

The Law Commission

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PROPERTY LAW

LIABILITY FOR CHANCEL REPAIRS

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LIABILITY FOR CHANCEL REPAIRS

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CHANCEL REPAIRS

Summary

In this report the Law Commission examines the liability, of mediaeval origin, to repair the chancels of some parish churches of the Church of England and the Church in Wales. It recommends that in cases where this liability is an incident of the ownership of particular pieces of the land, and where it attaches to the right to receive corn rents and some rentcharges created to replace tithes, it should be abolished in ten years' time. A draft bill with explanatory notes on its clauses is annexed to the report. No recommendation is made in relation to the chancel repairs liability of certain ecclesiastical and educational bodies retained on the redemption of tithe rentcharges.

THE LAW COMMISSION

Item IX of the First Programme

LIABILITY FOR CHANCEL REPAIRS

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

PART I

INTRODUCTION

1.1 In this report we consider the law relating to the liability for chancel repairs and we recommend the abolition of that liability in whole or part.

Background

1.2 Owners of particular pieces of land in England and Wales are liable, by reason of that ownership, to pay for the repair of the chancel of a parish church. Certain bodies which formerly benefited from the tithe rentcharges also have responsibility for particular chancels. To distinguish between them, we have called the first liability "landowners' liability", and the second "rentcharge liability". Chancel repair liability only affects churches of the Church of England and the Church in Wales. It certainly does not apply to all parish churches; the liability relates to those built before the Reformation, and not even all of them are affected. It has been suggested to us that some 5,200 parish churches benefit, about one third of the total number. Nor does all land carry the liability; one estimate is that in England some 3,780,500 acres are involved. There are no comprehensive records identifying for which chancels the liability exists and which landowners are responsible. All those who are liable are known as "lay rectors".¹

1.3 The lack of records relating to the liability causes uncertainty; the conveyancing system cannot provide any guarantee to a purchaser of land that he will be free from this obligation. The difficulties which this causes were drawn to the Commission's attention in 1969,² and although some work was done on the subject it was dropped because it was judged not to be urgent.³ The Project was revived in 1981 when the Law Society asked us to pursue it after one landowner, who had not known that he was liable, found himself having to pay over £10,000 for chancel repairs.⁴

¹ An alternative term is "lay impropiator". The word "lay" is used even though some lay rectors are clerics or ecclesiastical corporations.

² 5th Annual Report, para. 28.

³ 8th Annual Report, para. 24.

⁴ 17th Annual Report, paras. 2.61-2.64.

Reform proposals

1.4 The case for reform of this branch of the law is that it is anomalous, uncertain and obscure, it causes unnecessary difficulties and expense in dealing with land, occasionally leading to severe financial hardship, and it is unsuited to our modern society. Chancel repair liability has been criticised by an academic lawyer who wrote: "one of the more unsightly blots on the history of English jurisprudence must be the present state of the law concerning liability for chancel repairs."⁵ We would not dissent from that. Again, it may well have been thought appropriate several hundred years ago for the owners of certain pieces of land to be responsible for repairs to part of the parish church of which they would probably have been members of the congregation. That land may since have been developed for residential, commercial or industrial use, and may today be owned by a member of a different church or different faith, a limited company or a local authority. Those owners may well feel that they should not have an obligation to maintain the parish church. There are also cases in which boundary changes have made landowners in one parish responsible for the repair of the chancel of a church in another parish.⁶

1.5 The impact of chancel repair liability on landowners, although explicable on historical grounds, now appears wholly capricious. Some find themselves with a mediaeval duty to do, or contribute towards the cost of, repairs to part of the parish church. The majority have no such responsibility. It is hard today to see any justification for this imposition. Later sections of this Report concentrate on the possible ways to alleviate the injustice which can be caused in individual cases by the inability of the conveyancing system to ensure that prospective purchasers of land are invariably forewarned of chancel repair liability. Nevertheless, we consider that this relic of the past is, for a more general reason, no longer acceptable: the burden it imposes ought not to be borne only by some, *merely* because they happen to own particular pieces of land.

1.6 In 1983, we published a Working Paper⁷ written by our former Secretary, Mr. Brian O'Brien. That put forward the provisional conclusion that both landowners' liability and rentcharge liability should be phased out over a period of 20 years. It would continue unabated for the first five years, be reduced to one half for the following ten years, and be limited to one quarter during the final five years.⁸ For the reasons discussed below, we have concluded that landowners' liability should be abolished after ten years, but that it should not be reduced before abolition. We make no recommendation in relation to rentcharge liability, although we recognise that it has been criticised as illogical and capricious.

1.7 On 18 February 1982, the General Synod of the Church of England overwhelmingly supported a motion approving a phasing out of chancel repair

⁵ Dr. J. H. Baker (1984) 100 L.Q.R. 186.

⁶ This has even resulted in the parochial church council of one parish having a liability to repair the chancel of a neighbouring parish's church.

⁷ Working Paper No. 86.

⁸ Working Paper, para. 6.28.

liability in the manner which became the provisional conclusion of the Working Paper. Once we had decided to make recommendations which differed from the Working Paper's provisional conclusion, we informed the central church bodies. The Standing Committee of the General Synod expressed disappointment at the emphasis we placed on the abolition of landowners' liability, rather than abolition of all forms of chancel repair liability. They also had a strong preference for phasing out liability over 20 years, but believed that church opinion generally would acquiesce in the recommendation for abolition at the end of ten years without phasing. The committee accepted that the latter arrangement would undoubtedly be simpler to administer. The Representative Body of the Church in Wales accepted the recommendations now contained in this Report.

1.8 In response to the Working Paper, and to the press release summarising it which the church authorities distributed to many parochial church councils (PCCs), we received representations from the people and bodies listed in Appendix C to this report. We are grateful to all who responded. We also wish to record our thanks to Sir Wilfrid Bourne, K.C.B., Q.C., who helped us in analysing the response to the Working Paper and in other work leading to this report. Those respondents whose primary concern is with conveyancing favoured the abolition of chancel repairs liability, with little or no delay. Of those within the church, PCCs whose churches benefited from payment for chancel repairs understandably favoured retention of the liability; in other cases opinion was divided.

1.9 Our conclusions and recommendations are summarised in Part VII of this report, and a draft bill to implement the recommendations is in Appendix A.

PART II

THE PRESENT LAW

History

2.1 The reasons for the present state of the law relating to chancel repairs can only be fully appreciated, and some of its complications can only be understood, with a knowledge of its rather complicated history. This was carefully and clearly explained in Parts II and IV of the Working Paper.¹ For convenience, we reproduce these passages from the Working Paper as Appendix B to this report.

Liability

2.2 Although, historically, responsibility for chancel repairs arose in various ways, there are now effectively two distinct types of liability. The first affects the owners of particular parcels of land. We refer to this as "landowners' liability". The second type of liability has no connection with land ownership. This in turn can arise in two different ways.

2.3 When tithe rentcharges were extinguished in 1936,² the connected chancel repair liability was preserved for certain ecclesiastical and educational bodies which were issued with Government stock in lieu of the whole of the rentcharges they lost.³ The bodies in question are the Church Commissioners,⁴ ecclesiastical corporations such as the deans and chapters of cathedrals, the universities of Oxford, Cambridge and Durham, their constituent Colleges, and Winchester College and Eton College.⁵ In this report, we refer to this as "rentcharge liability". It should be made clear that those bodies who can be subject to rentcharge liability can equally, if they happen to own relevant land, be affected by landowners' liability. When they are liable as landowners, rather than as former rentcharge owners, the rules which relate to landowners' liability apply.

2.4 The other form of chancel repair liability which is not connected with land ownership is attached to the right to receive corn rents and some rentcharges created to replace tithes.⁶ Those rentcharge were not redeemed in 1936.⁷ For convenience, we refer to this as "corn rent liability", although by

¹ Working Paper, paras. 2.1-2.28, 4.1-4.5.

² Tithe Act 1936, s.1.

³ Other rentcharge owners were also issued with stock in exchange for the rentcharges which were then redeemed. However, in their case, such part of their entitlement "as may be reasonably sufficient, having regard to the condition of the chancel . . . , to provide for the cost of future repairs thereof and to provide a capital sum the income of which will be sufficient to insure it for a sum adequate to reinstate it in the event of its being destroyed by fire" was withheld and issued to the Diocesan Board of Finance: Tithe Act 1936, s.31(2). The former rentcharge owner's chancel repairs liability was regarded as satisfied by that deduction, and was cancelled.

⁴ As successors to the Ecclesiastical Commissioners and Queen Anne's Bounty.

⁵ Tithe Act 1936, s.31(2) proviso.

⁶ Working Paper, para. 2.24.

⁷ Despite the words of the Tithe Act 1936, s.1, "all tithe rentcharges shall be extinguished", the Act only applied to those rentcharges payable under the Tithe Acts 1836 to 1925 (s.47(1)) and not to those created earlier.

that phrase we shall intend to include any liability attaching to any rentcharges which were not extinguished.

2.5 A landowner's liability for chancel repairs is enforceable against him even though he purchased the property in ignorance of the possibility. The payment required can be of a substantial sum; it can exceed the value of the property which gives rise to the liability.⁸ It is not a charge on the land, so that no owner has any responsibility for his predecessor's default, and a PCC has no right of recourse to the land of a lay rector who defaults.

2.6 There is no register of the potential liability for chancel repairs. Indeed, it is expressly listed as one of the overriding interests to which dispositions of registered land are subject.⁹ The best records of the liability, although only of that to which the Tithe Act 1936 relates, are those which were deposited at the former Inland Revenue Tithe Redemption Office, and are now in the custody of the Public Record Office. There may also be evidence in the hands of diocesan or parish authorities, and county record offices can sometimes help, particularly with enclosure awards. The only thing which is certain is that none of these records is comprehensive and failure to find any reference to a liability rarely rules out the possibility that one exists.

2.7 In many cases, there is more than one lay rector of a parish. This may be because their respective liabilities arose in different ways, or because the land to which liability attaches has been subdivided and each lay rector owns part of it. We believe that there are parishes in which there is one lay rector with a liability which does not derive from the ownership of land and one or more other lay rectors who are liable as landowners. Frequently, although not always,¹⁰ when there is more than one lay rector each is liable for the whole of any repair costs, subject always to a right of contribution from the others.¹¹ The problems associated with apportioning the liability are considered below.¹²

Benefit of chancel repair liability

2.8 In England, the benefit of the right to have the chancel repaired is vested in the PCC of the parish.¹³ In Wales, it is vested in the Representative Body of the Church in Wales. This applies to all the forms of liability.¹⁴ To simplify this report, we refer, where it is not necessary to distinguish between the English and Welsh positions, to the body entitled to enforce chancel repair liability as the PCC. This should be read to include the Representative Body.

⁸ *Wickhambrook Parochial Church Council v. Croxford* [1936] 2 K.B. 417.

This point was expressly left open by Lord Simon in *Representative Body of the Church in Wales v. Tithe Redemption Commission* [1944] A.C. 228, 239.

⁹ Land Registration Act 1925, s.70(1)(c). The owner of registered land is therefore bound by the liability notwithstanding that there is no mention of it on the register; indeed, registration is not possible. In view of the fact that the liability is not a charge on the land, it is arguable that it should not have been listed as an overriding interest.

¹⁰ When tithe rentcharges were extinguished under the 1936 Act, the connected chancel repair liability was apportioned in Records of Ascertainment; see Working Paper, para. 2.17.

¹¹ *Chivers & Sons Ltd v. Air Ministry* [1955] Ch. 585.

¹² Paras. 5.11-5.15.

¹³ Chancel Repairs Act 1932, ss. 2, 4.

¹⁴ Welsh Church Act 1914, s.28(2).

Ascertaining liability

2.9 Even where the necessary records to establish a landowning lay rector's liability are available, the law is not clear in a number of respects. The Working Paper identified five cases of uncertainty.

- (a) It is not known whether chancel repair liability connected with tithe rentcharges redeemed before the Tithe Act 1936 survived the redemption;¹⁵
- (b) It is not clear whether chancel repair liabilities continue if the tithe rentcharges to which they were attached are extinguished under the Limitation Acts by reason of non payment;¹⁶
In both cases (a) and (b) there is the possibility that the chancel repair liability transferred to the land out of which the former tithe rentcharge issued;
- (c) It is possible, but not certain, that tenants, as distinct from freeholders, of the rectorial land can be liable;¹⁷
- (d) There is uncertainty whether liability runs with land acquired from a spiritual rector before 1923, when such rectors ceased to have any responsibility for chancel repairs;¹⁸
- (e) The enforcement provisions in Wales may not cover liability arising in cases not formerly running with tithe rentcharge.¹⁹

Apportionment

2.10 In only one case in which joint lay rectors share the liability for chancel repairs is the liability legally apportioned, so that each is responsible merely for his proportion of the cost. This is where tithe rentcharges were redeemed by the Tithe Act 1936.²⁰ A Record of Ascertainments was produced by the Commissioners under that Act which specifies the division of liability. In other cases, the liability is several, i.e. each lay rector is responsible for the whole repair bill, subject to having a right to recover contributions from the others. Even in a case to which a Record of Ascertainments applies and where the liability is a landowner's one and not a rentcharge liability, there can still be apportionment problems, if one of the original landholdings is later subdivided. The 1936 Act only provided for the original apportionment. Also, the apportionment in the Record of Ascertainments only affects the rectors mentioned in it, who were former rentcharge owners, and their successors. If there are other lay rectors in the same parish, liable as landowners, the PCC can recover the whole repair cost from them or from any one of them.

¹⁵ Working Paper, paras. 2.26-2.27.

¹⁶ Working Paper, para. 2.28.

¹⁷ Working Paper, paras. 3.8-3.11.

¹⁸ Working Paper, para. 2.23; Ecclesiastical Dilapidations Measure 1923, s.52.

¹⁹ Working Paper, para. 4.5.

²⁰ Tithe Act 1936, Sch. 7.

PART III

PROBLEMS WITH LANDOWNERS' LIABILITY

Conveyancing

3.1 Our main concern in examining this topic is its effect on the conveyancing system. While it is true that much of the law is anachronistic, and capricious in its modern application, yet it is only in connection with dealings with land that it appears to create difficulty and injustice. Necessarily, the conveyancing system is only affected by landowners' chancel repair liability. The problems identified here do not relate to rentcharge or corn rent liabilities, which are not connected with land ownership.

3.2 The principal problem which chancel repair liability poses in conveyancing is that no purchaser of land can be sure that he is taking free from it.¹ Because the records are incomplete, a search which does not reveal a liability gives no guarantee that there is none. Some records which do exist are very imprecise in identifying the land affected, so the result of a search can be inconclusive. Further, because a search of the records deposited at the Public Record Office² must be conducted personally, and because in many other places where details of chancel repair liability may be found there are no formal search and inspection arrangements, any search is expensive and time-consuming. While we understand that a search for chancel repair liability is not conducted as a routine part of purchase procedure by many solicitors, we do have evidence that such searches are regularly done.³ Failure to search in all cases falling within some reasonable criteria is probably professional negligence.⁴ The result is that, in the case of many purchases of land or property, expensive and time-consuming searches are or should be carried out,⁵ even though the result will be inconclusive and the purchaser may later find himself saddled with a liability of which he had no warning. This has been called "the conveyancing trap." The purchaser in the trap has no recourse under the normal covenants for title against a vendor who has not disclosed the liability.⁶

3.3 There are two other conveyancing problems. First, once a landowner finds himself caught in the conveyancing trap—liable to carry out or pay for chancel repairs of which he was ignorant when he bought—his property may well be permanently reduced in value, because on any sale he will be obliged to

¹ *Hauxton Parochial Church Council v. Stevens* [1929] P. 240.

² And in most, if not all, county record offices.

³ "The best advice must be to search in cases of doubt, but the cost of doing so (in terms of time to be spent and possibly agents' fees) should first be ascertained and the client's specific instructions sought if the cost is likely to be significant" *Handbook of Conveyancing Searches*, E. O. Bourne (1984).

⁴ Cp. *G. & K. Ladenbau (UK) Ltd. v. Crawley & De Reye* [1978] 1 W.L.R. 266.

⁵ We are told of one parish where, unusually, the liability for chancel repairs is recorded on the deeds of local land. However, liability has been redeemed. So although still mentioned on the deeds, it no longer exists. The result is that purchasers' solicitors raise fruitless enquiries, to which the incumbent feels obliged to waste time in replying. Registration of title will eventually solve this particular problem unless an over zealous conveyancer refers to the now misleading pre registration deeds.

⁶ *Chivers & Sons Ltd. v. Air Ministry* [1955] Ch. 585.

divulge the potential liability.⁷ Secondly, we have been told of cases in which negotiated sales have fallen through because the purchasers have felt unable to accept an uncertain and unlimited liability. The landowner in these cases has the alternative of paying a lump sum to compound all future liabilities.⁸ That is generally expensive and the procedure is often slow. It would be unrealistic to expect to negotiate a payment quickly enough to resume a sale which was threatened by the unexpected discovery of a chancel repair liability in the course of the prospective purchaser's enquiries.

3.4 The modern conveyancing system seeks to inform a purchaser of land of the precise benefits and burdens which he is taking on; any reform must be to further that aim. A purchaser's information comes from the various forms of registration, which took over from the earlier doctrine of notice. Liability for chancel repairs is an exception. There is no reliable source of information about it, and yet prudent purchasers must undertake inconclusive searches which materially add to the expense of, and delay in, conveyancing. There are only a few known examples of purchasers who have fallen into the conveyancing trap, but in those few cases the consequences can be severe. The effort of making such searches as are possible is therefore fully justified. This is not a situation which should be allowed to continue. The promotion of an effective conveyancing system and the proper protection of purchasers require that there be reform.

Several liability

3.5 There is a second problem which we are concerned to solve. An aspect of the liability for chancel repairs which gives rise to resentment is that, in most cases in which there is more than one lay rector and the liability is not rentcharge liability, each is liable for the whole repair costs. While anyone facing a demand for a large sum, for only a proportion of which he is ultimately responsible, may not relish the position, the rule exacerbates the conveyancing trap. The recipient of the completely unexpected demand may justifiably feel that the several liability makes his position even worse.

3.6 The lay rector who is presented with the claim is entitled to contributions from the other lay rectors but he faces a series of problems. He must first identify the other lay rectors, he is responsible for demanding contributions, he has to finance any action to recover the shares of others, and he runs the risk of loss if any of them is unable to pay his share. This does not apply to the corporations with rentcharge liability; their liability was, whenever necessary, apportioned under the Tithe Act 1936.⁹ Nevertheless in a parish with one lay rector with landowners' liability¹⁰ and another with rentcharge liability, the former can be obliged to pay the whole amount due, even though the latter

⁷ The standard enquiries before contract customarily raised by purchasers' solicitors elicit this information.

⁸ Ecclesiastical Dilapidations Measure 1923, s.52(1).

⁹ Tithe Act 1936, Sch. 7.

¹⁰ In two cases, the liability of lay rectors with landowners' liability has been apportioned: first where a tithe rentcharge belonged to the owners of the land out of which it was payable, and the rentcharge was merged by the Tithe Act 1936; and secondly, where such a merger was effected under the Tithe Act 1836 or a later Act; see Working Paper, para. 2.16.

cannot. We do not consider it acceptable that lay rectors should face legally enforceable demands for sums which are not their ultimate responsibility, and, thus appear to become collecting agents for the Church.

3.7 The obvious way to resolve this problem is to have a legal apportionment of liability, so that each lay rector is liable only for his own proportion of the cost of chancel repairs. We consider this later in our report.¹¹ However, there is one consequential problem which must be faced immediately. There are some parishes, predominantly in Wales, where the number of lay rectors is so great, and their respective shares so small,¹² that compulsory apportionment would be tantamount to abolishing the liability. This problem cannot be lightly dismissed. We were told that in Wales chancel repair liability still exists in about one parish in nine, and in many of those only part of the cost of repairs is covered by the liability. In over 70 per cent of those parishes, the total amount recoverable is less than 30 per cent of the repair costs. In many parishes the total liability is subdivided between many lay rectors.

Legal uncertainties

3.8 We have pointed out that in addition to the substantial difficulties created by the lack of adequate records, there are also uncertainties in the way in which the law applies in certain cases. We doubt whether these queries often arise, or cause any appreciable problems. However, if it is proposed to solve the major problems by a means which contemplates the permanent existence of chancel repair liability, attention must either be given to these defects in the law or it must be accepted that the law in this field is to remain imperfect.

¹¹ Paras. 5.11–5.15.

¹² The share of one lay rector in the Parish of Llandbardarnfawr is 1/558955, or 1.79p towards every repair bill of £10,000!

PART IV

THE FAVOURED SOLUTION:

ABOLITION OF LANDOWNERS' LIABILITY

Possible Solutions

4.1 The two possible solutions to the major problem, the conveyancing trap, which we have identified are registration and abolition of landowners' chancel repair liability. Of the two, registration is the less drastic, because it does not involve depriving PCCs of their established rights. If all landowners' liabilities were registered, there would no longer be any question of buying in ignorance, and the conveyancing trap would disappear. However there are considerable drawbacks to creating a register. It imposes burdens both on those who would be called upon to register and on those who would wish to resist registration applications. The lack of reliable records is bound to make the process lengthy and costly.

4.2 In practice, it would be desirable for registration to be associated with the formal apportionment of landowners' chancel repair liability. This would, so far as it is possible, limit a landowner's liability and allow that limit to be recorded on registration, so that any purchaser was aware of it. It would provide a general solution to the problems of the several liability. Again, however, the lack of records would make this a formidable task. Yet, if there were no apportionment, registration would have to be on the basis that not only could a PCC identify the person liable for chancel repairs, but each lay rector should be able to ascertain who was liable to contribute to any payments he himself had to make. In a conveyancing transaction, the purchaser should be able to find out not only whether, but also for how much, he could become liable to pay. Apportionment would therefore be necessary to simplify registration, and satisfactorily to reform the conveyancing system.

4.3 Neither registration nor apportionment does anything to resolve the legal uncertainties.¹ We do not place much emphasis on this factor, but record it for completeness.

4.4 Abolition of landowners' chancel repair liability is our favoured solution because neither registration nor apportionment fully and simply solves the conveyancing and several liability problems. Abolition, on the other hand, solves all the problems we have identified. Once it takes effect, there can be no more conveyancing trap, and the liability would no longer deter purchasers of land. Further, with the liability gone, there would obviously be no problems in assessing the amount for which any one person was liable. Finally, there would be no need to consider the legal uncertainties. Abolition is the only solution we have been able to identify which satisfactorily deals with all those points. Accordingly, our primary recommendation is that landowners' chancel repair

¹ Para. 2.9.

liability be abolished. The possibility of abolishing other forms of liability is considered in Part VI of this Report.

4.5 While recommending the abolition of landowners' chancel repair liability, we emphasise the need to do so without undue delay. We regard the conveyancing trap as a serious matter demanding prompt attention. Were the abolition solution not to be accepted, or if it were not promptly implemented, we would recommend that registration and apportionment procedures be introduced. We accordingly discuss these alternatives later in this Report,² but only on the basis that they are our less favoured alternative.

Consequences of Abolition

4.6 Abolition would necessarily deprive those parishes with the right to enforce landowners' chancel repair liabilities of further benefit. We see no practical possibility of their being compensated either from private or from public funds. Abolition results in no benefit for these parishes, except perhaps the avoidance of the odium which attaches on the rare occasions when someone finds himself in the conveyancing trap. Despite this, our consultation revealed no substantial body of opinion against abolishing landowners' liability, as distinct from the rentcharge liability. Encouraged by this, and by the support of the General Synod of the Church of England, we consider it right to regard the simplification and certainty of the conveyancing system as more important in the public interest.

4.7 Two other factors inherent in abolition must be considered. First, there will be landowners who purchased in full knowledge of the existence of chancel repair liability and paid less for their property as a consequence. Abolition will present them with an uncovenanted enhancement in the value of their land. Secondly, some landowners have already paid substantial sums to redeem their liability. Only a small number of people will fall into these categories. We do not consider that there are any practical transitional measures which we can recommend to change the position in either case, nor do we consider that the absence of such measures constitutes any reason not to proceed with abolition.

Timing of Abolition

4.8 The manner and timing of abolition needs detailed consideration. It is not only the conflicting interests of those liable to pay and those entitled to benefit be balanced, but consequential practical difficulties must be avoided.

(a) Phasing

4.9 The Working Paper arrived at the provisional conclusion that liability should be phased out over a 20 year period. For the first five years lay rectors would remain fully liable; for the next ten years, the liability would be cut by 50 per cent; and for the last five years, lay rectors would only have to pay 25 per cent of repair costs.³ Even if one were to accept that some liability should persist for 20 years, this proposal involves certain complications. At present, the

² Part V.

³ Working Paper, para. 6.28.

lay rector's primary liability is to carry out the actual repairs, even though in practice the liability is frequently satisfied by paying the cost of the repairs rather than doing the work. A duty to do the work would become inappropriate as soon as the liability was for less than the full cost. The options would then be to make the liability the appropriate percentage either of what the cost of repairs would be, established by expert evidence, or of what was actually spent on repairs. Each presents difficulties.

4.10 As soon as the lay rector's liability fell below 100 per cent, parishes would have to raise the balance of repair costs in some other way, which might prove difficult. To limit a parish's claim against the lay rector to a proportion of what was actually spent would mean that until they raised the balance they could get nothing from the lay rector. On occasions, this could mean that they were deprived of any payment from the lay rector. Also, if the work had to be done first, the PCC would run the risk of suffering any default on the lay rector's part.

4.11 Other difficulties would arise if the alternative course were adopted, including that of payment in advance of the sum estimated to be needed. Because of the difficulty in raising the balance, the contemplated work might never be done, or never wholly done. Take an example of what might result. In the sixth year of the phasing period—when the liability would be 50 per cent—a demand is made and the lay rector pays; but only an incomplete repair job is done because the full cost is never raised. Ten years later, before the phasing period expires, there is a further demand. The lay rector may allege that some of the work then needed is caused by deterioration resulting from incomplete repairs ten years earlier. No doubt any such disputes could be resolved on expert evidence, but there is the potential here of making the collection of payments for chancel repairs much more difficult and expensive, just at the moment when the value of the right would be declining.

4.12 The county court at present has jurisdiction to order that money paid by a lay rector is paid into court.⁴ We assume that this jurisdiction would be exercised where the lay rector paid before the work was done.⁵ While there may be no technical difficulty in leaving the law unchanged on this point during the phasing period, we foresee practical snags. The payment of the money into court would not help in raising the balance required. If it were only paid out to reimburse 50 per cent or 25 per cent, as the case may be, of expenditure incurred, all the difficulties envisaged in delaying the lay rector's obligation to pay until the work is done⁶ would remain, except the possibility of his default. If the money in court were paid out to reimburse the PCC in full so long as that money lasted, the result could be as suggested above for partial repairs.

(b) Limitation of claims

4.13 A number of those who responded to the Working Paper expressed

⁴ C.C.R. Ord.49, r.2.

⁵ *Wickhambrook Parochial Church Council v. Croxford* [1935] 2 K.B. 417, 445-6.

⁶ Para. 4.10.

⁷ Para. 4.11.

concern that the prospect of abolition of the liability within a fixed period might stimulate an unreasonable escalation of claims pending abolition. This could result from the combination of two forces. First, a parish which knew that it had lay rectors would seek to complete all conceivable repair work before abolition. Work which was not urgent, and would normally be left until more accumulated, would be brought forward to ensure that the lay rector paid. Secondly, in many parishes where there was no known lay rector, the PCC would feel impelled to do research to see whether any chancel repair liability could be discovered. There is no logical reason why that research should not be done in any event if the chancel needs repair, but we accept that the prospect of abolition may well stimulate greater efforts. It is likely that this research would often involve fruitless expenditure and time and money and, where it did bear fruit, would catch an unwitting lay rector in the conveyancing trap.

4.14 Two possible way to avoid a rush of claims during an interim period before abolition were suggested to us. First, the liability should be abolished immediately. While that clearly solves the perceived problems, it does so in a way which can be regarded as unnecessarily expropriatory. Further, it may be thought that a PCC should have a final chance to benefit from a right which they have enjoyed for so long, even if some repair work is done earlier than it might have been. Should lay rectors who are to be permanently relieved of liability object to paying the price of leaving their parish church with a chancel in good repair?

4.15 The second suggestion concentrates on cutting out the research which could result, on the one hand, in more claims against people who are in ignorance of their chancel repair liability and, on the other, in a useless waste of church funds. This alternative would limit chancel repair liability during the interim period, between the passing of legislation for abolition and the date of abolition, to cases in which a claim to repair the particular chancel had been made successful during a specified period before the final abolition date, e.g. during the previous 40 years. We initially found this suggestion attractive, even though the period during which qualifying claims must have been made could only be fixed arbitrarily. However, on closer examination, it seemed impossible to devise a scheme which was fair, and sufficiently achieved the twin objectives of eliminating unnecessary research and avoiding any further springing of the conveyancing trap.

4.16 The principal difficulties stem from the need to identify with precision the earlier successful claims which would validate claims during the interim period. For example, should any of the following suffice for this purpose: repair work done by a lay rector without any request from the PCC; work done or paid for by a person who was a lay rector, but who also had other connections with the church which might have induced him to agree to do so, such as being a churchwarden or the patron of the living? The position could also be unsatisfactory where there were two lay rectors. A claim during the qualifying period might quite properly have been made against one of them (*A*). If he did not seek any contribution from the other (*B*) is *B* to remain liable pending abolition? To allow the claim against *B* could expose him to the operation of the conveyancing trap; to disallow it would penalise the PCC which had no

need to pursue the original claim against *B*, but might now consider that the better course.

4.17 For these reasons, we do not recommend any restriction, by reference to earlier successful claims, on claims between the date legislation is passed and abolition takes effect.

(c) Delay

4.18 It is clear that if there is now to be a determined effort to remove the conveyancing trap, little delay can be justified. Were the conveyancing issue the only one to be considered, immediate abolition would be the appropriate action. However, as other matters must also be weighed in the balance, a view has to be taken as to the length of delay which is acceptable before abolition if the alternative solution to eliminate the conveyancing trap—registration—is not to be adopted. Clearly, there would inevitably be delay before any registration system could be effective, because of the need to establish administrative procedures and to allow an initial registration period. On the other side, it seems fair to allow Church authorities a final opportunity to put their chancels in good repair before the landowners' liability is abolished. Churches are inspected by the diocesan architect every five years,⁸ and it follows that there should be enough time for making at least one of those inspections and for implementing any recommendations which follow from it. Taking these factors into account, we favour the liability being abolished in ten years' time. To perpetuate the uncertainty within the conveyancing system for any longer period would not be tolerable. For the same reason we urge that there be no more than the minimum delay in introducing the necessary legislation.

4.19 We also recommend that the Act states the actual abolition date, rather than providing that chancel repair liability be abolished ten years after the date on which it was passed. A statute can always be more readily understood when the date is given, but it is particularly important when the provisions will not have practical effect for a considerable period. For the same reason, it is helpful if an easily memorable date be chosen. The draft bill in Appendix A is drawn on this basis. It provides, by way of illustration, that chancel repair liability cease to have effect on 1 January 1996.

Operation of abolition

4.20 When the date for abolition of chancel repair liability arrives, it is obviously essential to be able to determine which claims, if any, can still be pursued. Any claim in which court proceedings claiming payment have already been served should not be affected; otherwise there is an invitation to lay rectors to delay payments which are legitimately due and to prevaricate in the litigation. On the other hand, abolition must be effective as soon as possible after the date decided upon, so that it should no longer be possible after the operative date to take proceedings to claim a payment for chancel repairs.

⁸ Inspection of Churches Measure 1955.

4.21 There will have to be one exception to this bar on proceedings. Unless by then all chancel repairs have been apportioned—and we would not recommend that there be apportionment if the abolition solution is adopted—there may be cases in which proceedings are taken for the whole of the repair costs against one lay rector, who has a right to seek contribution from others, but has not yet done so. To allow the impact of abolition to increase the liability of the lay rector who happens to be chosen by the PCC as the defendant to their proceedings, by releasing his fellow lay rectors, would be an unacceptable discrimination. Potential contributories must therefore remain liable to pay towards claims validly made before abolition is effective.

4.22 Even if abolition is agreed, we are nevertheless anxious that the inconveniences caused by chancel liability should linger no longer than necessary. The precise rules governing the liability of lay rectors called upon to contribute to sums paid by another lay rector are not clear. To make the position certain after abolition, we propose that the liability be limited to those who were lay rectors immediately prior to the abolition date whether or not they subsequently part with the land in question. This would avoid any further innocent purchasers being caught in the conveyancing trap. We further suggest that claims for contribution by one lay rector against another be limited, by analogy with the limitation of action rules which apply to contributions recovered under section 1 of the Civil Liability (Contribution) Act 1978, to proceedings brought within two years of the date on which the right accrued.⁹ We accordingly recommend that, to be effective, proceedings to recover one lay rector's contribution to a payment by another should be served within two years of the abolition date (i.e. before 1 January 1998, if the liability ceased to have effect on 1 January 1996).

Draft Bill

4.23 Appendix A to this Report contains a draft bill to implement our primary recommendations for the abolition of landowners' chancel repair liability and the limitation on actions to enforce that liability or payment of contributions.

4.24 Some consequential legislation would be required once chancel repair liability had finally been abolished.¹⁰ We consider that this would be best dealt with when the abolition date had passed. The alternative of amending other legislation on the basis that those amendments would not take effect until the end of 10 years would not be satisfactory.

⁹ Limitation Act 1980, s.10.

¹⁰ E.g., parts of Land Registration Act 1925, s.70, Tithe Act 1936, s.31 and Sch. 7. More extensive repeals would be required if all chancel repair liability is abolished: see para. 6.6.

PART V

ALTERNATIVE SOLUTION:

REGISTRATION AND APPORTIONMENT

5.1 We now turn our attention to the possibilities of registering and formally apportioning landowners' chancel repair liability. We only suggest consideration of these possible solutions to the conveyancing problems which we have identified if our primary recommendation of abolishing that liability is not promptly implemented.

Registration

5.2 If landowners' chancel repair liability were registered in a register open for public inspection, on the basis that a purchaser of land took it free from any liability which was not registered, there would no longer be a conveyancing trap. The Church's rights could remain undisturbed, and due warning of them would be available to any prudent prospective purchaser.

5.3 Registration of chancel repair liability could take a number of forms. First, it could be a registration either of an established right or of a mere claim to that right. The difference is that in the first case any dispute about the existence of the right is settled before there is a definitive registration, while in the second the person who would be liable for chancel repairs takes no part in the registration procedure and the settlement of disputes is postponed until there are repairs to be done or paid for. Secondly, any registration could be in a new register created for the purpose, or in an existing register. In choosing a method of registration, we consider that the guiding principle should be the need for conveyancing to be both simple and cheap.

(a) Established right or mere claim?

5.4 A new register of rights, taken to be established once conclusively registered, was set up by the Commons Registration Act 1965. It gave commoners a limited period within which to register their rights.¹ Any not then registered were lost. Commons Commissioners were appointed to determine any disputes.² The obvious advantage of that type of provision is that, once the register is established, the precise extent of the rights and liabilities is conclusively stated and easily ascertained. However, to establish such a register causes the interested parties considerable work and expense. If the period for registration is limited, there is effective compulsion to do research, which may be extensive yet inconclusive. PCCs could justifiably feel that it was their fiduciary duty to ensure that they did not irretrievably lose the possibility of a claim, even though no repair was currently needed and there was no known lay rector. There could be no guarantee that the investment of time and money in

¹ Commons Registration Act 1965, s.1(2). The period was originally to have ended on 31 March 1970: Commons Registration (Time Limits) Order 1966, art. 2; it was extended to 31 July 1970: Commons Registration (Time Limits) (Amendment) Order 1970, art. 2.

² Even now, nearly 15 years after the registration period ended, disputes are still being litigated: e.g. *re West Anstey Common* [1985] 2 W.L.R. 677.

research would bear any dividend. By the same token, landowners could also find themselves incurring considerable expense in resisting registration claims which might turn out to be quite unjustified. The number of contested chancel repair cases appears to be so small that we consider that any scheme which might trigger widespread investigations of this kind would be unjustified. In addition, any arrangements to determine disputes, on the model of the Commons Commissioners, would be expensive and, in cases where no repairs were currently outstanding, could unnecessarily provoke local disputes.

5.5 The alternative to the registration of established liabilities is a register of claims. This would serve as a warning to purchasers of the land affected, but would still allow a demand to do the work or to pay for it to be contested, when it was presented, on the ground that there was in fact no liability. This would postpone any consideration of the merits of a claim, and therefore expenditure in establishing and contesting a claim until the need arose, if it ever did. The likely disadvantage of this arrangement is that a prudent PCC would register its claims as widely as might conceivably be justifiable.³ Because of the vagueness of some old maps, and the difficulty of identifying on modern maps areas designated on the old ones, the registration of claims could often spread more widely than would finally be found to be justified. The implications for a purchaser of land subject to chancel repair liability are serious. Whenever a registered claim was disclosed on a search, the purchaser would in his own best interests insist on its being investigated in detail. This would add to the cost of the conveyancing process and could deter prospective purchasers to a greater extent than is at present the case.

5.6 Although neither a register of established rights nor a register of claims would be without its problems and drawbacks, we would favour a register of claims if registration were to be implemented. Since a preliminary disputes procedure is not necessary before that type of register can be fully operative it could be made effective more quickly. However, it must be noted that the need to achieve effective apportionment arrangements may suggest that a register of effective rights be established.⁴

(b) What Register?

5.7 The proliferation of registers which have to be searched before purchasing land is a major blot on our conveyancing system. Although bringing all available information onto a single register may not be practicable in the foreseeable future,⁵ the creation of any new register could only make matters worse. Setting up a new register must also be more expensive than expanding an existing one, and the need for an additional search could only add to

³ The legislation might usefully contain a provision that a person who sustains damage as a result of an unjustified registration could claim compensation from the PCC which applied to register that claim; cp. Land Registration Act 1925, section 56 (3).

⁴ Para. 5.15.

⁵ Conveyancing Committee—Second Report (1985), para. 4.19.

conveyancing costs both for the work involved and in paying a search fee.⁶ We therefore conclude that there should be no new register for this purpose.

5.8 There are two major sets of registers which are searched on almost every purchase of land and if chancel repair liability were recorded on either of them, the cost of searches would probably not be affected. The two alternatives are, on the one hand, H.M. Land Registry's register of title linked with its register of land charges for unregistered titles, and on the other, the register of local land charges. While it might seem appropriate for the Land Registry to register chancel repair liability, there are difficulties. Until the system of registration of title is universal, the land charges registry would have to be used as well. Here, registration is against the estate owner's name. PCCs seeking to register could have difficulties in ascertaining landowners' names, and minor inaccuracies can invalidate the protection offered.⁷ An alternative for unregistered land would be to register chancel repair liability by means of a caution against first registration. That is revealed by a search of the index map, but it is not the practice to make such a search when buying land outside an area of compulsory registration of title, and we believe that such searches are not even universally made when buying unregistered land where registration is compulsory. Registration by means of a caution against first registration would accordingly not be satisfactory, because it would entail increasing the work required on buying land.

5.9 The register of local land charges⁸ would be our preferred register for notices of claims of chancel repair liability. The register is already divided into a number of parts, dealing with disparate matters affecting land. Presumably, it would be simple to add another for this purpose. Although almost all local land charges are claims of a public nature, there are precedents for registering private rights.⁹ One adaptation of the generally applicable local land charge system would be needed. Normally, non-registration does not absolve a purchaser from any liability, but may entitle him to compensation from the registering authority.¹⁰ This recognises that the majority of charges are of a public nature, and that compensation for want of registration should be in the nature of damages for breach of statutory duty.¹¹ However, this is not appropriate for 'non-public matters . . . , the registration of which is intended to be entirely voluntary'.¹² For this reason, the compensation provisions do not apply in cases of non-registration under the Rights of Light Act 1959¹³ or the Leasehold Reform Act 1967.¹⁴ We recommend that notices of claims of chancel

⁶ Searching in the commons register, on which some suggested to us that a new register should be modelled, involves applying to the county council (as distinct from the district or borough council to which local land charge searches are addressed), and paying a fee, currently £3.

⁷ *Oak Co-operative Building Society v. Blackburn* [1968] Ch. 730, 743.

⁸ Now maintained under the Local Land Charges Act 1975.

⁹ E.g., light obstruction notices under the Rights of Light Act 1959, s.2, and management powers schemes under the Leasehold Reform Act 1967, s.19.

¹⁰ Local Land Charges Act 1975, s.10, as amended by the Local Government (Miscellaneous Provisions) Act 1982.

¹¹ Law Commission *Report on Local Land Charges* (Law Com. No. 62), paras. 51, 52.

¹² *Ibid*, para. 53.

¹³ Rights of Light Act 1959, s.2(4)(b); Local Land Charges Act 1975, Sch. 1.

¹⁴ Leasehold Reform Act 1967, s. 19(10A); Local Land Charges Act 1975, Sch. 1.

repair liability should not only be similarly excluded from the compensation scheme, but that the former rule¹⁵ should apply in this case: namely, that no claim should be valid unless registered.

5.10 The one facility which registration in the local land charges register, and probably in any existing register, could not conveniently offer is a means of identifying the other properties whose owners share responsibility for the same chancel. Registration in the local land charges register would not therefore offer much help to a lay rector who was seeking contributions from other lay rectors. We do not see this as overriding the argument that, in default of abolition of landowner's chancel repair liability, a registration system would be required which avoided further conveyancing complications, but rather as supporting the need for apportionment which we consider below. It must, however, be recognized that if there was incomplete registration so that a PCC could choose which liabilities to register and would lose any claim against the owner of other land once it changed hands, the effect could be to increase the burden on those lay rectors whose liability was registered; their right to seek contribution from co-lay rectors against whose land there was no registration would be lost. Thus the requirements of any fair system of apportionment, which should establish and record all liabilities, may run counter to the best procedure from a conveyancing point of view.

Apportionment

5.11 Legal apportionment of chancel repair liability between the lay rectors who at present have several responsibility, would solve the problems caused by several responsibility. Each lay rector would then only be responsible for his own proportion of the liability and PCCs would have to apply separately to each lay rector. This was achieved with apparent simplicity, in the case of rentcharge chancel repair liability,¹⁶ by a provision that "References in the Chancel Repairs Act 1932¹⁷ to the cost of putting a chancel in repair shall, in relation to a liability limited under this Schedule to a proportion of such cost, be construed as references to that proportion of such costs".¹⁸

5.12 There is at present no special machinery for apportioning chancel repair liabilities.¹⁹ Apportionments under the Tithe Act 1936 were made by the Tithe Redemption Commission,²⁰ which was later abolished. Its functions, which by then did not include apportionment of chancel repair liability, because that work had been concluded, were transferred to the Commissioners of Inland Revenue.²¹ If there were to be apportionment, it would be convenient

¹⁵ Land Charges Act 1925, s.17(3).

¹⁶ And some landowners' liability: see footnote 10 to para 3.6.

¹⁷ Which made claims by PCCs to enforce the liability subject to the jurisdiction of the civil courts.

¹⁸ Tithe Act 1936, Sch. 7, para. 4.

¹⁹ Presumably, the courts would undertake the task if necessary, but there appears to be no modern case in which they have done so. The jurisdiction to assess contributions in the Civil Liability (Contribution) Act 1978, s.2. only applies to liability "in respect of any damage suffered by another person" (s.1), which does not seem apt to include chancel repair liability.

²⁰ Tithe Act 1936, Sch. 7, paras. 2, 3.

²¹ Tithe Redemption Commission (Transfer of Functions and Dissolution) Order 1959.

for some body with appropriate expertise to be given this function. The body should be seen to have independence and objectivity in performing it. Initially, many apportionments would be needed to formalise the present position. As time went by, the need for further apportionments would occur, because the land affected might be further subdivided. This suggests that the work could not be undertaken by an ad hoc body, but would be better allocated to an existing permanent one. The apportionment work would from time to time have a considerable legal content, because it would entail ascertaining the total extent of the land in any parish to which liability attached. An appropriate forum to make apportionments and settle disputes might therefore be the Lands Tribunal.²²

5.13 It would be necessary to lay down a basis for apportionment, because there is none at present. An informal apportionment of liability when payments had been made in the past could be adopted and formalised. Even then, an apportionment method for future subdivisions would be needed. The 1936 Act apportionments were based on the respective amounts of tithe rentcharges which were then being replaced;²³ there is no equivalent arithmetical calculation which can be done in relation to landowners' liabilities. As most, if not all, the land in question was agricultural land when the liability originally arose, it seems reasonable to apportion on the basis of respective land areas.²⁴ Clearly, other bases, e.g. comparative land values, are possible and might be thought fairer. However, that type of comparison changes from time to time, and as any apportionment would be final and permanent it is better to exclude considerations of value.

5.14 Apportionment would necessarily pose problems for PCCs in collecting the cost of chancel repairs. We have already pointed out that, in any parish which had a large number of lay rectors, apportionment could result in de facto abolition of the liability.²⁵ Even where this did not apply, the PCC would certainly need to know who the lay rectors were, or at least which land was affected. Apportionment would place on the church authorities the need to trace all lay rectors; once apportionments had been made, a PCC could only recover the full cost of chancel repairs by applying to every lay rector for his share. The PCC should therefore be given the right to be informed about any apportionment and, possibly, the right to be consulted before any apportionment were agreed or determined. Any argument about apportionment could also involve a primary contention that a particular area of land carried no liability at all; the PCC might wish to contest that. However, we should not want to inhibit the opportunity to agree upon apportionments without any proceedings. The PCC should therefore be given the chance and the right to intervene, but there should be no assumption that it would in every case. We suggest that any move to apportion should require notice to be given to the

²² Although, of existing bodies, the Lands Tribunal seems the best suited, its present organisation, without local offices, may be less than ideal and additional members and staff could be required. An alternative would be the leasehold valuation tribunals which do have local offices.

²³ Tithe Act 1936, Sch. 7, para. 2.

²⁴ This method was agreed between the parties in *Chivers & Sons Ltd. v. Air Ministry* [1955] Ch. 585.

²⁵ Para. 3.7.

PCC. If it did not choose to intervene within a specified period, it would lose the right to do so, but for the apportionment to be effective the landowners would have to give the PCC notice of particulars of it.

5.15 The difficulty and cost of making the first apportionments should not be underestimated. The need to identify all the land owned by lay rectors would mean that the paucity and unreliability of the records would involve much research which might not bear fruit.²⁶ Who bore the burden of proving that land carried the liability to chancel repairs would vary according to the circumstances. In one case, the PCC might wish to establish a duty to repair in a parish where none had recently been enforced. In another, a lay rector might seek to show that his liability was shared with other landowners. The work to establish a comprehensive apportionment would be much the same as that needed to create a conclusive register of the liability.²⁷ There is therefore a case for arguing that on achieving a comprehensive apportionment, lay rectors' liabilities should be recorded on a conclusive register, instead of a register of claims. However, that would certainly delay the abolition of the conveyancing trap.

Remaining Expense and Delay

5.16 Even if landowners' chancel repair liability is retained, and the conveyancing trap is removed by the introduction of provisions for registration and apportionment, the liability will still cause expense and delay in some conveyancing transactions, albeit without the injustice which the trap can engender. If the register were one of claims, there would be uncertainty until the PCC sought to enforce the liability. A prudent purchaser of land against which a claim was registered would require enquiries to be made before contracting to buy. These enquiries, which might have to be extensive, would be to evaluate the likelihood of a claim being established and, if one were, the amount which could be payable. On the other hand, if any liability shown on the register were conclusive, the investigations which a prospective purchaser might justifiably make about it could still be lengthy and costly. Comprehensive registration could make this worse. It could increase the number of cases in which enquiries about chancel repair liability are made, because it seems likely that the present difficulty in searching effectively, and even ignorance of the possibility of there being any liability, mean that enquiries are not made in some cases in which that would be the prudent course. Again, whenever an apportionment, or further apportionment, were necessary even parties not in dispute would often need professional advice, for which they would have to pay, to establish the amounts of the divided liabilities. Purely from the point of view of the conveyancing process and the need to make it simpler and more certain, therefore, we consider registration and apportionment to be a less desirable solution than abolition. Although registration and apportionment would prevent unfairness, only abolition could remove the need to spend additional time and money on the minority of transactions affected by chancel repair liability.

²⁶ The difficulties can be illustrated by some Records of Ascertainment relating to some Welsh parishes, which were intended to identify land by tithe areas but simply did not do so.

²⁷ As distinct from a register of claims: see para. 5.5.

PART VI

OTHER MATTERS

Rentcharge Liability

6.1 The provisional conclusion in the Working Paper was that all chancel repair liabilities should be abolished at the same time.¹ However, because rentcharge liability² and landowners' liability now rest on different bases, and their respective effects vary, we have reconsidered whether they should be treated in the same way.

6.2 Rentcharge chancel repair liability is now fundamentally different from the landowners' liability, because it in no way relates to the ownership of land. Accordingly, the conveyancing trap cannot apply to it, nor does it have either of the other detrimental effects on conveyancing. Furthermore, the liability has been legally apportioned.³ Rentcharge liability is limited to certain corporations,⁴ but they may also, separately, be liable as landowners. In such cases, the conveyancing difficulties associated with landowners' chancel repair liability apply and the recommendations made earlier in this Report extend to them. This section of our report is confined to rentcharge liability, where different considerations apply.

6.3 It is undoubtedly the case that the way in which chancel repair liability now operates is capricious; not every old and architecturally distinguished chancel has the benefit of the liability, and not every chancel which has the benefit falls into that category. This applies as much to rentcharge liability as to landowners' liability, and if the latter were abolished but not the former, the effect would be even more capricious. To abolish landowners' liability could in some cases undermine the effectiveness of the rentcharge liability. In those parishes where both currently apply, the residual rentcharge lay rector might only be responsible for a part of the repair expenses and the remainder would have to be found by the parish.

6.4 On the other hand, a number of those who responded to the Working Paper expressed satisfaction about the way in which the corporate bodies discharged their chancel repair liabilities.⁵ They spend substantial sums annually, and, as both parishes and the lay rectors are fully aware of the responsibilities, there are no disputes about liability. The chancels in question are generally ancient and frequently of architectural beauty; some of those who commented to us felt that these payments for their maintenance not only help the Church but make a positive contribution to the national heritage. This liability is not regarded as unfair, because the corporations were issued with stock for the purpose of continuing the endowments from which they have

¹ Working Paper, para. 6.28.

² Defined: para. 2.3.

³ Para. 4.10.

⁴ Para. 2.3.

⁵ Our correspondents did not distinguish between rentcharge liability and other forms of chancel repair liability.

always funded chancel repairs. Against that, it was pointed out to us that the income from the stock has not kept pace with the increasing cost of the repairs.

6.5 The financial consequences of abolition of the rentcharge chancel repair liability would be serious to those parishes involved. The corporations relieved of the liability would benefit to the same degree, a benefit which some who commented on the Working Paper would regard as an unjustifiable windfall. In judging whether this relief is appropriate, the nature of the corporations in question should be borne in mind. The primary concern of the Church Commissioners is the payment of clergy stipends. Presumably, any additional funds which became available would be devoted to that purpose. Cathedral chapters have their own responsibilities, and it has been suggested that it is ironic that a chapter sometimes has to allocate funds to repair a parish church—not necessarily even in the same diocese—when at the same time appealing for considerable sums for the upkeep of its cathedral. The educational corporations may be thought by some to be adequately endowed; but they are all charities and any funds which would otherwise have been spent on chancel repairs would all necessarily be devoted to their primary objects.

6.6 Because it has no general repercussions, we consider that rentcharge chancel repair liability can, and perhaps should, be dealt with separately from landowners' liability. It does not jeopardise or inhibit efficient conveyancing, and there is no apportionment problem. In sum, it does not affect our major concerns on behalf of the general public. For that reason, we do not make a recommendation that it be abolished. On the other hand, we recognise that there are reasons why some of those most closely concerned, and in particular a strong body of opinion within the Church of England, would wish it to be abolished, and we have sought to summarise these reasons. If it is accepted that the rentcharge liability should be abolished, it could well be convenient for it to be done at the same time and in the same way as landowners' liability. The draft bill in Appendix A illustrates how this might be done, simply by omitting section 1(2) which appears in square brackets.

Corn rent liability

6.7 Some of the considerations which apply to rentcharge liability also apply to corn rent chancel repair liability. It is not an incident of land ownership, and therefore there are no conveyancing implications. Most if not all of those who are liable fall within the class of corporations which can have rentcharge liability.⁶ In exchange for their responsibility of the chancel they receive a corn rent or a rentcharge.

6.8 Corn rent chancel repair liability differs from rentcharge liability in the facts that there has been no legal apportionment between co-lay rectors and that details about its extent and application, both generally and in particular cases, are much less clear. It exists as a separate category precisely because it was not affected by the Tithe Act 1936. This means that there is no Record of Ascertainments giving a formal, albeit sometimes defective, record of the liability.

⁶ While this is probably the case, it cannot be stated with absolute certainty.

6.9 We believe that this is a small category of chancel repair liability, although we have no direct evidence. It is certainly true that chancel repair liability does not attach to every corn rent which is still payable, because many represent vicarial rather than rectorial tithes.

6.10 Because there has been no apportionment of liability in parishes which have more than one lay rector, the effect of abolishing landowners' chancel repair liability would sometimes be to increase the liability of those with corn rent liability. In a parish in which, at present, one lay rector (*A*) has a landowners' liability⁷ and a second (*B*) has a corn rent liability, the PCC can recover the full cost of chancel repairs from *B* who can obtain a contribution from *A*. Were *A*'s liability to be abolished, but *B*'s left outstanding, *B* would be faced with bearing the full cost of any demand from the PCC. That would not be an acceptable consequence of abolishing landowners' chancel repair liability, and we therefore recommend that corn rent chancel repair liability be abolished at the same time. The draft bill in Appendix A provides for this.

Miscellaneous

6.11 Some miscellaneous points were raised with us in consultation. None of them seemed to us matters on which we were called upon to make any recommendation in the course of this study, but it is right that we should record them, and place on record that it is not our intention that there should be any change relating to them.

(a) *Lay rectors' other rights*

6.12 In some cases, the lay rector is entitled to the chief seat in the chancel for himself and his family during divine service.⁸ He may own the freehold of the churchyard, or even the church.⁹ No proposal that we make in relation to chancel repairs is intended to abolish the office of lay rector. There is no reason in connection with the implementation of our proposals why any other incidents of that office should be changed.

(b) *Commutation Funds*

6.13 A lay rector has been able to commute his liability for chancel repairs under the Ecclesiastical Dilapidations Measure 1923.¹⁰ Payments form a fund held by the relevant Diocesan Board of Finance, the income from which can be applied to the repair of any part of the church in question, not merely the chancel. Although some discontent was expressed to us about these funds,¹¹ the topic seems to be one exclusively for the Church and not a matter for us.

(c) *Other private obligations*

6.14 Other examples of private individuals with obligations to contribute

⁷ Not falling within the categories mentioned in footnote 10 to paragraph 3.6.

⁸ *Stileman-Gibbard v. Wilkinson* [1897] 1 Q.B. 749.

⁹ *Griffin v. Dighton* [1863] 33 L.J. Q.B. 29.

¹⁰ s.52(2)-(5).

¹¹ One complaint is that some funds are too small to be useful. In 1970, we were told of two such funds for parishes in the Diocese of Guildford which each had annual incomes of 3s. 7d. (18p).

towards the repair of parish churches were drawn to our attention.¹² These are rare, and do not seem to stem from any general principle. We are not clear that they are incidents of the ownership of land—except, anomalously, of private ownership of part of the parish church itself—which are our main concern. In any event, the cases which still exist are probably well known to those involved, so there can be no conveyancing trap. For these reasons, we make no recommendations relating to these cases.

¹² E.g. the private ownership of aisles and transepts, with associated repairing responsibilities.

PART VII

SUMMARY OF RECOMMENDATIONS

7.1 In summary, our recommendations are as follows.

- (a) Chancel repair liability arising from the ownership of land should be abolished after ten years (para. 4.18). The abolition should not prejudice any claim to recover the cost of repairs for which legal proceedings had been served before the abolition date. A lay rector should remain liable to contribute to a fellow lay rector's liability established before the abolition date provided proceedings to recover the contribution are served not later than two years after the abolition date (para. 4.22).
- (b) Chancel repair liability arising from the ownership of corn rents and from the rentcharges not redeemed by the Tithe Act 1936 should be abolished at the same time (para. 6.10).
- (c) The chancel repair liability of certain corporations which was preserved by the Tithe Act 1936 does not have to be abolished to prevent conveyancing difficulties or to avoid the several liability of lay rectors. If it is decided for other reasons to abolish it, this could be done at the same time as other chancel repair liabilities are abolished (para. 6.5).
- (d) No change should be made in any other rules relating to lay rectors, the ownership and repair of parts of churches, or the funds established on the commutation of chancel repair liabilities (paras. 6.11-6.14).

7.2 If chancel repair liability arising from the ownership of land is not abolished promptly, we recommend that:

- (a) Claims that owners of land are liable to pay should be registered in local land charges registers, and the consequence of non registration should be that a purchaser of that land would be exonerated (paras. 5.9-5.10);
- (b) The liabilities of individual lay rectors should be legally apportioned, and permanent machinery established further to apportion whenever land was subdivided. Liability should be apportioned in proportion to the areas of land in question, and disputes should be referred to the Lands Tribunal. PCCs (or the Representative Council of the Church in Wales) should have the right to be heard in any apportionment proceedings, and to be notified of the result of any apportionment (paras. 5.13-5.15).

(Signed) RALPH GIBSON
TREVOR GIBSON
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

J. G. H. Gasson, *Secretary*
30 September 1985

APPENDIX A

DRAFT

OF A

BILL

TO

Make provision for ending the liability of lay rectors for the repair of chancels.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Abolition of liability to repair chancels.

1.—(1) No person shall after the end of 1995 be liable as lay rector for the repair of the chancel of any church or chapel.

[(2) Subsection (1) above shall not apply to a liability which exists by virtue of the proviso to subsection (2) of section 31 of the Tithe Act 1936 (which relates to certain liabilities of ecclesiastical and educational bodies).]

EXPLANATORY NOTES

Clause 1

1. This clause abolishes the liability of lay rectors for chancel repairs.

Subsection (1)

2. After the end of 1995, no lay rector has any liability for the repair of the chancel of a church or chapel (see paragraph 4.18 and 4.19 of the Report). The abolition not only takes away the duty to repair, but also removes any liability to pay in whole or part for the cost of such repairs.

Subsection (2)

3. This subsection (which can be omitted: see paragraph 6.6 of the Report) preserves the 'rentcharge' chancel repair liability of certain bodies, as explained in paragraph 2.3 of the Report.

Transitional
provisions

2.—(1) Section 1 above shall not apply to a person's liability in respect of a claim made in proceedings—

- (a) brought against him before the end of 1995, or
- (b) brought against him before the end of 1997 by another person liable as lay rector, or
- (c) brought against him before the end of 1997 as a party to proceedings brought before the end of 1995 against another person liable as lay rector.

(2) For the purposes of subsection (1) above proceedings shall be treated as brought against a person on the day on which he is served with process making him a party to those proceedings.

(3) Subsection (1) above shall not be construed as enabling proceedings to be brought against a person by virtue of his becoming lay rector after the end of 1995.

EXPLANATORY NOTES

Clause 2

1. This clause makes limited exceptions to the abolition of liability effected by clause 1, in certain cases in which the need for repair arose before the end of 1995.

Subsection (1)

2. The lay rector's liability is preserved in three cases (see paragraph 4.21 of the Report):

- (a) Where proceedings were brought against a lay rector before the end of 1995;
- (b) Where, before the end of 1997, one lay rector brought proceedings against another to enforce the latter's liability to contribute towards the former's expenditure on or towards chancel repairs;
- (c) Where, before the end of 1997, a lay rector is made party to proceedings which had been brought against another lay rector before the end of 1995.

Subsection (2)

3. The time limits in subsection (1) apply to the date of the service of process on the lay rector concerned, whether that service is personal, by post or substituted service permitted by order of the court.

Subsection (3)

4. To ensure that the "conveyancing trap" disappears at the end of 1995, this subsection makes clear that no proceedings for contribution to expenditure by one lay rector can be brought against another person who only becomes a lay rector after the end of 1995.

Short title
and extent

3.—(1) This Act may be cited as the Chancel Repairs Act 1985.

(2) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 3

This clause provides for the short title and extent of the Act.

APPENDIX B

Extracts from Working Paper No. 86

PART II

HISTORY OF THE LIABILITY

Background

2.1 The chancel repair liability with which we are concerned has existed at common law from “the time whereof the memory of man runneth not to the contrary”, that is to say from before the accession of King Richard I in 1189. We have to start by putting the topic into its early context, which is that of parochial finance in mediaeval times.

2.2 At the time of which we speak, every parish had its parish priest, known in law as the “rector”. His income was derived from sources within the parish, principally (i) the profits of the glebe, which was land belonging to him in right of his office; and (ii) the tithes. The latter gave the rector one-tenth of the produce of or from the land in the parish and originally came to him in kind, be it in the form of crops, stock or dairy products. By the end of the mediaeval period however the tithes had been widely commuted by local custom into fixed money payments. The rector’s proprietary rights, taken together, constituted the “rectory”.¹

2.3 The glebe and tithes provided for the maintenance of the rector. In addition, provision had to be made for the maintenance of the parish church. The general rule in Western Europe, under Canon Law, was that the repair of the church was the personal responsibility of the parish priest; but by the custom of England the responsibility was, in general, divided between the rector and the parishioners.² The latter were liable to maintain the fabric of the western end of the church (where they sat) and the rector was left with the responsibility for the chancel at the east end of the church. In early times this part of the church was commonly separated from the rest by a rood-screen, a feature which generally disappeared at or after the Reformation. The entrance to the chancel is today likely to be marked by a step, and an arch. The parish priest, the rector, paid for repairs to the chancel out of the profits of his rectory.

2.4 Having indicated the starting point, we have to explain how the liability to repair the chancel devolved from the parish priest to the persons (and institutions) who now have the liability, and in particular how, in many cases, it falls on private landowners. But before turning to that directly, let us say something about the manner of making appointments to rectories.

¹ Today the word, in ordinary use, is restricted in its meaning to the parsonage house of an incumbent, if he is called “Rector”. In the present Paper we will however use the word in its older and wider sense.

² *Pense v. Prouse* (1695) 1 Ld. Raym. 59, Holt C.J. In some places, notably the City of London, the whole responsibility was by local custom assumed by the parishioners: *ibid.*; and see *Bishop of Ely v. Gibbons and Goody* (1833) 4 Hag. Ecc. 156 in which a similar custom was established by evidence for the parish of Clare in Suffolk.

Advowsons

2.5 The right of appointment to a rectory, known in law as an advowson, was generally in lay hands, being vested in the successor in title to the landowner who originally built and endowed the parish church. In many, perhaps most, cases the owner of the advowson (or, as he is more usually called, the patron of the living) was at first the lord of the manor, and the advowson formed one of the rights of the manor and passed with it. Whether that was so or not, the advowson was separately transferable by conveyance.³

Monastic rectories

2.6 During the 13th, 14th and 15th centuries many advowsons were acquired from lay patrons by religious houses.⁴ The reason for the monasteries' interest is easily discovered. Advowsons could, of course, be exercised in favour of ecclesiastical persons only; but monasteries qualified, notwithstanding their corporate nature. As soon as the relevant living fell vacant the monastery could exercise its rights by appropriating the rectory to itself, and it invariably did so in order to obtain the profits of the rectory (especially the tithes). The advowson thereafter went effectively into abeyance, because the rector would not obtain preferment, resign or die.

2.7 Having thus made itself the rector, the monastery became responsible for the cure of souls in the parish. It fulfilled that obligation by deputy—hence the emergence of 'vicars' on the parochial scene. The monastery provided for the vicar by allotting to him a portion of the glebe and tithes. The tithes had traditionally been classified as "greater" (hay, corn and wood) and "lesser" (the remainder); and by and large the monastic rector retained the greater tithes which could be conveniently stored in barns to await collection, and assigned the lesser (and more perishable) tithes to the vicar. A further consequence for the monastery in making itself the rector was that it became, as rector, liable for chancel repairs. The principal mark of that liability was receipt of the rectorial tithes.

Laicization of monastic rectories

2.8 The general dissolution of the religious houses during the reign of King Henry VIII marks the next stage in the history of the topic. In some cases the former abbeys became the cathedral churches of new dioceses, effectively retaining their former property by way of endowment. To the extent that that property included rectories it included also chancel repair liabilities. In some further cases monastic property was transferred to existing cathedrals by way of additional endowment: a particular transfer of this sort from Westminster Abbey⁵ to St. Paul's, in London, is believed to be the origin of the expression "robbing Peter to pay Paul". Again, if the property included a rectory, the

³ An advowson formerly had a value in direct proportion to the value of the related rectory, and transfers by way of sale were not uncommon. Very few (if any) advowsons may now lawfully be disposed of by way of sale in the light (in particular) of the Benefices Act 1898 (Amendment) Measure 1923, s.6.

⁴ Usually in consideration of an undertaking to say Masses in perpetuity for the souls of members of the transferor's family.

⁵ The Abbey Church of St. Peter.

transfer of the benefits carried with it the repair burden. But in the majority of cases the property of the religious houses—including their advowsons and the rectories which they had appropriated thereby—were disposed of by the Crown in favour of lay institutions (notably Oxford and Cambridge Colleges) and individuals.⁶ It was as a result of those impropriations that entitlement to rectorial tithes and glebe fell into collegiate and private hands. The new lay rectors, as rectors, inherited the chancel repair liabilities.⁷

2.9 We pause there in our outline of the history in order to emphasise the words “as rectors” in the previous sentence. On the disposal of monastic property the destination of an advowson and of its connected rectory were generally the same, so that the new patron and the new (lay) rector were one and the same person.⁸ (The advowson, which had lain dormant while in monastic hands, revived: not for the original purpose of making presentations to the rectory, but for the purpose of appointing the vicar of the parish, who now held the cure of souls in his own right and not merely as a deputy.) Now the common identity of the patron and the lay rector has given rise to a misunderstanding. It is widely believed that the *patron* is liable to repair the chancel. That belief has perhaps been encouraged by the fact that tithes have disappeared while rights of patronage and chancel repair liabilities have not. It will however be clear from what we have already said that the chancel repair liability was always attached to the ownership of the rectory, and not to the right to appoint to the rectory, (or, in more recent times, vicarage). The chancel repair liability follows the history of the rectorial property, because the owner of what is at any point of time rectorial property is the rector (or at least *a* rector). Rectorial property includes rectorial glebe, but for present purposes it is the rectorial tithes which really matter. The patron (as such) is not concerned in that history.

Tithes

2.10 We have now to turn our attention to tithes, with particular reference to those payable to the rector. Although these remained valuable assets they were to a large extent not receivable by the Church at all, let alone by the parochial clergy for whose benefit the right was originally established. Furthermore, the value of those tithes which had been commuted by custom into fixed money liabilities suffered from the marked fall in the value of money during the 16th century.⁹ Increasingly, tithes were regarded as a nuisance; and from the later years of the 17th century steps were taken, at intervals, to eliminate them. The process has only recently been completed.

2.11 The first available opportunity to eliminate the tithes in a parish

⁶ The Suppression of Religious Houses Act 1539 (31 Hen 8. c.13) confirmed the King's grants thus authorising rectories to be held as lay fees.

⁷ *Serjeant Davies' Case* (1621) 2 Rolle 211.

⁸ Sometimes the rectorial property was divided between two or more grantees, so the parish acquired two or more rectors. But even in such a case the advowson would normally have gone to one of the new rectors.

⁹ The importation into Europe of quantities of gold and silver from newly-discovered America made possible (and in fact resulted in) a considerable increase in the money supply: with inflationary consequences.

usually arose in connection with the enclosure of the parochial common lands. At one time, every village had an area of land enjoyed by the villagers in common for pasturing, wood-gathering and so forth. From the end of the 17th century onwards, there was an increasing tendency for these lands to be "enclosed", that is to say to be appropriated to particular owners and fenced off. The process was for the most part carried out under the authority of Acts of Parliament,¹⁰ supplemented by local Enclosure Awards. In making an award, it was possible to appropriate part of the common land to the rector as such,¹¹ to the intent that the land so appropriated should stand in place of the rectorial tithes. The villagers' shares in the former common lands were diminished by that appropriation, but their lands were thenceforth freed from those tithes.¹² The rector's new land became rectorial property instead of his tithes, and chancel repair liability accordingly became attached to the ownership of that land.

2.12 The effect of an enclosure award made in the circumstances just described is clearly demonstrated by one of the very few relatively recent cases about chancel repair liability: *Chivers & Sons Ltd. v. Air Ministry*.¹³ In that case it was shown that Queens' College, Cambridge had, in 1834, been allotted certain lands as lay rector of the parish of Oakington in Cambridgeshire, in lieu of rectorial property including tithes. Part of those lands was sold to Chivers Ltd. in 1924 and another part was sold to the Air Ministry in 1940. In 1950 the chancel of Oakington parish church required repair; and the upshot of the case was that the company and the Ministry had, by acquiring relevant rectorial property, made themselves lay rectors and were accordingly both liable to defray the cost.¹⁴

2.13 An important step was taken in relation to tithes in 1836 when the Tithe Act of that year introduced procedures for converting existing tithes into money liabilities ("tithe rentcharges") charged on the lands in respect of which tithes had been payable.¹⁵ With a few insignificant exceptions which we can disregard for present purposes, tithes were within a few years so converted, either by agreements reached in parochial meetings or by awards made by the Commissioners appointed to execute the Act. This Act contained two provisions of particular relevance to the history of the chancel repair liability. First, where the rectory was still in the hands of an ecclesiastical owner, land could be given to the rector instead of tithe rentcharges.¹⁶ Where that option was taken up, the effect was the same as that of an award to the rector under an enclosure scheme: the land became rectorial property and chancel repair liability thenceforth attached to its ownership. Secondly, provision was made

¹⁰ Usually Local Acts, of which there are believed to have been some 2230 (see *Millard's Tithes*, p. 12).

¹¹ In addition, of course, to land to which he might be entitled as an ordinary landowner, or lord of the manor.

¹² The vicarial tithes would, by the same process, have been eliminated, so that the tithes disappeared altogether.

¹³ [1955] Ch. 585.

¹⁴ As the name of the case indicates, the proceedings were, in form, an application by Chivers & Sons Ltd. for a contribution from the Ministry.

¹⁵ The liabilities were variable by reference to the price of corn. Certain other rents quantified on the same basis and known as "corn rents" were rents similar to tithe rentcharges which arose under pre-1836 commutations. Tithe rentcharges were stabilised by the Tithe Act 1925, s.1.

¹⁶ Tithe Act 1836, ss. 29 and 62; extended by Tithe Act 1839, s.19.

for the extinction of the right to tithes by merger in the land out of which the rentcharge issued.¹⁷ There was not to be merger by operation of law, but the tithe rentcharge owner could effect a merger specifically by deed.¹⁸ On such a merger obligations previously attached to the tithes or tithe rentcharge (including, it is generally thought, the chancel repair liability), were transferred to the freehold interest in the land in which the rentcharge had merged.¹⁹

2.14 A number of Acts relating to tithes and tithe rentcharges were passed during the succeeding hundred years until, by the Tithe Act 1936, tithe rentcharges were abolished and were replaced (from the payers' standpoint) by "tithe redemption annuities". These were terminable charges due to expire in 1996. In fact they were terminated prematurely in 1977.²⁰

2.15 The tithe redemption annuities were payable to the Government²¹ and Government stock was issued to most of the owners in actual receipt of rentcharges, by way of compensation for the extinction of their rights. By contrast with earlier legislation in this field, the 1936 Act dealt specifically, in its Seventh Schedule, with the question of chancel repairs. It has however to be emphasised that the Act was concerned only with tithe rentcharges and accordingly with the chancel repair liabilities connected with them alone.

2.16 The effect of the 1936 Act, with particular reference to the repair liabilities, may be summarised as follows. Tithe rentcharges were divided into four classes:²²

Class (a): Rentcharges receivable by persons other than those within Class (b). These rentcharges were extinguished and compensation stock was issued. Part of the stock was issued to the rentcharge owners and part was issued to the appropriate Diocesan authority on behalf of the parochial church council to which the chancel repair liability was transferred.

Class (b): Rentcharges receivable by spiritual rectors²³ and certain ecclesiastical²⁴ and educational²⁵ foundations. These rentcharges were extinguished and compensation stock was issued in full in respect of them. The chancel repair liability remained where it was. (Where the tithe rentcharge had

¹⁷ Tithe Act 1836, s.71; and see also Tithe Act 1839. Unity of possession did not produce merger at common law: *Chapman v. Gatcombe* (1836) 2 Bing. N.C. 516. Even if the tithes and the land in respect of which they were payable were owned by the same person they were owned in different capacities. In such a case payment of the tithes was simply in abeyance, pending severance of the titles.

¹⁸ The declaration would usually be in favour of the rentcharge owner's own land; but he could dispose of the rentcharge to the owner of the burdened land to the intent that it should merge.

¹⁹ Tithe Act 1839, s.1.

²⁰ Finance Act 1977, s.56.

²¹ Originally collected by the Tithe Redemption Office, but latterly by the Board of Inland Revenue.

²² Tithe Act 1936, Sch. 7., para. 2.

²³ I.e. rectors in the original sense, the parsons of parishes whose rectories had never become subject to lay impropriation.

²⁴ The Church Commissioners (as successors to Queen Anne's Bounty and the Ecclesiastical Commissioners) and ecclesiastical corporations such as Deans and Chapters.

²⁵ Oxford, Cambridge and Durham Universities; their constituent Colleges; Winchester and Eton.

been paid to a spiritual rector in right of his benefice the stock was issued to Queen Anne's Bounty and the benefice was augmented appropriately. The rector's chancel repair liability had, in most cases, already passed to the parochial church council²⁶).

Class (c): Rentcharges which were not currently payable because they and the lands out of which they were payable were owned by the same persons. The 1936 Act (unlike the 1836 Act) merged the rentcharge in the land in such a case and the rentcharge was thus extinguished. No stock was issued, the land formerly charged being discharged by the merger. But (as under the express mergers effected under the earlier legislation²⁷) the exonerated land became land to which chancel repair liability attached.

Class (d): Rentcharges which had already merged under the 1836 and subsequent Acts. These, of course, did not require extinction in 1936, and no compensation was called for. They were introduced into the 1936 Act in order to add them back to the sum of the original tithe rentcharges, so that the lands in which they had merged should bear their proper part in the apportionment of the chancel repair liability flowing from the tithe rentcharge source.

2.17 The Commission appointed to put the 1936 Act into effect was required to compile, in relation to every chancel repairable by tithe rentcharge owners, a document which has come to be known as the Record of Ascertainments. The information recorded, and the way in which the chancel repair liability was apportioned may be illustrated from the actual Record relating to a particular parish.

Parish X
Total tithe rentcharges in 1844:

Vicar	£190.10.0
All Souls College, Oxford	21. 0.0
Lay Impropiator A	5. 0.0
Lay Impropiator B	22. 0.0
Lay Impropiator C	15. 0.0
Lay Impropiator D	7.10.0
Lay Impropiator E	24. 0.0
	<hr/>
	£285. 0.0
	<hr/> <hr/>

Apportionable amount: £76.5.0. (The Vicar's rentcharges derived from vicarial tithe and did not carry chancel repair liability. It seems that £18.5.0 of the College's rentcharges were either derived from a non-rectorial source or, more likely, had been redeemed).

²⁶ Ecclesiastical Dilapidations Measure 1923, s.52(1).

²⁷ Para. 2.13 above.

Class (a)	rentcharges	£5. 0.0	(evidently representing that of Lay Impropiator A)
Class (b)		2.15.0	(College's balance)
Class (c)		22.00.0	(evidently representing that of Lay Impropiator B)
Class (d)		46.10.0	(evidently representing those of Lay Impropiators C, D and E)
		<hr/>	
		£76. 5.0	
		<hr/> <hr/>	

In the result, in that parish the Diocesan authority would have become responsible for 1200/18300ths of the chancel repair liability, in the place of the owners of the Class (a) rentcharges; All Souls College (a Class (b) rentcharge owner) became liable for 660/18300ths; and the various owners of the lands in which rentcharges had merged (the Class (c) and Class (d) rentowners) became liable for 16440/18300ths between them. The lands in which rentcharges had merged were identified in Schedules to the Record, by reference to a plan.

Glebe

2.18 Rectorial tithes form much the more important source of chancel repair liability and we can provide a much shorter outline of the relevant history of glebe, the other form of rectorial property from which the liability may flow.

2.19 Glebe is defined as land forming part of the endowment of a benefice (that is, a rectory, or vicarage with cure of souls), other than the parsonage house and its grounds. For present purposes it is necessary to distinguish between:—

- (a) Mediaeval glebe which fell into monastic hands with the rectory, and subsequently passed to a lay impropiator;
- (b) Mediaeval glebe which fell into monastic hands with the rectory and was then allotted to the vicar;
- (c) Glebe forming (until very recently) part of a rectory which was never appropriated by a religious house, and so has always been a spiritual rectory; and
- (d) Land which was glebe within (c), but which has been disposed of.

2.20 The first (which we may call "impropriated glebe") ceased on impropriation to be glebe as defined. There is no doubt that its ownership carries chancel repair liability with it. We may add that the chances of a piece of land being identifiable today as impropriated glebe are fairly remote, unless it is still in the hands of the original lay impropiator (such as an Oxford College), and the details of its acquisition are known. We are not aware of any litigated case in which liability to chancel repairs has been based directly on the ownership of impropriated glebe,²⁸ but there may well be instances of acceptance of liability wholly or partly on that basis.

²⁸ But it appears from the statement of facts in *Chivers & Sons Ltd. v. Air Ministry* [1955] Ch. 585 that the original rectorial property replaced by the lands in question in the case had included former glebe.

2.21 The second, vicarial glebe, does not concern us because, like vicarial tithe, it is not rectorial property and therefore does not carry chancel repair liability.

2.22 The position in relation to the third, true rectorial glebe,²⁹ seems to be equally clear. Up to 1923 the spiritual rector was liable to repair the chancel,³⁰ but that liability was then in almost every case transferred to the parochial church council by the Ecclesiastical Dilapidations Measure 1923.³¹ There has in fact been no true rectorial glebe since 1 April 1979 because there came into force on that day certain provisions³² of the Endowments and Glebe Measure 1976 (a measure designed to eliminate the gross inequalities between parochial endowments) whereby all glebe belonging to individual benefices vested in the appropriate Diocesan Board of Finance for the general benefit of the Diocesan stipends fund.

2.23 The position of the fourth, former glebe land acquired from a spiritual rector, is perhaps not so clear, but the better view in principle is, we think, that such an acquisition does not carry with it any chancel repair liability. The question at the root of the matter is, does a disposition of rectorial property constitute also a disposition (in whole or in part) of the rectory itself, or is it an alienation of the property from the rectory? Not surprisingly, purchasers of land from lay impropriators have contended for the second alternative—in the *Chivers* case, the Air Ministry argued that Queen's College alone was still the rector, and as such solely responsible for the chancel repairs—but the contention has not found favour in the courts.³³ Lay impropriators have always been free to dispose of their rectorial property and are under no obligation to preserve the proceeds of sale (if any) by way of security for the continued performance of rectorial obligations; and the courts have taken the view that in those circumstances the rectory (or an appropriate share of it), together with its obligations, should pass with the property. But the same considerations do not apply to dispositions by spiritual rectors. Freehold dispositions of rectorial property by such rectors were prohibited by the Ecclesiastical Leases Act 1571, and even leasing was severely restricted. It was not until a much later date that glebe could be sold or exchanged at all,³⁴ and a general power (hedged around nevertheless with requirements of non-objection and approval) seems not to have existed before the Ecclesiastical Leasing Act 1858. But the proceeds of sale had always to be added to the endowments of the benefice. In those

²⁹ This was often more extensive than the mediaeval glebe, having been added to by e.g. allotments in lieu of tithe or tithe rentcharges (see paras. 2.11 and 2.13 above) and purchases. Statutory authority was often necessary for the latter because of *incumbentia* (see e.g. Gifts for Churches Acts 1803 and 1811).

³⁰ The Pluralities Act 1838 s. 92 showed that this was so even if a stipend equal to the whole of the endowment income of a rectory was allotted to a curate.

³¹ Sect. 52(1). By s.39 of the Endowments and Glebe Measure 1976, chancel repair liabilities of the Church Commissioners arising out of glebe or tithe rentcharges held or formerly held by the Commissioners on trusts for particular benefices were similarly transferred to the relevant parochial church councils.

³² Particularly s.15.

³³ *Chivers & Sons Ltd. v. Air Ministry* [1955] Ch. 585; *Hauxton P.C.C. v. Stevens* [1929] P. 240; and see *In re The Alms Corn Charity* [1901] 2 Ch. 750.

³⁴ The Clergy Residences Repair Act 1776, s.11 is the earliest instance to have come to our notice.

circumstances there is no special reason for construing a conveyance of glebe land under the statutory powers as including a part-disposal of the rectory itself. Indeed, the proposition that by selling part of the glebe the spiritual rector makes a layman³⁵ co-rector with himself is, in our view, an unpromising one. That is why we think that dispositions by spiritual (as contrasted with lay) rectors sever the property disposed of from the rectory and from its attendant obligations. That is the explanation, we believe, for the undoubted fact that rectorial property allotted by monastic spiritual rectors to their vicars never attracted chancel repair liability. We would only add, by way of parenthesis, that on any view the liability can hardly attach to glebe land disposed of since 1923 if at the time of the disposal the repair of the chancel had already ceased to be a responsibility of the rectory.

Corn rents, etc.

2.24 We now enter shortly upon a subject of some obscurity. We have already³⁶ explained how, under Inclosure Acts, land sometimes took the place of rights to tithes. That was, however, not the only thing that could happen to tithes under the Acts. It is thought that in perhaps a quarter of the many Inclosure Acts some or all of the tithe liabilities in the parish were converted into rentcharges variable with the price of corn from time to time, which were accordingly known as "corn rents". These provisions anticipated the general conversion of tithes into tithe rentcharges by the Tithe Act 1836. It is known, moreover, that similar rentcharges were created in lieu of tithe liabilities under other local Acts, and not in connexion with an enclosure scheme.

2.25 The Tithe Act 1936 was primarily concerned only with 1836 Act tithe rentcharges and it did not extinguish the earlier tithe corn rents or rentcharges. Nor did it have anything to say about the chancel repair liability connected with such payments. There can be no doubt that such liability does run with such of those payments as represent rectorial tithe: their position is indistinguishable in principle from land representing rectorial tithes. The extent of chancel repair liability under this head is not known; but the overwhelming majority of the corn rents etc. collected by the Church Commissioners appear to represent vicarial rather than rectorial tithes, and it may be fair to infer that commutations of tithes belonging to lay rectors usually took a landed rather than a money form.

Redeemed tithe rentcharges, corn rents, etc: and the Limitation Act

2.26 Several of the Tithe Acts³⁷ contained provisions for the redemption of tithe rentcharges, and these were in 1885 extended to corn rents etc.³⁸ So far as the latter were concerned, the provisions were essentially preserved by the

³⁵ Or perhaps a limited company!

³⁶ Para. 2.11 above.

³⁷ E.g. Tithe Acts 1846, 1860 and 1878.

³⁸ Tithe Rentcharge Redemption Act 1885. The corn rent could be redeemed outright or by way of an enlarged, terminable, rentcharge known as a "corn rent annuity".

Tithe Act 1936.³⁹ If and when the Commissioners of Inland Revenue make a scheme for the purpose, the provisions will be replaced by such scheme.⁴⁰

2.27 We are not concerned in this Paper with the question whether these rents are now payable or not, but we are required at least to ask the question, what happened to the attendant chancel repair liability when the relevant rectorial property ceased on redemption to exist? The statutes appear to be silent on this question.⁴¹ There appear to be three possible answers:

- (i) Quoad the redeemed rentcharge, the chancel repair liability disappeared. This is not perhaps an unreasonable answer if the redemption affects an insignificant proportion of the whole of the liability-bearing rentcharges; but there are obvious difficulties about it if that is not so. It is known that in some parishes the entirety of the tithes were redeemed in the 19th century,⁴² and that answer might therefore mean that the repair of the chancel became wholly unprovided for. It will be recalled that the parishioners' customary liability is a limited one: it is not as though the parishioners are responsible for the fabric of the whole of the church except so far as the rector is, by custom, liable.
- (ii) The liability was transferred to the land out of which the rentcharge (or corn rent) had been payable: on the footing that the redemption should be treated as a purchase of the rentcharge (or corn rent) by the landowner which brought about a merger.
- (iii) The liability remained with the former rent owner, treating the redemption moneys as the substituted rectorial property.

We do not think that the first answer can, in principle be right,⁴³ but the choice between the second and third is not an easy one. Bearing in mind the evident reluctance of the Courts to hold that lay impropiators who have disposed of the relevant rectorial property (and do not have to preserve the proceeds) remain rectors, the second answer would appear appropriate. On the other hand a Committee on Chancel Repairs⁴⁴ adopted the third answer in 1930; and the general scheme of the Tithe Act 1936 (which can be regarded as a wholesale redemption) appears to be consistent with that view. That Act is, however, a somewhat uncertain guide in the present context. It was clearly seen that if compensation stock were issued to lay impropiators (other than the excepted

³⁹ Sect. 30(1).

⁴⁰ Corn Rents Act 1963.

⁴¹ It is not thought that chancel repair liability is an "incumbrance" within Tithe Act 1860, s.36.

⁴² This appears from County lists published in *Grove's Alienated Tithes* (1876).

⁴³ Notwithstanding the suggestion to the contrary in the Board of Inland Revenue's Explanatory Notes on Liability for Chancel Repairs (1971). It is perfectly true that the apportionment scheme set out in Part I of the 7th Sch. to the Tithe Act 1936 does not add back redeemed tithe rentcharges in the same way as it adds back merged rentcharges, with the result that redeemed rentcharges do not figure in the Record of Ascertainments; but we believe this was not because the repair liability had ceased but because the third answer to the question posed in the text above was regarded as correct and the apportionment scheme did not fit liabilities not attached to land.

⁴⁴ Report of the Chancel Repairs Committee (1930, Cmnd. 3571). "Other tithe rentcharges have been extinguished by redemption, in which case the burdens on the tithe rentcharges have not become burdens on the lands out of which the tithe rentcharges formerly issued, but are burdens on the capital sum or annuity representing the consideration for the redemption of the tithe rentcharges".

ecclesiastical and educational corporations) it would become impossible to trace the responsible lay rectors thereafter: hence the provision for (in effect) compulsory commutation of the chancel repair liability.⁴⁵ Precisely the same considerations apply to redeemed rents, but no similar provision was attached to them. Perhaps it was thought to be too late to do anything about redeemed rents, and that if persons liable for chancel repairs had become untraceable that was a misfortune past praying for. All that can be said for certain about chancel repair liability in connection with redeemed rents is that the position is uncertain.

2.28 Tithe rentcharges, corn rents etc. are all rights to which the provisions of the Limitation Act 1980 relating to land apply. Having regard to the fact that the amounts charged were often small we think it likely that non-payment has in numerous cases led to the extinction of the rights themselves, under the statute. All the doubts which we have expressed in the preceding paragraphs as to the effect on attendant chancel repair liability of extinction of the rights by redemption are, it seems to us, equally expressible in relation to cases where the rights are extinguished by the operation of the Limitation Act.

⁴⁵ See para. 2.16 above—the provision applicable to Class (a) rentcharges whereby part of the stock was issued not to the tithe rentcharge owner but to the diocesan authority. That the reason for this provision was as stated in the text is shown by the reasons for an amendment made in Committee in the House of Lords to ensure that tithe rentcharges belonging to the very few sinecure spiritual rectors would be Class (a) rather than Class (b): *Hansard* (H.L.) (1935–36) Vol. 101, Cols. 950, 951.

PART IV

WALES

4.1 The Welsh Church Act 1914 disestablished, as from 31 March 1920,¹ "the Church of England, so far as it extends to and exists in Wales and Monmouthshire". Before that date the law relating to the repair of Welsh chancels was precisely the same as that applying to chancels in England; and, in principle, it remains so. We should however note a number of provisions in the 1914 Act because they have a bearing on our subject and introduced Welsh variants.

4.2 Broadly speaking, all Welsh ecclesiastical property became vested in a temporary body known as the Commissioners of Church Temporalities in Wales ("the Welsh Commissioners").² This property included many tithe rentcharges³ held by the Ecclesiastical Commissioners and Queen Anne's Bounty (the Church Commissioners' predecessors). The disestablishment scheme involved a partial disendowment of the Church in Wales and the function of the Welsh Commissioners was to effect a 3-way distribution of the ecclesiastical property vested in them.⁴ One part (primary all buildings, funds held for the repair or improvement of buildings, and private benefactions) went to a new body known as the Representative Body of the Church in Wales; another part, consisting of other property (including tithe rentcharges) appropriated to the use of parochial benefices, went to the County Council appropriate to the parish concerned;⁵ and the last part, the balance of the property (including tithe rentcharges not so appropriated) went to the University of Wales.⁶

4.3 The first Welsh variant arose out of the transfer of church buildings to the Representative Body. When tithe rentcharges were abolished in 1936 the share of the compensation stock issuable in respect of Class (a) rentcharges to Diocesan authorities went, in Wales, not to the dioceses but to the Representative Body.⁷ Furthermore, since the University of Wales is not one of those whose tithe rentcharges fell into Class (b), the rentcharges which fell to that University's lot under the 1914 Act were treated as Class (a) rentcharges and the Representative Body received a share of the stock issued in respect of them. The Representative Body has accordingly succeeded to the chancel repair liabilities formerly associated with the ownership of those rentcharges.

4.4 A second variant was created by the exemption of the County Councils from chancel repair liabilities arising from their receipt of tithe rentcharge

¹ Welsh Church (Temporalities) Act 1919, s.2.

² 1914 Act, s.4.

³ In this Act, the expression is not limited to 1836 Act rentcharges but includes all payments in lieu of or in the nature of tithes or tithe rentcharge: s.38(1).

⁴ 1914 Act, s.8.

⁵ *Ibid.*, s.8(1)(c) and (d). The County Council holds the property on charitable or eleemosynary trusts: s.19(1)(a).

⁶ On trusts for itself, its constituent Colleges, and the National Library of Wales: s.19(1)(b).

⁷ Tithe Act 1936, Sch. 7 Part III para. 1.

under the 1914 Act.⁸ Those rentcharges were accordingly excluded from the apportionments of liability recorded in the Records of Ascertainments under the Tithe Act 1936, and the burden of the liability referable to those rentcharges has in effect passed to the other former rentcharge owners and the Representative Body. We should perhaps add that that result did not occur at once. In order that the existing holders of benefices should not be prejudiced by the transfer of their benefices' rentcharges from the Ecclesiastical Commissioners to the County Councils,⁹ the County Councils were required to pay sums annually to the Representative Body, to be paid over to the holder of the benefice.¹⁰ While those payments were being made the benefice holder, if previously liable for chancel repairs, remained so.¹¹ We are not clear as to his position in relation to apportionment under the 1936 Act. But this was a transitional problem and the provision is (we suppose) not now of any application.

4.5 Finally, the 1914 Act abolished the jurisdiction of the ecclesiastical courts in Wales, and the ecclesiastical law of the Church in Wales ceased to exist as law.¹² That necessitated the creation of a new procedure for enforcement of chancel repair liability; and section 28(2) provides for enforcement by the Representative Body in the temporal courts "in like manner as if such liability arose under a covenant made with the Representative Body and running with the tithe rentcharge". This provision anticipated by a number of years the transfer of jurisdiction to the ordinary courts in England by the Chancel Repairs Act 1932: and that Act accordingly does not apply in Wales. At the same time we wonder whether the Welsh provision is not somewhat defective, in that chancel repair liability attached to the ownership of land acquired under an inclosure award (for example) seems not to be catered for.

⁸ 1914 Act, s.28(1).

⁹ Via the Welsh Commissioners, as explained in para. 4.2 above.

¹⁰ 1914 Act, s.15(1)-(2).

¹¹ *Ibid.*, s.15(4).

¹² *Ibid.*, s.3(1).

APPENDIX C

List of those who commented on Working Paper No. 86, or on the press notice which summarised its conclusions

Cathedrals Finance Conference
Church Commissioners for England
Diocese of Portsmouth, Bishop's Council
Diocese of St Edmundsbury and Ipswich, Bishop's Council
Ecclesiastical Judges Association
General Synod of the Church of England

Parochial Church Councils of the following parishes:

Ashford Carbonel
Barney
Godmanchester
Gorleston
Gressenhall
Much Marcle
Sigleton
Sohan
Wittlesford

Mr. H. G. M. Bass, Lay Secretary, Sparham Deanery
Mr. E. F. Bates, J.P., Chapter Clerk and Cathedral Administrator, Rochester Cathedral
Rt. Revd. Bishop of Hereford
Ven. J. E. Burgess, Archdeacon of Bath
Revd. Canon D. Caiger, Team Rector, Shaston Team Ministry
Revd. J. E. Davies, Vicar of Leeming
Mr. B. S. Exham, Registrar and Legal Secretary to the Bishop of Lichfield
Revd. J. H. Green, B.D., A.K.C., Rector of Petworth
Revd. Canon R. B. Griffin, Rural Dean, Vicar of Dartford
Lt. Col. J. R. Haddock, M.C., Secretary, Diocese of Norwich Board of Finance and Pastoral Committee
Revd. J. I. C. Hayward, Vicar of Springfield
Ven. F. J. Hoyle, Archdeacon of Bolton
Revd. H. F. Jackson, B.D., A.K.C., Rector of Ash
Revd. G. P. Jenkins, Vicar of Churcham
Mr. G. H. Newson, Q.C., Chancellor of the Dioceses of London, St. Albans and Bath and Wells
Revd. G. H. Paton, Vicar of Kingston-near-Lewes
Architectural and Archaeological Society of Durham and Northumberland
Atlantic Title & Trust Ltd
Country Landowners Association
Ecclesiastical Law Association
Lancaster, Morecambe & District Law Society
The Law Society
National Farmers' Union
Norfolk Churches Trust Ltd
Senate of the Inns of Court and the Bar (paper by Mr. S. G. Maurice)

Warden and Fellows of Winchester College
Dr. J. H. Baker
Mr. D. N. Cheetham, Solicitor
Mr. H. S. Cranfield
Mr. B. K. Edgley
Mr. A. H. Frost, Solicitor
Professor D. McClean
Mr. D. E. Meehan