are discussed in Part D of the Paper, and are summarised below.

6. In order that a purchaser of property offered for sale subject to a new rentcharge may be able to see what it represents in financial terms, and to give him a clear choice as to whether or not to avail himself of the "loan" which it represents, he should be entitled to require the vendor to offer the property in the alternative free of rentcharge, at a price higher than the other by not more than the current statutory redemption price of the proposed rentcharge (paragraphs 54-58).

7. All new rentcharges should be subject to a term; and we suggest that the maximum term permitted should lie somewhere between 25 and 70 years (paragraphs 60-66). This is a matter on which we are most anxious to receive specific advice.

8. Every rentcharge which is now in existence should (if it has not expired in the meantime) come to an end automatically, and without compensation, on a day to be fixed by Parliament. That day would probably be some sixty or seventy years hence. The amount of compensation to which the owner of a rent would theoretically be entitled on extinguishment of his rights after a period of that length would be so small that any arrangements for its payment would be uneconomic (paragraphs 67-72).

9. If it is considered undesirable that a simple rentcharge should become an overriding rentcharge on any subdivision of the subject land, the legal consequences of effecting such a subdivision without obtaining a legal apportionment of the existing rentcharge could be altered in such a way as to provide the strongest possible incentive to the obtaining of such an apportionment (paragraphs 74-79).

10. A statutory formula for ascertaining the price at which a rentpayer is entitled to redeem a terminable rentcharge should be restored (paragraphs 81-86), and steps should be taken to enable the redemption and apportionment procedures to be simplified.

11. We suggest that it might be advantageous to transfer the statutory functions connected with redemption and apportionment, presently carried out by the Secretary of State for the Environment, to District Councils (paragraphs 89-90). We feel that those functions might be more easily carried out at local level, and that such a transfer would enable applications to be made more readily.

12. In order to reduce complications in applying for redemption or apportionment, we think that the application should be accompanied by the relevant documents of title and no further information should be required to be given that is not reasonably necessary for the purpose in hand. If an apportionment can reasonably be made on the basis of an equitable (or informal) apportionment already binding the applicant's co-rentpayers, it is not necessary that they be involved. Redemption might be effected through the District Council so that the applicant is not in direct contact with the rentowner and does not have to bear the cost of proving the rentowner's title (paragraphs 91-100).

13. We suggest that appeals against apportionments should be heard at local level, before Local Valuation Courts (paragraph 101).

14. Apportioned rents of low amounts (perhaps £5. a year or less) should, if the rentowner so requests, always be redeemable. In certain circumstances, they should be redeemed by the District Council (and a local land charge substituted) (paragraphs 102-103).

15. An apportionment should operate retrospectively to cover outstanding arrears (paragraph 104). Furthermore, on apportionment, any collateral covenant which would otherwise require the rentpayer in question to continue to be liable for the rent in respect of the land, or to be liable to collect it on the rentowner's behalf, should become unenforceable (paragraphs 105-107).

16. We suggest that the common form covenant to pay the rentcharge and ancillary covenants (for example, to keep buildings in repair) should run with the land, and that all covenants relating to the rentcharge should be enforceable only against the landowner for the time being (paragraph 109).

17. The remedy of distress for rentcharge arrears should be abolished if and when it is abolished for other purposes (paragraph 111); and the statutory remedies provided by section 121(3) and (4) of the Law of Property Act 1925 (entry into possession etc.) should not be available without the leave of the county court (paragraph 112).

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