



The Law Commission

Working Paper No 67

Transfer of Land

Land Registration (Fourth Paper)

LONDON

HER MAJESTY'S STATIONERY OFFICE

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This Working Paper, completed for publication on 15 April 1976, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 31 December 1976.

All correspondence should be addressed to:

A J Tuck
Law Commission
Conquest House
37-38 John Street
Theobalds Road
London WC1N 2BQ
(Tel: 01-242 0861 ext 237)

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THE LAW COMMISSION
FIRST PROGRAMME: ITEM IX: TRANSFER OF LAND
WORKING PAPER NO.67
LAND REGISTRATION (FOURTH PAPER)

PART A INTRODUCTION

1. This is the fourth (and last) in the series of working papers on Land Registration which we are publishing for comment and criticism. In it we deal with two closely related topics: the protection of derivative interests in registered land and the priorities of those interests.
2. Previous working papers in the series (Nos. 32, 37 and 45) were published in September 1970, July 1971 and July 1972. The introduction to the first paper (Part A) was intended as an introduction to the series and in it we gave a brief description of the Land Registration system and its history and objectives.
3. This paper also discusses one matter which relates specifically to unregistered land.¹ Applications for the registration of estate contracts are occasionally made with little or no justification and in the course of a judgment delivered while this paper was being prepared Brightman J. had occasion to draw attention to the fact that a greater degree of protection against this was enjoyed by the proprietor of registered land than by the owner of unregistered land. Since the protection of estate contracts in relation to registered land is a topic which we intend to cover in this paper in any event, we have decided to include consideration of this aspect of the unregistered system, and to seek views on it.

1 See Part D, paras. 118-128, below.

4. Our provisional conclusions on the topics discussed in this paper are summarised in Part F at pages 80 to 86 . Comments on these provisional conclusions are invited. We would add that if any of our correspondents would like to add to the comments which they have already made on earlier papers in the series, we would welcome such further comments at the same time.

PART B PROTECTION OF INTERESTS IN REGISTERED LAND

I. THE INTERESTS REQUIRING PROTECTION

5. Under our system of registration of title to land there are three legal estates or interests - freeholds, leases for more than 21 years² and rentcharges - which may be registered as separate numbered "titles". When the proprietor of such an interest sells his interest, or grants another registrable interest out of it for value, the purchaser or grantee will, when registered, obtain a title which is free from all interests deriving out of his vendor's or grantor's title unless they were either protected by an entry on the register or are of a kind which, by statute, do not need to be so protected.³ The interests which do not require protection by an entry are those called "overriding interests" by the Act, and we discussed them in Working Paper No. 37; in this part of this paper we discuss the methods whereby other derivative interests may be protected on the register so as to ensure that they are not overridden on the registration of a disposition by the proprietor of the interest from which they derive. It will be appreciated that the derivative interests requiring such protection by an entry on the superior title include those leases and rentcharges which are registrable as separate "titles".

6. As we have indicated in earlier papers in this series, the statutory scheme of title registration in force in England and Wales was never intended to set up an independent land law system, differing in content from the

2 There are some exceptions: see our first Working Paper in the series, No. 32.

3 Land Registration Act 1925, ss.20 (dispositions of freeholds) and 23 (dispositions of leaseholds) as subsequently amended. In this paper we refer to the Land Registration Act 1925 as "the Act" and to the Land Registration Rules 1925 as "the Rules"; and references to sections and rules without indication as to their derivation are to sections and rules contained in that Act and those Rules.

land law which had developed over the centuries at common law. It follows that those derivative interests which the law recognises and protects (or makes protectable) where the title to the land is not registered must be recognised by and made protectable in the registered system. Those derivative interests are:-

Legal leases

Legal rentcharges

Legal easements and other rights appurtenant to land

/i Legal mortgages and charges

Equitable interests in the land itself (e.g. equitable leases, equitable mortgages, equitable easements, restrictive covenants and estate contracts)

"Equities" binding on a purchaser with notice⁴

Equitable interests under trusts and settlements of land.

7. Before embarking on our review of the means whereby those interests may be protected when they affect registered land it is helpful first to indicate how they are protected on the occasion of a disposition of unregistered land.

4 See paras. 49-51, below.

II. PROTECTION OF DERIVATIVE INTERESTS IN UNREGISTERED LAND

8. Before 1926, the law drew a clear distinction in this connection between those interests which were "legal" and those which were "equitable". Put shortly, a transferee always took subject to any legal estates or interests affecting the land acquired; but a purchaser for value of a legal estate took free of any equitable interest of which he did not have notice. In the result, the owner of a derivative legal interest was not called upon to take any special steps to ensure that a transferee of the superior title would be bound by his interest; but the owner of a derivative equitable interest was always at risk, having to ensure that any potential purchaser of the superior title would have notice of his rights.

9. The application of these rules gave rise to difficulties. In the first place, some adverse legal interests were not always readily discoverable by a purchaser in the course of examining his vendor's title: legal mortgages not accompanied by deposit of the mortgagor's title deeds ("puisne mortgages") were a prime example. Secondly, there was wide scope for argument as to what constituted "notice" in relation to equitable interests; and while it was sometimes relatively easy for the owner of an equitable interest to ensure that a purchaser of the superior title would have the requisite notice,⁵ this was not always so.

10. The 1925 property legislation did not throw the old principles overboard but it substantially altered the manner of their application, and thereby solved the major difficulties. First of all, the Law of Property Act cut down the scope of the rule applying to legal estates and interests, by drastic pruning of the types of estates or

5 For example, where the equitable interest was such as to entitle its owner to physical possession of the land itself, or of the title deeds.

interests capable of subsisting at law;⁶ and the Land Charges Act took this a step further by making puisne mortgages subject to the same rule as to notice as applies to equitable interests in land. The problems relating to "notice" were dealt with by setting up a system of registration⁷ covering puisne mortgages and equitable proprietary interests in land,⁸ and by providing that registration (and only registration) constitutes notice.⁹

11. Also relevant is a further important feature of the Law of Property Act: the conversion of what had formerly been legal concurrent interests in land into beneficial interests under trusts for sale. These beneficial interests thus became interests in the proceeds of sale instead of being interests in land, and on a sale of the land whatever interest the beneficiaries have as regards the land is liable to be transferred exclusively to the proceeds. Beneficial interests in land held on trust for sale are accordingly classifiable as "overreachable interests". Corresponding interests under strict settlements of land are similarly overreachable.

12. The present position of the interests in unregistered land listed in paragraph 6 above may accordingly be summarised as follows. The legal estates and interests (other than puisne mortgages) are in no need of special protection: their legal status is enough. Puisne mortgages and equitable interests in the land (except equitable charges

6 Law of Property Act 1925, s.1(1) and (2).

7 Now governed by the Land Charges Act 1972.

8 Except certain equitable charges secured by deposit of title deeds.

9 Law of Property Act 1925, ss.198 and 199.

secured by a deposit of title deeds) require, for their protection, to be registered as land charges under the Land Charges Act. The equitable charges just mentioned are protected by the deposit, which affords ample notice, and like them "equities"¹⁰ are also governed by the old law as to notice (and are not registrable as land charges). Finally, equitable interests under trusts and settlements are designed to be overreachable, so that a purchaser may acquire the legal estate free from them (even if he knows they exist).

10 See paras. 49-51 and 64-66, below.

III PROTECTION OF DERIVATIVE INTERESTS IN REGISTERED LAND

(i) Overriding interests

13. We do not propose to deal with overriding interests at any length here since they formed the subject-matter of part of one of our earlier working papers in the series.¹¹ In the present context it is sufficient to note the special position of overriding interests so far as protection is concerned. Most of them are capable of being noted on the register of the title they affect and if at the time of first registration of the land they appear on the title they may be noted by the Registry.¹² They may also be noted at any time if their existence is established or admitted.¹³ If any such interest is entered on the register its protection derives from the entry,¹⁴ and not from its special status as an overriding interest; but if it is not entered it is nevertheless protected because statute so provides.¹⁵ Among the commoner overriding interests are leases for terms of up to 21 years, easements acquired by prescription, and local land charges.

(ii) Overreachable interests

14. In paragraph 11 above we explained the nature of overreachable interests. Such interests are not directly protectable as interests in land but (whether the title to the land held on trust is registered or not) the position of the beneficiaries is given a measure of protection by provisions designed to ensure that the proceeds of sale are not paid to a single trustee who is not a trust corporation. In the case of registered land, where the proprietors are

11 Part B of Working Paper No. 37.

12 Sect.70(2); and rr. 41 and 199.

13 Sect.70(3).

14 Sects.20(1)(a) and 23(1)(b).

15 Sects. 20(1)(b) and 23(1)(c).

trustees there will be an entry in the register - a restriction - which tells those proposing to deal with the registered proprietors that unless the terms of the restriction¹⁶ are complied with, dispositions will not be registered without an order of the court or the Registrar.

(iii) Methods of protection for interests requiring protection

15. There are four main types of entry having protective effects: the notice, the caution against dealings, the restriction and the inhibition. The registration of a registrable derivative interest as a separate "title" is not primarily a means of protecting it; rather it is a means of perfecting it. But in fact protection is achieved by registration because as part of the process of registration an entry will be made in the register of the title out of which the derivative interest was created. In the following lettered sections we will describe, first, the uses of inhibitions and restrictions; then we will deal with notices and cautions against dealings; and finally, we will describe the various methods of protecting mortgages and charges.

(a) Inhibitions

16. For our purposes we can deal with inhibitions briefly. Except in relation to bankruptcy, they are uncommon. They result from an order made by the Registrar or the court, and their effect is to inhibit for a specified time, or until the occurrence of a specified event, or generally until further order, the registration or entry of any dealing with the land (or charge) concerned.¹⁷ An inhibition is not, therefore, a means whereby a derivative interest is usually protected; but, as it stops the registration of dealings, it indirectly protects all derivative interests until it is removed.

16 See paras. 18 and 19, below.

17 Sect. 57.

(b) Restrictions

17. A restriction, like an inhibition, does not directly protect derivative interests although indirectly it may have that effect. Its purpose is to tell a person who proposes to deal with the registered proprietor that the proprietor's power to deal with the land is in some way limited. The proprietor may, for example, be a tenant for life under the Settled Land Act 1925, a charity, a local authority or a company; or two or more people may be registered as proprietors indicating the existence of a trust for sale. In such cases a restriction will appear in the proprietorship register of the title, so worded as to indicate what has to be done in order that a disposition, or a particular type of disposition, may be registered.

18. In paragraph 14 we mentioned that a restriction may be used to give a measure of protection in relation to overreachable interests: the form of restriction very commonly used in that connection is the "joint proprietor restriction". It is applicable when two or more people are registered as proprietors and the survivor alone will not have power to give receipts for capital moneys. The Registrar is bound to enter it and it is in the following form:-

"No disposition by one proprietor of the land (being the survivor of joint proprietors and not being a trust corporation) under which capital money arises is to be registered except under an order of the registrar or of the court."

19. Restrictions in other forms may indicate that the proprietor is required by some limitation contained in a trust instrument, or by some statutory provision, to obtain the consent of a third party (or to meet some other similar requirement) before a disposition will be registered. In any such case the proposed disponee will make it his business to see that the condition specified by the restriction has been duly satisfied.

20. An appropriate restriction can sometimes be used as an alternative to the entry of a notice - for example, it can be used to protect an estate contract, or a general equitable charge.¹⁸ We do not think that restrictions are commonly used in these types of cases, however, and it is for consideration whether there is any advantage in allowing their continued use for such purposes.

(c) Notices and cautions against dealings - generally

21. The two types of entry which are directly protective of a derivative interest are the notice and the caution against dealings. A caution against dealings can probably be used to protect any interest that can be protected by notice (although the converse is not true).¹⁹ Cautions, however, differ from notices in two important respects. First, a caution is essentially a hostile entry and can always be put on the register whether or not the proprietor agrees, whereas the entry of a notice generally requires the co-operation of the proprietor. Secondly, notices have a substantive effect and may affect priorities, but cautions are merely designed to give warning that the cautioner may have some right or claim. It is presumably because of those differences that the entry of a caution, unlike that of a notice, does not specify the nature of the interest in respect of which it has been lodged. With these preliminary observations we now look at each type of entry in more detail.

18 Sect. 58.

19 It seems that a mortgage which can be protected by a mortgage caution may only be protected in that way (s.106(2)); and the interest of a judgment creditor under a charging order is protected by making an entry under s. 59(1) which refers to cautions but not to notices (except in the context of bankruptcy).

(d) Notices

22. A notice appears in the charges register of a title. Its purpose is, as its name implies, to give notice of the adverse or derivative right or interest to which it relates, but it does not necessarily guarantee the validity of the interest.²⁰ Notices are used in relation to the following classes of interests among others:-

- (i) Leases not qualifying as overriding interests (section 48);
- (ii) Legal rentcharges (section 49(1)(a));
- (iii) Land charges corresponding with the interests in unregistered land which are registrable under the Land Charges Act 1972 (sections 49(1)(c) and 50);
- (iv) Legal easements, expressly created.

23. Notices may be in various forms depending on the interest to which they relate. A notice protecting a contract for the sale of land might, for example, read as follows:-

16 January 1969 - Contract dated 10 January 1969 for sale to John Smith for £8,000.

An entry relating to restrictive covenants might read as follows:-

20 January 1973 - A transfer dated 15 January 1973 by Blankshire Homes Limited (Vendor) to John Brown (Purchaser) contains covenants a copy of which is set out in the schedule annexed.

The following is an example of a notice of a lease:-

10 August 1973 - Lease dated 6 August 1973 of 12 Lover's Lane (numbered 2 on the filed plan) for 99 years from 24 June 1973 at the rent of £40 p.a.

If the lease is registered in its own right the notice will also state the title number under which it is registered.

²⁰ Sect. 52.

24. The Act is not entirely consistent in its terminology when referring to an entry which will appear on the register of a title to indicate the existence of some adverse interest. The Registrar is sometimes authorised or required to "enter a note" or to "enter notice",²¹ instead of "entering a notice". So far as the protection of the interest is concerned, however, such "notice" or "note" will have the same effect as an ordinary notice.

*25. Subject to certain exceptions, a notice cannot be entered on the register unless the land certificate is first produced to the Registrar.²² That rule is designed to ensure, among other things, that a notice of a derivative interest cannot be put on the register unless the proprietor co-operates by lodging his certificate at the Registry to meet the application to register or note the interest. But the rule only applies where the certificate is "outstanding", so that if the certificate happens to be in the Registry for any reason, the application can, subject to what is said below, proceed. The certificate may be in the Registry in connection with some other application, but it is most likely to be there because the property is subject to a mortgage. (Under section 65 a mortgagor's certificate remains in the Registry during the currency of the registration of the mortgage.) It will thus be seen that notice of a derivative interest may, in theory, be made against a title without the knowledge or consent of the proprietor. In practice, however, where the certificate is in the Registry, steps are taken to notify the proprietor that the application has been made

21 Sects. 70(2) and 70(3); r. 41.

22 Sect. 64. Similarly, in the case of a disposition affecting a registered charge, it is necessary for the charge certificate to be lodged.

so that he can object if he wishes to do so.²³ We return to this matter later when discussing possible changes in the law.²⁴

(e) Cautions against dealings

26. There are two main types of caution,²⁵ the caution against first registration and the caution against dealings. The former (as its name indicates) does not operate to protect interests in land the title to which has been registered, and we discuss it later in the paper.²⁶ The cautions referred to in this section of the paper are cautions against dealings in registered land.

27. We have already mentioned that, in contrast to notices, cautions are essentially hostile entries on a title and that they are merely warning entries of some right claimed by the cautioner. A caution may be lodged by any person who has any kind of interest in any land or charge registered in the name of any other person,²⁷ unless his interest is already registered, or protected by a notice or restriction. The proprietor's certificate is not called for, but the cautioner is required to make a statutory declaration in support of his claim. If a caution is lodged without reasonable cause the cautioner is liable to compensate any person who has thereby sustained damage.²⁸

23 Notification is not given to a proprietor of an application by his or her spouse to enter notice of a charge under the Matrimonial Homes Act 1967.

24 In paras. 58-61, below.

25 The Rules (r. 215(2)) also make provision for a caution against conversion of a title from a lower to a higher category (e.g. from good leasehold or qualified freehold to absolute title).

26 In Part E, paras. 129-139, below.

27 Sect. 54(1).

28 Sect. 56(3).

28. After a caution has been lodged, the Registrar will not register any dealing, or make any entry on the register for protecting the rights acquired under a deposit of a land (or charge) certificate or other dealing by the proprietor with the land (or charge), until notice has been served on the cautioner.²⁹ The proprietor can, indeed, at any time require that such a notice be served, whether or not there has been a dealing.³⁰ The notice (often referred to as a "warning-off notice") tells the cautioner that his caution will cease to have any effect after a specified number of days (usually fourteen) unless, in the meantime, he shows cause to the contrary. If the Registrar is satisfied that there are no grounds for continuing the caution he may at once order that it cease to have effect. Otherwise, he will normally require all necessary parties to appear before him to argue the points in issue.

29. At the conclusion of the hearing the Registrar may make such order as he thinks just. At one extreme, he may refuse to register the dealing, or to make the entry, to which the cautioner has objected; at the other, he may remove the caution and allow the application to go forward unconditionally. But he may also allow the application to go forward subject to the fulfilment of some condition, or to the continuance of the caution, or to the making of some other entry on the register which will protect the cautioner's rights.³¹ At any stage, however, the Registrar may refer the matter or any question which arises for the decision of the court.³²

29 Sect. 55(1).

30 Rule 218. The proprietor does not, however, normally have this right in relation to a caution lodged by his or her spouse under the Matrimonial Homes Act 1967: Land Registration (Matrimonial Homes) Rules 1967, r. 6.

31 Rule 220(3).

32 Rule 220(4).

30. Where a caution has been lodged that fact is shown in the proprietorship register of the relevant title.³³ As we have mentioned, the entry does not give any indication of the nature of the matter which the caution has been lodged to protect. That can only be ascertained from the declaration in support of the caution which has to be made when it is lodged.

Mortgages and charges

31. We now turn to a description of the three methods of protection peculiar to mortgages and charges.

(f) Entry on the register of charges by deed
as part of the process of registration

32. Section 25 of the Act provides that a proprietor of registered land may charge it by deed, and such a charge is, under section 26, completed by registration. The chargee thereupon becomes the proprietor of the charge; but no separate numbered title is created.³⁴ (In this respect, the registration of a charge differs from that of a registrable lease.) The particulars of the charge are simply entered in the "charges" part of the register of the mortgaged title. This entry serves a dual purpose: it constitutes the registration from which the proprietor of the charge derives his title; and it also (since it is on the burdened title) serves as a protective entry - any disposition of the mortgaged land would be subject to the charge. It is, of course, on account of this second point that registration entries have a place in this paper. It is the only instance of protection for a derivative interest being derived from an entry in the register of the burdened title which has been placed there primarily for another purpose.

33 A caution affecting a registered charge appears in the charges register of the title.

34 But the chargee is issued with a charge certificate; and the land certificate retained in the Registry (s.65).

(g) Mortgage cautions

33. Although section 25 would appear to give a proprietor of registered land as full a power to charge it by deed as he could wish, the Act contains a later provision which may overlap it. Section 106(1) gives him power "by deed or otherwise" to mortgage his land in any way which would have been permissible had the land not been registered. This section envisages that a mortgage by deed may not be immediately registered under section 26, and accordingly goes on to provide a means whereby it may be protected on the register of the mortgaged title. Such a mortgage may be protected by "a caution in a specially prescribed form and in no other way".³⁵ This caution is called a "mortgage caution".

34. From every point of view a mortgage caution is a very inadequate substitute for registration under section 26:

"Why anyone should wish to register a mortgage caution instead of registering the mortgage as a charge is incredible. There is no difficulty as to form because a mortgage of registered land may be in any form; there is no saving of fees because the fee for registering a mortgage caution is the same as for registering the mortgage as a charge. The mortgage cautioner must lodge the land certificate in the Land Registry, where it will be retained until the mortgage caution is withdrawn or cancelled; he does not get in return a charge certificate but merely the original mortgage endorsed with notice of the registration of the mortgage caution. Worst of all, the mortgage cautioner cannot dispose of the registered land by a registered disposition and he cannot, therefore, easily realise his security. In short, the procedure is clumsy in the extreme. It is invoked so seldom that the

³⁵ Sect. 106(2). If the mortgage is not by deed, it is protectable by an ordinary caution against dealings.

printing of the statutory forms has been discontinued. If mortgage cautions are not already obsolete they are at least in the last stages of obsolescence...."³⁶

35. The preliminary consultation carried out before publication of the first paper in this series indicated that there was virtually no call for the retention of mortgage cautions as a means of protecting mortgages and charges.

(h) Notices of deposit

36. Title to registered land, or to a registered charge, derives from the fact of registration, and the land or charge certificate issued to the proprietor is not, strictly speaking a "document relating to the legal estate", that is to say, a document of title:³⁷ it is merely evidence of the state of the register. Nevertheless, the Act provides for the deposit of such a certificate as security for a loan.³⁸ The certificate of a registered title is thus, in this respect, treated as if it were equivalent to the documents of title to an unregistered property or (as the case may be) to a mortgage deed relating to it.

36 Ruoff and Roper on the Law and Practice of Registered Conveyancing (3rd ed., 1972), p. 133 (footnotes omitted). (We refer to that book elsewhere in this paper as "Ruoff and Roper".)

37 This view is, we believe, supported by the judgements in Re White Rose Cottage [1965] Ch. 940 which assumed that a charge created by a memorandum of deposit could be protected by a notice under s.49. Such a charge can only be so protected if it comes within the definition of "land charge" in s.2(4)(i) and (iii) of the Land Charges Act 1972. That definition specifically excludes charges protected by a deposit of documents relating to the legal estate affected.

38 Sect. 66.

37. The person with whom the certificate is deposited may give the Registrar notice of the deposit,³⁹ which will be entered in the charges register of the affected title.⁴⁰ The applicant does not have to lodge the certificate at the Registry. There is also a procedure for protecting an intended deposit of a certificate which results in the Registrar entering a notice of the intended deposit in the register.⁴¹ A notice of deposit or intended deposit operates as a caution against dealings.⁴²

39 Rule 239(1).

40 Rule 239(3).

41 Rules 240 and 241.

42 Rules 239(4) and 242(1).

IV. HOW PARTICULAR INTERESTS IN REGISTERED LAND ARE PROTECTED

(i) Long leases, legal rentcharges and legal easement

38. Where long leases, legal rentcharges and legal easements are created out of registered land they have to be completed by registration. Additionally, in the words of the Act, "notice thereof shall also be noted on the register"⁴³ (against, that is to say, the registered title which is subject to the new derivative interest). Any such interest which had been created before first registration of the title out of which it derives should appear on the title deduced to the Registry on that occasion, and the Registry will enter a notice in respect of it.⁴⁴ Furthermore there are at present some leases which are neither registrable nor overriding interests: notices may also be entered in respect of these.⁴⁵ In all these cases, as soon as the derivative interest is noted on the superior title the proprietor of that title and the persons deriving title under him are deemed to be affected with notice of the interest in question and the interest is accordingly protected.

39. A notice is thus the primary method of protecting long leases, rentcharges and legal easements. A caution against dealings may also be used as a means of protecting them; and that may be the only practicable method where the land certificate is not in the Registry and the proprietor does not lodge it to meet the grantee's application to register or note his interest.

43 Sects. 19(2) and 22(2).

44 Sect. 70(2) and rr. 40 and 41.

45 Sect. 48. This provision covers inalienable leases and short leases granted at a premium. In Working Paper No. 32 we provisionally proposed that the law should be changed so that all leases of registered land are either registrable or overriding.

(ii) Mortgages and Charges

(a) Generally

40. The statutory provisions relating to the creation and protection of charges of registered land are of some complexity, and it is not possible always to state with absolute certainty what the law is. Charges appear, nevertheless, to fall into four separate categories:-

"Legal" mortgages and charges;
"Equitable" mortgages and charges by deed;
Mortgages and charges under hand (which
are necessarily equitable); and
Equitable charges created by deposit of the
land or charge certificate.

There may, however, be only three separate categories, because it is arguable that there is no relevant distinction between the first two. The Act appears to treat all mortgages and charges by deed in the same way.⁴⁶ Nevertheless, it has traditionally been assumed that an equitable mortgage is not within the ambit of section 25, even if it has been created under seal: if it were, it would be capable of registration under section 26 and by such registration the mortgagee would by virtue of sections 27(1) and 34(1) acquire the equivalent of a charge by way of legal mortgage. Although, in Re White Rose Cottage,⁴⁷ Wilberforce J. said that the equitable mortgage in that case (which was under seal) was registrable, the Court of Appeal reverted to the traditional view that it was not,⁴⁸ thereby reflecting the general

46 See s.25 and s.106. The reason may lie in the fact that such charges (whether legal or equitable in form) carry a power of sale under s.101 of the Law of Property Act 1925.


47 [1964] Ch. 483 at p. 490.

48 [1965] Ch. 940 at p. 949.

reluctance to accept that the Act could have had the intention of enabling an "equitable" charge to be converted into a "legal" one through registration. For the purposes of this part of this paper we will accordingly assume that the traditional view is correct, and we will deal with the methods of protecting each of the four categories of charges in turn.

(b) "Legal" mortgages and charges

41. These charges, which must be by deed, are undoubtedly registrable and are therefore protectable by means of a registration entry.⁴⁹ If not registered, they are protectable by mortgage caution. Whether they are also protectable in other ways is a matter which is not entirely free from doubt;⁵⁰ but we understand that the Registry will (in an appropriate case) enter a notice of deposit and are also prepared, in the last resort, to enter an ordinary caution (or even a notice). The importance of the Registry's practice in this field emerges from the next paragraph.

 42. As the law stands, a legal mortgagee may find himself in difficulties when he attempts to protect his charge. If the mortgagor's certificate of title is in the hands of a prior mortgagee,⁵¹ he will, of course, not be in a position to give a notice of deposit; and he will not be able to register his charge, or lodge a mortgage caution (or apply for a notice) because all those things require the production of the mortgagor's certificate to the Registry,⁵²

49 See para. 32, above.

50 See s.106(2).

51 This will usually be the situation where the prior mortgage has not itself been registered as a charge. (If it has been so registered, the chargor's land certificate will be at the Registry: s.65.)

52 Sects. 64, 65 and r. 223(2).

a requirement which, in the circumstances, cannot be met. The legal mortgagee may therefore be reduced to applying simply for the entry of an ordinary caution (for which the production of the mortgagor's certificate is not required). Although this will give him an opportunity of protecting his mortgage in the event of an application for the registration of a disposition of the mortgaged land, he will (through his inability to register his charge) have been deprived of his power of sale. The proposals for reform which we make later in this paper would remove that obvious defect in the system. ✖

↓
(c) "Equitable" mortgages and charges by deed

43. On the assumption which we have made, these charges are not registrable (or protectable by mortgage caution). If accompanied by a deposit of the mortgagor's certificate they are, however, protectable by a notice of deposit;⁵³ and in any event, by the entry of a notice,⁵³ or of an ordinary caution. If such a charge is a second (or subsequent) charge, the difficulties referred to in the previous paragraph may arise here also, in relation to an application for the entry of a notice.

(d) Mortgages and charges under hand

44. A proprietor may charge his land by means of an instrument under hand in the same way as an owner of unregistered land.⁵⁴ The means of protecting a charge so created are the same as those for protecting equitable mortgages and charges by deed.

53 Re White Rose Cottage [1965] Ch. 940.

54 Sects. 101(1) and 106(1).

(e) Equitable charges created by the deposit of certificates of title

45. The remaining method of charging registered land is by the deposit of the certificate of title with the lender.⁵⁵ As we have seen, the charge (or, as the Act calls in, lien) created by such a deposit can be protected by a notice of deposit or intended deposit, which operates as a caution against dealings. We think, however, that it is rare for a loan to be secured by a deposit of a land certificate on its own: the deposit will almost invariably be accompanied by a memorandum and the charge will be created not by the deposit but by the memorandum.⁵⁶ Nevertheless, the Court of Appeal has held that a notice of deposit will effectively protect such a charge.⁵⁷

(iii) Equitable interests

46. The procedure for protecting equitable interests (other than equitable mortgages) depends on whether they are overreachable or not.

(a) Equitable interests that are not overreachable

47. The primary method of protecting those (equitable) interests in land which are (in the case of unregistered land) protected by registration under the Land Charges Act, is by notice.⁵⁸ Such interests include estate contracts and restrictive covenants. Alternatively, they can be protected

55 Sect. 66.

56 Shaw v. Foster (1872) L.R. 5 H.L. 321. The memorandum will normally be under seal and contain provisions designed to enable the chargee to exercise powers of sale without the assistance of the court.

57 Re White Rose Cottage [1965] Ch. 940.

58 Sect. 49(1)(c).

by a caution against dealings. It seems too that some of these interests may, if the proprietor agrees, be protected by a restriction.

(b) Equitable interests that are overreachable

48. It is of the essence of an overreachable interest that it should be capable of being overreached on a sale of the land in which the interest subsists, so that it will no longer bind the land. Provided that the purchaser observes the formalities that are a prerequisite to overreaching, any notice he may have of the existence of the equitable interests in question is irrelevant; and no purpose would normally be served by providing such notice by the entry on the register of a notice or a caution against dealings. All that is required is the entry of a restriction which will tell a purchaser that there are some overreachable interests in existence, so that the necessary formalities will be observed. Despite this, specific provision is made in the Act for the registration of certain notices of overreachable rights. Under section 49(1)(d) a notice is available to protect what is described as "the right of any person interested in the proceeds of sale of land held on trust for sale or in land subject to a settlement to require that (unless a trust corporation is acting as trustee) there shall be at least two trustees of the disposition on trust for sale or of the settlement". And under the proviso to section 49(2) a notice is available, pending the appointment of trustees of a disposition on trust for sale or a settlement, in respect of overreachable interests which will, in due course, be protected by the entry of a restriction. Later in this paper,⁵⁹ when we come to discuss possible changes in the law, we will return to these provisions. Furthermore, it has been held⁶⁰ that a person interested under a trust for sale of land is entitled to have a caution entered.

59 In paras. 67 and 68.

60 Elias v. Mitchell [1972] Ch. 652.

(iv) "Equities"

49. Notwithstanding the general policy of the 1925 property legislation to make registration the only means whereby notice of an equitable interest can be given to a purchaser of land, there is a residual class of unregistered or unregistrable "equity" which the courts have held to be binding on a purchaser with notice. An illustration of this is provided by E.R. Ives Investment Ltd. v. High⁶¹ where the Court of Appeal held that a purchaser was estopped from denying the validity of an informally created right of way although it had not been registered under the Land Charges Act. If such a right can be enforced against a purchaser of unregistered land who has notice of it, it ought to be enforceable, in similar circumstances, against a purchaser of registered land. It has, however, been suggested that that may not be the case⁶² and that there may be no way of protecting such an equitable right against a purchaser of registered land, since it may be neither an overriding interest - and therefore self-protecting - nor a land charge capable of protection by notice.

50. Although such an equity may not be an overriding interest or a land charge we think that it might be held to be an "interest" in respect of which a caution against dealings would be available; and if so it might also be protectable by notice as an interest "which it may be deemed expedient to protect by notice instead of by caution..."⁶³ Alternatively, the true view may be that equitable rights of the type under discussion lie outside the scope of the words in sections 20(1) and 23(1) which give rise to the need for

61 [1967] 2 Q.B. 379.

62 Poster v. Slough Estates Ltd. [1969] 1 Ch. 495 per Cross J. at pp. 506-508.

63 Sect. 49(1)(f).

protection,⁶⁴ so that they are wholly unaffected by the absence of a protective entry.⁶⁵ The argument here is that the words in sections 20 and 23 are now an integral part of the traditional rule that the purchaser of a legal estate takes subject to equitable interests which bound his predecessor and of which he had notice: in other words, the provisions relate to the question 'By what equitable burdens is the purchaser bound by succession?' Those provisions have no bearing whatever (so the argument runs) on the answer to the quite different question 'By what equitable burdens is the conscience of the new owner bound, in the circumstances, directly - and quite independently of whether his predecessor was similarly bound?'⁶⁶ If this argument is correct, these equities are not comprehended within the words "estates and interests whatsoever" in sections 20(1) and 23(1) and there is accordingly no statutory provision against the operation of which any form of special protection is required.

51. Even if these "equities" are either safe or protectable (on one or other of the bases suggested in the preceding paragraph) we do not think it satisfactory that the Act does not make their position clear. We accordingly revert to them later in this paper.⁶⁷

64 Registered disponees for value take subject to the incumbrances and entries appearing on the register; to overriding interests; and (in the case of leaseholds) to the covenants, obligations and liabilities incident to the estate; but "free from all other estates and interests whatsoever...."

65 We think that this is a tenable view which may cause us to reconsider what we said in para. 70 of our third working paper in this series (W.P. No.45), when discussing the subject of rectification.

66 This line of reasoning was applied in relation to an unprotected equitable interest in the proceeds of sale of a house in Peffer v. Rigg, The Times, 19 March 1976.

67 In paras. 64-66, below.

Summary of methods of protecting interests in registered land under existing law

52. In the following table we show in summary form how interests in registered land may be protected under the existing law.

Interests	Primary method of protection	Other means of protection
1 Long leases, legal rentcharges, legal easements and other appurtenant rights	Notice	Caution
2 "Legal" mortgages and charges	Entry on register of mortgaged title as part of process of registration as charge	Notice of deposit Mortgage caution Notice Caution
3 "Equitable" mortgages and charges by deed	Notice	Notice of deposit Caution
4 Equitable charges under hand		
5 Lien created by deposit of certificate	Notice of deposit having effect of caution	
6 Land charges other than puisne mortgages	Notice	Caution Restriction
7 Charging orders	Caution	
8 Overriding interests	None required by definition	
9 Overreachable equitable interests	Restriction	Caution Notice
10 "Equities"	Caution ⁶⁸	Notice

68 Or possibly, none required: see para. 50, above.

V. POSSIBLE CHANGES IN THE LAW

53. We think that the primary methods of protecting interests in registered land are generally satisfactory, in that they are appropriate to the interests in question: restrictions for overreachable interests and notices for derivative interests which should bind a purchaser of the superior title with notice. There are, however, certain matters which call for discussion and, we think, reform of the law, and we deal with them in this part of the paper. They relate to:-

- (1) the function of the caution against dealings and its relationship with notices and restrictions;
- (2) "equities";
- (3) notices of certain overreachable interests;
- (4) mortgages and charges of registered land;
- (5) the production of certificates of title before entries can be made in the register.

(1) The function of the caution against dealings and its relationship with notices and restrictions


(a) Generally

54. The position of the caution against dealings as a form of protective entry is rather special. Unlike a notice to which the Act directly ascribes a substantive effect,⁶⁹ a caution against dealings is given an effect solely through procedural provisions. The entry appears to have two

69 See ss.48(1), 50(2) and 52.

functions. First, it enables a person who claims an interest in land to protect his claim without the co-operation of the registered proprietor;⁷⁰ secondly, it provides a method of protection in certain cases in which the Act does not provide for protection in any other way.

55. The reason for the difference in the effect of notices and cautions against dealings is this. An interest protected by a notice is regarded as an established interest, and any disposition of or out of the proprietor's registered estate will take effect subject to it without further enquiry. An interest protected by a caution, on the other hand, is not so regarded and the Act provides a procedure - the "warning-off" procedure described in paragraphs 28 and 29 above - for testing its validity at or before the point of time when it is at risk: that is to say, when the registration of a disposition is applied for. From the point of view of protection there is no need for a caution to have a statutory effect in the interim, so long as the cautioner has a chance of establishing his claim if it is challenged; and the effect (if any) of an interest which has been cautioned depends entirely on the outcome of the warning-off procedure. Furthermore, as will appear later in this paper (Part C), it appears that under the present law the presence (or absence) of protective entries may have little or no bearing on the question of priorities.

 56. It might be supposed that an intending purchaser or mortgagee, searching the register, would be able to draw an inference from the nature of the protective entry as to whether the protected interest was, or was not, admitted by

70 Production of the land (or charge) certificate is not required (s.64(1)(c)).

the proprietor. This, however, is not necessarily so. The presence of a notice may, it is true, have resulted from an application which the proprietor supported by lodging his land certificate; but equally it could signify no more than that when the entry was made the proprietor's land certificate was at the Registry. For example, it may have been there on deposit (in accordance with section 65) because the land was subject to a registered mortgage. This situation is, of course, a very common one and it is therefore often permissible for a notice to be entered without any indication of the proprietor's assent.⁷¹ Conversely, the presence of a caution may mean that the existence of the interest in question is disputed by the proprietor, so that he would not produce his certificate in support of an application for a protective entry; equally, however, it may mean (i) that the owner of the interest to be protected does not wish to tell the proprietor that he is making the entry, and is content to apply for a caution only, or (ii) that the proprietor, though willing, is unable to produce his certificate because he has already deposited it with a third party as security, or (iii) that the interest in question is one for which the Act makes no provision for protection by notice or is one which is expressly protectable by caution only. An outstanding example of an interest of this last sort is that of a judgment creditor under a charging order: it is the order itself (rather than the equitable charge created by it) which is protectable on the register, and the entry is a caution.⁷²

71 As a matter of practice the Registry, though not obliged to do so, notify the proprietor in such a case so as to give him a chance to object to the entry of the notice.

72 Sect. 59(1). The protection of charging orders is discussed in paras. 83-85, below.

57. It seems to us that the dividing line between notices (or, where appropriate, restrictions) on the one hand, and cautions on the other, is drawn in a very haphazard manner. Once the protective entry has been made a clear distinction exists, for the form of the entry dictates whether or not the warning-off procedure will have to be gone through on or before the occasion of the next registered disposition; but there is no consistent principle governing the choice of the form of entry in the first place.

(b) A new procedure

58. The purpose of having both notices and cautions in the registered system is to enable a distinction to be drawn between those interests which call for a warning-off procedure and those which do not. This, we suggest, has nothing to do with the nature of the interest being protected but is a question to be determined solely by the concurrence or non-concurrence of the proprietor in the making of the entry against his title. We accordingly suggest the adoption of the following principles:-

- (1) an interest not disputed by the proprietor should always be protected by notice;⁷³
- (2) an interest disputed by the proprietor should be protected by caution; and
- (3) consequently, subject to the exceptions mentioned in paragraph 60 below, there should be no interests which are protectable only by notice, or only by caution.

73 In this and the following paragraphs, we use the word 'notice' to encompass 'restriction', the corresponding entry appropriate to overreachable interests.

59. We envisage a procedure along the following lines for the protection of derivative interests.⁷⁴ The applicant would apply in all cases for a notice. Then:

- (1) If the land certificate accompanies the application or is lodged by the proprietor of the land expressly to meet the application then no further consent is necessary.
- (2) If the land certificate is already deposited at the Registry (under section 65)⁷⁵ or held by a chargee who has protected his charge on the register, the written consent of the proprietor should be lodged with the application.
- (3) If the proprietor's consent is not indicated in any of those ways the Registry will serve notice on the proprietor, whose consent will be implied if no objection is received from him within a prescribed time. The notice will request the proprietor to produce his certificate if it is outstanding, though we do not consider that the Registry should be obliged to enforce production if that request is not complied with.
- (4) If the proprietor objects to the entry, a notice will not be entered. A caution will be entered instead, with the same priority as a notice would have had.

74 We do not suggest that this new procedure should be generally applicable to derivative interests which must be completed by registration (e.g. legal easements and long leases). But we suggest that it should apply to derivative interests which (being overriding interests) do not need protection, if the owner of the interest wishes to have an entry placed on the register of the title affected and there is no provision in the Act expressly forbidding the making of such an entry.

75 Under that section the land certificate must remain deposited in the Registry during the currency of the registration of a charge.

(5) There may occasionally be cases in which it appears on the face of the application (or from the reaction of the proprietor) that there is considerable doubt whether any entry should be made. We think that the Chief Land Registrar ought, therefore, to have power to require the applicant to make a statutory declaration in support of his application if he is not satisfied that a prima facie case for the entry of a caution has been shown.

60. In two cases, the procedure could be simpler, the applicant getting his (or her) notice entry without delivery of the land certificate, a form of consent or correspondence between the Registry and the proprietor: the consent of the proprietor is not a relevant consideration if the interest to be protected is either that of a judgment creditor under a charging order, or is the right of occupation given to a spouse by the Matrimonial Homes Act 1967. In these two cases, therefore, the question of entering a caution only does not arise. The Registry will accordingly not have to communicate with the proprietor, with the result that no request will be made for the production of the proprietor's certificate for the purpose of bringing it up-to-date. In our view, however, no such request should be made in the case of an entry pursuant to an application under the Matrimonial Homes Act (special considerations in the sphere of family law applying there); and the probability is that any request directed to a judgment debtor would be ignored.

* 61. One of the incidental consequences flowing from the adoption of such a procedure would be that (with the two exceptions just mentioned) it would no longer be possible to place a protective entry on the register without taking steps to inform the proprietor. Under the present law, the proprietor may not find out that someone else has the benefit of a caution until the entry comes to light on some later occasion when, perhaps, a sale is in contemplation; and

this may sometimes be a source of embarrassment. On the other hand there may be advantages in the present law. We seek views on the desirability of a change in the law on this point. *

62. It will be apparent that the adoption of such a new procedure would require substantial alteration of the law in relation to the production of certificates to the Registry. We revert to this in paragraphs 89-98 below.

(c) Applications made without reasonable cause

63. We have already⁷⁶ drawn attention to the provision, contained in section 56(3) of the Act, under which a person who lodges a caution without reasonable cause is liable to compensate anybody who thereby suffers damage.⁷⁷ Under the existing procedure cautions are, as we have seen, lodged without the co-operation of the proprietor and that provision, together with the requirement that the application for a caution must be supported by a statutory declaration,⁷⁸ provides some deterrent against the unjustified lodging of a caution. The introduction of the proposed new procedure for obtaining protection would by-pass the statutory deterrent provisions, for the applicant would not "lodge a caution", but would apply for the entry of a notice (or restriction); and even if the eventual outcome were that only a caution were entered on the register, the applicant would not generally be required to support his claim by statutory declaration.⁷⁹ Furthermore, if the Registry's letter to the proprietor fails to reach him, a notice will in due course be entered in accordance

76 Para. 27, above.

77 In extreme cases, the malicious lodging of a caution may also give rise to an action for slander of title.

78 Rule 215(4).

79 But see para. 59(5), above.

with the application, although it might otherwise have been objected to. In such a case the proprietor could apply to have the register rectified under section 82 to remove the offending entry, so all would not have been lost; but we suggest that as applications for notices and restrictions might occasionally be given effect to without the actual knowledge or consent of the proprietor, a provision on the lines of section 56(3) ought to be attached to them. In that way a person causing another damage by causing a notice or restriction to be entered without reasonable cause would be penalised. We do not, however, suggest that every application should be accompanied by a statutory declaration. That would, in our view, add unnecessarily to the cost and weight of the procedure.

(2) "Equities"

64. The position of these rights is somewhat obscure. It is plain from cases like E.R. Ives Investment Ltd. v. High⁸⁰ that there are rights in relation to unregistered land which are not registrable land charges but which are nevertheless enforceable on equitable principles against a purchaser with notice. Assuming (as we do) that our registration system is not intended to operate as a distinct, and therefore potentially different, land law system, these equitable rights must be recognised within it.

80 [1967] 2 Q.B. 379; see para. 49, above. The principle received further support in Shiloh Spinners Ltd. v. Harding [1973] A.C. 691.

65. We think that this objective is best achieved by use of the procedure proposed in paragraph 59. A person claiming to be entitled to one of these equitable rights should be able to apply for notice⁸¹ to be entered on the register. The procedure undertaken as the result of such an application would normally result in a notice or caution being entered; which entry was actually made would depend on whether the proprietor objected to the application. Whether a notice or caution was entered, the result of the entry would be exactly the same as in any other case where such an application was made. Until the person entitled to a right of this type applied for entry of a notice his right would be enforceable (if at all) in accordance with the principles recognised in Ives v. High. He could test the enforceability of his right at any time by applying for the registration of a notice. In the result "equities" would be binding on a purchaser with notice even though they were not protected on the register. They would thus bear some similarities to overriding interests but would differ from them in that in the case of "equities" notice is always an essential factor. Our proposals would recognise a limited exception to the general principle of the 1925 property legislation which requires notice to be derived exclusively from registers.

66. It may be that the existing law already provides sufficient protection⁸² but we do not feel sufficiently confident on that score to suggest that there is no need for clarification (at least). It has been suggested⁸³ that "equities" in registered land may be in a particularly

81 Or perhaps a restriction, as would appear to be appropriate in a case such as Peffer v. Rigg, The Times, 19 March 1976.

82 See para. 50, above.

83 Poster v. Slough Estates Ltd. [1969] 1 Ch. 495 at p.507.

vulnerable position. We think that the possibility of their existence may not have been considered in 1925.

(3) Notices of certain overreachable interests

67. Section 49(1)(d) provides that a notice may be entered in respect of "the right" of a beneficiary under a trust for sale or settlement "to require" that the trustees shall be at least two in number (or a trust corporation). This provision seems anomalous in two respects. First, no such right exists under the general law (although it is possible for the trust deed to make express provision for it) and it is not given expressly by the Act. Secondly, it seems to us that a notice is not the appropriate entry in this situation. It is in the nature of an overreachable interest that a purchaser should be able to take free from it; what the beneficiary needs is not protection of his interest as such but protection against the possibility of a sale by a sole trustee (not being a trust corporation) to a purchaser without notice of the trust, followed by failure of the trustee to account for the proceeds. The appropriate protective mechanism is not a notice but a restriction. We suggest that a beneficiary should be entitled to have a restriction entered, if the trustees do not object, or a caution if they do. If that suggestion were adopted it seems to us that paragraph (d) of section 49(1) could be repealed.

68. Section 49 contains another provision which we think might also be repealed - the proviso to subsection (2). The subsection provides (in our view, rightly) that a notice shall not be registered in respect of interests capable of being overreached by trustee proprietors and of being protected by a restriction. The proviso, however, allows a notice of such an interest to be lodged pending the appointment of trustees for sale. This notice will be replaced by a restriction as soon as the appointment is made.

We think that the person having the overreachable right should be able under the suggested new procedure to apply for the appropriate restriction in the first place. The proviso would not then be needed; in fact, it is hardly ever applied in practice.

(4) Mortgages and charges of registered land

(a) Generally

69. One of the obvious reasons for the introduction of any system of registration of title to land is the expectation that it will simplify conveyancing. The system which has been adopted in England and Wales by and large succeeds in this respect. But there is one area, the creation and protection of mortgages and charges, where conveyancing under the registered system can lead to complications which would not have arisen had the title to the land remained unregistered. That is clearly unsatisfactory and we suggest that some fairly major reforms are required. Others have expressed similar views.⁸⁴

70. There are a number of reasons why the law and practice in this field are complex, but the main one seems to us to have been the desire to ensure that no method of charging unregistered land should be unavailable for registered land. A place therefore had to be found in the registered system not only for legal and equitable charges created by instruments but also for equitable charges created simply by deposit of the documents of title with the lender. The traditional distinction between charges by deed and those not by deed also had to be accommodated within the system. We thus have four methods whereby a proprietor can charge his land (by legal charge, by

84 Harman L.J. (Re White Rose Cottage [1965] Ch. 940, 952); Professor E.C. Ryder (1966) 19 C.L.P. 26); and Professor P.B. Fairst (Mortgages (1975) p.20).

equitable charge under seal, by equitable charge under hand and by deposit of the certificate) and, as a glance at the table in paragraph 52 will show, there are no less than five methods of protecting charges on the register (registration, mortgage caution, notice, notice of deposit, and caution).

71. The question which we now ask is whether, in modern conditions, it is any longer necessary to preserve all these methods of creating and protecting charges of registered land. We suggest that the answer is "no"; and that considerable simplification could be achieved. Put shortly, the essence of our proposals is that any instrument in writing which would create a charge if the land were unregistered should create a charge on registered land capable of registration as a charge (though registration would sometimes require the leave of the court). The chargee would, however, have the option of protecting his charge either by registration, which would give him the full powers of a legal mortgagee, or by notice on the register, which would merely protect his charge and establish its priority. We will discuss this idea in greater detail below, but whether it is feasible or not seems to us to turn on whether or not equitable charges should have an entirely separate place in the system; for our suggested scheme involves the notion that all charges of registered land would be capable, through registration, of taking effect as legal charges.

(b) The role of equitable charges

72. The best security on land is always provided by a legal mortgage or charge, and that, in the context of the registered system, means a registered charge. Such a charge will give the lender power to sell the land and make title to the purchaser to whom he sells without the assistance of the court. If the charge is an equitable one it cannot

be registered⁸⁵ and the mortgagee is not able, by registration, to obtain the full powers of a legal mortgagee. Unless it is under seal he has, without the assistance of the court, no power of sale at all; and even if it is by deed (so that he has that power under section 101 of the Law of Property Act 1925) he is faced with technical difficulties created by the decision in Re Hodson and Howes' Contract.⁸⁶ In the result, if an equitable charge only is taken, the chargee commonly takes steps to put it, so far as he can, in the position of a legal charge. The charge will be made by deed (or will be accompanied by a memorandum under seal) and the deed (or memorandum) will contain special provisions enabling the chargee to get in and deal with the legal estate. Having regard to the disadvantages of equitable charges, and particularly the pitfalls which lie in the way of those who wish to realise them,⁸⁷ why, it may be asked, should anybody choose to take an equitable, rather than a legal, charge as security for his money? It is not, we are sure, because the lender is content to have less than the legal mortgagee's full range of powers, for he will, if advised, seek to put himself in a position to exercise those powers without the assistance of the court. Nor do we think that the equitable chargee is prepared to accept any risk that his charge may not have priority over a subsequent incumbrancer.

73. The answer to the question posed in the preceding paragraph lies, we suggest, simply in the fact that at one time an equitable charge could be obtained with less formality and less expensively than a legal mortgage. Hence

85 See para. 40, above.

86 (1887) 35 Ch. D.668. This case suggests that no equitable mortgagee is in a position to convey the legal estate to a purchaser, even if he has a power of sale.

87 See Re White Rose Cottage [1965] Ch.940.

it was considered to be a suitable form of security for a short-term loan, or for a loan to a relative or friend.

74. The former advantages of equitable mortgages, in terms of informality and cheapness, have disappeared. A properly drafted equitable charge or memorandum of deposit will now be scarcely less formal than a legal mortgage or charge because of the special provisions to which we have already referred;⁸⁸ and that is true whether or not the subject matter of the charge is registered land. To the lender - and the charge is, after all, his security - there can be no benefit, only detriment, in informality. The circumstances may, it is true, be such that only a brief document is called for; but brevity does not necessarily involve informality. The essentials of a legal charge require few words.

75. Costs arise under two heads: the cost of creating the security, and the cost of perfecting or protecting it. As to the first, the cost of drafting an equitable charge in such a form as to be as effective as a legal charge is unlikely now to differ much from that of a legal charge; and as to the second, although equitable charges formerly had a stamp duty advantage over legal charges (in that the duty was at a much lower rate) that advantage has gone with the abolition of the charge to duty. Furthermore, both forms of charge may, in the case of registered land, be protected by a notice of deposit, and the fee for the entry is, of course, the same in either case.

88 See Megarry & Wade, The Law of Real Property (4th ed., 1975), p.902.

(c) A possible new scheme for creating and protecting charges of registered land

76. The absence, as it appears to us, of practical advantages in equitable mortgages, and of any real distinctions between the powers of an equitable mortgagee (under a properly drawn instrument) and those of a legal mortgagee has led us to explore the possibility of having only one kind of charge of registered land. This would be capable of being registered and, when registered, would give the proprietor of the charge the full powers of a legal mortgagee. But recognising the fact that the possession of such powers through registration is usually unnecessary in the case of temporary or short-term borrowings, so that the cost of immediate registration is not justified, there could also be a cheaper and less formal procedure for the purpose simply of protecting the charge. This would take the place of the existing notice of deposit. The scheme that we would like our readers to consider is as follows:-

- (1) Any charge of registered land created by an instrument which would, if the land were unregistered, have created a valid legal or equitable charge over it, would be capable of registration. (We will refer to such a charge as a "registrable charge".)
- (2) If the instrument were not a deed, registration would require the leave of the court. (We envisage that the court would give leave in the circumstances in which it would now grant an order for sale.) This preserves the existing distinction (so far as the power of sale is concerned) between mortgages by deed and those under hand only. No extension of section 101 of the Law of Property Act 1925 is envisaged.

- (3) A charge, when registered, would confer on the proprietor of the charge the full powers of a legal mortgagee.
- (4) Deposit of a land (or charge) certificate would by itself, no longer create a charge over the land (or charge) concerned.⁸⁹
- (5) A registrable charge could be protected in one of two ways:-
 - (i) By registration as a charge, as under existing law, subject to the payment of the full fee. As stated in (2) above, this method would, in the case of a charge created under hand only, be available only with the leave of the court.
 - (ii) By notice (or, if the entry is disputed, caution) on the register subject to payment of a substantially lower fee based on the cost of making the entry.
- (6) Protection by notice would, in order to keep the cost as low as possible, be effected by the Registry noting the particulars as supplied by the applicant without investigating his right to the charge claimed.⁹⁰ The entry would not, therefore, have the benefit of a State "guarantee".
- (7) Protection by notice would give the chargee protection from having his charge overridden by the registration of a subsequent disposition. It would also establish a firm priority date for the charge because we

89 See paras. 78-80, below.

90 The Registry does not at present investigate title on an application for entry of a notice, but does do so in the case of a mortgage caution.

suggest⁹¹ that if the charge becomes a registered charge it should be registered with priority as of the date of the earlier notice. Before realising his charge (or exercising any other powers of a legal mortgagee) the chargee would have to register his charge and pay the full fee.⁹²

- (8) In his application to note a registrable charge the chargee would have to state if he holds the certificate of title,⁹³ and whether the charge secured further advances.⁹⁴
- (9) The mortgage caution, the notice of deposit and the restriction would no longer be available as means of protecting charges on registered land.

(d) Special cases

77. Before turning to transitional provisions, there are three special matters that should be discussed: deposit of certificates of title as security, floating charges by companies and charging orders.

91 Para. 110, below.

92 Cf. s.59(2), proviso.

93 This has a bearing on the question of the production of the certificate of title on the full registration of a subsequent charge: see para. 93 below.

94 See paras. 114-117, below.

(i) Deposit of certificates of title as security

78. It is a feature of the scheme which we have outlined above that the deposit of a certificate of title would no longer create a lien (or charge) on the land or registered charge. So far as we are aware, loans are not commonly made on the security of a deposit alone (that is to say, without any memorandum), and on that footing the proposal should not cause inconvenience in practice. If we are wrong about this, we will have to consider whether or not a place should be found for the mortgage by deposit in the new scheme; and, if it is decided that it ought to have a place, how it can be fitted in.

79. We think that it could be fitted in by providing that the deposit created a charge, but one that is not registrable without the leave of the court. Protection for such a charge would be by notice: in these respects it would be in the same position as a charge created by an instrument under hand. There seems to be no reason why it should be protectable by caution, as at present, as the proprietor's consent to the entry of the notice would be evidenced by the fact that the chargee lodged the certificate with his application to note the charge.

80. There are a number of reasons why we would prefer to see the demise of the charge by deposit of certificates of title. First, as a matter of principle, we think that in a registered system all charges should be in such a form as to be capable of being registered (even though there is no absolute requirement that they be registered). Secondly, we think that it is wrong, in this one respect, to have to pretend that a certificate of a registered title is, in fact, a "document of title". Thirdly, a notice of deposit does not disclose the details of the charge and we think that it is wrong in principle, in the context of a registered system, that a subsequent chargee should have to take subject to a prior charge, the extent and terms of which are not

revealed by an inspection of the register. By contrast, we think that, on registration, any charge created by an instrument can, and should, have its priority conferred by earlier protection by notice preserved.

(ii) Floating charges by companies

81. If a company creates a floating charge over its assets, an equitable charge over those assets is thereby created, but the charge is of such a nature that the company, subject to any specific contractual restrictions, may deal with any property affected from time to time by the charge in the ordinary course of its business. This situation continues unless and until an event (such as the liquidation of the company) occurs having the effect of crystallizing the charge, and making it specific. On the first registration of land by a company, any existing debenture trust deed or other document creating a floating charge on that land will be noted in the charges register of the title. If the land is already registered, a floating charge affecting it may be protected on the register by notice or caution. Once the charge crystallizes it becomes registrable as a charge.

82. Floating charges must be fitted into the proposed new scheme, and the only question is how that should be done. Until the charge crystallizes it clearly cannot be registrable because the chargee has no power of sale before that happens. It seems therefore that it must be treated as an unregistrable charge protectable on the register by notice or, if the entry is disputed, by caution.

(iii) Charging orders

83. A judgment creditor may be given a charging order on the judgment debtor's land. Such an order, by statute, takes effect as if it were an equitable charge created under hand by the debtor.⁹⁵ Where an order affects registered land it is protectable on the register as a writ or order by means of a caution against dealings.⁹⁶ We have already, in paragraph 60 above, suggested that a caution is an inappropriate method of protecting the creditor's interest under a charging order, for the consent of the proprietor is not a relevant factor when the charge has been created by an order of the court.

84. We suggest that charging orders should be treated for all purposes as (registrable) charges created under hand. As such they could not be registered without leave of the court. The judgment creditor would therefore have to go to the court before he could exercise any power of sale. The position in relation to charging orders on unregistered land is, effectively, the same.

85. We may add that the substitution of a notice for a caution as the method of protecting a charging order would, in our view, be a useful reform in any event. A caution must be warned off on an application to register a subsequent dealing. The warning-off procedure seems to us to be inappropriate to an interest under a court order and its operation does apparently cause difficulty in practice if the priority of the creditor's interest over that of a subsequent dealing is to be preserved. The difficulty is resolved, we understand, by adding a note in the register

95 Administration of Justice Act 1956, s.35.

96 Sect. 59(1). In practice, we believe that a notice is sometimes used.

to the effect that the creditor cautioner's interest has priority to the dealing. If the entry had been a notice in the first place the problem would not have arisen.

Summary of proposals as to protection of mortgages and charges

86. In the following table we show in summary form the effect of our proposals for the protection of mortgages and charges of registered land.

Type of Charge	Existing Law		Proposed Law	
	Primary method	Other methods	Primary method	Other methods
"Legal" mortgage or charge	Registration (Not available if certificate of title held by a prior mortgagee)	Notice Caution Notice of deposit Mortgage caution	Registration (without production of the certificate if held by a prior mortgagee) ⁹⁷	Notice (Caution if contested)
"Equitable" mortgage by deed	Notice	Caution Notice of deposit	Notice (Caution if contested)	Registration with leave of court
Equitable charge under hand				
Charging order	Caution		Notice	
Lien created by deposit of certificate	Notice of deposit having the effect of a caution		[No longer available]	

97 See para. 93, below.

(e) Transitional provisions and the effect of the proposed scheme on first registration

87. We envisage that the new scheme should apply only to charges of registered land created on or after an appointed day and that the effect and priorities of charges in existence before that day should remain unchanged. We do not believe that this would create any difficulties that do not now exist since the register already contains a mixture of registered charges and charges protected in other ways.

88. We do, however, wish to draw attention to the fact that after the appointed day an equitable mortgage of unregistered land, which had been created by deed, would on first registration of the charged land be capable of protection by full registration.⁹⁸ The chargee would accordingly be in the same position as if the mortgage had been a legal one. Since the deed is designed to give the equitable mortgagee powers over the legal estate, we do not believe that the conversion of his status from "equitable" to "legal" by the act of registration should be regarded as more than a purely nominal change.

(5) The production of certificates of title before entries can be made in the register

(a) The statutory provisions

89. We said in paragraph 62 above that the possible new procedure for protecting derivative interests on the register would require some substantial alterations of the law relating to the production of certificates of title to the Registry before entries are made in the register. There

98 This is not now the position. See para. 40, above.

are, also, some other matters connected with the production of certificates to the Registry that we think must be discussed. For convenience we set out in the next paragraph the text of section 64(1) of the Act (as amended) which contains the main statutory provisions.

90. 64.(1) So long as a land certificate or charge certificate is outstanding, it shall be produced to the registrar -

- (a) on every entry in the register of a disposition by the proprietor of the registered land or charge to which it relates; and
- (b) on every registered transmission; and
- (c) in every case (except as hereinafter mentioned) where under this Act or otherwise notice of any estate right or claim or a restriction is entered or placed on the register, adversely affecting the title of the proprietor of the registered land or charge, but not in the case of the lodgment of a caution or of an inhibition or of a creditors' notice, or of the entry of a notice of a lease at a rent without taking a fine or a notice of a charge for capital transfer tax.

91. It will be noted in passing that it is paragraph (c) of the subsection which will clearly require amendment if the new procedure for protecting interests is adopted - as indicated in paragraph 59, production of the certificate would not be essential to the entry of a notice.

(b) The purpose of the provisions

92. Shortly stated, the need to produce the certificate, and its production, reduces the risk of fraud. In the first place, production is indicative of the consent of the proprietor to the making of the entry applied for, and the need to produce the certificate accordingly inhibits fraud on the part of persons claiming derivative interests in the proprietor's land. Production of the certificate also operates to reduce the risk of frauds perpetrated by proprietors (or former proprietors). Plainly, no land certificate should remain in the hands of a former proprietor who has transferred the whole of his interest; and it is somewhat undesirable that any proprietor should hold a certificate which does not show all the adverse derivative interests and incumbrances which are actually on the register. Production of the certificate enables the Registry to cancel it; or to retain it while a registered charge is subsisting; or to make it up-to-date before returning it to the proprietor, as appropriate.

(c) Possible modifications

93. Registration carries with it a State guarantee of title and we accept that the certificate should normally be produced on the occasion of a transfer and on the creation of a derivative interest which is required by the Act to be completed by registration - primarily long leases and legal easements, together with mortgages or charges by deed for which there is an application for registration. This rule is, however, liable to give rise to difficulties where the certificate is in the hands of a prior unregistered mortgagee. The concurrence of such a mortgagee is not required to a transfer, or to the creation of a second charge, and we think it unnecessary to demand production of the certificate on the registration of a transfer or second

charge if the Registry has been told⁹⁹ that the certificate is in the hands of a prior mortgagee. The certificate will remain in the hands of the prior mortgagee (and, in the case of a transfer, no certificate will be issued to the new proprietor while the mortgage remains in existence) and that, from the point of view of the prior mortgagee, is what matters.

94. We recommend, however, that production of the certificate should cease to be essential for the entry of a mere notice or restriction, neither of which carries a State guarantee. We agree that so long as there are certificates of title,¹⁰⁰ an attempt should be made to keep them up-to-date; and the procedure suggested in paragraph 59 above reflects this. We are inclined to think, however, that it would be very rare for another person to complete a transaction with a proprietor in sole reliance on the certificate and what is shown (or not shown) by the copy entries bound up in it. The certificate carries a warning that the entries may not be complete; and in any event, adverse interests which are protected on the register by means of a caution are not shown. For those reasons it is always advisable to make an official search. The matters which we have suggested might be protected by means of a notice (notwithstanding non-production of the certificate) are now protectable by caution; and we accordingly believe that the suggested change in the law would not make certificates of title substantially less reliable than they are at present. The adoption of the suggestion would remove many of the difficulties now created by the terms of section 64(1)(c) in cases where the proprietor's certificate of title is held by a mortgagee.

99 See para. 76(8), above.

100 Some systems of title registration do not, in fact, provide for such certificates.

95. In relation to the case of a registrable lease¹⁰¹ at a rent without taking a premium, section 64(1) contains provisions which are difficult to reconcile. On the one hand, under section 64(1)(a) the land certificate (if outstanding) must be produced to the Registry when applying to have the new leasehold title registered; but paragraph (c) of section 64(1) provides that it shall not be necessary to produce the certificate in the case "of the entry of a notice of a lease at a rent without taking a fine." The registration seems to need production of the certificate, while the noting does not. At one time the practice of the Registry was to require production of the land certificate in such a case, but the Court of Appeal held that on the wording of the Act that was wrong.¹⁰² The Court did, however, express the view that it was desirable that an entry of the lease should be made on the lessor's land certificate. In our first working paper in this series we expressed agreement¹⁰³ with that view and said that we thought that the long established practice of producing the land certificate should be continued in all cases upon which the registration of a lease is sought. As indicated in paragraph 93 above, we are still of that view.

(d) Enforcement of the obligation to produce certificates

96. The proprietor who grants a derivative interest ought, in our view, to be under a general obligation to the grantee of that interest to arrange for his certificate to

101 I.e. one granted out of registered land for a term exceeding 21 years.

102 Strand Securities Ltd. v. Caswell [1965] Ch. 958.

103 Working Paper No. 32, para. 65.

be lodged (if it is not already in the Registry) to meet any application to register or to protect that interest. Under section 110(6) of the Act the grantor of a registrable derivative interest is under such an obligation if the grant is for valuable consideration.¹⁰⁴ But the obligation does not extend to a lessor or mortgagor; nor does it extend to a grantor of an interest which is not registrable, but is nevertheless capable of being noted on the register for its protection. We suggest that the obligation should be extended to cover all classes of derivative interest created for value by a proprietor out of registered land and for which protection on the register is necessary.¹⁰⁵

(e) Protection of the interest of an applicant for registration, where production of the certificate is required but the proprietor fails to produce it

97. Under the new procedure for protecting interests on the register, we have suggested that if the proprietor objects to the entry of a notice or restriction a caution should be entered.¹⁰⁶ But that procedure would not apply where the application is for the protection of a registrable derivative interest such as an easement or long lease. Since an applicant for protection of such an interest by registration cannot obtain registration unless the certificate of the proprietor's title (if outstanding) is produced, he may (despite his right of action against the proprietor) be prejudiced by the proprietor's failure to produce his certificate. Delay in obtaining protection on the register could result in the loss of priority. While the

104 The grantee is a purchaser, as defined in s.3(xxi).

105 Overriding interests would not therefore be included because protection is not necessary.

106 See para. 59(4), above.

Registry is treating the application as a "pending application", there will be no such loss, because registration takes effect as of the date of the delivery of the application. But in the absence of the certificate the application will in due course be cancelled. We suggest that, before an application for registration is cancelled for this reason, the applicant should be given an opportunity of lodging a caution (pending production of the certificate) and that such a caution should be entered as of the date of the delivery of the application for registration which it replaces.

(f) Financial statutory land charges

98. Rights under local land charges may be protected on the register in the same way as are land charges, namely, by notice; but it is not usual to find such rights referred to on the register because they form one of the categories of overriding interests¹⁰⁷ and so are not in need of protection by entry. But before any local land charge to secure the payment of money is realised it must be registered as a charge on the register of the relevant title.¹⁰⁸ A local authority entitled to a statutory financial charge may encounter practical difficulties in meeting this requirement because the relevant land certificate (or certificates, if more than one registered interest in the land is affected), if outstanding, must be lodged at the Registry before the charge can be registered. Such a chargee should not in our view be prejudiced by its inability to comply with a requirement that it has no means of procuring. There is, in our view, a case for exempting

107 Sect. 70(1)(i).

108 Sect. 59(2). The reason for this provision is that a charge affecting registered land requires to be registered if it is to be a charge entitling the chargee to exercise the statutory powers of a legal mortgagee.

such charges from the requirement, contained in section 64 of the Act, that the certificate of title, if outstanding, needs to be produced to the Registry when the charge is registered. Similar considerations apply to land charges of classes A and B, which may arise under statutory authority in favour of individuals;¹⁰⁹ and to the Inland Revenue charge for capital transfer tax (class D(i)).

109 Generally speaking, these charges are in favour of tenants or other limited owners to enable them to recover out of the freehold certain expenses borne by them.

PART C. PRIORITIES OF INTERESTS IN REGISTERED LAND

Introduction - Priority distinguished from protection

99. Up to this point we have been dealing only with the protection of derivative interests - the process of ensuring that such an interest is not overridden if the superior interests out of which it derives is sold or otherwise dealt with for value. We now turn to the different, but connected, question of the priority of derivative interests, that is to say, the relationship of one derivative interest with another and, in particular, the order in which they rank between themselves in the event of direct conflict. Problems of priority arise most commonly in relation to financial charges on land. If several people have lent money on the security of the same property, and the proceeds of sale of the property are not sufficient to satisfy them, how they rank for payment will be all-important to them.

The effect of sections 20 and 23 of the Act

100. The Act has very little to say about priorities of derivative interests as such. But it contains, in sections 20 and 23, a principle which in many cases solves problems which would otherwise arise as "priority problems": registered dispositions take effect subject to entries on the register (and to overriding interests), but free from all other interests. It is because of this principle that there is a need for protection, with which we have been concerned in the earlier part of this paper.

101. In most cases, sections 20 and 23 operate in a manner which effectively destroys an unprotected prior interest. Some restrictive covenants and estate contracts must, we imagine, have sunk beyond trace through not having been protected in the register before the relevant disposition was registered.¹¹⁰ But this is not always so, and, in

110 The same would be true in relation to unregistered land where an unregistered restrictive covenant or estate contract is void against a purchaser of the legal estate.

particular, it is not so in the case of mortgages and charges. A registered charge will not be subject to earlier unregistered or unprotected interests, but such interests will still be good against the proprietor of the land. All that has happened to them is that they are postponed to the interest of the registered chargee; and it is pre-eminent in the field of mortgages and charges that sections 20 and 23 operate to determine priorities.¹¹¹

Sections 20 and 23 only apply to registered dispositions

102. Sections 20 and 23 contain, however, a limiting factor: the subsequent interest has to be perfected by registration. Purely equitable (minor) interests cannot be registered, so that an equitable mortgage (for example) cannot obtain priority over earlier unregistered or unprotected mortgages through the operation of these sections. Furthermore the Act does not deal with their priority anywhere else.

Priorities between minor interests - general

103. Despite a suggestion to the contrary in Re White Rose Cottage,¹¹² the more recent case of Barclays Bank Ltd. v. Taylor¹¹³ seems to establish, as a general principle, that

111 Sect. 29, which provides in express terms that registered charges rank between themselves according to the order in which they are entered in the register (subject to any entry to the contrary), merely reflects the operation of the principle.

112 [1965] Ch. 940. The priorities of equitable charges protected by a notice of deposit and cautions respectively were in issue and Lord Denning M.R. said (at p. 949) "Prima facie their respective priorities were governed by the order of date of those entries". In that case, however, there was no conflict between the order of entry and the order of creation.

113 [1974] Ch. 137.

priorities between minor interests¹¹⁴ are governed by the "old" law on the subject, unaffected by the changes introduced into the law by the 1925 legislation. As between such interests, notice is not normally a relevant consideration: priority is usually determined by order of creation so that "he who is first in time prevails". In the result, the grantee of an equitable interest (such as an equitable mortgagee) takes subject to any prior minor interest, whether the prior interest was protected on the register or not.

104. We do not think that the situation outlined in the previous paragraph is a satisfactory one in a registered land system. However the scope of any changes must depend partly on practical considerations. We therefore next consider the desirability of reform in certain specific areas.

Where only non-financial charges are involved


105. Most of the difficulties which arise in relation to competing minor interests are found in cases where financial charges are involved: in practice, cases involving non-financial charges only are usually more straightforward. Restrictive covenants (and equitable easements) tend not to conflict with one another, so that as between them priority is not a live issue. Estate contracts may well conflict with one another, and with restrictive covenants or equitable easements; but the owner of an estate contract does not normally part with his money on the strength of a search until the time comes for him to acquire the legal estate contracted for. At that point of time, the discovery from the register of equitable interests about which his contract was silent will entitle him to refuse to complete; and

114 Minor interests, which are stated to take effect only in equity (s. 2(1)), are those interests which cannot be disposed of or created by a registered disposition and which require protection on the register. They thus include all equitable mortgages and matters such as restrictive covenants and estate contracts which in relation to unregistered land are land charges for the purposes of the Land Charges Act 1972.

registration will (by virtue of section 20 or section 23) wipe out unrecorded estate contracts, restrictive covenants and equitable easements.

106. Practical considerations are also relevant. It is the experience of the Land Registry that few problems are caused in practice by the fact that the priority of non-financial minor interests is not determined by the state of the register. If the law were changed in this respect it would be reasonable to expect a marked increase in the number of registrations of such interests merely as a precaution designed to ensure priority. For example, it might become the practice to register all estate contracts. The considerable amount of work involved in registering such contracts and then cancelling the registration a little later would be entirely wasted in the vast majority of cases. Our present view, therefore, is against changing the law insofar as it affects the priority of one non-financial charge in relation to another.

The anomalous position of an equitable mortgagee of registered land



107. It is wrong, we suggest, in a system of registration of title, that a person proposing to lend money to a registered proprietor on the security of an equitable mortgage is unable to establish by searching the register that there are no charges, other than those there protected, which may rank ahead of him.¹¹⁵ The situation is different in the case of equitable charges of unregistered land: an equitable mortgagee of unregistered land has priority over all legal and equitable charges not protected either by deposit of documents of title or by registration in the Land Charges register.¹¹⁶ The registration rule is, contrary to expectation, stricter in relation to unregistered land than it is in relation to registered land.

115 See para. 103, above.

116 Land Charges Act 1972, s. 4(5).

Deposit of certificate as security prevents subsequent registered charge

108. There is another seeming defect in the registered system which has a bearing on the problem of priorities of mortgages and charges. We have already mentioned it in connection with the production of certificates.¹¹⁷ It is that where the certificate has been deposited as security for a loan, it is not now possible to register a further charge as a charge and thus get the status and powers of a legal mortgagee. A person wishing to lend money on the security of land in such circumstances will have to be content with a mortgage ranking as a minor interest; and though he will have constructive notice (through the borrower's evident inability to produce his land certificate) of the existence of the prior charge in respect of which the deposit of the certificate was made, he may find that there are other unprotected interests ahead of him of which he knows nothing. Had he been able to register his charge as a charge he would only have taken subject to prior mortgages of which he had notice from the register.

109. One of the suggestions made earlier in this paper in connection with the protection of mortgages and charges - that charges of registered land should be capable of registration without production of the certificate if the certificate is known to be in the hands of a prior chargee - would appear, in most instances, to overcome the particular difficulty mentioned in the previous paragraph. But that suggestion does not by itself touch on the question of the priority of charges which are not registered, but which remain minor interests because they are only protected (if at all) by notice or caution.

117 See para. 93, above.

Financial charges and other interests acquired for value

110. Although we have indicated above¹¹⁸ that we feel that, where non-financial charges only are involved, the balance of convenience is against making any changes in the present system, we do at present think that it is right in principle that a person parting with money for an interest in land, or taking a substantial interest in it (e.g. under a registrable lease) should be entitled to rely on a search of the register; and should take free from any prior interest which should have been (but was not) entered in the register, if, and to the extent to which, the existence of such prior interest would be prejudicial to him. In practice, the application of this principle requires:

- (a) that any interests acquired for value (and which is either registered or noted) should have priority over any financial charge¹¹⁹ which had not been protected before its own protective entry was made; and
- (b) that a financial charge¹¹⁹ which was, initially, not registered but noted, and which is later registered (for the purpose of enabling the chargee to exercise his power of sale), should on registration have priority over any land charge which had not been duly protected before the initial protection of the financial charge. There is no substantial need for a merely noted financial charge to have immediate priority over a prior (but unrecorded) non-financial minor interest;¹²⁰ but if and when the chargee

118 In para. 106.

119 Including interests under charging orders on land, which (in para. 84 above) we have suggested should be equated with charges created under hand.

120 This is already the position under the Land Charges Act for unregistered land. A general equitable charge does not, under that Act, obtain priority by registration over, for instance, an earlier estate contract, even if the latter has not been registered.

comes to register his charge in order to be able to exercise his power of sale he will want to be able to sell free from the non-financial land charge. The chargee will have lent his money on the strength of the state of the register (and on the strength of the absence of relevant adverse entries) at the time when he lent his money. Registration of his charge will bring section 20 (or section 23) into play, but its operation needs to be backdated, because he should not be affected by interests entered on the register after his mortgage was protected.¹²¹

111. It will be noted that we suggest that the priority to be gained by a subsequent charge should be dependent on its being duly protected itself. There is, perhaps, a case for resting the priority on the non-protection of the prior interest, as the Land Charges Act does; but we incline to the view that in a registered system the privilege of acquiring priority through the register should be conditional on the subsequent interest being entered in accordance with the rules of the system.

Official searches

112. Priorities of interests in registered land may be affected by the operation of the official search procedure under the Land Registration (Official Searches) Rules 1969.¹²² A purchaser - and this means any person (including a lessee or chargee) who acquires or intends to acquire a legal estate or interest for value - may apply for an official search of the register relating to a title which he has authority to inspect. And if such a search has been made, the purchaser concerned who presents his application for registration

121 This reflects the principle enshrined in Bailey v. Barnes [1894] 1 Ch. 25.

122 S.I. 1969 No. 1179.

within the following sixteen working days¹²³ will be accorded priority over other matters entered on the register during the interval.

113. If the law relating to the protection and priority of mortgages and charges on registered land is changed as suggested, the provisions relating to official searches will need some alteration. The case which they will need to cover is that of the registrable charge which is to be protected not by registration but by notice. In such a case the chargee ought, we think, to get the same priority for his charge as if the application had been for its registration. In other words, if his application to note the charge is made within the prescribed period following a search, the charge when noted should rank for priority from the date on which the search was made and not from the slightly later date on which notice of the charge was entered on the register.

Charges to secure further advances

114. A prior mortgagee (whether legal or equitable) of unregistered land may make further advances ranking ahead of subsequent mortgages by arrangement with the subsequent mortgagees. Even if there is no such arrangement, the further advances will have such priority if the original mortgage imposed an obligation on the mortgagee to make further advances, or if the further advances were made without notice of the existence of intervening mortgages.¹²⁴ For this purpose, notice must usually be express¹²⁵ and not the deemed notice which is given by registration under the Land Charges Act.¹²⁶ To protect himself from being postponed in

123 Under the Rules this may be extended.

124 Law of Property Act 1925, s. 94(1).

125 Ibid., s. 94(2).

126 Ibid., s. 198.

relation to further voluntary advances by a prior mortgagee, a later mortgagee will accordingly, as a matter of conveyancing practice, give notice of his mortgage to the prior mortgagee.

115. Section 94 of the Law of Property Act 1925 applies to all mortgages other than to charges actually registered under the Land Registration Act. It is accordingly applicable to any charge of registered land protected by notice or caution.¹²⁷

116. In relation to charges of registered land that are registered as charges, section 30 of the Act corresponds to section 94 of the Law of Property Act 1925. Its provisions include one to the effect that where the proprietor of the charge is not under a positive obligation to make further advances, but the charge is made for the purpose of securing such advances,¹²⁸ the Registrar has to notify the proprietor of the charge before making any entry that would prejudice the priority of any further advances. The first chargee is thus warned that further advances will, for priority purposes, be postponed to the intervening entry.

117. It will thus be seen that in relation to registered charges the onus of giving notice falls on the Registrar, whereas in all other cases, whether the land is registered or not, it falls on the subsequent mortgagee. That seems to us to be a possible cause of confusion; and we suggest that it should be eliminated by placing the onus of giving notice on the chargee in every case.

127 Or, under the present law, mortgage caution.

128 As, for example, a charge to secure a bank overdraft of indeterminate amount.

420(6)

PART D THE PROTECTION OF ESTATE CONTRACTS (REGISTERED AND UNREGISTERED LAND)

118. An estate contract is a "land charge" and as such requires protection. In the case of unregistered land the contract is registered at the Land Charges Registry at Plymouth; but where the contract relates to registered land it is protectable by notice or by caution on the register of the title to that land. Under the proposed procedure an estate contract would be protected by notice (or by caution if it were disputed).

119. Perhaps the commonest example of an estate contract is a contract for the sale of a house. In relation to that type of contract, abuses sometimes occur. A person who wishes to buy a house may, as a negotiating gambit, seek to inhibit the owner from dealing with the property while negotiations are proceedings; and he may do this by register an estate contract although no contract yet exists, or the grounds on which one is claimed are flimsy.

120. Where the title to the land is registered, there are three considerations which may deter anyone seeking to set up an alleged estate contract in this way. First, if the proposed registration is malicious, it may be that an action for slander of title would be maintainable against him.¹²⁹ Secondly, in lodging a caution - and that would be the appropriate method of getting a contested entry onto the title - the applicant has to support it by a statutory declaration and there are penalties for making false declarations. Thirdly, as we have already observed, if anybody lodges a caution without reasonable cause, he is liable to compensate any person who thereby sustains damage.¹³⁰ In any event, the proprietor can put the cautioner

129 This is, of course, equally true where the title to the land is unregistered.

130 Sect. 56(3).

to proof of his case by requiring the caution to be warned off. If an ill-founded registration has been made, the courts have shown themselves ready to provide relief in summary proceedings.¹³¹ We would add that if our new procedure for making notice or caution entries¹³² is adopted, an obstacle will have been placed in the way of getting a spurious entry on the register, because the proprietor will be informed of the application and will accordingly have an opportunity of putting the applicant to proof at once.

121. So far as registered land is concerned, we have not received any complaints about the misuse of protective cautions. But there are grounds for thinking that owners of unregistered land may not be sufficiently protected against unjustifiable registrations of estate contracts. We are therefore taking this opportunity - although it is strictly outside the scope of this paper - of examining the system for registering estate contracts affecting unregistered land, to see whether it is too easy for a person to get a dubious entry onto the land charges register with impunity.

122. The procedure for registering an estate contract - or indeed any land charge - affecting unregistered land is simple. The applicant merely has to fill in and sign the appropriate form of application. The form of application is filed in the Registry as it is and becomes part of the register. The consent of the person against whose name the charge is registered is not required, but a statutory declaration in support is needed if the application is not made by a practising solicitor.¹³³ Unlike the Land Registration Act, the Land Charges Act does not provide that a person registering without reasonable cause is liable to pay compensation.

131 Heywood v. B.D.C. Properties Ltd. (No. 1) [1963] 1 W.L.R. 975.

132 See paras. 59-61, above.

133 Land Charges (No. 2) Rules 1972, r. 6 (S.I. 1972 No. 2059).

123. The question of disputed entries was considered in our Report on Land Charges Affecting Unregistered Land¹³⁴ published in 1969. What we then said was as follows:-¹³⁵

"Disputed entries

60. So far in this part of our Report we have discussed the cancellation of entries of charges which are no longer effective. Sometimes, however, questions can arise as to whether an entry was properly made in the first place.
61. We have already referred to the fact that the Registrar is not concerned to enquire into the accuracy or validity of an application to register a Land Charge and that applications are filed in the form in which they are lodged. Inevitably, therefore, some applications are lodged and accepted for registration which relate to matters which are not registrable as Land Charges at all or to matters which should not be registered for some other reason, such as an "estate contract" where no binding contract, in fact, subsists. The presence of an erroneous registration can clearly be a source of embarrassment to the owner of the land which appears to be affected by it because he may find it difficult to deal with his land so long as the entry remains on the Register. It would not be practicable within the framework of the existing system to require a person wishing to register a

134 Law Com. No. 18.

135 The footnotes have been omitted from the quotation.

Land Charge to have to prove its validity before it is registered. Where no prima facie case can be made to support a registration the courts have granted summary applications to vacate the entry and, although, from the point of view of the owner of the land, it is unfortunate that he should be put to any expense, it appears that this summary method is the only practicable solution for dealing with such cases. In other circumstances, there seems to be no alternative to the matter being determined at the trial of an action commenced by writ, since the question whether the entry of a Land Charge should be vacated can usually be determined only by a decision as to the effect of the instrument or matter which is the subject matter of the entry.

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

124. We have no direct evidence that the boom in the property market which occurred in 1971 and 1972 gave rise to any great increase in the number of registrations of estate contracts on insufficient grounds but the conditions then prevailing were just those in which such a thing could

have happened. Moreover, there are several reported cases coming from that period, and in one of them the procedure for registering estate contracts affecting unregistered land was subjected to criticism from the Bench and compared unfavourably to its counterpart under the Land Registration Act.¹³⁶ We think that a further look at the procedure is, therefore, justified and the publication of this paper provides us with a vehicle for consultation on some further ideas.

125. In general, we do not resile from what we said in the passage from our report which we quoted above. Nevertheless we think that there may well be a case for introducing into the unregistered system a provision giving a statutory right to compensation to anybody who suffers damage as the result of a registration of a land charge made without reasonable cause. That would help to bring the two systems into line and provide an extra deterrent to the making of unjustifiable applications.

126. There is one other way in which it seems to us that the unregistered system might perhaps be improved without introducing major administrative changes. It is that applications for registration of land charges¹³⁷ (or possibly only estate contracts) should not be accepted by the Registry unless they are countersigned by the person against whose name the registration is sought (or his solicitors) or are supported by a statutory declaration by the person claiming the benefit of the charge, whether the application is made by a solicitor or not. That again would bring the registered and unregistered systems closer into line and would without placing a great burden on applicants, provide a further deterrent against registrations made on flimsy grounds

136 Jones v. Morgan, The Times, 11 December 1973 (Brightman J)

137 An exception would have to be made for charges under the Matrimonial Homes Act 1967 (i.e. Class F Land Charges).

127. It has been suggested to us that estate contract registrations should only remain valid for a relatively short time unless the person against whose name the registration was made consented to the registration. That would force the person seeking to uphold the existence of the contract to apply to the court.

128. While we can see the merits of this suggestion in relation to any case where the propriety of registering an estate contract is open to doubt, cases of that kind are, we suspect, relatively rare, and we question whether it would be right to adopt it as a rule of general application. In the case of most purchases - at any rate where the completion date is not unusually far ahead and there is nothing to indicate that the vendor may go back on his bargain - the purchaser does not feel that there is any need to register an estate contract against his vendor. It is only where something is unusual (or suspicious) that the registration of an estate contract will in the ordinary way be considered and it is, of course, in just that sort of case that the vendor's consent might not be forthcoming. In those circumstances we do not feel that the purchaser ought to be forced into court to prevent his registration from becoming valueless.

PART E CAUTIONS AGAINST FIRST REGISTRATION

129. In a sense, cautions against registration seem out of place in a paper dealing with interests in registered land since, as their name indicates, they only arise when the title to the land is not yet registered. But they have many of the features of the caution against dealings and are dealt with in the same part of the Act.

130. The caution against first registration, like a caution against dealings in its present form, is a warning device. Its purpose is to prevent a person who has an interest in land from losing that interest or having it prejudiced in the event of a relevant estate in the land becoming registered with a clear title in favour of someone else as proprietor. It may be lodged by any person having or claiming an interest in unregistered land that would entitle him to object to a disposition of the estate without his consent.¹³⁸ A statutory declaration in support of the caution has to be lodged stating, among other things, the nature of the cautioner's interest.¹³⁹ As with a caution against dealings, a person who lodges a caution against first registration without reasonable cause is liable to compensate anybody who thereby sustains damage.¹⁴⁰

131. When a caution against first registration has been lodged, the estate which it purports to affect will not be registered without the cautioner being given notice and being given an opportunity to intervene.¹⁴¹

138 Sect. 53(1).

139 Sect. 53(2).

140 Sect. 56(3).

141 Sect. 53(3).

132. Although the Act itself confines the applicability of cautions against first registration to cases where the cautioner has an interest which entitles him to object to a disposition of the land without his consent, such cautions are, in practice, accepted by the Registry in respect of interests which may not strictly satisfy that condition. Indeed, the prescribed form of statutory declaration in support of the caution lists, as examples of cautionable interests, interests which would not necessarily entitle the cautioner to object to a disposition of the land without his consent.¹⁴² An equitable mortgage created by a memorandum of charge under hand is one such interest: a sale of the land would take effect subject to the mortgage, but the mortgagee could not actually prevent a sale from taking place; and the mortgage may not exclude the proprietor's powers of leasing. The practice of the Registry is indicated in the following extract from Ruoff and Roper:⁻¹⁴³

"It must not be thought that the examples ... which appear in the Rules themselves circumscribe the nature or extent of cautionable interests. For example, a landowner having the benefit of an easement or restrictive covenant may wish to ensure that when the title of the burdened land is registered his own rights will be protected on the register of title. And in any circumstances in which there may be a contention in regard to the ownership or enjoyment of land the lodgment of a caution against first registration may be a prudent precaution. It is not necessary, however, that an element of dispute should be present. Legal mortgagees of unregistered land in a compulsory area which has not yet become subject to a liability to compulsory registration sometimes protect their interests by caution. The question whether, or how far a share in proceeds of sale confers a right of cautioning is discussed elsewhere. However, the requirement that the cautioner should have or claim to have such an interest in the land as entitles him to object to any disposition thereof being made without his consent is somewhat liberally interpreted by the Land Registry because it is manifestly desirable that cautions of this nature should be accepted in all reasonable cases. Accordingly the word

142 Land Registration Rules 1925, Schedule, Form 14.

143 Page 273 (footnotes omitted).

'disposition' is treated as meaning a disposition free from incumbrances, leases and other interferences with absolute ownership. The result is that almost any person interested can apply, although the liability in damages of a person lodging a caution without reasonable cause if anyone suffers loss thereby must be borne in mind."

133. It seems to us to be right in principle that cautions against first registration should be available to ensure that land is neither wrongly registered nor registered in such a way that rights protectable on the register are not entered. We entirely agree therefore with the approach which is adopted by the Registry. If, however, there is to be legislation amending the Act, we think that it should make it absolutely clear that a caution against first registration is available to anybody who has or claims an interest in the land which is capable of registration or protection on the register. If such a change were to be made it might also be desirable to change the full name of this type of caution to remove the implication that it can only be used to prevent a first registration. The purpose of such a caution should be to ensure that first registration does not take place without regard to the interest notified by the caution.

134. Although we are not aware of any widespread criticism of the way in which the caution against first registration procedure operates, certain matters have been brought to our attention. First, it is said that the Registry, in not giving a narrow construction to section 53(1), too readily accepts cautions against first registration. That point we have already discussed. Secondly, it is suggested that the landowner should immediately be notified of a cautioner's application, and given an opportunity to object. Thirdly, it is suggested that the Chief Land Registrar should be able to determine the cautioner's rights (if any) at the time when the caution is lodged, and not merely when an application is made to register the title to the land.

135. We accept that a caution against first registration may constitute a blight on the title to unregistered land, and that it is possible for the procedure to be misused in the same way, and for the same purposes, as the procedure for registering land charges at the Land Charges Registry.¹⁴⁴ It is, however, worth observing that the practical problem of getting rid of spurious entries is more easily solved where the title to the land is to be registered than when it is not, because the warning-off procedure is available and it may not be necessary to apply to the court.

136. In the present context there are, we think, two points which must be firmly borne in mind. The first is that the only purpose of a caution against first registration is to ensure that the cautioner will obtain the necessary protection for his interest if and when the title to the land affected comes to be registered. Until then the caution has no formal effect whatever. Secondly, since the land is by definition unregistered land at the time when the entry of such a caution is applied for, the Registry knows nothing about the title, or the identity of those interested in opposing the entry of a caution. An application for a caution is made ex parte and the Registry can only act on the strength of the facts put to them. If the statutory declaration in support appears to disclose the existence of a cautionable interest the Registry must, it seems to us, act as if the interest were cautionable. It would not, we think, be practicable or desirable to require the Chief Land Registrar to serve notices and adjudicate in the matter otherwise than at the time when the title is deduced to the Registry on an application to register it.

144 See Part D, above.

137. Nor do we think that it would be practicable to limit the procedure to cases where the cautioner's application is supported by the consent of all those whose interests would be affected by the entry of a caution (in other words, treating an application for a caution against first registration as if it were for a notice rather than for a caution). Quite apart from the difficulty of knowing whether all the necessary consents had been obtained, it seems to us that the caution procedure is really designed for just those cases where, because of some doubt or dispute, such consents could not be readily obtained. Derivative interests which are admitted by the applicant for first registration will normally appear on the application; it is the others which are in special need of protection at that stage, and it is this caution procedure which gives the claimants an opportunity of bringing them, in advance, to the notice of the Registry.

138. It follows from what we have said that we do not at present believe that it would be possible to prevent the occasional misuse of the procedure for entering cautions against first registration by adopting restrictive rules. The situation is very similar to that arising in relation to the registration of estate contracts at the Land Charges Registry; and in relation to that we have already suggested that the only practicable safeguards lie in requiring a statutory declaration in every case, and in providing a right of action against a cautioner who has acted without reasonable cause. Changes in the law may be required if those safeguards are to exist in relation to registrations at the Land Charges Registry; but no such amendment is called for in relation to cautions against first registration, because both the necessary provisions are already in the Act.

139. The Land Charges Act 1972 (in section 1(6)) gives power to the court to order an entry in the register of land charges to be vacated. No such provision is needed in relation to entries made in the register of a title kept

under the Land Registration Act 1925, for power is given under section 82 of that Act to rectify the register. A caution against first registration is not, however, entered in a register of title (since, by definition, no such register exists at the stage when it is lodged) and there is no specific provision in the Act giving the court power to direct the removal of the caution as a matter ancillary to a substantive decision against the existence of the cautioned interest. The court would, doubtless, make such an order under its inherent jurisdiction; but it would seem more consistent to include the power in the legislation.

PART F SUMMARY OF PROVISIONAL CONCLUSIONS

As to protection of interests in registered land
(Part B. Paragraphs 5-98).

(a) Generally

1. The purpose in a registered land system of having notices and restrictions on the one hand and cautions on the other is to enable a distinction to be drawn between entries which are contentious and those which are not. Under the existing law this distinction is not clearly drawn. Accordingly we suggest the adoption of a new procedure for protecting interests on the register based on the following principles:

- (i) an interest which is not disputed by the proprietor should always be protected by notice or, where appropriate, restriction;
- (ii) an interest disputed by the proprietor should be protected by caution; and
- (iii) consequently (subject to the exceptions mentioned in 3 below) there should be no interests which are protectable only by notice (or restriction), or only by caution.

(Paragraphs 57 and 58)

2. Under the proposed new procedure the applicant would in all cases apply initially for the entry of a notice or, where appropriate, a restriction. A notice or restriction would be entered if the case is one covered by paragraph 3 below or (as appropriate) the proprietor consents or does not object following his being notified of the application by the Registry. If the proprietor objects, a caution will be entered. In the event of conflict between competing interests, such a caution would have the same effect on priorities as a notice or restriction would have had. In a doubtful case the Chief Land Registrar might require the applicant to make a statutory declaration in support of the application. (Paragraph 59)

3. The consent of the proprietor is not a relevant consideration where the entry on the register is of rights under a charging order or rights of occupation of a spouse under the Matrimonial Homes Act 1967. Such rights should accordingly always be protected by notice (and never by caution). (Paragraph 60)

4. A person who without reasonable cause causes a notice or restriction to be entered on the register should be liable to compensate anybody who thereby suffers damage. (Paragraph 63)

5. It should be made clear that those "equities" which in relation to unregistered land, are not registrable land charges but are nevertheless enforceable against a purchaser with notice are similarly enforceable where the title to the land is registered even if they do not appear on the register. A person claiming to be entitled to such an equity should be able to apply for notice of it to be entered on the register under the new procedure mentioned in 2 above. (Paragraphs 65 and 66)

6. The provisions contained in section 49(1)(d) and the proviso to section 49(2) under which certain matters are protectable by notice where a restriction would be more appropriate should be repealed. (Paragraphs 67 and 68)

(b) Mortgages and charges

7. There should be a new scheme for the creation and protection of mortgages and charges of registered land. Under it there would be only one kind of charge which must be by instrument and any distinction between "legal" and "equitable" charges of registered land would cease to exist. The charge would be capable of being registered but registration would, where the charge is not by deed, require the leave of the court. When registered the proprietor of the charge would have the full powers of a legal mortgagee. (Paragraph 76)

8. A registrable charge could, as a less expensive alternative to registration, be protected and obtain priority by being noted on the register. Before realisation a noted charge would have to be registered. (Paragraph 76)

9. A charging order on registered land should be treated as a charge created under hand. It could thus be registered with the leave of the court. (Paragraph 84)

10. A floating charge by a company would not be registrable until it crystallized but would be protectable by notice or, if disputed, by caution. (Paragraph 82)

11. Deposit of a land (or charge) certificate should, by itself, no longer create a charge over the land (or charge) concerned. (Paragraphs 78-80)

12. The mortgage caution, the notice of deposit and the restriction should no longer be available as means of protecting charges of registered land. (Paragraph 76)

(c) Production of certificates of title before entries can be made on the register

13. Certificates of title should, as now, be produced to the Registry on the occasion of the registration of a transfer or where an entry is to be made of a derivative interest which is required by the Act to be completed by registration. But production of the certificate should no longer be required on an application to register a transfer or a charge where the certificate is known to the Registry to be in the hands of a prior mortgagee. (Paragraphs 93 and 108-109)

14. Production to the Registry of the certificate of title should cease to be essential where the application is for the entry of a notice or restriction to protect a derivative interest which does not have to be completed by registration. (Paragraph 94)

15. The obligation on a proprietor (under section 110 of the Act) to lodge his certificate (if it is not already in the Registry) to meet an application to register certain derivative interests should be extended to cover all classes of derivative interest created for value out of registered land and for which protection on the register is necessary.

(Paragraph 96)

16. If an applicant is unable to proceed with an application to register an interest because the proprietor fails to comply with his obligation to produce his certificate to the Registry, the applicant should, before the application is cancelled, be entitled to have a caution entered as of the date of the delivery of the application for registration.

(Paragraph 97)

17. Production of certificates should no longer be required before registration of certain financial statutory land charges (e.g. local land charges), which must be registered before they can be realised. (Paragraph 98)

As to priorities of interests in registered land

(Part C. Paragraphs 99-117)

1. An unprotected financial charge of registered land should be postponed to any interest, whether financial or not, acquired for value and protected on the register.

(Paragraph 110)

2. Where a financial charge, having initially been noted, is subsequently registered it should on registration have priority over any land charge which was not duly protected on the register before the financial charge was originally protected.

(Paragraph 110)

3. A mortgagee who intends to protect his charge by notice under the new procedure should be able, by making an official search and lodging his application within the prescribed time, to obtain the same priority for his charge as if his application had been for the registration of the charge.

(Paragraph 113)

4. Where a registered charge is made for securing further advances, the Chief Land Registrar is by section 30 of the Act under an obligation to notify the proprietor of the charge before making any entry in the register which would prejudice the priority of any further advances. It is suggested that the Chief Land Registrar should no longer be under this obligation.

(Paragraph 117)

As to the protection of estate contracts
(Unregistered land)

(Part D. Paragraphs 118-128)

1. There may be a case for introducing into the system for registering interests affecting unregistered land under the Land Charges Act 1972 a provision, corresponding to section 56(3) of the Land Registration Act 1925, to the effect that a person who causes an entry to be made in the register of land charges without reasonable cause will be liable to compensate anybody who thereby sustains damage.

(Paragraph 125)

2. It is suggested that applications for registration of estate contracts affecting unregistered land might be acceptable only if countersigned by the person against whom registration is sought or supported by a statutory declaration by the person claiming the benefit of the charge. (This rule could be widened to extend to land charges generally.)

(Paragraph 126)

As to cautions against first registration

(Part E. Paragraphs 129-139)

1. The Act should be amended to make it clear that a caution against first registration is available to anybody who has or claims an interest which, if the land were registered, would be capable of registration or protection on the register. (Paragraph 133)

2. Power should expressly be given to the court to direct the cancellation of a caution against first registration. (Paragraph 139)

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