Law Commission
Reforming the law

Chancel repair liability and registration

Consultation Paper

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15 July 2025

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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Fraser, Chair, Professor Penney Lewis, and Professor Alison Young. The Chief Executives are Joanna Otterburn and Roshnee Patel.

The terms of this report were agreed on 15 May 2025, while Professor Nicholas Hopkins was the Law Commissioner for Property, Family and Trust Law.

Topic of this consultation: We are consulting on reforms to the law governing chancel repair liability and land registration.

Geographical scope: This consultation concerns the law of England and Wales.

Duration of the consultation: We invite responses from 15 July 2025 to 15 November 2025.

Responses to the consultation may be submitting using an online form accessible at: https://lawcom.gov.uk/project/chancel-repair-liability-and-registration/. Where possible, it would be helpful if this form is used.

Alternatively, comments may be sent:

By email to: chancelrepair@lawcommission.gov.uk.

By post to: Chancel Repair Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

Availability of materials: The consultation paper is available on our website at https://lawcom.gov.uk/project/chancel-repair-liability-and-registration/.

We are committed to providing accessible publications. If you require this consultation paper to be made available in a different format please email chancelrepair@lawcommission.gov.uk or call 020 3334 0200.

After the consultation: We will analyse the responses to the consultation, which will inform our final recommendations for reform to Government, which we will publish in a report.

Consultation principles: The Law Commission follows the consultation principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The principles are available on the Cabinet Office website at: https://www.gov.uk/government/publications/consultation-principles-guidance.

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We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous we will not include your name in the list unless you have given us permission to do so.

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Chapter 1: Introduction

CHANCEL REPAIR LIABILITY

1.1 Chancel repair liability is an obligation to keep the chancel of a parish church in good repair. The "chancel" is the eastern end of the church, containing the altar. In many churches, the chancel is divided from the main body of the church by a step. The main body of the church is known as the "nave", where the parishioners sit. Historically, in England and Wales the parish priest was responsible for repairing the chancel, while the parishioners were responsible for repairing the nave.[1] These repairing obligations now rest with parochial church councils in both England and Wales.[2] Throughout this consultation paper, we will use the acronym "CRL" to refer to chancel repair liability.

1.2 Due to a remnant of 16th century law, some private landowners also have an obligation to repair the chancel of their local church. They are still bound by the repairing obligation that used to apply to parish priests. The story of how some landowners inherited obligations from the church is complex and full of uncertainties. We examine it in detail in Chapters 2 to 4, but give a brief overview here.

1.3 Before the Reformation – the split between the Anglican Church from the Roman Catholic Church in 1530s, when Henry VIII became the head of the Church of England in place of the Pope – some parish priests had obligations to keep the chancels of their churches in good repair. This obligation applied specifically to the "rector" of the parish (also known as the "parson"). The rector was given land in the parish (glebe land) and the right to collect tithes (a kind of ecclesiastical tax which entitled him to a tenth of the produce of the parish) from which to fund the repairs, his other religious duties, and his living expenses.

1.4 Prior to the Reformation many rectories were acquired by monasteries. The monasteries acquired the religious office of rector and its associated property and rights. They also thereby took on the obligation to repair the chancel of the church. Following the Reformation, the majority of the monasteries in England and Wales were dissolved by Acts of Parliament under Henry VIII and Edward VI. The rectories that had belonged to the monasteries passed to the Crown. The Crown transferred many of them to lay persons (persons who were not members of the clergy), who then owned them as private property. However, lay persons who acquired rectories were still treated by the courts as rectors (and are described as lay rectors). They stepped

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1 This division of responsibility for repairs between the priest and the parishioners appears to have become well established by the end of the 13th century. We discuss this division of responsibility in more detail at para 2.40 below.

2 For the Church of England, see the Parochial Church Councils (Powers) Measure 1956, s 4. The Church in Wales is disestablished, but its rules and regulations also place the burden of repairing non-cathedral churches on parochial church councils: see para 1 of the Church Fabric Regulations (The Constitution of the Church in Wales, vol 2, s 2, para 8.1), available here: https://www.churchinwales.org.uk/en/clergy-and-members/constitution/volume-ii-section-2-rules-and-regulations/ (last visited 15 July 2025).

into the shoes of the monasteries, which had been dissolved. Consequently, lay rectors were subject to CRL.

1.5 The land and property rights that belonged to lay rectories were heavily affected by the enclosure of common land that occurred during the 17th to 19th centuries. (Under a series of Local Acts of Parliament, common land in parishes was divided into parcels and given to those people in the parish who had formerly enjoyed rights over the common land. Many lay rectors who had received tithes paid from common land were given allotments of land in place of their tithes. The statutes of enclosure use the old-fashioned spelling – "inclosure" – and they are commonly referred to as the "Inclosure Acts".) Tithes were then abolished by a series of Acts in the 19th and early 20th centuries. As a result, by the early 20th century, the property belonging to lay rectories consisted primarily of land.

1.6 There are some uncertainties about how lay rectories were passed from owner to owner. We explore these uncertainties in detail in Chapters 3 and 4. The leading case on the issue is a decision of the High Court from 1955: *Chivers & Sons Ltd v Air Ministry*.[3] According to *Chivers*, a person becomes a lay rector (and therefore subject to CRL) simply by acquiring a parcel of land that belonged to a lay rectory. We discuss in Chapter 4 whether *Chivers* may have been wrongly decided,[4] but the common understanding of the current law is that CRL transfers automatically with the ownership of particular areas of land.

1.7 Although parish priests in England are no longer subject to CRL,[5] and responsibility for repair of churches has passed to parochial church councils, these changes in the law did not affect the liability of lay rectors. Furthermore, while the Church in Wales was disestablished under the Welsh Church Act 1914, which means that most obligations under ecclesiastical law ceased to apply in Wales, disestablishment did not affect the CRL of many lay rectors.[6] We consider the disestablishment of the Church in Wales in more detail in Chapter 4.[7]

The impact of chancel repair liability

1.8 The impact of CRL on a landowner may be substantial. The owner of the affected land is required to keep the eastern end of the relevant church in "substantial repair without ornament".[8] The potential costs of repairs were brought to public attention by the litigation between Mr and Mrs Wallbank and the parochial church council of Aston

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3 [1955] 1 Ch 585.

4 See paras 4.59 to 4.65 below. *Chivers* has been subject to both academic and judicial criticism. See J H Baker "Lay Rectors and Chancel Repairs", (1984) *The Law Quarterly Review* 100, p 183, and *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 AC 546, at [109] by Lord Scott.

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

6 Due to the saving provision in the Welsh Church Act 1914, s 28. We discuss at para 4.86 below that the liability of some lay rectors may have been abolished, because the saving provision in s 28 did not apply to them.

7 See paras 4.80 to 4.86 below.

8 *Pell v Addison* (1860) 2 F. & F. 291; 175 E.R. 1066; cf. *The Parochial Church Council of Aston Cantlow and Wilmcote with Billesley v Wallbank* [2007] WL 504692, at [7].

Cantlow. This dispute lasted from 1994 until 2007 and included an appeal to the House of Lords.[9] Ultimately, the Wallbanks faced a repair bill of £186,969.50 (plus VAT).[10] It may consequently be of great importance to a purchaser to know whether the land they are proposing to acquire is burdened by a CRL.

1.9 Moreover, the fact that some pieces of land are affected by CRL has consequences for the costs of conveyancing in general, whether or not a person is buying land that actually carries the liability. Anyone who has purchased land in England and Wales, whether their home or some other land, may have encountered CRL. They may remember being provided with information about it or remember their solicitor or conveyancer carrying out a chancel repair search.[11] There may have been some reference to chancel repair in the register of title (or in the property deeds, if the land was unregistered). The conveyancing costs may have included a sum for chancel repair liability insurance.

1.10 We have been told that CRL searches typically cost in the region of £30 to £40 for residential properties, but might cost up to £100 for a larger tract of land. CRL insurance can be as cheap as £15, but prices vary, particularly where there is substantial risk that a property is subject to CRL. We discuss the costs implications of CRL for ordinary conveyancing in Chapter 8,[12] and provide some data from a 2017 survey by the Conveyancing Association in Appendix 2.

Knowledge of chancel repair liability

1.11 Our current project is focussed on whether a purchaser of land can know whether they will become bound by CRL as a result of acquiring the land. If *Chivers* was correctly decided, then under the general law, a person can be bound by CRL simply by acquiring former rectorial property regardless of whether they knew about, or had any way of discovering the existence of, the liability. Furthermore, it can be very difficult to discover whether a parcel of land traces back to a rectory that became the property of the Crown following the dissolution of the monasteries. There may no reference to CRL in any title deeds belonging to the seller. Parish records are sometimes incomplete or inaccessible. Land carrying CRL may be located many miles away from the church and have no evident connection to the building.

1.12 The general law has, however, been modified by the law governing land registration. The Land Registration Act 2002 ("the LRA 2002") is the principal statute that governs registered land in England and Wales. Following a change in the law that took effect on 13 October 2013, CRL is no longer an "overriding interest" in relation to registered land. An overriding interest is an interest that can bind a purchaser of registered land regardless of whether it is recorded in the register. It was thought that, when CRL

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9 [2003] UKHL 37; [2004] 1 AC 546. The appeal concerned human rights law. The House of Lords was not asked to rule on whether (and how) the Wallbanks' property was subject to CRL or on the scope of their liability.

10 Additionally, the Wallbanks faced legal fees reported to have been around £250,000.

11 Various businesses offer chancel repair search services. The type of search varies; some searches merely check whether the land being acquired is within a parish where there are (or could be) CRLs. Detailed searches may examine the parish's records of ascertainment, concerning which lands are subject to CRL and how the liability is distributed.

12 See paras 8.3 to 8.5 below.

ceased to be an overriding interest, it would then need to be registered (specifically, protected by entry of a notice in the register) in order to bind a purchaser of registered land. Consequently, it was thought that a person buying registered land after 13 October 2013 should always know whether they might be affected by CRL. We discuss the LRA 2002 and its application to CRL in more detail below.[13]

1.13 Despite the change in the law, there is still a substantial market for CRL searches and insurance. It appears that purchasers of registered land are routinely paying for searches or taking out insurance regardless of whether there is any notice of CRL registered against the title to the land. We understand that the continued market for CRL searches and insurance may be being driven by uncertainties about the legal status of CRL and whether the LRA 2002 applies to the liability in the way that was assumed.

Our project

1.14 Our current project has been prompted by these concerns about the legal status of CRL. The focus of this consultation paper is on the registration of CRL and the consequences of non-registration. We investigate whether the LRA 2002 clearly applies to CRL or whether there could be reasonable doubts about its application. The crucial question, discussed in Chapter 5, is whether CRL is a type of *interest in land*, which might be governed by the LRA 2002. Our primary aim is to find out whether the LRA 2002 needs to be reformed in order to ensure that a purchaser of registered land will only be bound by CRL if it is recorded in the register. We also ask consultation questions about whether a clarification of the LRA 2002 could reduce the need for purchasers of registered land to pay for CRL searches and insurance.

1.15 In order to consider whether CRL is an interest in land, we examine the nature of CRL in Chapters 2 and 4. We trace the history of the liability from before the Reformation to the present day. Our analysis of CRL has revealed some uncertainties about the manner in which CRL transfers with the ownership of land. We think that, prior to the 20th century, only a person who acquired a lay rectory, not a person who merely acquired some land that used to belong to a rectory, was bound by CRL. This provides some reason to think that *Chivers* may have been incorrectly decided. If that is the case, then it is possible that the decision may at some point be overturned by the Court of Appeal or the Supreme Court. If that were to happen, it may be that a person would no longer be bound by CRL unless they were acquiring a lay rectory, in which case they would know about the CRL without needing to resort to the Land Register.[14] However, litigation concerning CRL is infrequent and, if a fresh case were to arise, we cannot be certain what the court may decide. It would be preferable if it were clear from the provisions of the LRA 2002 that purchasers of registered land are only bound by registered CRLs.

Uncertainties

1.16 We emphasise that we are not able to draw completely certain conclusions about the nature of CRL and the application of the LRA 2002 to that liability. The law is not clear.

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[13] See paras 1.20 to 1.39 below.

[14] We take this point (and the possibility that *Chivers* may be overturned) into account in Chapter 6, where we examine the case for reforming the LRA 2002.

We explain how the law governing CRL can be interpreted in different ways. We do not draw a firm conclusion about whether or not a person can automatically become bound by CRL by acquiring a particular parcel of land. We also do not draw a firm conclusion about whether a purchaser of registered land could be bound by an unregistered CRL. Rather, we explain that the law is uncertain and consider whether it could be clarified.

OUR TERMS OF REFERENCE

1.17 Our current project on CRL forms part of our 13th Programme of Law Reform. As set out in the 13th Programme, the CRL project is intended to consider the legal status of CRL and its interaction with the Land Registration Act 2002 ("the LRA 2002").[15] We explain the background to our project and the concerns about the registration of CRL that have prompted it in more detail below. We said in the 13th Programme that "[t]his small project would aim to close the loophole [concerning the registration of CRL] and so achieve with certainty what was intended to be achieved by the Land Registration Act 2002".[16]

1.18 The scope of the project is now defined in more detail in the Terms of Reference agreed with Government, which are reprinted below.

1. The project on chancel repair liability ("CRL") will review the law governing the registration of CRLs. The intended scope of the project is narrow. The Land Registration Act 2002 ("the LRA 2002") aimed to ensure that, after 2013, a purchaser of registered land could not be bound by a CRL unless it was noted in the Land Register. The CRL project will not revisit the policy behind the LRA 2002 but, rather, will review whether that policy is being achieved.

2. As part of the project, we will consider the following principal issues.

    a) What is the nature of CRL?

    b) Why and how is CRL capable of binding successive owners of land?

    c) What registration requirements currently apply in relation to CRL?

    d) Will an unregistered CRL cease to bind registered land if, after 13 October 2013, there is a registered disposition of that land for valuable consideration?

    e) What risks currently exist that a purchaser of registered land could find themselves bound by an unregistered CRL?

    f) If there are risks that unregistered CRLs could bind purchasers of land, what steps (if any) could or should be taken to resolve this issue?

3. Linked to our review of land registration law and CRL, we will also consider applications for first registration of land (which is governed by similar provisions in the LRA 2002 to those that apply to purchases of registered land) and

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15 Thirteenth Programme of Law Reform (2017) Law Com No 377, para 2.30.

16 Above, para 2.31.

purchases of unregistered land (which trigger first registration). We will review whether CRL should be registered (whether as a land charge, a local land charge, or in some other form) in order to bind purchasers of unregistered land.

4. We note that we made two recommendations which have important links to CRL in Updating the Land Registration Act 2002 (2018) Law Com No 380: namely Recommendation 13 (on providing reasons when seeking to register notices relating to CRL (or other similar interests) post 2013), and Recommendation 30 (on rectification of the register when CRL (or other similar interests) are not noted in the register on first registration). Government has accepted Recommendation 13 and is still considering Recommendation 30. The CRL project may need to comment on the issues addressed by these recommendations, but will not reconsider the policy underlying them.

5. The project will not aim to make proposals or recommendations about any of the following issues:

    a) whether CRL should be abolished;

    b) whether CRLs should continue to be capable of binding successive owners of the affected land;

    c) what types of maintenance or repair may be required under a CRL;

    d) how the amount payable under a CRL should be calculated; and

    e) how CRLs should be divided following division of the affected land.

THE ORIGINS OF OUR PROJECT AND THE CENTRAL ISSUE WITH THE CURRENT LAW

1.19 We included a project reviewing CRL in our 13th Programme of Law Reform because of concerns raised by consultees during our prior review of land registration law, which culminated in the publication of our 2018 report: Updating the Land Registration Act 2002 ("the 2018 Report").[17] A significant group of consultees – including the Law Society, the London Property Support Lawyers Group, and the City of London Law Society (Land Law Committee) – raised a broad concern about the legal status of CRL. We gave a brief overview of these concerns above, but to explain them in detail, we need first to examine some features of the LRA 2002.

The registration regime under the LRA 2002

1.20 Two aspects of the land registration regime under the LRA 2002 are of particular relevance to CRL: the provisions governing first registration of unregistered estates, and the provisions governing transfers for value (sales) of registered estates.

[17] (2018) Law Com No 380.

First registration

1.21 When an unregistered freehold or leasehold estate in land is registered for the first time, the estate is vested in the registered proprietor "subject only to the following interests affecting the estate at the time of registration":

(1) interests which are entered in the register;

(2) overriding interests (listed in Schedule 1 to the LRA 2002); and

(3) various other interests which are not relevant to our current discussion, including some rights of adverse possessors, beneficial interests under trusts, and (for leasehold estates) various obligations under the lease.[18]

1.22 The process for applying for registration is set out in the Land Registration Rules 2003 (particularly rules 28 and 35) and in HM Land Registry's prescribed forms. The rules and the forms ensure that interests affecting an unregistered estate will generally be brought to the registrar's attention and that the registrar will then enter them in the register. However, where the registrar does not become aware of certain interests affecting the land (and so does not enter them in the register), it matters whether the interests qualify as *overriding interests* under Schedule 1. Overriding interests are interests that will continue to bind the estate even if they are omitted from the register during first registration.

Transfers for value

1.23 If a freehold or leasehold estate is already registered and the owner transfers it to another person, the general rule is that the transfer has no effect on what interests affect the estate. However, section 29 of the LRA 2002 sets out a special rule that applies where a registered freehold or leasehold estate is *sold* (transferred to another person for valuable consideration). Under section 29, a disposition of a registered estate for valuable consideration—

> has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.[19]

1.24 Here is an example of how this provision operates.

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18 LRA 2002, ss 11 and 12.

19 The rule in section 29 also applies to grants of various interests out of an estate where the Act requires the grant to be completed by registration, such as the grant by a freeholder of a long lease. The leaseholder is not bound by unregistered interests affecting the freehold, unless they are overriding.

X is the freehold owner of a piece of land and a neighbour N has a restrictive covenant affecting X's land, which prevents X from using the land for business purposes. X sells the freehold to Y. If N's restrictive covenant is "postponed" to Y's interest, N cannot enforce the covenant against Y (or anyone to whom Y transfers or grants an interest in the land). As we are considering a transfer of a *freehold* interest and freeholds last forever,[20] the postponement of the restrictive covenant will effectively extinguish N's interest.

1.25 Under section 29, an interest is protected at the time of registration if:

(1) it is recorded in the register;

(2) it is an overriding interest (under Schedule 3 to the LRA 2002); or

(3) it falls within some other categories which are not relevant to our discussion (interests affecting estates registered with qualified title, and various obligations under leases).

Notices

1.26 The primary method for protecting an interest in land (including, it was thought, CRL) is by entering a notice in the register. A notice "is an entry in the register in respect of the burden of an interest affecting a registered estate".[21] A notice is recorded against the title to the relevant land. The entry of a notice does not guarantee the existence of the interest to which it relates. Rather, it guarantees that, *if* the interest exists and burdens the relevant land, it will bind a purchaser of that land.[22]

1.27 We can illustrate the effect of registering a notice by reference to our previous example concerning N's restrictive covenant.

As in the previous example, freeholder X grants neighbour N a restrictive covenant. N applies for the entry of a notice against X's title relating to the covenant. X then sells the freehold to Y. As there is a notice of the restrictive covenant registered at the time of the sale, the covenant is "protected". It is binding on Y and (assuming the notice remains in the register) will be binding on anyone to whom Y transfers or grants an interest in the land.

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20 Subject to some rare exceptions where (on insolvency or dissolution of a company) freeholds can be extinguished and the land reverts ("escheats") to the Crown.

21 LRA 2002, s 32(1).

22 LRA 2002, s 32(3).

Overriding interests

1.28 Rights and interests that "override" a sale of registered land are listed in Schedule 3 to the LRA 2002. They bind a purchaser of the affected land even if a notice relating to them has not been recorded in the register. Generally, Schedule 3 lists rights and interests that either—

(1) would be readily discoverable on an inspection of the land (so a purchaser can learn of them even if they are not recorded in the register); or

(2) are of limited duration (so it would be unreasonable to expect the owner to register them, and any prejudice to a purchaser would be short lived).

1.29 However, not all overriding interests have these characteristics. As we discuss below, for the first ten years that the LRA 2002 was in force (that is, until 13 October 2013), CRL was listed as an overriding interest. CRL is not obvious from an inspection of the land and is not of limited duration.

Chancel repair liability and land registration

1.30 We discuss the history of land registration in Appendix 1 to this consultation paper, starting with the Land Registry Act 1862. We examine, in particular, the reasons why particular rights and interests came to be listed as overriding interests.

1.31 Our analysis suggests that the relevant 19th century legislation was focussed on the rights and interests that were typically of concern to conveyancers at the time and were subject to standard enquiries by the buyer when land was sold. Where these rights and interests were not going to be registrable under the relevant legislation, they were listed as overriding interests. Importantly, we have not found that there was ever a detailed consideration of the legal status of these rights and interests. We have found no evidence that there was an analysis of whether, if these rights and interests were not listed as overriding interests, they would have been affected by the substantive provisions on land registration in these early statutes.

1.32 However, the relevant 19th century legislation was published without explanatory notes. Due to the passage of time and the limited amount of bill documentation that has been preserved, we cannot reach certain conclusions about why particular provisions were or were not included in these historic land registration Acts.

1.33 For over a century, CRL was listed as an overriding interest under land registration legislation (first in the Land Transfer Act 1897 and then in the Land Registration Act 1925 ("the LRA 1925")). As with other overriding interests, we have not found that CRL was listed because there had been any analysis of its legal nature. We have found no evidence of any detailed consideration of whether the liability was capable of being affected by land registration legislation. However, while CRL remained an overriding interest, this analysis did not need to be carried out. Overriding interests are partial *exceptions* to the land registration regime. Listing a right or interest as overriding disapplies parts of land registration law: an overriding interest does *not* need to be registered in order to continue to bind land that is sold to a new owner. Consequently, while CRL remained an overriding interest, it did not need to be decided whether the liability could properly be registered under land registration legislation.

The Land Registration Act 2002 and chancel repair liability

1.34 The approach taken to CRL by land registration legislation changed with the LRA 2002, but the story of how the LRA 2002 came to make provision for CRL is complicated. The LRA 2002 implemented the Law Commission and HM Land Registry's joint report: Land Registration for the 21st Century: A Conveyancing Revolution ("the 2001 Report").[23] At the time that the 2001 Report was published, the Court of Appeal in *Wallbank* had decided that enforcement of CRL by parochial church councils was unlawful under the Human Rights Act 1998.[24] As a result, the 2001 Report made no recommendations in relation to CRL and the draft bill published with the report made no provision for CRL.[25] Likewise, the LRA 2002, as originally enacted, did not mention CRL.

1.35 Before the LRA 2002 came into force, however, the House of Lords reversed the decision of the Court of Appeal in *Wallbank* and it became possible to enforce CRLs once more. As a result, the Lord Chancellor exercised the power in section 134 of the LRA 2002 to make transitional and savings provisions to issue the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 ("the 2003 Order").[26] The 2003 Order added paragraph 16 to Schedules 1 and 3 to the LRA 2002, which made "a right in respect of the repair of a church chancel" an overriding interest. The LRA 1925 had also listed CRL as an overriding interest,[27] and the effect of the 2003 Order was that the LRA 2002 continued to treat CRL in the same manner.

1.36 The 2003 Order stated that paragraph 16 would only remain part of Schedules 1 and 3 for ten years after the Act came into force (that is, until 13 October 2013). After that date, CRL would no longer be listed as an overriding interest.

1.37 The Department for Constitutional Affairs issued a press release on 24 September 2003 explaining the rationale for the 2003 Order.

> The Order preserves the status of Chancel Repair Liability within the land registration system for a period of 10 years. This was made necessary by a House of Lords ruling in the decision *Wallbank v Parochial Church Council of Aston Cantlow and Wilmcote with Billesley, Warwickshire*, which, in effect, wrong-footed the Land Registration Act.
>
> For the next 10 years, Chancel Repair Liability will now remain an interest that binds successive owners of a property even though it is not protected by an entry in a register kept by the Land Registry. After the 10-year period, however, the liability will only bind new owners of registered land if it is protected by an entry in the register.

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23 (2001) Law Com No 271.

24 [2001] EWCA Civ 713; [2002] Ch 51. The Court of Appeal held that parochial church councils were public authorities and enforcement of CRL breached a landowner's right to property under Article 1 of Protocol 1 of the European Convention of Human Rights.

25 (2001) Law Com No 271, para 8.75.

26 SI 2003/2341.

27 LRA 1925, s 70.

1.38 It was generally assumed that, when CRL ceased to be an overriding interest, the liability would then be governed by the substantive provisions of the LRA 2002. As mentioned in the press release, it was assumed that, from 13 October 2013, CRL would need to be protected by entry of a notice in the register to bind a purchaser of registered land.

1.39 It is possible, however, that the historical treatment of CRL as an overriding interest (since 1897) inadvertently set a trap, which was triggered by the 2003 Order. It could seem that, because CRL had been listed as an overriding interest for over a century, it must be a type of liability that could be subject to the registration provisions in the LRA 2002 (particularly section 29 on transfers for value and section 32 on notices). But it appears that there had never been a detailed analysis of the nature of the liability and whether it could, in fact, be registered under the LRA 2002 or earlier legislation.

The concerns raised by consultees during our land registration project

1.40 In 2015, we began a project to consider updates to the LRA 2002. We published a consultation paper in 2016.[28] In response to that consultation, we received a submission from the Law Society, part of which discussed the registration of CRL:

> the demand from lenders and purchasers for insurance against chancel repair liability continues post [13 October 2013] – this appears to be because some commentators regard such liability as something akin to council tax which binds the property owner for the time that they are the owner and has nothing to do with whether the liability is protected on the relevant registered title. The consequence of the demand for insurance is delay and cost and this is a very real administrative burden on transactions.

1.41 The concern highlighted by the Law Society is that CRL cannot correctly be described as an "interest in land" or an "interest affecting a registered estate". If this concern about the nature of CRL turns out to be well-founded, then the enforcement of CRL may not be governed by the LRA 2002 at all. CRL may in fact bind purchasers of land regardless of registration, and nothing in the LRA 2002 may alter that outcome.

The impact on insurance and conveyancing practices

1.42 As explained at the beginning of this chapter, purchasers of registered land frequently pay for CRL searches or CRL insurance regardless of whether there is any notice relating to CRL registered against the land. The fact that CRL ceased to be an overriding interest on 13 October 2013 appears to have had a limited impact on conveyancing practice – many purchasers of land are still being advised by their solicitors or conveyancers to protect themselves against a potential hidden liability.

1.43 The Law Society's response to our land registration project suggested that the continued use of searches and insurance may be due to the uncertainty regarding the legal status of CRL. Possible doubts about the status of CRL are also suggested by HM Land Registry's Practice Guide 66, on former overriding interests. The guide notes that—

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[28] Updating the Land Registration Act 2002: A Consultation Paper (2016) Law Commission Consultation Paper No 227.

> [t]here have been arguments that chancel repair liability is not an interest in land that can be protected by notice. HM Land Registry currently operates on the basis that it does constitute such an interest.[29]

1.44 We are keen to hear from consultees, and conveyancers in particular, about whether they have obtained (or advised a client to obtain) a CRL search or insurance. If so, we would like to know whether the reason the search was conducted or insurance was obtained was because of uncertainty about the status of CRL (specifically, because of uncertainty about whether or not an unregistered CRL might be binding on a purchaser of registered land). We ask consultation questions about these matters in Chapter 8.

UNREGISTERED LAND

1.45 Aside from the question of whether the LRA 2002 deals adequately with CRL, there are still potential problems concerning unregistered land. There is a statutory regime under the Land Charges Act 1972 which requires some interests affecting unregistered land (such as restrictive covenants) to be registered as land charges if they are to bind a purchaser. However, CRLs are not land charges under the 1972 Act and therefore are not required to be registered. Consequently, a CRL is automatically binding on a purchaser of unregistered land regardless of whether the purchaser knew of its existence.

1.46 Most land (89% of the land area) in England and Wales is registered.[30] Nevertheless, there are still a significant number of sales of unregistered land each year.[31] There is consequently a question whether it might be worthwhile to reform the law governing unregistered conveyancing to require CRLs to be registered if they are to bind purchasers of unregistered land. One possibility is registration as a land charge, but there are other forms of registration that could be considered as well. We discuss this issue in Chapter 7.

ISSUES OUTSIDE OF THE SCOPE OF THIS REVIEW

1.47 The purpose of our current project is to review the law governing the registration of CRLs and the effects of registration. We are not considering reforms to the underlying nature or operation of CRLs; such wider issues are excluded under our Terms of Reference agreed with Government.

1.48 The aim of our review of the registration requirements applying to CRLs is to ensure that a purchaser of land will not be bound by a CRL unless the liability has been noted in the register. A purchaser should be aware that the land they are acquiring is potentially subject to a CRL and should be able to take this fact into account in deciding whether to proceed with the purchase. However, we recognise that there are

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29 HM Land Registry, Practice guide 66: overriding interests that lost automatic protection in 2013 (April 2018), para 3.6.3.

30 HM Land Registry Annual Report and Accounts 2023-24, p 4.

31 For example, HM Land Registry received 70,138 applications for first registration in the 2023-24 financial year (although some will have been voluntary applications for first registration rather than mandatory applications following a sale of unregistered land), and 14,923 applications to add, renew, change or remove entries in the land charges register (Annual Report and Accounts 2023-24, pp 116 and 118).

many problematic aspects of CRL that would remain even if all issues concerning registration were to be resolved. Two of the key problems are set out below.

(1) The registration of a CRL shows that the relevant land *might* be subject to the liability. But registration does not by itself guarantee that the liability exists. There may be no easy way for a purchaser to discover whether the land is *actually* subject to a CRL. They may need to investigate the history of land use and customs in the parish going back to before the Reformation.[32] Furthermore, even if the CRL has not been enforced in the parish in living memory, that does not necessarily mean the liability no longer exists. CRL is not subject to any limitation period; it does not lapse due to lack of enforcement. A parochial church council has no power to release or permanently waive the liability (and may be torn between their duty to maintain the church and their desire to avoid reputational damage by pursuing a parishioner for the costs of repairs).

(2) There are problems with the nature and level of the liability for chancel repairs. In *Wickhambrook Parochial Church Council v Croxford*,[33] the Court of Appeal decided that CRL is not limited to the value of the land to which it attaches. There is nothing in principle that would prevent the purchaser of a £50,000 plot of land from becoming liable for repairs costing millions. Furthermore, following *Wickhambrook*, CRL is a *several* liability. Where rectorial land is split between multiple landowners, any one of them can be pursued for the entire costs of repairing the chancel. Each lay rector would have a right to contribution from the others, but that does not mean that a contribution would in fact be recoverable. The other lay rectors may be insolvent or untraceable. Thus, a lay rector may not only be pursued for a substantial amount of the costs of repairing the chancel, they may be required to pay an excessive proportion of those costs.

1.49 These problems concern the nature of CRL and are outside the scope of our current project. It is, furthermore, not clear that these problems admit of an easy solution. For example, replacing severable liability with proportional liability for chancel repairs might be extremely intricate. As another example, imposing a limitation period may be difficult given a church may require repair only infrequently. If Government were in future to consider substantive reform of CRL, there would be a question whether it would be worthwhile to change the nature of the liability, rather than to explore abolishing it or phasing it out.

Abolition of chancel repair liability

1.50 We are not considering whether CRL should be abolished as part of our project; this issue is expressly excluded under our Terms of Reference. The Law Commission previously recommended abolition (subject to a ten-year transitional period) – this was

[32] As we explain in Chapter 2, the responsibility of a rector for repairs of the chancel could be modified by local custom.

[33] *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417.

the principal recommendation in our 1985 report on CRL.[34] Our recommendation was rejected by Government in 1998.[35]

THE STRUCTURE OF THIS CONSULTATION PAPER

1.51 In this chapter, we have introduced the issues about which we are seeking to consult. Our discussion of these issues in the body of this consultation paper is split into two parts.

1.52 Part 1 of this consultation paper contains our technical legal analysis of the nature of CRL, our discussion of whether CRL is an interest in land, and our examination of whether the LRA 2002 applies to CRL.

(1) In Chapter 2, we examine the historical origins of CRL and its original status as an obligation on a religious officeholder to take care of the property vested in him[36] for the purposes (and for the duration) of his office.

(2) In Chapter 3, we examine how the law governing CRL developed following the dissolution of the monasteries in the 16th century, when rectorial property passed to the Crown and was given to lay persons.

(3) In Chapter 4, we consider further legislative developments that had an effect on CRL, specifically the enclosure of common land, the abolition of tithes, the disestablishment of the Church in Wales, and the passage of the Chancel Repairs Act 1932.

(4) In Chapter 5, we build on our analysis of CRL to examine whether the liability is an interest in land, and whether it may qualify as "an interest affecting a registered estate" for the purposes of the LRA 2002.

1.53 In Part 2 of this consultation paper, we examine whether the law governing registered land should be reformed to clarify whether CRLs are registrable and the effects of non-registration. We also examine whether parochial church councils should be

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34 Property Law, Liability for Chancel Repairs (1985) Law Com No 152.

35 On 29 July 1998, the Lord Chancellor, Lord Irvine of Lairg, announced in a written answer in the House of Lords that Government had decided not to implement the Law Commission's 1985 report (Written Answer, Hansard (HL), 29 July 1998, vol 592, col WA202). Since that date, Government has repeatedly resisted further calls to abolish CRL. Government rejected the Law Society's submission of October 2006 calling for the abolition of chancel repair liability (available here: https://michaeljameshall.wordpress.com/wp-content/uploads/2011/03/submission_chancelrepairliability.pdf (last visited 15 July 2025)). On 6 March 2008, the Prime Minister's Office published a response rejecting an online petition supporting abolition. Following a debate in the House of Commons on 17 October 2012 on abolishing chancel repair liability, the Parliamentary Under-Secretary of State for Justice, Helen Grant MP, argued that it had not been shown that a change in the law is necessary (*Hansard* (HC), 17 October 2012, vol 551, col 136WH). On 15 January 2015, following a debate on a question by Lord Avebury about what steps Government were taking to abolish chancel repair liability, Lord Ashton of Hyde replied on behalf of Government that it had no plans at the time to change the law (*Hansard* (HL), 15 January 2015, vol 758, col GC285). Government has given various reasons for deciding not to pursue abolition: (a) that abolition would be expensive as the church would be entitled to compensation, (b) that the case for abolition is less strong now that CRL must be registered under the LRA 2002, and (c) that there is little evidence of CRL causing prejudice to landowners in practice, as CRL insurance is cheap and readily available

36 At the time, the relevant officeholders (parish priests) were always male.

required to register CRL as a land charge, or in some other form, in order to bind purchasers of unregistered land.

(1) In Chapter 6, we consider whether the LRA 2002 should be amended to resolve any uncertainties about the application of the Act to CRL. We ask consultation questions about whether clarifying the LRA 2002 could reduce the need to carry out CRL searches or obtain insurance when buying land.

(2) In Chapter 7 we consider whether the provisions in the LRA 2002 concerning first registration should be amended to clarify their application to CRL. We also consider whether any reform of the law governing unregistered conveyancing is needed to ensure that purchaser of unregistered land are not bound by CRLs that they could not reasonably have discovered.

(3) Finally, in Chapter 8, we seek general evidence from consultees about their experiences of dealing with CRL when buying (or acting in relation to the purchase of) registered and unregistered land.

1.54 In Appendix 3 to this Consultation Paper, we set out and discuss a draft clause which would implement the provisional proposals to reform the LRA 2002 put forward in Chapters 6 and 7.[37] We provide this draft clause for two reasons:

(1) so that consultees can see what legislative changes may be entailed by our provisional proposals; and

(2) so that consultees can comment on the clause (and we ask consultation questions in Chapters 6 and 7 about whether the clause would have the desired effect).

Accessibility

1.55 Part 1 of this consultation paper examines difficult questions of property law and complex legal history. We are not aware of any previous legal work that has examined the nature of CRL in sufficient detail to answer the questions we pose in this consultation paper, and so we have produced our own analysis. While we have endeavoured to clarify the relevant issues as much as possible, our discussion in Part 1 is intended for specialists and may not be accessible to those without a legal background.

1.56 Part 2 of this consultation paper considers how the law could be reformed to address the issues we explain in Part 1. We have tried to make Part 2 accessible to non-specialists. Anyone without a legal background can skip Part 1 and read Part 2. (We provide a summary of our provisional conclusions from Part 1 at the beginning of Chapter 6.) Although many of the consultation questions we ask in Part 2 are directed particularly at professionals involved in the conveyancing of land, including insurers, we are keen to hear from anyone who has experience in relation to chancel repair liability, including landowners whose property is affected by the liability or who took out insurance against it. Additionally, we are keen to hear from parochial church

[37] See Consultation Questions 4, 5, 9 and 10 at paras 6.32, 6.41 to 6.42, 7.49, and 7.52 to 7.53 below respectively.

councils about their approach to the registration and enforcement of chancel repair liability and its role in maintaining parish churches.

ACKNOWLEDGEMENTS

1.57 We have had many useful discussions with individuals and organisations in preparing our consultation paper. We are very grateful for their time and assistance, which has greatly assisted the development of this paper. We owe particular thanks to Beth Rudolf at the Conveyancing Association, who kindly organised surveys of the Conveyancing Association's members for us, providing invaluable data about the use of CRL searches and insurance.

THE PROJECT TEAM

1.58 The Commissioners would like to record their thanks to the following members of staff who worked on this consultation paper: Christopher Pulman (lawyer); Yusuf Lahham (research assistant); Colin Oakley (team manager).

Part 1: The Origins and Nature of Chancel Repair Liability

Chapter 2: The origins of chancel repair liability

INTRODUCTION

2.1 In Chapter 1, we summarise the problems that our project on chancel repair liability ("CRL") aims to address. The issues we discuss derive from a central problem: what is the nature of CRL? Under the Land Registration Act 2002 ("the LRA 2002"), a purchaser of registered land should not be bound by CRL unless the liability is entered in the register of title at the time of the purchase. However, the LRA 2002 will only apply to CRL if it is an *interest affecting a registered estate*.[1] We have been told by some stakeholders in the legal sector that they are uncertain about the legal status of CRL. We think there may be some substance to the concerns raised by stakeholders. It is arguable that CRL is not an interest in land and there could be doubts about whether it is the sort of interest that is governed by the provisions of the LRA 2002.

2.2 The purpose of Part 1 of this consultation paper is to examine the nature of CRL. In this chapter, we consider the historical origins of the liability. In Chapter 3, we examine whether the liability changed when it came to apply to lay persons following the dissolution of the monasteries in the 16th century. In Chapter 4, we examine further legislative changes that affected CRL, particularly in the 19th and 20th centuries. Finally, in Chapter 5, using our analysis of CRL as a basis, we discuss whether CRL is an interest in land, and whether it is "an interest affecting a registered estate" for the purposes of the LRA 2002.

2.3 Chapters 2 to 5 are likely to be of greatest interest to legal academics and professionals (and we ask consultation questions about our technical legal analysis at the end of these chapters). The issues examined in these chapters are complex. Modern legal textbooks and practitioner texts tend to discuss CRL only briefly, if they discuss the liability at all. We have therefore needed to develop our own analysis of the liability. Much of the relevant law is antiquated, obscure, and sometimes inconsistent.

2.4 However, it is not necessary to read Part 1 of this consultation paper (Chapters 2 to 5) in order to respond to the consultation questions we ask in Part 2 (Chapters 6, 7 and 8). We summarise our conclusions about the law governing CRL at the beginning of Chapter 6.

Contents of Chapters 2 to 4

2.5 In this chapter, we aim to explore the origins of CRL and how it bound parish priests and religious institutions prior to the Reformation. We explain that CRL was an obligation on the holder of a religious office – namely, the parson of a parish – to use the profits of particular property (vested in him[2] by virtue of his office) to maintain the church.

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1 LRA 2002, s 29(1).

2 At the time, the parson of a parish was always male.

2.6 In Chapter 3, we continue the history of CRL following the Reformation and the dissolution of the monasteries, when church property passed to the Crown and was given to lay persons. In Chapter 4, we continue to trace the history of CRL up to the present day. We examine later legislation that had an effect on CRL, namely the Inclosure Acts (which enclosed common land), the Tithe Acts (which abolished tithes), the Welsh Church Act 2014 (which disestablished the Church in Wales) and the Chancel Repairs Act 1932 (which reformed the enforcement of CRL).

Sources

2.7 In addition to case law, there are several sources and commentaries on ecclesiastical law to which we refer in this chapter and in Chapter 3. In chronological order, these are the following.

"Lyndwood's Provinciale": *Lyndwood's Provinciale: The Text of the Canons therein Contained, Reprinted from the Translation made in 1534* by William Lyndwood, J. V. Bullard and H. Chalmer Bell (eds) (The Faith Press, 1929) – a collection of canon law and commentary assembled in 1430 and first published in 1496.

"Godolphin's Repertorium Canonicum": *Repertorium canonicum, or An abridgment of the ecclesiastical laws of this realm* by John Godolphin (S Roycroft, 1678).

"Gibson's Codex": *Codex Juris Ecclesiastici Anglicani* by Edmund Gibson (J. Baskett, 1713).

"Watson's Complete Incumbent": *The Clergy-Man's Law: or the Complete Incumbent* by William Watson (E. and R. Nutt and R. Gosling: 1725).

"Burn's Ecclesiastical Law": *Ecclesiastical Law* by Richard Burn, 2nd edition (H. Woodfall and W. Strahan, 1767).

"Eagle on Tithes": *A Treatise on the Law of Tithes* by William Eagle (Saunders and Benning, 1830).

"Stephens' Treatise": *A Practical Treatise of the Laws Relating to the Clergy* by Archibald John Stephens (W. Benning and Co., 1848).

"Phillimore's Ecclesiastical Law": *The Ecclesiastical Law of the Church of England* by Sir Robert Phillimore, 1st edition (Henry Sweet, 1873).

"Prideaux's Guide": *A Practical Guide to the Duties of Churchwardens in the Execution of Their Office* by Charles Grevile Prideaux, 15th edition (Shaw & Sons, 1886).

Courts, custom and common law

2.8 As background to our discussion, we clarify two initial matters, which make it easier to interpret the older case law on CRL.

2.9 First, the majority of cases which we cite preceded the Supreme Court of Judicature Act 1873, which (supplemented by later legislation) unified the various courts of law into a single High Court and unified the courts of law and equity. For this reason, we refer to decisions by the *courts* (plural).[3] Furthermore, it is important to note the distinction between the ecclesiastical or "spiritual" courts and the secular or "temporal" courts. The Ordinance of William the Conqueror in 1072 prohibited secular courts from determining matters of ecclesiastical law and conferred jurisdiction for such matters on the bishops.[4] (In older case law and legal texts, the bishop is often referred to as "the ordinary", as he exercised ordinary, rather than delegated, power to execute ecclesiastical law.) However, in some cases, the participants in an ecclesiastical dispute had a choice whether to seek a remedy in the spiritual courts or in the temporal courts, because the dispute gave rise to both an ecclesiastical and a secular cause of action. The division between ecclesiastical courts and secular courts still exists: applications or disputes concerning ecclesiastical law are still determined in the consistory court of the relevant diocese, by the diocesan chancellor acting on behalf of the bishop.

2.10 Secondly, when parish churches were initially built in England and parish boundaries were established, the church in England was part of the wider Roman Catholic church, which was governed by its own canon law. Likewise, the construction of parish churches and the development of parishes in Wales, which started in the south and accelerated under Norman rule, occurred at a time when the church in Wales was becoming more closely integrated with Rome.

2.11 There is academic debate about the extent to which Catholic canon law was automatically recognised and enforced by courts in England and Wales prior to the Reformation.[5] We do not take a position on that debate. Nevertheless, it is clear—

(1) that a large amount of Catholic canon law was recognised and enforced in England and Wales; but

(2) that the application of canon law was subject to and modified by local customs (either across England and Wales as a whole or within a particular locality). As

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3 Broadly speaking, the Court of Common Pleas dealt with civil disputes between private persons, the Court of King's Bench dealt with cases involving the Crown, criminal cases, and assorted other matters, the Court of Exchequer dealt with cases relating to tax or Crown revenue, and the Court of Chancery allowed litigants to seek an equitable remedy where no legal remedy was available from the Lord Chancellor or (later) the Vice-Chancellor or the Master of the Rolls.

4 Burn's Ecclesiastical Law notes that, prior to the Norman conquest, both spiritual and temporal matters were determined in the county court, where the bishop and the earl sat together, or in the "hundred court" before the local lord and an ecclesiastical judge (vol 2, p 30).

5 See the discussion and references in M Hill KC, *Ecclesiastical Law* (4th ed, 2018), para 1.13. The judicial position, expressed robustly by Tindal LCJ in *R v. Millis* (1844) 8 E.R. 844; 10 Cl. & F. 534, p 680, is that "the canon law of Europe does not, and never did, as a body of laws, form part of the law of England". Tindal LCJ cited Hale's *History of the Common Law*, which maintained that canon law applied only insofar as it was consistent with the common law and Acts of Parliament, and that some canons and Papal decretals were never recognised in England. Nevertheless, Tindal LCJ was commenting on the legal position more than three centuries before *R v Millis*, and the true position in relation to the application of Catholic canon law was more nuanced than the judgment suggests.

we discuss later in this chapter, some of these customs specifically concerned the repair of churches and CRL.

2.12 Following the Reformation, not all pre-Reformation ecclesiastical law remained part of the law of England and Wales. In *Middleton v Croft*, Lord Hardwicke held that only prior canons that had "been allowed by general consent and custom within the realm, and are not contrariant or repugnant to the laws, statutes, and customs, of this realm, nor to the damage nor hurt of the King's prerogative, are still in force within this realm, as the King's ecclesiastical laws".[6]

2.13 In Chapter 4, we discuss the fact that the disestablishment of the Church in Wales under the Welsh Church Act 1914 has largely ended the application of ecclesiastical law in Wales.[7] Some elements have been preserved, including those relating to CRL.

THE ORIGINAL NATURE OF CHANCEL REPAIR LIABILITY

2.14 Today, CRL is thought to be an obligation that binds some landowners because they own particular parcels of land. However, historically, CRL was an obligation on parish priests, as an element of their religious office. The liability was related to land but did not attach to the ownership of any particular parcel of land. To understand the current nature of CRL, it is necessary to trace how the liability has transformed over the centuries, particularly as a consequence of the Reformation, to see what elements of its original form it still retains and what elements have been lost.

2.15 Consequently, in this chapter we examine the history of CRL. We focus, in particular, on features of the liability that caused problems when CRL came to apply to lay persons instead of religious persons following the Reformation, a process we discuss in Chapter 3. To understand the history of CRL and its original nature, it is necessary to consider the way in which parish churches first came to be established.

THE ESTABLISHMENT OF PARISH CHURCHES

2.16 Until the 8th century in England, the bishops and their clergy generally conducted their ministry from cathedral churches, although the clergy would travel into rural areas to preach and administer the sacraments.[8] The need for more local provision of spiritual services prompted the building of parish churches, often by local lords who gave land and money for their construction. The boundaries of the parishes established therefore often matched the boundaries of the lord's manor.[9]

2.17 Once built, a parish church needed to be consecrated by the bishop. By ecclesiastical law, the bishop could not consecrate a church unless it was endowed with property for the maintenance of the parish priest.[10] The endowment typically consisted of a residence, and further land donated by the lord that could be farmed or let to generate

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6 (1734) 94 E.R 1097; Cunningham 114, p 122. Cf. *Bishop of Exeter v Marshall* (1868) LR 3 HL 17, pp 41 to 42, by Willes J; pp 46 to 47, by Lord Chelmsford LC; p 53, by Lord Westbury.

7 See paras 4.80 to 4.86 below.

8 Phillimore's Ecclesiastical Law, p 263.

9 Above, p 264.

10 Above, p 1759, citing the 16th Canon of the Council of London 1075.

income. This further land was called the "glebe". The endowment also included the right to receive tithes from the residents of the parish.[11] We discuss the right to tithes in more detail below.

2.18 A clergyman who was given the office of parish priest, endowed with all the glebe and tithes of the parish, was known as the "parson" or "rector" of the parish, and his residence was accordingly called the "parsonage" or "rectory". However, the term "rectory" can also refer to the *living* (also known as the "benefice") conferred on the rector, which included the right to use and enjoy all the rectorial property. To avoid confusion, we generally refer in this consultation paper to rectors, rather than parsons, and we only use the term "rectory" to refer to the benefice, rather than to the parsonage house. The rector ministered to the parish by providing "cure (or care) of souls".

2.19 The lord who had built the church and endowed it with glebe land enjoyed, at common law, a right to nominate a person of his choice as rector.[12] The person nominated needed to be morally upstanding and canonically qualified to minister to the parish but, subject to those conditions, the bishop had no power to refuse to institute the nominee.[13] The common law did not treat the right to nominate as merely a personal privilege of the founder of the parish. Rather, the right would pass with ownership of the manor to the lord's eldest living son (the next lord).

2.20 Over time, the right to nominate the rector came to be recognised as a distinct property right, known as an "advowson". This right would pass with a transfer of the manor outside of the lord's family and it was enforceable in the secular rather than the ecclesiastical courts.[14] It also became possible for an advowson to become severed from the title to the manor – to become an advowson in gross rather than an advowson appendant – for example, by being specifically retained by the lord when the manor was transferred.[15] Consequently, advowsons could be sold, donated or traded like any other piece of property. The owner of the advowson was referred to as the "patron" of the parish.

TITHES

2.21 A rector enjoyed the right to receive tithes paid by the residents of his parish. A tithe was, in substance, an ecclesiastical tax, which required residents to offer up one tenth

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11 Although there was originally some doubt as to whether a person could pay tithes to a spiritual person or body of their choice, by 1200 it had become settled practice that tithes were payable to the incumbent of the parish which contained the relevant land (Phillimore's Ecclesiastical Law, p 1486; *Barsdale v Smith* (1598) 1 Gwillim 207).

12 Stephens' Treatise, pp 2 to 3.

13 The grounds on which institution may be refused were discussed by Lord Westbury in *Bishop of Exeter v Marshall* (1868) LR 3 HL 17, at p 52. If the bishop objects to the institution on the grounds of immoral conduct (for example, that the nominee has committed simony – accepting more than one benefice with cure of souls), the issue may be tried before the temporal courts. If the bishop objects on the ground of insufficient learning, the matter may be referred to the archbishop.

14 See Godolphin Repertorium Canonicum, p 209, and *Bishop of Exeter v Marshall* (1868) LR 3 HL 17, p 32 by Blackburn J.

15 Godolphin's Repertorium Canonicum, p 209; Phillimore's Ecclesiastical Law, p 334.

of the produce of their land or fruits of their industry for support of the church.[16] Over time, many tithes were transformed into obligations to pay money. Tithes often provided the most significant portion of a rector's income, from which he could fund the repairs of the chancel and his other duties. Furthermore, when some lay persons became subject to CRL following the dissolution of the monasteries (which we discuss in Chapters 3 and 4), their liability was often based on their acquisition of rectorial tithes.

2.22 The law developed a complex classification of tithes (distinguishing, for example, between "praedial" tithes of the direct produce of the land and "mixed" tithes of animals that fed on the land). This classification is largely irrelevant for the purposes of our discussion, but there was a significant distinction drawn between "great" tithes of corn, hay and wood, and all other tithes (called "lesser" tithes). This distinction is important for our consideration, later in this chapter, of how in many parishes spiritual ministry was split between a rector and a vicar. The vicar was often granted the lesser tithes of the parish, while the rector retained the greater tithes.

2.23 By the common law of England and Wales, all land in the country was charged with the payment of tithes. Phillimore's Ecclesiastical Law noted that, before the establishment of parishes, tithes were deposited with the bishop. Phillimore wrote that "[i]n the western churches they were usually divided into three or four parts; one was set apart for the bishop, a second for the rest of the clergy, a third for the poor, a fourth for the maintenance of the fabric and the necessary use of the church".[17] When parish churches were established and the right to collect tithes passed to the rectors, the obligation to repair the church passed to the rectors as well. Following the endowment of parishes, many bishops stopped collecting their portion of the tithes and they were later forbidden to demand it if it was not required to support their livings.[18] So the fourfold division of tithes became a threefold division, received by the rector.

2.24 The payment of tithes was a spiritual obligation enforceable under ecclesiastical law, and only a spiritual person (the holder of a religious office) could possess a right to tithes.[19] Nevertheless, this widely supported proposition of law hides some underlying complexities.

(1) First, by the 15th century, the temporal courts had encroached on the jurisdiction of the spiritual courts in many ways. This encroachment was

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16 The term "tithe" derives from the old English word for a "tenth", although the history of tithing traces back to the early church and beyond to Judaic practices. In the Christian context, tithing began as a moral obligation (based on Paul's injunction in Galatians chapter 6 to share goods with those who provide religious instruction and the Old Testament practice of tithing) for Christians to support the work of the church by giving one tenth of their income. The practice of tithing later hardened into an enforceable legal obligation.

17 Phillimore's Ecclesiastical Law, p 329.

18 Burn's Ecclesiastical Law, vol 1, p 61.

19 *Sherwood v Winchombe* (1593) 1 Gwillim 164; *The Bishop of Winchester's Case* (1596) 1 Gwillim 167, pp 185 to 186; *Barsdale v Smith* (1598) 1 Gwillim 207, p. 211; R H Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (OUP 2004), pp 442 to 443.

discussed by Norma Adams in "The Judicial Conflict over Tithes".[20] Suits concerning tithes were brought in the temporal courts where the dispute was said to affect the value of the patron's advowson, where a tithe of goods had already been physically separated from the rest for collection, where portions of tithes were sold, and where there was a dispute over whether particular land was tithable.

(2) Secondly, while a lay person could not obtain a permanent grant of tithes, a rector could grant a lease of his tithes to a lay person (although a rector's power of leasing came to be greatly restricted by Parliament[21]). A rector could also take a lease of additional land, for example from the lord of the manor, and there is evidence that rectors sometimes agreed to transfer some of their tithes to the lessor in exchange for the lease.[22]

(3) Thirdly, there were cases in which the lord of a manor agreed a composition of the tithes he owed to the rector (meaning he replaced his tithing obligations with a grant of land or an annuity paid to the rector). In some cases, the tithes payable from the manorial lands became secular property, annexed to the manor and payable to the lord.[23] The courts still insisted that tithes were spiritual rights, which could not be owned by a layperson and could not be an item of property appendant to a manor.[24] Instead, as Gibson's Codex explained, the courts developed a fiction that the tithes received by the lord of the manor were not really a tithe (a tenth of the harvest) but a profit à prendre[25] permitting the lord to take each tenth sheaf of wheat (etc), which reflected the lord's ancient rights of retainer over his tenants.[26]

2.25 We consider below the manner in which tithes and the rest of the endowment of the rectory were vested in the rector and the obligations and limitations that applied to the use of rectorial property.

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20 N. Adams, "The Judicial Conflict over Tithes", *The English Historical Review* 52(205) (January 1937), pp 1 to 22.

21 See para 2.36 below.

22 See, for example, *Pellatt v Ferrars* (1801) 126 E.R. 1429; 2 Box. & P. 542, in which the lord of the manor of Beddington had granted a lease to the rector of Beddington in exchange for a rent and a portion of the rectorial tithes.

23 In *Wolley v Platt and Lowood* (1824) 148 E.R. 196; M'Cle. 468, for example, it was argued (albeit unsuccessfully, because of lack of evidence) that a portion of the tithes of the parish of Stayley belonged to the Earl of Stamford. Baron Graham commented that "[t]he claim of a portion of tithes is a perfectly legitimate one" and "may be claimed from the most ancient time: it may be transmitted from father to heir; and may inhere, in a family, or at least in the claim of a family" (p 475).

24 *Sherwood v Winchcombe* (1593) 1 Gwillim 164. See also *Saunders v Sanford* (1617) 1 Gwillim 298: "there is no difference in reason between a rectory and a portion of tithes; for a layman without special matter is no more capable of the one than he is of the other".

25 A "profit à prendre" is a right to take produce or wild animals from land (for example, pannage is right to feed acorns on the land to pigs, and piscary is a right to take fish).

26 Gibson's Codex, vol 2, p 690.

THE NATURE OF THE RECTOR'S INTEREST IN THE RECTORIAL PROPERTY

2.26 It was well established that the rector, following induction, was vested with a freehold interest in the church and churchyard, the parsonage house, and the glebe land (along with the right to the tithes of the parish).[27] The rector's interest was sufficient to bring an action for trespass[28] (against, for example, a neighbour who encroached upon the churchyard) and to grant various interests in the land, including leases.

2.27 The reference to a freehold is a reference to an estate of freehold *tenure*. A rector's ownership of the rectorial property was not subject to a requirement that he offer particular services to his immediate lord or the Crown. (However, the rector's use of the land was subject to extensive conditions and restrictions, which were analogous to conditions of tenure.) The rector did not possess an *estate in fee simple*, which could, by definition, be passed to the owner's heirs and assigns. The rector's interest endured only for life, or until resignation or dismissal,[29] at which point the rectory would be in abeyance or suspended.

2.28 The rector's freehold gave him enjoyment of the rectorial property but only insofar as was consistent with the duties of his office. As described by Mr Justice Blackburn in *Greenslade v Darby*, the rector could not use the church "for any purpose which was inconsistent with the object of its consecration" but "nevertheless, the enjoyment of the property, so far as it could be exercised by one holding a sacred office, belonged to the rector as owner of the freehold".[30] Thus, given the limited nature of the rector's interest, he was not entitled to bar the parishioners and churchwardens from the church,[31] or displace the authority of the bishop to determine how the church was to be used.[32]

2.29 Two aspects of a rector's interest in the rectorial property require particular attention.

(1) First, there were significant limitations on a rector's power to dispose of the property to third parties.

(2) Secondly, a rector had various obligations relating to the maintenance of the rectorial property and dilapidations. One such obligation was CRL, but liability to repair the chancel was but an aspect of a wider set of obligations.

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27 See, for example, *Beckwith v Harding* (1818) 1 B. & Ald. 509, p 517; Godolphin, p 137; Phillimore, p 1756.

28 *Batten v Gedye* (1889) 41 Ch. D. 507, p 516; Prideaux's Guide, p 88.

29 Or in a few less usual scenarios, such as the exchange of benefices by two rectors.

30 (1867-68) L.R. 3 Q.B. 421, p 429.

31 "Where there is a spiritual rector he has, when inducted, the corporal possession of the church for the use of the parishioners, subject to the control of the Ordinary" (*Griffin v Dighton and Davis* (1864) 122 E.R. 767; 5 B. & S. 93, pp 103 to 104 by Cockburn CJ). Where a vicar had been appointed to minister in the church, the rector's freehold interests was described by Cockburn CJ in *Griffin* as being "naked and abstract right", which carried with it no right of possession of the church (p 103). Cf. Prideaux's Guide, pp 89 to 91.

32 The rector could not for example distribute seats in the church to particular parishioners (*Pettman v Bridger* (1811) 161 E.R. 996; 1 Phillimore 316, p 323 by Sir John Nicholl) or erect tablets in the chancel without permission of the bishop (*Beckwith v Harding* (1818) 1 B. & Ald. 509, pp 517 to 518, by Lord Ellenborough CJ; *Rich v Bushnell* (1827) 162 E.R. 1407; 4 Haggard 164, p 174 by Sir John Nicholl).

(1) Disposal of rectorial property

2.30 A rector was only vested with the rectorial property by virtue of his office and was only entitled to that property for as long as he remained the rector. His interest was consequently not sufficient to transfer an estate in fee simple to a third party.[33] A rector could only alienate the rectorial property with the consent of the patron and the bishop.[34] For this reason, in *Fanshaw v Rotherham* Lord Keeper Henley[35] said:

> it is to be observed, that the parson has not in himself the mere right of things, which he has in right of the church; the fee simple is in abeyance: so that every act that he has done may be avoided when he ceases to be incumbent, except such as were done with the consent of the patron and ordinary.[36]

2.31 A rector could not transfer the rectorial property to another person and appoint that person to act as rector in his place, because the right of appointment belonged to the patron subject to the supervision of the bishop.[37] While a rector was entitled to grant a lease of his glebe land, he could not grant a lease or other incumbrance on the property that would affect his successor in the office.[38]

The transfer of tithes

2.32 We discuss above the grant, and restrictions on the grant, of portions of tithes from a parish and the severance of tithes from a rectory. There were further restrictions that applied to the modification and discharge of tithes.

2.33 Tithes were not payable by one spiritual person to another, and so the right to tithes was suspended while the tithable land was in the ownership of a cleric or religious institution. Tithes would again become payable if the land were to be transferred or leased to a lay person.[39] Similarly, a rector was not obliged to pay tithes to himself, and so if a rector purchased additional land in the parish that was subject to tithes, the right to tithes was suspended (on the basis of "unity of possession") until the land was transferred or let to a different (lay) person. Neither spiritual ownership nor unity of

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33 Phillimore's Ecclesiastical Law, p 1610.

34 *Goodale v Butler* (1597) 1 Gwillim 204, p 205. Note, however, that Gibson's Codex (vol 2, p 689) states that a rector could not alienate rectorial property even with the consent of the patron and the bishop, which is inconsistent with the observations in *Goodale* and with those in *Fanshaw* (below).

35 The Lord Keeper of the Great Seal of Great Britain, sitting in the Court of Chancery, who exercised the same powers as the Lord Chancellor under the Lord Keeper Act 1562. Lord Keeper Henley was the last person to hold the office of Lord Keeper, and was later appointed Lord Chancellor, becoming the Earl of Northington.

36 (1759) 1 Eden 276, p 292.

37 *Grendon v Bishop of Lincoln* (1576) 1 Gwillim 136, p 139 by Dyer CJ.

38 Indeed, there is case law that suggests a lease would automatically determine on the death of the rector (see *Johnson's Case* (1628) 124 E.R. 365; Hetley 88) even if the new rector accepted rent from the tenant "because by [the rector's] death the franktenement is in abeyance, and in no man". It is not clear whether it would make any difference if the lease were granted with the consent of the patron and the bishop, although Phillimore's Ecclesiastical Law (p 1645) suggests such leases were valid before a series of statutes intervened to restrict them.

39 See, for example, the argument of Lord Coke, when he was Attorney-General, in *Blinco v Barksdale* (1596) Cro. Eliz. 577, p 578: "the Levite ought not to pay tithes to another Levite: but when the glebe land is conveyed into the hands of a layman, as here it is, it shall be otherwise".

possession would permanently extinguish the right to tithes. The reason for this, as explained by Gibson's Codex, is that tithes were not "things issuing about of lands" but were spiritual duties.[40]

2.34 We mention above that (subject to some complications) tithes could only be held by a spiritual person. A rector could not, therefore, simply transfer title to some or all of the tithes of the parish to a lay person. There were significant restrictions on whether a lay person could agree a modification of their obligation to pay tithes or discharge their land from tithes.

(1) A lay landowner could show their land was discharged from tithes by composition. Composition involved a release of tithes by the rector (with the consent of the patron and the bishop) in exchange for adequate and enduring compensation to the church, such as a grant of further land or an annuity to the rector.[41]

(2) A lay landowner could agree an alternative manner of tithing – for example, to pay a fixed sum of money rather than a portion of farm produce. They could also establish an alternative manner of tithing by *prescription* (in other words, by showing it had existed for time immemorial). However, for the practice to be enforceable, it would need to be shown that the alternative manner of tithing did not disadvantage the church.

It was not possible for a lay landowner to escape the payment of tithes simply by showing that tithes had never been paid in respect of the land.[42]

2.35 Matters were slightly different if a religious institution, such as a monastery, owned land within a parish that would ordinarily be liable for tithes. Like a lay person, the monastery could establish a particular manner of tithing by agreement or prescription, or show a discharge of tithes in exchange for compensation. However, a religious institution could also show their land was *exempt* from tithes by Papal Bull (formal permission from the Pope) or by prescription (showing that tithes had never been paid). Moreover, it appears that some monasteries took a grant of tithes payable from their land, which they would then collect in future after letting or transferring the relevant land to a lay person.[43]

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40 Gibson's Codex, vol 2, p 690.

41 There is some uncertainty in the case law about whether land could be discharged from tithes by consent of the patron and the bishop without compensation (suggested in *Slade v Drake* (1617) 80 E. R. 439; Hobart 295, p 297) or whether payment was required (known as a "real composition"). The need for a real composition is probably correct – see *Fanshaw v Rotherham* (1759) 1 Eden 276, pp 293 to 294, by Lord Keeper Henley, and *Norbury v Mead* (1821) 4 E.R. 582; 3 Bligh 211, pp 237 to 238 by Lord Redesdale; R H Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (OUP 2004), p 453.

42 See R H Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (OUP 2004), p 454; *The Aldermen and Burgesses of Bury St Edmund and Wright v Evans* (1738) 92 E.R. 1249; 2 Comyns 643, pp 650 to 651 by Sir John Comyns CB; *Norbury v Meade* (1821) 4 E.R. 582; 3 Bligh 211, pp 237 to 238, by Lord Redesdale. Establishing a manner of tithing by long usage was known as prescription "in modo decimandi" (a mode of tenthing), whereas establishing the non-payment of tithes by long usage was known as prescription "in non decimando" (not tenthing).

43 *Norbury v Meade* (1821) 4 E.R. 582; 3 Bligh 211, p 236 by Lord Redesdale.

Legislative interventions

2.36 Alongside the restrictions placed by the common law on the disposal of rectorial property, Parliament has repeatedly intervened to prevent the dissipation or improper use of church assets. Restrictions on the transfer of church property existed under the civil law of the Roman Empire.[44] By the 15th century, a substantial body of canon law had developed restricting the use of rectorial (and other church) property.[45] Following the Reformation, statutes were passed in the reign of Elizabeth I (13 Eliz. c.2 and 13 Eliz c.5) to restrict leasing of rectories and to prevent rectors from disposing of their assets in order to deprive their successors of a remedy (in particular, of remedies relating to dilapidations, discussed below), and in the reign of James I (2 Jac c.3) to prevent the disposal of property belonging to Bishoprics and Archbishoprics, except the grant of leases of 21 years or three lives[46] with a suitable rent reserved.

2.37 It is notable that there was a need for these statutes. They sought to prevent the considerable riches that were often conferred by ecclesiastical benefices from being exploited for private profit.

(2) Dilapidations and waste

2.38 In addition to the restrictions on disposal which we discuss above, a rector was subject to various obligations in relation to the use and maintenance of the rectorial property.

(1) First, a rector was subject to negative obligations to refrain from committing "waste" – meaning the destruction or dissipation of property by a person who does not have an absolute entitlement to it. As a rector enjoyed only a life interest in the rectorial property (subject to earlier dismissal or resignation) and was vested with the property to support his ministry to the parish, he was not entitled to cause loss to his successors or the church by despoiling the land or buildings. It would evidently be waste for a rector to demolish the church or parsonage house, but most of the case law concerns the cutting down of trees or the extraction of gravel or stone from the glebe land. A rector was not entitled to open new mines on the glebe land,[47] to fell trees in the churchyard except for

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44 John Godolphin records the decree of Emperor Justinian that, subject to defined exceptions, "the lands of the Church should not be sold, alienated, or exchanged" (Godolphin Repertorium Canonicum, pp 136 to 137).

45 The canons recorded in Lyndwood's Provinciale prohibit the alienation of church property by pastors except in accordance with the canons (pp 59 to 60), and contain detailed restrictions on leasing rectorial property (bk 3, title 9, chs 1 to 3); on giving perpetual stipends or pensions (bk 3, title 8, ch 2); on building houses or granting estates in fee simple to a pastor's children or concubines (bk 3, title 12); on transferring property by will or on an intestacy (bk 3, title 13, chs 1 to 7); on the appointment of a rector who was already in possession of an ecclesiastical benefice with cure of souls (bk 3, title 7, ch 3); and on sons being appointed as rectors immediately after their fathers ceased to hold the office (bk 1, title 8, ch 1).

46 A lease that named three living persons and that would expire when all three had died.

47 *Knight v Mosely* (1753) 27 E.R. 118; Amb. 176, p 176 by Lord Hardwicke LC.

the purpose of repairing the church,[48] or to cut down timber on the glebe land for sale rather than for the repair of buildings on the land.[49]

(2) Secondly, a rector was also subject to positive obligations to maintain the buildings with which his benefice was endowed, including the parsonage house and farm buildings upon the glebe land, and to repair or rebuild any buildings that fell into disrepair or ruin.[50]

2.39 Across western Europe, a rector's obligations included a requirement under canon law to maintain and repair the parish church (the entire building). Both Burn's and Phillimore's Ecclesiastical Law noted that, under canon law, the repair of the church belonged to the person who received the fourth (or third) part of the tithes of the parish, traditionally allocated to repair.[51] (As explained at paragraph 2.23 above, this person was originally the bishop and later the rector.) While generally correct, the statement from Burn and Phillimore needs to be treated with some caution. We have discussed how, in some parishes, a portion of tithes was severed and given to another spiritual person or religious house. There is no suggestion such a portion of tithes carried any liability to repair the local church. A rector was bound to repair the church because he received tithes (and other property) vested in him for the purpose of repairs *and* because he was the incumbent of the parish, with responsibilities for performing the sacraments and providing divine service.

2.40 In England and Wales, however, the requirement to maintain the church was modified by a general custom that the body (or nave) of the church would be repaired by the parishioners and the rector would repair only the chancel.[52] Yet the obligation of the parishioners or the rector to repair different sections of the church could vary according to local customs. For example, a custom developed in the City of London that the parishioners (rather than the rector) would repair *both* the nave and the chancel of the church.[53] Different customs have been established in other parishes.[54]

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48 The trees were needed to shield the building from the effects of wind: *Bellamie's Case* (1615) 81 E.R. 471; 1 Rolle 255; *Strachy v Francis* (1741) 26 E.R. 534; 2 ATK 217.

49 *Duke of Marlborough v St. John* (1852) 64 E.R. 1068; 5 Deg. & Sm. 173, p 178 by Sir James Parker V-C.

50 Godolphin's Repertorium Canonicum, p 175; *Wise v Metcalfe* (1829) 109 E.R. 461; 10 B. & C. 299, pp 313 to 314 by Bayley J.

51 Burn's Ecclesiastical Law, vol 1, p 320; Phillimore's Ecclesiastical Law, p 1785.

52 *Pense v Prouse* (1695) 91 E.R. 934; 1 Ld. Raym. 59; *Griffin v Dighton and Davis* (1864) 122 E.R. 767; 5 B. & S. 93, p 106 by Cockburn CJ. The custom had become well-established by the time of the Constitution of Othobon in 1268. In "The custom of the English Church: parish church maintenance in England before 1300" (2010) 30 *Journal of Medieval History*, Carol Cragoe wrote that the earliest evidence of the custom is from the 1224 statutes of Winchester Diocese, but that the custom did not become established across England until the middle of the 13the century. Cragoe cites sources that suggest the custom developed (a) because there had been an increase in the number of parish churches in the 12th century and rectories were endowed with less property for the maintenance of the churches, and (b) because so many rectories had been appropriated by monasteries, and vicars were left with insufficient means to maintain the whole church.

53 See *The Bishop of Ely v Gibbons and Goody* (1832) 162 E.R. 1405; 1 Hag. Ecc. 107, p 163, where Sir John Nicholl discussed both the custom in London and a similar custom in the parish of Clare in Norfolk.

54 In *Ball v Cross* (1689) 91 E.R. 152; 1 Sakeld 164, parishioners established that they had no liability to repair the nave of the parish church because they proved a custom under which they had never contributed to the

2.41 CRL was thus originally an aspect of the repairing obligations a rector undertook as part of his religious office. It was not a separate liability, but an aspect of a rector's wider obligations. It was a duty or a responsibility of a religious officeholder, similar to a rector's duty to administer the sacraments or provide hospitality for the poor.

2.42 To further understand the original nature of CRL, it is informative to consider —

(1) the persons to whom the rector owed his duty to maintain the rectorial property;

(2) how the duty was enforced; and

(3) the scope of the rector's duty.

To whom was the duty of repair owed?

2.43 CRL was a duty on an officeholder. It began in the early church as a moral duty, and hardened into a legal duty as ecclesiastical law evolved. CRL may be called a "liability" in the sense of broad sense of being a legal obligation, but it was neither a monetary liability nor a liability in the sense of a private obligation owed to another individual. Unlike a civil action, a person who brought proceedings in the ecclesiastical courts to enforce a rector's repairing obligations did not have to establish that they had suffered personal harm due to the rector's non-performance. An analogy is sometimes drawn between an action for disrepair in the ecclesiastical courts and criminal proceedings. However, as Lord Selborne observed in *Mackonochie v Lord Penzance*, while these proceedings "are called (and in some sense are) criminal and penal", ecclesiastical law "has for its object, not the punishment of individual offenders, but the correction of manners, and the discipline of the Church".[55]

2.44 The bishop and diocesan authorities had a duty to supervise the proper discharge of a rector's spiritual obligations and also an interest in the maintenance of a sufficient living that would enable future rectors to provide cure of souls in the parish.[56] But it would not be correct to describe CRL as a duty owed solely *to the church*. Proceedings in the ecclesiastical courts were often commenced by the churchwardens, who represented the interests of the parishioners or the parish at large.[57] The parishioners would be particularly affected by damage or disrepair to the church or churchyard if it prevented their use for divine service or burial.

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repair of the parish church but had instead used a separate parish chapel for christenings and burials. Other cases concerned customs that particular families in the parish or the owners of a significant property in the parish had customarily repaired the chancel (usually combined with a right for the relevant landowner to enjoy the chief seat and rights of burial in the chancel): see *Hawkin's Case* (1702) 5 Modern 389, *Williams v Bond* (1690) 2 Ventris 238, and *Anonymous* (1681) 89 E.R. 217; 1 Freeman 300.

55 (1881) 6 App. Cas. 424, p 433.

56 The constitutions of Cardinal Othobon of 1268 required bishops, and archdeacons, on their visitation to parishes, to give particular regard to the state of repair of the church, parsonage, and other buildings, and exhort rectors to fulfil their repairing obligations (Godolphin's Repertorium Canonicum, p 174). The canons collected in Lyndwood's Provinciale also contained a requirement for archdeacons to give "diligent consideration to the building of the church, and specially of the chancel whether perchance it lack or need any reparation" (bk 1, title 10, ch 4).

57 Pideaux's Guide noted that "although the churchwardens are not charged with the repairs of the chancel, yet they are with the supervisal both of that and the minister's house, to see that neither of them be permitted to dilapidate or fall into decay" (p 420): cf Phillimore's Ecclesiastical Law, p 1790.

2.45 Moreover, proceedings for disrepair were also brought by two further classes of person.

(1) First, proceedings were sometimes commenced by the patron of the parish. A patron had an interest in the preservation of the rectorial property. Waste or dilapidation would prejudicially affect their advowson (their private property right) by undermining their power to grant future incumbents a rectory that provided the same standard of living. Given the connection to the patron's property rights, they also had a right in the temporal courts (specifically the courts of chancery) to obtain an injunction against a rector committing waste.[58] We are not aware of any case, however, in which a patron established a cause of action in the temporal courts to compel a rector to discharge his *positive* repairing obligations.

(2) Secondly, the rector's successor (once he became the new rector) would be prejudicially affected by waste or disrepair, not only because it may affect his income from the benefice, but also because the new rector would be obliged to remedy the damage or disrepair. The canons in Lyndwood's Provinciale state that "[i]f the parson of any Church depart, leaving the Church housing down or ruinous, such portion shall be deducted out of his ecclesiastical goods as shall suffice to repair them and to supply other faults of the Church".[59] The successor could seek an order from the spiritual courts for the former rector to make good his default. (He also had a separate action at common law in the temporal courts, which we discuss in Chapter 3.[60])

2.46 It might be possible to construe CRL as a duty owed to the church, the parish, the patron *and* the rector's successors in title.[61] However, we think the better analysis of the duty may be that it was not owed to a closed group of persons at all. Rather, CRL was *in some respects* akin to a duty on a public official, owed to the public in general (although we are not suggesting that it was a fully-fledged public duty in the sense used in modern administrative law). CRL was enforceable by those with sufficient interest in its performance, including parishioners. The parishioners had rights in relation to the use of the church, but they did not have any proprietary interest in the church, churchyard, glebe, or tithes. The parishioners' right to enforce CRL was not based on any private interest affecting the rectorial property.[62] As discussed below,

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58 *Duke of Marlborough v St. John* (1852) 64 E.R. 1068; 5 Deg. & Sm. 173.

59 Lyndwood, bk 3, title 27, ch 1.

60 See para 3.65 below.

61 We have not found evidence of proceedings being brought by any other persons. In 1832, *The special and general reports made to His Majesty by the Commissioners Appointed to Inquire Into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales* ("the 1832 Commissioners' Report") recommended a modified procedure for CRL in the ecclesiastical courts, "preserving to all the authorities of the Church, the Patron and Parishioners, a right to institute the Proceedings" and preserving the court's jurisdiction to hear claims "by the Successor to the Benefice" (p 51).

62 We note that where CRL was enforced by the patron of the parish or by a successor to the rector, the patron and the successor were (in part) protecting a proprietary interest in the church and glebe. Importantly, it is exactly in these cases that parallel general law claims were developed, because the temporal courts would protect the patron's property rights (the advowson) and the successor's freehold interests in the rectorial property. But these general-law routes of enforcement were not available to the parishioners or the churchwardens.

the initial remedy was an order that the rector must discharge those obligations rather than (for example) an award of damages.

The manner of enforcement

2.47 Where a rector had failed to comply with his repairing duties, the initial step for the ecclesiastical courts was to issue an order (known as a "monition") for the rector to comply with his duty. In *Mackonochie v Lord Penzance*, Lord Selborne described these orders as follows:

> "Monition" (which is sometimes itself called an ecclesiastical censure) is described in the books as of a "preparatory" nature … i.e. (as I understand the term) as a warning or command, to be followed in case of disobedience by some coercive sanction. It appears to have been a general (though not an invariable) rule of the canon law, that monition ought to precede suspension or excommunication.[63]

2.48 Where the monition was disobeyed, the court had various options, including suspension of the rector,[64] dismissal, or excommunication. From 1813,[65] the court was required to pronounce a sentence of contumacy, which would give rise to proceedings for contempt of court, rather than excommunication. The most common remedy, however, was for the bishop to appoint a person to take possession (to "sequester") the rectorial property and fund the repairs out of the profits of the rectory.[66]

The nature and scope of the rector's duty

2.49 The obligation on a rector to repair the chancel and the rest of the rectorial property was an obligation to perform works: to conduct or direct the repairs, potentially using the timber or other materials produced by the glebe land. It was not a financial obligation to pay a particular sum of money.

2.50 The extent of a rector's duty to maintain the chancel and the parsonage was explained by Mr Justice Bayle in *Wise v Metcalfe*:

> the incumbent was bound to maintain the parsonage … and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain any thing in the nature of ornament.[67]

2.51 However, the court in *Wise v Metcalfe* was not asked to consider the manner in which a rector was required to discharge his duty. In particular, the court did not consider *how* (i.e. out of what money) a rector was obliged to fund the repairs. This is an issue we examine below.

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63 (1881) 6 App. Cas. 424, p 433.

64 See Lord Selborne's discussion of the use of suspension in *Mackonochie v Lord Penzance* (1881) 6 App. Cas. 424, p 437.

65 Under 53 Geo. 3, c. 127, "An act for the better Regulation of Ecclesiastical Courts in England; and for the more easy Recovery of Church Rates and Tithes".

66 See Godolphin's Repertorium Canonicum,, pp 174 to 175.

67 (1829) 109 E.R. 461; 10 B. & C. 299, p 316.

Further reflections on the scope of the rector's duty and the receipt of profits

2.52 On our best interpretation of the law, a rector was not under a freestanding duty to repair the chancel (and other property) regardless of what income he had received from the rectory. Rather, a rector was specifically obliged to use the profits of his benefice to fund repairs. We have reached this conclusion for the following reasons.

2.53 First, we are not aware of any case in which a newly instituted rector, who had not yet received any income from the rectory, was obliged to fund repairs of the chancel out of his own money or goods. Indeed, it is not likely that a rector who had not had the time, or who did not have the resources, to repair the chancel would be censured by the ecclesiastical courts. The bishop or the current rector could pursue the former rector who had failed to remedy the relevant dilapidations and require him to fund the repairs. Furthermore, the ecclesiastical courts could take account of how and when the disrepair arose; the liability for the former rector was not an all-or-nothing affair. Thus, Phillimore's Ecclesiastical Law notes that if the benefice had been vacant for several years after the former rector departed, or the new rector had delayed suing the former rector for some time, "a proportionable deduction would be made for the decays which may reasonably be supposed to have happened during such intermediate time".[68]

2.54 Secondly, on finding the chancel was in disrepair, the canon law required the bishop to set a timetable for repairs (which could take into account the level of the rector's income).[69] We mention above that, where repairs were not carried out, the standard remedy was for the profits of the rectory to be sequestered, rather than for the rector to be compelled to repair (potentially using his own separate resources). Godolphin's Repertorium Canonicum states that the repairs were then completed "at the Parson's charge out of the profits and fruits of his Church and Benefice".[70]

2.55 In fact, not all of the profits were likely to be sequestered, as that may interfere with the provision of cure of souls and the support of the poor within the parish. As we mention when discussing the history of tithes (at paragraph 2.23 above), tithes were originally split into three or four portions, with one portion being intended for the maintenance of the rectorial property. The 19th injunction of Edward VI's *Injunctions to the Church of England* in 1547 said that if the property of a rectory is in decay, the rector should commit a fifth part of his income to the repairs until completed. This injunction was reissued as the 13th injunction of Elizabeth I's *Injunctions, given to all the Clergy* in 1559. In line with these injunctions, where the profits of a rectory were sequestered, it appears that a practice arose of sequestering only one fifth of the profits for the purposes of repairs. For example, the 1743 case of *Sollers v Lawrence* concerned rectorial buildings that had burned down. Chief Justice Willes[71] recorded that, in the absence of fault by the incumbent, "the constant rule is to order a fifth part of the profits of the living to be set apart" for rebuilding, and the ecclesiastical courts

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68 Phillimore's Ecclesiastical Law, p 1616.

69 Lyndwood's Provinciale, bk 1, title 10, ch 4.

70 Godolphin's Repertorium Canonicum, p 174.

71 The Chief Justice (the most senior judge) of the Court of Common Pleas.

generally followed this rule.[72] Similarly, in *North v Barker* in 1810, Sir John Nicholl noted that the ecclesiastical court will not usually order sequestration of more than a fifth of the tithes of the rectory for the purpose of remedying dilapidations.[73]

2.56 Thirdly, where a sequestrator had been appointed to take possession of the profits of the rectory, the sequestrator became bound by a duty to maintain and repair the rectorial property.[74] A sequestrator was bound to repair for exactly the same reason that a rector was bound to repair: the sequestrator took possession of property and income granted to the church for the maintenance of the chancel and the parsonage and to provide a living for successive incumbents. As Sir William Scott expressed the point in *Hubbard v Beckford*, the duty to repair is "a thing incident to, and inseparable from, the subject-matter [of the sequestration] itself, that there are certain duties and expenses for which the sequestrator is bound to provide".[75]

2.57 There is no suggestion that a sequestrator's duty required them to do more than use the profits of the rectory for the purposes of repair. A sequestrator would not be required to put their hand into their own pocket to fund the repairs if the profits they had received were insufficient.[76] As sequestrators and rectors were subject to the same duty, the fact that a sequestrator would not be required to draw upon their personal funds supports our view that a rector was also not required to use his personal funds to repair the rectorial property.

2.58 Finally, where a rector resigned from a parish leaving the rectorial property in disrepair, the Constitution of Edmund of 1236, collected in Lyndwood's Provinciale, states that the former rector must fund repairs "out of his ecclesiastical goods".[77] Phillimore's Ecclesiastical Law discusses Lyndwood's gloss on this canon, that if the former rector does not own sufficient ecclesiastical goods, the reparation ought to be made out of his patrimonial goods.[78] It is notable that a requirement for a former rector to use his personal wealth, and not the profits of the rectory, for the repairs was taken to require a special justification, namely that ecclesiastical goods are insufficient because the rector "has employed his ecclesiastical goods in the improving of his patrimony".[79]

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72 (1743) 125 E.R. 1243; Willes 413, pp 420 to 421.

73 (1810) 161 E.R. 1334; 3 Phillimore 307, p 309.

74 Phillimore's Ecclesiastical Law, p 1788; *Hubbard v Beckford* (1798) 161 E.R. 562; 1 Hag. Con. 307, pp 310 to 311 by Sir William Scott; *Whinfield v Watkins* (1812) 161 E.R. 1059; 2 Phill Ecc 4, p 8 by Sir William Scott.

75 (1798) 161 E.R. 562; 1 Hag. Con. 307, p 311.

76 See *Whinfield v Watkins*, (1812) 161 E.R. 1059; 2 Phill Ecc 4, a suit against a former sequestrator: it was specifically alleged (at p 2) that the sequestrator had received enough income from the benefice to fund the repairs.

77 Lyndwood's Provinciale, bk 3, title 27, ch 1.

78 "Patrimony" refers to a person's inherited and inheritable goods (literally, goods acquired from the father).

79 Phillimore's Ecclesiastical Law, p 1671. Note, however, that in *Downes v Craig* (1841) 152 E.R 71; 9 Meeson and Welsby 166, p 176, in explaining the liability of rectors to their successors, Baron Parke simply stated that "[i]f they have permitted dilapidations, they are to pay to their successors so much as shall be necessary to put the rectory into a proper state of repair".

Summary

2.59 If our analysis is correct, we can characterise the original nature of CRL as follows. CRL was one of a bundle of duties that bound a rector by virtue of his religious office. Specifically, the rector was required to use the property vested in him pursuant to his office for the purpose of discharging various positive obligations: in particular, to provide cure of souls in the parish and to maintain and repair the chancel, parsonage house, any other rectorial buildings.

THE APPROPRIATION OF RECTORIES

2.60 Having examined the nature of rectories and rectorial duties above, there is a further aspect of ecclesiastical law we need to consider before we examine the transfer of church property into lay hands during the Reformation in Chapter 3. We need to consider the appropriation of rectories by monasteries and other religious institutions.

2.61 The office of rector carried with it a valuable package of property and rights, particularly income from the tithes of the parish and from letting the glebe land. There was a temptation, therefore, for rectories to be exploited for private gain. Much of the early development of ecclesiastical law in England and Wales involved a series of attempts by canons and Acts of Parliament to stop rectories and other ecclesiastical benefices being abused for private gain. For example, the canons of the Third Lateran Council of 1179 prohibited the grant of ecclesiastical benefices and tithes to a lay person,[80] while the canons of the Fourth Council in 1215 addressed pluralities, by forbidding the holder of one ecclesiastical benefice with cure of souls from obtaining a second.[81]

2.62 However, while a lay person could not be appointed as rector or be given the tithes of a parish, it was possible to appoint a spiritual corporation as rector. This appointment was known as an "appropriation" of the rectory. A spiritual corporation could try to secure its appointment by the patron, but the more common practice was for the corporation to acquire the advowson and appoint itself as rector, so that it became both the patron and the incumbent. In *Grendon v Bishop of Lincoln*, Chief Justice Dyer explained that "appropriations were originally made to abbots, priors, deans, prebendaries, and such others who could minister the sacraments and perform divine service".[82] The effect of such an appropriation was to appoint a corporation sole rather than a natural person as rector – to appoint, for example, an abbot *and his successors* to hold the office. However, appropriations came to be made to spiritual corporations aggregate – to the dean *and chapter* of a cathedral, for example, or to abbeys and priories rather than abbots and priors.[83]

2.63 An abbot or prior was capable of ministering to the parish himself, but he could appoint a deputy to perform his spiritual duties in his place. The deputy was known as a vicar (from the Latin "vicarius", meaning "substitute"). A spiritual corporation

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80 Phillimore's Ecclesiastical Law, p 275.

81 Above, p 1162.

82 (1576) 1 Gwillim 136, p 139 by Dyer CJ.

83 Watson's Complete Incumbent p 189; Phillimore's Ecclesiastical Law, pp. 272 to 273.

aggregate, such as an abbey or priory, could not minister to the parish itself and so a vicar would need to provide for cure of souls.

2.64 The appropriation of a rectory could confer a significant financial benefit. The spiritual corporation became the perpetual incumbent of the rectory and received its income. There was a risk that spiritual services to the parish could suffer, as the income was diverted to the corporation's own uses. As a result, a succession of laws were passed to control appropriations.

(1) The Constitution of Othobon required all religious houses in possession of rectories to present vicars, endowed with sufficient income, to the bishop for institution.

(2) A statute from the reign of Richard II (1391, 15 Rich. 2, c.6) provided that appropriations could be licensed by the bishop only if, first, the bishop had identified a suitable portion of the profits of the rectory that were to be distributed yearly for the support of the poor of the parish, and, secondly, that a vicar of the parish was well and sufficiently endowed.

(3) A statute of Henry IV (1402, 4 Hen. 4, c. 12) required that, on future appropriations, a permanent vicarage should be created and endowed with sufficient income, and a canonically qualified "secular person" should be instituted as vicar (not a member of a religious house and so, for example, not a monk of the priory that obtained the appropriation).

2.65 Each of these statutes hints at the problems they were intended to remedy. Originally, vicars were often servants of the relevant religious house who could be dismissed at will.[84] In such cases, the vicarage – the vicar's religious office – had no permanency and no endowment. It was not a benefice. The appropriator of the rectory could retain the third portion of the tithes traditionally allocated for the support of the rector, providing the vicar with little by way of support.[85] The terms of 15 Rich. 2, c.6 also suggest that appropriators were retaining the portion of tithes traditionally allocated to providing hospitality and the support of the poor.

2.66 In the years following these Acts, it became common to reserve the term "vicar" for those religious officials who had responsibility for cure of souls in the parish, served for life and were endowed with property for their support. However, where a vicarage was endowed in accordance with the Acts, it was not usually given the entire revenue of the rectory. Vicarages were frequently endowed with the small tithes of the parish and a portion of the glebe, while the appropriator retained the great tithes and the rest of the glebe.[86] Religious houses retained significant income from their appropriated

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84 *Jones v Ellis* (1828) 148 E.R. 918; 2 Y. & J. 265, p 273 by Alexander CB.

85 In *Grendon v Bishop of Lincoln* (1576) 1 Gwillim 136, Dyer CJ discussed the history of appropriations, including appropriations to spiritual corporations aggregate. He said: "in order to supply these defects in the persons to whom such appropriations were made, who could not themselves perform divine service, a vicar was afterwards devised … and he had but a small portion allotted him, and they to whom the appropriations were made retained the great revenue, and did nothing for it, and as the revenue decayed, so did preaching and hospitality in the parsonage, and other good works" (p 140).

86 See the discussion of appropriations by Blackburn J in *Greenslade v Darby* (1867-68) L.R. 3 Q.B. 421, pp 429 to 431. At p 430, Blackburn J noted that "[a]fter the passing of the statute [4 Hen. 4, c. 12], the general

rectories. Moreover, there were ways around the requirements of 15 Rich. 2, c. 64 and 4 Hen. 4, c. 12 for religious houses that wished to retain greater income. Some appropriations were exempt, including those that occurred before the passing of those Acts. In other cases, the appropriation was made to a spiritual corporation sole – for example, to the prior of a monastery – *with* cure of souls, so there was no requirement to appoint a vicar. However, the prior could still deputise the provision of spiritual services via a stipendiary curate, who was licensed to act by the bishop. A curate was a temporary appointee; unlike a vicar, he was not the incumbent of the parish but an assistant to the rector, who retained the primary responsibility to provide cure of souls.[87]

Repairing obligations on vicars and curates

2.67 It is useful for understanding the nature of CRL to consider briefly the obligations of vicars to maintain the chancel of the church and the property with which the vicarage was endowed.

2.68 A vicarage was endowed by the rector out of the rectorial property. As a result, the common law conferred on the rector the advowson of the vicarage (just as it conferred the patronage of a rectory on the lord who founded it).[88] Where a vicarage was vacant, it was therefore open to the rector with the consent of the bishop to bring the vicarage to an end by uniting it with the rectory.[89]

2.69 There were no specific elements of the rectorial property with which the vicarage needed to be endowed. A vicar could only establish an entitlement to an item of vicarial property – for example, the small tithes of the parish – by showing he had specifically been endowed with them, or by establishing a later grant by the rector, a relevant local custom, or claiming them by prescription (presuming title on the basis that the vicar had enjoyed them for time immemorial).[90] According to Phillimore's Ecclesiastical Law:

> There were no vicarages at common law: or, in other words, no tithes or profits of any kind do *de jure* belong to the vicar, but by endowment or prescription, which cannot be presumed, but must be shown on the part of the vicar.[91]

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practice was for the monastery to give the person they appointed vicar the small tithes, and sometimes a portion of the glebe land" (p 430).

87 See the discussion of the nature of curacies by Sir William Scott in *The Duke of Portland v Bingham* (1792) 161 E.R. 509; 1 Hag. Con. 156, p 166.

88 Phillimore's Ecclesiastical Law, p 279 to 280. Phillimore mentions, however, (citing *Sherley v Underhill* (1620) 123 E.R. 1086; Hut. 41) that in some cases the patron of a rectory only gave permission for an appropriation of the rectory to a religious house on condition that they obtain the advowson of the vicarage, which became appendant to their manor.

89 Godolphin's Repertorium Canonicum, p 199.

90 R H Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (OUP 2004), p 458. See, for example, *Barsdale v Smith* (1597) 78 E.R. 873; Cro Eliz. 633 concerning a custom for the vicar to receive the tithe of hay, and Phillimore's Ecclesiastical Law, p 285.

91 Phillimore's Ecclesiastical Law, p 281. The courts did apply a few presumptions, however: for example, that the vicar was entitled to the pasturage of the churchyard (*Greenslade v Darby* (1867-68) L.R. 3 Q.B. 421, p 430 by Blackburn J), and that a vicar endowed with all the small tithes of the parish was not entitled to tithes from the rector's glebe land without a specific grant (*Blinco v Barksdale, Vicar of Marston* (1596) 78 E.R.

2.70 It was presumed that the rector was vested with the freehold of the church and churchyard, as he was entitled to it under the general law (although we are not aware of any reason in principle why, for example, the freehold of the churchyard could not have been given to the vicar as part of his endowment).[92] However, the rector had no right to the possession or control of the church that would entitle him to exclude the vicar. The vicar had the right to use the church for the purpose of performing his spiritual duties.[93]

2.71 Given that the extent of the endowment of a vicarage was not prescribed by law, it was possible for a vicarage to be endowed with insufficient income to support the vicar and his work. In such circumstances, the bishop had the power to dissolve the vicarage, provided cure of souls could then revert to the rector, or to require the rector to augment the endowment of the vicarage out of the rectorial property.[94]

2.72 Regarding the repairing obligations of vicars, in our 1983 consultation paper on chancel repair liability, we stated that vicarial property did not carry with it any CRL.[95] (The same claim was made by Lord Scott in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* ("*Wallbank*"), but we do not know if it was based on the assertion in our consultation paper.[96]) We now think this statement was incorrect. The vicar was under an obligation to maintain the vicarage and other vicarial property and could be pursued by his successor for dilapidations if he failed to discharge his duty.[97] Moreover, there is clear authority that a vicar could be liable to maintain the chancel. In *Griffin v Dighton and Davis*, Chief Justice Cockburn said:

> the liability of the rector to repair the chancel is not universal. It is said that where there are both rector and vicar in the same church they shall, there being no custom to the contrary, contribute to the repair of the chancel in proportion to their benefice.[98]

The same statement of law appears in Phillimore's Ecclesiastical Law.[99] In fact, the vicar and not the rector could have sole responsibility for maintaining the chancel, as in *Bellamie's Case*.[100] Both Godolphin's Repertorium Canonicum and Prideaux's Guide note the possibility that a vicar may be responsible for repairing the chancel

821; Cro. Eliz. 578, p 579; Phillimore's Ecclesiastical Law, p 1492). The rector could not resile from the original endowment of the vicarage by claiming via prescription a right to property granted to the vicar (*Pringe v Child* (1604) 74 E.R. 975; Noy 3).

92 Prideaux's Guide, pp 88 to 89; *Jones v Ellis* (1828) 148 E.R. 918; 2 Y. & J. 265, p 273 by Alexander CB.

93 *Griffin v Dighton and Davis* (1864) 122 E.R. 767; 5 B. & S. 93, p 103 by Cockburn CJ.

94 Gibson's Codex, vol 2, p 758.

95 Transfer of Land: Liability for Chancel Repairs (1983) Law Commission Working Paper No 86, para 2.21.

96 [2003] UKHL 37; [2004] 1 AC 546, at [99].

97 *Whinfield v Wakins* (1812) 161 E.R. 1059; 2 Phill Ecc 4 concerned whether a sequestrator of a vicarage stepped into the shoes of the vicar and was liable to maintain the vicarial property.

98 (1864) 122 E. R. 767; 5 B. & S. 93, p 105.

99 Phillimore's Ecclesiastical Law, p 1768.

100 (1615) 81 E.R. 471; 1 Rolle 255. See also *Allison v Reeves* (1666) 84 E.R. 158; 2 Keble 254. Importantly for our purposes, in both cases the rectory had been transferred into lay ownership following the dissolution of the monasteries, so the lay rector was not subject to CRL.

and that, in such cases, he would be entitled to use the trees from the churchyard for that purpose.[101] The extent of the vicar's responsibility was sometimes established by custom, but it also appears that it was sometimes agreed by the rector and bishop as part of the original endowment of the vicarage. We are not aware of any reported case in which the extent of a vicar's responsibility for repair was varied by later agreement, but the endowment of the vicarage could have been altered by later agreement between the rector, the vicar and the bishop.

2.73 We also note that the presumption about the division of liability between vicars and rectors supports our analysis of CRL as an obligation on the holder of a particular kind of religious office to use the profits of the rectory for repair of the chancel. First, a vicar was liable for CRL because he was *the incumbent* of the parish, or at least possessed a permanent office. For that reason, in *Pawly v Wiseman*,[102] it was held that a curate who could be dismissed at will was not the incumbent of the parish and was not liable for dilapidations, notwithstanding the fact that he enjoyed a stipend and was granted some of the tithes of the parish. By contrast, in *Mason v Lambert*, a permanent curate, who could not be dismissed at will and whose curacy was endowed with extensive property was held to be responsible for repairs.[103] Secondly, a vicar was vested with property from the rectory for the purposes of discharging his spiritual functions, and his liability was presumed to be proportional to the amount of property with which he was vested. (Likewise, in *Mason v Lambert*, it was held that the maintenance of ecclesiastical buildings was "a duty growing out of occupation and enjoyment" of church property.[104] The duty applied to a perpetual curate as the curacy was endowed with property and the curate "holds such buildings and lands as such curate, and as annexed to his curacy".[105])

CONSULTATION QUESTION

2.74 In this chapter, we have explored the original nature of CRL, when it was an obligation solely on spiritual rectors. Our discussion provides the background for Chapter 3, in which we examine how rectories were transferred into lay hands following the dissolution of the monasteries. In Chapter 3, we consider in particular how this transfer altered the nature of a rector's interest in the rectorial property and whether it affected the nature of their repairing obligations, including CRL.

2.75 Before proceeding, however, we recognise that the legal issues we discuss in this chapter are both complex and obscure. We have not been able to draw on any sufficiently detailed legal commentary on the nature of CRL and so we have provided our own analysis. Consequently, we invite consultees to inform us if there are any relevant cases, canons, or legal or historical commentaries which are not discussed in this chapter.

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101 Godolphin's Repertorium Canonicum, p 150; Prideaux's Guide, p 422.

102 (1674) 84 E.R. 910; 3 Keb. 614, discussed in Gibson's Codex, vol 2, p 792.

103 (1848) 116 E.R. 1069; 12 Q.B. 795, pp 806 to 807 by Lord Denman CJ.

104 Above, p 806.

105 Above, p 807.

Consultation Question 1.

2.76 We invite consultees to inform us if there are any relevant authorities, canons, or legal or historical commentaries which we have not considered in Chapter 2.

Chapter 3: Chancel repair liability after the dissolution of the monasteries

INTRODUCTION

3.1 In Chapter 2, we examine the origins of chancel repair liability ("CRL"). It was an obligation on parish priests, specifically on "beneficed" clergy: those provided with a living to support their ministry to the parish. The living consisted of land and other rights, most importantly the right to collect tithes, which generated an income to assist priests in performing the duties of their office. These duties included an obligation to keep the chancel of their parish church in good repair. These priests were called "rectors" and their religious offices together with the attached property were called "rectories".

3.2 CRL was only one part of a rector's repairing obligations. For example, a rector was also obliged to repair the parsonage house. Moreover, these obligations were part of a wider framework of ecclesiastical rights and duties. There were tight restrictions on whether the rector could dispose of the rectorial property and on whether rectorial property could be given to non-religious (lay) persons. Likewise, there were restrictions on who could be appointed as a rector and take ownership of a rectory – a person needed to be canonically qualified and instituted by the bishop.

3.3 However, today CRL may bind lay persons, who do not perform any religious function and are not canonically qualified to minister to the parish. Like spiritual rectors, these lay persons own rectorial property, but they are free to dispose of or to divide that property. As a result, there are cases in which a parish has multiple lay rectors, who are all subject to CRL relating to the same chancel.

3.4 Our purpose in this chapter is to examine how a religious duty on parish priests could have transformed into an obligation on lay persons. We consider to what extent the nature of CRL has changed: in particular, we discuss whether CRL remained an obligation on an officeholder, or whether it has become a burden on land akin to a mortgage, rentcharge or easement. In this chapter, we focus on the effects of the dissolution of the monasteries and the transfer of rectories to lay persons. In Chapter 4, we consider whether subsequent legislative changes – particularly the enclosure of common land and the abolition of tithes – had an impact on the nature of CRL. We then consider how the law in relation to CRL developed in the 20th century. Our analysis provides the groundwork for our discussion in Chapter 5 of whether CRL is an interest in land and whether it is governed by the Land Registration Act 2002 ("the LRA 2002").

3.5 We refer in this chapter to the same sources listed in Chapter 2 at paragraph 2.7 using the same abbreviations.

3.6 We mention at the start of Chapter 2 that the issues we consider in Part 1 of this consultation paper are complex. Consultees who are unfamiliar with property law can move ahead to Chapters 6, 7 and 8 (Part 2 of this consultation paper) where we

summarise our conclusions and ask consultation questions about reforming the LRA 2002 and the law of unregistered land.

THE DISSOLUTION OF THE MONASTERIES AND ITS EFFECTS ON CHANCEL REPAIR LIABILITY

3.7 During the Reformation, the Church of England broke away from the Roman Catholic Church; the Act of Supremacy 1534 made the King the head of the church in place of the Pope. At the time of the Reformation, around a third of rectories in England and Wales had been appropriated by religious corporations.[1] This represented a massive accumulation of wealth in the hands of the monasteries and other religious institutions.[2] We explain the appropriation of rectories in Chapter 2 at paragraphs 2.60 to 2.66.

3.8 We generally refer in this chapter to the Crown, rather than to the King or Queen. The Crown is the institution of the monarchy. We only refer to the King or Queen when we are discussing personal actions by the monarch. For example, the King or Queen, but not the Crown, can have heirs.

3.9 Following the Act of Supremacy, Parliament passed a series of Acts ("the statutes of dissolution") which dissolved the monasteries.[3] Under general ecclesiastical law, the dissolution of a religious institution that had appropriated a rectory terminated the appropriation.[4] The statutes of dissolution specifically provided that advowsons belonging to the dissolved monasteries were to vest in the Crown. Consequently, were the statutes of dissolution to have made no further provision, the default position would have been that the Crown (as patron of the affected parishes) could nominate new rectors. The nature of the rectories would have been unaffected.

3.10 However, the statutes of dissolution also made provision for the transfer of rectories to the Crown. The Dissolution of the Greater Monasteries Act 1539 expressly stated that the Crown was to acquire "parsonages appropriate". The other statutes (including the Dissolution of the Lesser Monasteries Act 1535) merely referred to the transfer of

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1 Burn's Ecclesiastical Law, vol 1, pp 65 to 66; Stephens' Treatise, p 37.

2 The Crown acquired property valued at £1.5 million per annum as a consequence of the dissolution of the monasteries (R Grey, *A System of English Ecclesiastical Law*, *extracted from the Codex Juris Ecclesiastici Anlicani by Dr Edmund Gibson, Bishop of London* (E and R Nutt and R Gosling, 1730), p 446. That sum is difficult to adjust for changing circumstances and inflation, but it would be over £500 billion today, and possibly in excess of £1 trillion.

3 27 Hen. VIII c.28 (1535), which dissolved the monasteries that had a value of less than £200 per annum; 31 Hen. VIII c.13 (1539), which dissolved monasteries with a higher value; 37 Hen VIII c.4 (1545), which dissolved various colleges, chantries, hospitals and other religious institutions; and 1 Edw VI c.14 (1547), which dissolved other chantries, colleges and free chapels.

4 Godolphin's Repertorium Canonicum, p 228; *Wright v Gerrard* (1617) 80 E.R. 449; Hob. 306, p 307 by Hobart CJ. Cf. *Grendon v Bishop of Lincoln* (1576) 1 Gwillim 136, where Dyer CJ cited the case of St John of Jerusalem from 1330, in which Herle CJ considered whether a rectory appropriated to the Templars could be transferred to the Prior of St John following their dissolution. Herle CJ held that it could not; the appropriation terminated on dissolution.

"churches" and "chapels". Nevertheless, all of the statutes of dissolution were interpreted to transfer rectories from the dissolved institutions to the Crown.[5]

3.11 The effect of these provisions was not merely to make King Henry VIII or Edward VI the new rector (or to make the Crown, as a spiritual corporation, the new appropriator of the rectories). Rather, the statutes of dissolution were interpreted also to authorise the Crown freely to alienate the appropriated rectories. While only the Dissolution of the Lesser Monasteries Act 1535 specifically authorised the transfer of monastic property to the King *and his assigns*, the others referred to the transfer of property to the King, "his heirs and successors". All of the statutes contained provisions preventing grants of monastic property by the Crown from being questioned.

3.12 By altering the law to permit the Crown freely to dispose of appropriated rectories to lay persons (and for those recipients also to be able freely to dispose of their rectories to third parties), the statutes of dissolution fundamentally changed the nature of the affected rectories. As Phillimore's Ecclesiastical Law stated, the Crown's "grantees had thereby not only the same interest in the appropriation that the religious houses had, but also an interest by the regal grant of an estate given them by Parliament".[6] The relevant rectorial property was transformed from an interest held for life into a lay fee – an estate in fee simple or fee tail,[7] depending on the terms of the grant.[8] Consequently, a new term was introduced to describe the grant of a rectory to a lay person: it was an "impropriation", rather than an appropriation.[9]

Overview of our analysis

3.13 The dissolution of the monasteries and the subsequent transfer of church property into lay hands had a profound impact on the law governing rectories. Much of the case law over the following centuries shows the courts grappling with the legal consequences of this transfer. The statutes of dissolution did not generally address the consequences of lay ownership of rectories: they did not set out what (if any) elements of ecclesiastical law would continue to apply to such rectories.

3.14 We attempt in this chapter to clarify what rights and obligations transferred to lay persons with the rectories. It should be noted, however, that our conclusions are not

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5 In *Wright v Gerrard*, Hobart CJ considered the intent behind the Dissolution of the Lesser Monasteries Act 1535. He said that "very much of the possessions of such inferior priories consisted in rectories appropriated, and the intent was to give them to the King" ((1617) 79 E.R. 518; Cro. Jac. 607, p 608). The statute gives the churches, chapels, advowsons, and patronages of the monasteries to the King, "which must be understood their churches, as they were in them either appropriate where they were so, or their advowsons where they were not; otherwise it were a mere tautologism" ((1617) 80 E.R. 449; Hob. 306, p 308).

6 Phillimore's Ecclesiastical Law, p 275.

7 See the glossary in Appendix 4 for the meanings of "fee simple" and "fee tail". Whether an estate was a fee simple or a fee tail determined who could acquire or inherit the estate – while the owner of a fee simple could transfer the estate or devise it by will to whomever they wished, a fee tail could only pass to specified heirs (for example, only to direct lineal descendants).

8 Watson's Complete Incumbent, p 581; *Walwyn v Awberry* (1677) 86 E.R. 866; 1 Mod. 258, p 261 by North CJ.

9 Phillimore's Ecclesiastical Law, p 273.

certain. The relevant case law is not always consistent. Some important conceptual issues have never been resolved by the courts.

3.15 In general, there was a great deal of continuity in the law that applied to rectories following the dissolution of the monasteries. We explain in this chapter that the courts treated the lay persons who acquired rectories *as rectors*. They were still subject to ecclesiastical law and enjoyed many of the same rights, and were subject to many of the same obligations, as spiritual rectors. Generally speaking, the courts only disapplied elements of ecclesiastical law where it was inconsistent with either—

(1) the fact that the rectors were lay persons who could not minister to the parish; or

(2) the fact that these rectories were now lay fees that the rector could freely transfer to others or (subject to uncertainties which we discuss below) divide into parcels.

3.16 As rectors, the lay persons who acquired rectories were subject to CRL. The nature of the liability (its extent and, subject to some uncertainties, several of its methods of enforcement) was the same as the liability that applied to spiritual rectors. CRL remained an obligation on the holder of a religious office or the occupant of a religious living, albeit that office or living had been transferred to a lay person.

3.17 It should be noted, however, that we are here describing the state of the law governing rectors and CRL from the 16th century up to around the middle of the 19th century. In this chapter, we largely focus on case law prior to the 20th century. There were developments in the case law concerning CRL from the beginning of the 20th century onward, which we discuss in Chapter 4. It is possible that the nature of CRL evolved further during that period.

THE CONTINUED APPLICATION OF ECCLESIASTICAL LAW

3.18 We suggest above that lay persons who acquired rectories from the Crown were rectors, who (subject to some exceptions) were generally afforded the same rights and subjected to the same obligations as spiritual rectors. Indeed, the term “impropriator”, a variation of “appropriator”, suggests that the courts were applying the same rules to lay rectors as applied to monastic appropriators prior to their dissolution.

3.19 To explain how we have reached that conclusion, we start with the wording of the statutes of dissolution themselves. They did not simply transfer rectorial property to the Crown. The Crown did not only become the owner of glebe land and tithes; it became the owner of the rectories that had been appropriated by the monasteries. We mention above that the 1539 Act dissolving the greater monasteries expressly stated that “parsonages appropriate” were passed to the Crown.[10] Moreover, rectories (not merely rectorial property) were subsequently granted by the Crown to lay persons via letters patent.

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[10] As we explain in Chapter 2 at para 2.18, the “rector” was also known as the “parson”, and similarly, a "parsonage" is another word for the “rectory".

3.20 Further important evidence about the effect of the statutes of dissolution can be derived from the recital to an Act of 1540 concerning the payment of tithes.[11] Under ecclesiastical law, a lay person had no right to sue for the payment of tithes in the spiritual courts. The 1540 Act was passed to address this issue. The recital explains that:

> diverse of the King's subjects being lay persons *having parsonages, vicarages and tithes to them and to their heirs* … cannot by the order and course of the ecclesiastical laws of this realm sue in any ecclesiastical court for the wrongful withholding and denying of the said tithes or other duties, nor cannot by the order of the common laws of this realm have any due remedy against any person … who wrongfully detain or withhold the same… . (Our emphasis.)

Section 5 of the 1540 Act further refers to persons who have or later obtain "any estate of inheritance, freehold, term, right or interest in or to any parsonage", while noting that such a parsonage has been "made temporal".

3.21 Turning to the case law that followed the dissolution of the monasteries, some of the clearest signs that the courts applied pre-existing ecclesiastical law to lay impropriators can be found in the cases concerning CRL. In *Chivers & Sons Ltd v Air Ministry*, Mr Justice Wynn-Parry said that "[i]t has long been established that the liability of an impropriator of a lay rectory to maintain the chancel is rested on the maxim that he who has the profits of the benefice should bear that burden".[12] On one understanding, this statement is accurate. As we explain in Chapter 2,[13] a rector was required to apply the profits of the rectory to the maintenance of the rectorial property, for that was one of the purposes for which they were given to the rector.[14] The same principle was applied to the lay rector. (Indeed, it appears that the courts were more ready to find that a local custom placed the burden of repair on someone other than the rector where the relevant person received the profits of the rectory.[15])

3.22 However, an alternative reading of Mr Justice Wynn-Parry's statement is that the application of CRL to lay rectors required some special justification. The reference to a "maxim" could suggest that lay impropriators were bound to repair the chancel by application of a special rule of law. It could have been argued that, for reasons of fairness, a lay person should not be able to take possession of ecclesiastical property without complying with the obligations that would have applied, had the property remained in spiritual hands. If understood in this light, we do not believe that the assertion in *Chivers* was correct.

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11 32 Hen. VIII c.7.

12 [1955] 1 Ch 585, p 593. This observation was cited with approval by Lord Hope in *Wallbank* ([2003] UKHL 37; [2004] 1 AC 546 at [23].

13 See paras 2.38 to 2.41 above.

14 "[M]aintenance and reparation of ecclesiastical buildings are treated as a duty growing out of occupation and enjoyment", *Mason v Lambert* (1848) 116 E.R. 1069; 12 Q.B. 795, p 806 by Lord Denman CJ.

15 See *Allison v Reeves* (1666) 84 E.R. 158; 2 Keble 254 (where the vicar received the profits) and *The Bishop of Ely v Gibbons and Goody* (1833) 162 E.R. 1405; 4 Hagg. Ecc. 157 (where the lay rector enjoyed no rights in the chancel, and repairs had previously been made out of rents vested in the churchwardens).

3.23 We are not aware of any early case in which the court resolved a *dispute* about whether lay rectors were generally subject to CRL. There were disputes about whether a particular lay rector was obliged to repair the chancel, where there was a local custom in the parish for someone else to conduct the repairs.[16] But the courts appeared to take it for granted that an impropriator was subject to the same repair obligations as a spiritual rector. There was no suggestion that any special justification (any application of a benefit-burden maxim) was required to make impropriators subject to CRL. We consider three of the earliest reported cases on CRL below.

(1) In *Hall v Ellis*[17] from 1609, it was presumed that lay rectors were subject to CRL. The dispute was whether a lay rector was entitled to the chief seat in the chancel. The court answered in the affirmative, because the rector was obliged to repair the chancel.

(2) Legal texts often cite *Sergeant Davies' Case*[18] from 1621 as the original authority for the proposition that lay rectors were subject to CRL. As *Hall v Ellis* shows, this point was in fact already settled by 1621. More importantly, the issue of whether an impropriator was subject to CRL does not appear to have been in issue in *Sergeant Davies' Case*. While the report of the case is brief, it appears to have been admitted that the lay rector was bound to repair the chancel. The dispute was about whether he was *also* bound to contribute to the repairs of the nave of the church as a parishioner, given that he owned additional non-rectorial property in the parish.[19] Under ecclesiastical law, the repairing of the chancel was a discharge from contributing to the repairs of the nave.[20] The point decided in *Sergeant Davies Case* was that this discharge did not affect any liability to repair the nave that arose from non-rectorial property in the parish belonging to the impropriator.

(3) Likewise, *Slowman v The Churchwardens of Longrevil*[21] from 1669 concerned a lay rector who was pursued for repairs of the nave on account of owning land in the parish. There was again no dispute that a lay rector was subject to CRL. The rector ultimately succeeded in arguing that he was not liable to repair the nave because the relevant land was found to be a parcel of the impropriation (rectorial land).

3.24 The reason why the liability of lay rectors was not disputed was, we think, because the law on this point was *already* settled. The court treated impropriators *as rectors*; they were subject to CRL because they occupied the office of rector. The liability was a feature of that office. Indeed, there are many other cases in which the courts noted in

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16 See, for example, *Anonymous* (1681) 89 E.R. 217; 1 Freeman 300, in which a lay impropriator established that there was a local custom that a prominent family in the parish was liable to repair the chancel, and *Allison v Reeves* (1666) 84 E.R. 158; 2 Keble 254 in which the impropriator established a custom that the vicar was liable for the repairs.

17 (1609) 74 E.R. 1096; Noy 133.

18 (1621) 81 E.R. 757; 2 Rolle 211.

19 This is the interpretation adopted by Godolphin's Repertorium Cononcium, p 143, and Stephens' Treatise, p 281. See also Gibson's Codex, vol 1, pp 223 to 224.

20 Stephens' Treatise, p 281; Phillimore's Ecclesiastical Law, p 1787.

21 (1669) 84 E.R. 469; 2 Keble 742.

passing that impropriators were subject to CRL under the general law or common custom *because they were rectors*.[22] The 1674 case of *Pawly v Wiseman*[23] is particularly informative. The court held that a curate dismissible at will was not liable for dilapidations, despite being in receipt of some tithes. The curate, unlike the vicar or the lay impropriator, did not hold an office to which CRL attached. It did not matter that the curate received some profits from the parish.

3.25 Furthermore, the nature of the liability on lay rectors appears to have been the same as the liability on spiritual rectors. Like spiritual rectors, the liability of a lay rector was *personal*,[24] which is consistent with it being an obligation of their office rather than a burden on their land. CRL was not a charge on a lay rectory. As the Divisional Court held in *Dean and Chapter of St. Asaph v Oversees of Llanrhaiadr-yn-Mochnant*, the repair of the chancel "was not an ecclesiastical due chargeable on the profits of the rectory … but a liability on the rector".[25] We discuss the nature of the liability on lay rectors in more detail below when we consider the division of lay rectories.[26]

3.26 Our conclusion that the courts enforced CRL against lay rectors by applying the same ecclesiastical law as applied to spiritual rectors is also supported by legal commentary. Phillimore's Ecclesiastical Law states that rectors are bound by CRL "by the custom of England, which has allotted the repairs of the chancel to the parson, and the repairs of the church to the parishioners",[27] and that "as rectors or spiritual persons, so also impropriators, are bound of common right to repair the chancels".[28] Gibson's Codex states that the parson is bound to repair the chancel by the custom of England, and that "parson" includes both a spiritual rector and an impropriator of the rectory.[29]

THE RIGHTS OF LAY RECTORS

3.27 We have presented an initial reason to think that, when rectorial property passed from the monasteries to the Crown and onward to lay persons, the courts did not apply CRL to that property by operation of a special rule of law. Rather, the courts continued to apply pre-existing ecclesiastical law. Further support for our conclusion can be

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22 *Walwyn v Auberry* (1677) 2 Ventris 35; *Clifford v Wicks and Townsend* (1818) 1 B. & ALD 498, p 503, recording the argument of the claimant; *Griffin v Dighton and Davis* (1864) 122 E.R. 767; 5 B. & S. 93, p 106 by Cockburn CJ.

23 (1674) 84 E.R. 910; 3 Keb. 614.

24 *Smallbones v Edney and Lunn* (1870) VII Moore N.S. 286, pp 294 to 295; (1869-71) L.R. 3 P.C. 444, p 450; 17 E.R. 109, by Mellish LJ; *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, p 432 by Lord Hanworth MR. There is a question whether a lay rector's liability, while personal, was limited to the profits they had received from the rectory. The Court of Appeal in *Wickhambrook* held that it was not. We discussed the issue at paras 3.97 to 3.98 below.

25 [1897] 1 QB 511, p 512. This finding does not appear to have been doubted on appeal to the Court of Appeal.

26 See paras 3.89 to 3.98 below.

27 Phillimore's Ecclesiastical Law, p 1785.

28 Above, p 1786.

29 Gibson's Codex, vol 1, p 223.

found by considering the rights that were afforded to impropriators (which parallel the rights previously afforded to spiritual appropriators of rectories).

Provision of cure of souls

3.28 We discuss in Chapter 2 that two Acts of Parliament from 1391 and 1402 restricted appropriations of rectories to religious institutions unless a vicarage was endowed.[30] Where the prior of a monastery had appropriated a rectory on condition that a vicarage be endowed, the vicar (not the prior) had responsibility for ministering to the parish (providing "cure of souls"). The dissolution of the monastery and the transfer of the rectory into lay hands did not alter this state of affairs. The lay person received a sinecure rectory (a rectory "without cure").

3.29 In some cases, the rectories that passed to the Crown on dissolution of the monasteries did not have vicarages endowed. The rectory might have been appropriated by the monastery prior to 1391, or the appropriation may have been exempt from the requirement to endow a vicarage. Instead, there was a stipendiary curate who provided cure of souls as a deputy of the appropriator. The appropriator (for example, the prior of a monastery) retained responsibility for the cure and could dismiss the curate, and minister to the parish themselves.

3.30 The law governing curacies needed to evolve following the dissolution of the monasteries. Where a rectory without a vicarage passed into lay hands, the lay rector was required to appoint a curate and the curate could no longer be dismissed at will by either the rector or the bishop.[31] This marked the beginning of what were called "perpetual curacies". Some curacies were granted an endowment so that they came to resemble vicarages. (In fact, where a perpetual curate was endowed with a significant portion of the rectorial income, the courts held that his religious office was sufficiently secure and beneficed for the curate to be subject to CRL, in addition to or instead of the rector.[32])

3.31 As a curate did not have primary responsibility for providing cure of souls, there is a question whether cure of souls still technically resided with the rector even after rectories were transferred into lay hands. If the law merely treated lay impropriators as the recipients of former church property (subject only to select pockets of ecclesiastical law, such as CRL), then the answer to this question should be no. But the answer to the question appears to be yes.

3.32 *The Duke of Portland v Bingham*[33] was a decision by the Consistory Court of the Diocese of London about whether a lay rector had any right to control the provision of cure of souls in their parish. The issue in the case was whether the lay rector could require a preacher to produce his licence from the bishop to preach in the parish.

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30 15 Rich. 2, c.6, and 4 Hen. 4, c.12. See para 2.36 above.

31 See the explanation of the origins of perpetual curacies by Blackburn J in *Greenslade v Darby* (1867-68) L.R. 3 Q.B. 421, pp 430 to 431.

32 *Mason v Lambert* (1848) 116 E.R. 1069; 12 Q.B. 795.

33 (1792) 161 E.R. 509; 1 Hag. Con. 156.

There was no vicarage and so there was a question whether cure of souls still resided with the rector. Sir William Scott said the following:

> the statutes of dissolution enact that benefices of every description should be held as they had been held by the dissolved religious houses, a grantee, who has obtained what was before held, as above described, [with cure of souls] would have the complete incumbency. … If such an impropriator should take orders, he might perform the offices of the church without institution, only taking the oaths imposed by later statutes. ... But it was not so in ordinary impropriations in which there had been a vicarage endowed; because the vicar holds by something extrinsic of the impropriator.[34]

3.33 A lay rector who was not canonically qualified was not entitled to provide cure of souls to the parish. However, where there was no vicarage, the decision in *Duke of Portland* indicates that cure of souls still technically resided with the lay rector. He could decide to minster to the parish himself if he became canonically qualified. The suit by the Duke of Portland failed because of an error in the pleadings. A footnote to the case report indicates that, in a later action, the Duke of Portland succeeded in the consistory court, the Court of Arches,[35] and the Court of Delegates.[36]

3.34 The decision in *Duke of Portland* is particularly significant for the purposes of this chapter. We are considering whether, following the dissolution of the monasteries, the courts applied CRL to lay rectors as a new type of proprietary burden on former rectorial property, while the rest of the ecclesiastical law in which the liability had been embedded fell away. *Duke of Portland* presents a clear rebuttal of this view. The owner of a lay rectory established that he held the office of rector, in the full ecclesiastical sense of the term. The Duke of Portland established that, as he owned the rectory and was canonically qualified, he could perform the *core* religious duty of a rector: namely, ministering to the parish and performing divine service. The ecclesiastical courts did not merely treat him as the owner of freehold property that was subject to a few former ecclesiastical obligations such as CRL.

Seats in the chancel and rights of burial

3.35 In addition to the potential provision of cure of souls, lay rectors were afforded other rights previously enjoyed by spiritual rectors. Prior to the Reformation, there was a presumption that the rector was entitled to the chief seat in the chancel. It was possible, however, for the right to be granted to a vicar, or to an established family within the parish, or for the right to be acquired by prescription.[37]

3.36 Following the Reformation, the right to the chief seat continued to be enjoyed by both spiritual and lay rectors. Both spiritual and lay rectors had recourse to the

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34 (1792) 161 E.R. 509; 1 Hag. Con. 156, p 166.

35 The archbishop's court.

36 Which exercised the jurisdiction now vested in the Judicial Committee of the Privy Council.

37 See *Hall v Ellis* (1609) 74 E.R. 1096; Noy 133: "of common right, the parson impropriate … ought to have the chief seat in the chancel; because he ought to repair it. But by prescription another parishioner may have it." See also *Spry v Flood* (1840) 163 E.R. 437; 2 Curt. 354, p 357 by Dr Lushington, and *Stileman-Gibbard v Wilkinson* [1897] 1 QB 749, pp 761 to 762 by Charles J.

ecclesiastical courts if their rights were infringed.[38] As Stephens' Treatise stated: "the Reformation left the rights of parson and vicar as it found them".[39] Prideaux's Guide reads as follows:

> since the charge of repairing that part of the church, as well as the freehold, is in the parson, it is most reasonable that he should be first provided for with a seat for his family in it. And the case is the same, whether the parson be appropriator, impropriator, or instituted rector of the parish.[40]

3.37 Similarly, where spiritual rectors had rights of burial in the chancel, to recover burial fees, or relating to the erection of monuments, these rights continued to be afforded to lay rectors (subject to the continuing supervision of the bishop).[41]

The advowsons of vicarages

3.38 We discuss in Chapter 2 the fact that, where a vicarage was endowed from the property of a rectory, the common law conferred on the rector the advowson of the vicarage (the right to nominate the vicar).[42] When the rectories appropriated by the monasteries passed into lay hands, the advowsons of the vicarages passed with them. The impropriators stepped into the shoes of the appropriators.

3.39 We now consider that our 1983 Consultation Paper on CRL contained a mistake. We said the following about advowsons:

> On the disposal of monastic property the destination of an advowson and of its connected rectory was generally the same, so that the new patron and the new (lay) rector were one and the same person. (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.)[43]

3.40 On further analysis, however, it appears that this passage confuses the advowson of the rectory with the advowson of the vicarage. Many monasteries were able to appropriate rectories because they acquired the advowsons of those rectories and appointed themselves as rector. The advowson of the rectory then remained dormant, because the monastery became the permanent rector. An advowson of the vicarage was a separate right, and it was not dormant. It was exercised by the monastery, who appointed the vicar. Following the dissolution of the monasteries, the law did not

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38 *Spry v Flood* (1840) 163 E.R. 437; 2 Curt. 354, p 357 by Dr Lushington: "the Ecclesiastical Court, in the exercise of its ordinary authority, would allot to him the possession of such sitting and protect him against the disturbance of such right".

39 Stephens' Treatise, p 280.

40 Prideaux's Guide, p 292 (this page reference is to the 16th ed, rather than the 15th ed). See also Watson's Complete Incumbent, p 388, and Gibson, vol 1, p 224.

41 See *Anonymous* (1681) 89 E.R. 217; 1 Freeman 300 and *The Bishop of Ely v Gibbons and Goody* (1833) 162 E.R. 1405; 4 Hagg. Ecc. 157, where the fact that the lay rectors in those cases had no emolument from the chancels (no seats, burial rights or monuments) indicated that the rectors were not bound by CRL. See also the facts of *Clifford v Wicks and Townsend* (1818) 106 E.R. 183; 1 B. & ALD 498, pp 500 and 503.

42 See para 2.68 above. We discuss the nature of advowsons at paras 2.19 to 2.20 above.

43 Transfer of Land: Liability for Chancel Repairs (1983) Law Commission Working Paper No 86, para 2.9.

develop a new right for lay rectors to nominate vicars. Lay rectors acquired *the rectories* that had belonged to the monasteries, which already carried with them the advowsons of vicarages.[44] A lay rector would, however, obtain a new advowson if they created and endowed a new vicarage from the property of the rectory.

Presumptive ownership of tithes

3.41 A further example of the continued application of ecclesiastical law to lay rectors can be found by considering the post-Reformation case law on the disposition and discharge of tithes. In Chapter 2, we explain that, prior to the dissolution of the monasteries, there were restrictions on whether a parishioner could discharge their land from an obligation to pay tithes.[45] In particular, a parishioner could not escape payment of tithes simply by showing that tithes had not been paid for time immemorial. Tithing was rooted in a moral duty to support the work of the church and was fiercely guarded by the courts, who were unwilling to let the church's income fall away without sufficient compensation.[46]

3.42 When rectories passed into lay hands, they carried with them the right of the rector to collect tithes from the parish. The transfer of tithes to lay persons prompted a great deal of litigation, apparently far more than the imposition of CRL.[47] We focus on two points arising from this litigation.

3.43 First, the rector had a presumptive entitlement to all of the tithes of their parish. The presumption was applied to both spiritual and lay rectors. A lay rector did not need to prove that they had been granted a title to the tithes; it was enough to prove that they owned the rectory of the parish.[48] By contrast, a person who could not show that they owned the rectory, but merely claimed title to a portion of tithes from a parish, needed to prove their title.[49]

3.44 Secondly, the courts applied some of the privileges concerning tithes enjoyed by spiritual rectors to lay rectors. In particular, in a sequence of cases, the courts decided that a parishioner could not escape from paying tithes to a lay rector via a defence of prescription based on non-payment for time immemorial. These cases were subject to

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44 It is not clear what happened to the advowsons of appropriated rectories following the dissolution of the monasteries. In many cases, the (dormant) advowson was owned by the monastery and the statutes of dissolution expressly transferred the right to the Crown. The advowson might then have been transferred by the Crown with the associated rectory to a lay rector. However, the advowson was a separate right and so the Crown or the lay rector could in theory transfer it to a third party. In other cases, the advowson may never have belonged to the monastery, and might still reside with the lord of the manor or their transferees (see Godolphin's Repertorium Canonicum, p 224). While the advowsons of impropriated rectories may now be defunct, it is theoretically possible that they could revive if the impropriator were to die intestate with no next of kin (ending the impropriation).

45 See para 2.34 above.

46 *Slade v Drake* (1617) 80 E.R. 439; Hob. 295, p 296.

47 Many disputes concerned whether landowners had inherited immunities from the monasteries (*Stathome's Case* (1567) 1 Gwillim 132; *Blinco v Barksdale, Vicar of Marston* (1596) 822, Cro. Eliz 577; *Whittie and Weston's Case* (1627) 78 E.R. 231; Godbolt 392; *Page v Wilson* (1821) 2 Jac. & W. 513). There were also disputes about whether a lay rector needed to prove the root of their title (*Hunston v Cocket* (1610) 79 E.R. 216; Cro. Jac. 252; *Norbury v Meade* (1821) 4 E.R. 582; 3 Bligh 211).

48 *Charlton v Charlton* (1732) 145 E.R. 688; Bunb. 325.

49 *Wolley v Platt and Lowood* (1824) 148 E.R. 196; M'Cle. 468.

criticism in later decisions by the courts (not least because the payment of tithes to a lay rector does not support the work of the church and should not be subject to the same protections), but they were never overruled.[50]

3.45 Under the statutes of dissolution, a lay person who acquired former monastic land could inherit an immunity from tithes that had previously been enjoyed by a monastery. In *Slade v Drake*, Chief Justice Hobart said that "if the temporal man succeeds a spiritual body in discharge, as upon the statute 31 H. 8. [the discharge of tithes] is to be reckoned in a spiritual person or body, not in temporal".[51] In *The Aldermen and Burgesses of Bury St. Edmunds and Lawrence Wright v Evans*, the same reasoning was applied to a lay rector's title to tithes. The lay rector was to be treated as a spiritual rector, "and, consequently, a man who could not prescribe against an ecclesiastical person, cannot any more prescribe against a patentee".[52] In *Scott v Airey*, Baron Eyre said:

> There is no difference between a lay impropriator and a rector. The lay impropriator becomes as it were a spiritual person; he holds in the same right. If it is not proper to disturb a possession in favour of a lay impropriator, it is not proper to disturb it in favour of a rector.[53]

3.46 The starting point for the courts was that lay rectors were subject to the same body of ecclesiastical law as spiritual rectors (even if elements of ecclesiastical law then needed to be disapplied because they were inconsistent with lay ownership of rectories).

ASPECTS OF ECCLESIASTICAL LAW THAT WERE DISAPPLIED

3.47 While a substantial body of ecclesiastical law was applied to lay rectors, some aspects were disapplied. There was not a clear and universal rule that determined whether or not ecclesiastical law would continue to apply – and the reasoning of the courts in different cases was sometimes inconsistent. Nevertheless, there was a general pattern. The courts disapplied ecclesiastical law where it was incompatible with (1) the lay ownership of rectories obtained from the Crown, or (2) a lay rector's ability to transfer the rectory to new owners.

3.48 In Chapter 2, we discuss the range of restrictions that applied to a spiritual rector's enjoyment of rectorial property.[54] A spiritual rector could not transfer the rectory to a new owner; the appointment of a new rector was a matter for the patron. There were

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50 In *Fanshaw v Rotheram* (1759) 28 E.R. 691; 1 Eden 276, Lord Keeper Henley held it was settled law that a parishioner could not prescribe against a lay rector based on mere non-payment of tithes (p 292) but expressed doubts about the rationale for this principle (pp 290 to 291). This principle of law was extensively criticised by the House of Lords in *Norbury v Meade* (1821) 4 E.R. 582; 3 Bligh 211, pp 237 to 239 by Lord Redesdale, pp 250 to 252 by Lord Eldon LC, although the house decided it did not need to overrule the principle in order to resolve the case.

51 (1617) 80 E.R. 439; Hob. 295, p 296.

52 (1739) 3 Gwillim 757, p 764. "Patentee" means the recipient of letters patent – in other words, the person who acquired a rectory from the Crown, granted via letters patent.

53 (1779) 3 Gwillim 1174, p 1176.

54 See paras 2.30 to 2.31 above.

limits on the ability of a spiritual rector to lease the rectorial property or convey a parcel of that property to a third party. These restrictions were not applied to the rectories that passed to the Crown under the statutes of dissolution. They were inconsistent with the intended transfer of the rectories to the King and his successors.

3.49 Relatedly a lay rector did not need to be canonically qualified and was not subject to suspension or dismissal by the bishop. These powers and restrictions were also inconsistent with the lay ownership of rectories and the free transferability intended by the statutes of dissolution. Interestingly, we are not aware of any case in which the court considered whether a lay rector could *resign* their office. We can see no reason why resignation should not be possible. Resignation (like dismissal) would presumably have ended the root appropriation of the rectory (and thereby ended the impropriation of the rectory by the Crown to lay persons), resulting in the rectorial property returning to the church awaiting the appointment of a new spiritual (not lay) rector by the patron of the parish. That is presumably why the issue of resignation was never tested.

3.50 Not only were impropriated rectories freely alienable, they were also divisible. Before considering division, however, there were some further areas of ecclesiastical law that ceased to apply to rectories when they were transferred into lay hands.

(1) In most cases, these areas of law are clearly identifiable and relate to the lay ownership and alienability of rectorial property: see our discussion of (a) tithes and (b) vicarages under the subheadings below.

(2) But in other cases, it is not clear whether ecclesiastical law continued to apply, and it is difficult to discern the rationale behind some of the relevant case law: see our discussion of (c) enforcing CRL and (d) other repairing obligations under the further subheadings below.

(a) Lay ownership of tithes

3.51 A significant portion of the rectorial property that passed to the Crown consisted of tithes. Lay persons had no right to sue to recover tithes in the ecclesiastical courts, but they were given a right to sue by an Act of 1540.[55] However, under ecclesiastical law, a lay person also could not *own* a right to tithes. Tithes were religious dues. Moreover, as tithes were payable to support religious ministry and in exchange for spiritual instruction, it was arguable that they could not be payable to a person who performed no ministry and gave no instruction.

3.52 The courts did not apply ecclesiastical law so as to deny lay rectors their entitlement to tithes. Rather, the courts held that the statutes of dissolution had transformed the nature of tithes as held by lay rectors. The *Case of Proxies* in 1604[56] examined tithes alongside the payment of proxies. Proxies were originally obligations on the clergy to provide food and support for the bishop during his visitation to the parish. They evolved over time into obligations to pay annual sums to the bishop, regardless of what visitations had occurred. The court held that proxies continued to burden rectories after they passed to lay rectors, even though lay rectors were not subject to

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55 32 Hen. VIII c.7.

56 Reported in detail in Godolphin's Repertorium Canonicum, pp 75 to 79. There is also a case report available in Middle French: *Anonymous* (1604) 80 E.R 491; Dav. 1.

visitation. Likewise, the court held that tithes were now payable to lay persons who had purchased impropriate rectories, despite the fact that they gave no instruction: "tithes appropriated to such houses of religion as were dissolved became a lay fee".[57]

3.53 That said, tithes still retained much of their ecclesiastical nature and were recoverable before the spiritual courts. As Edmund Gibson noted in his Codex, if tithes did not remain "*ecclesiastical* duties, they might have been recovered, as other chattels or lay-fees are, by action of debt, otherwise at common-law, and there had needed no Act of Parliament to enable laymen to sue for them".[58]

(b) The augmentation and dissolution of vicarages

3.54 We explain in Chapter 2 that, where a vicarage was endowed with insufficient property to provide a living for the vicar, the bishop had a power to require the rector to grant additional endowment to the vicarage out of his rectorial property.[59] Alternatively, the bishop had a power to dissolve the vicarage and reunify it with the rectory, after which the rector would be solely responsible for providing cure of souls.

3.55 There were some early cases that suggested that the bishop retained these powers in relation to an impropriated rectory.[60] Moreover, Edmund Gibson forcefully argued that bishops should be capable of requiring a lay rector to augment a vicarage. He noted that, under the statutes of dissolution, the King obtained the same interest in the appropriated rectories that had belonged to the monasteries, and that there were savings for the rights of third parties. These savings, he argued, should preserve the rights of the bishop. Although the power to augment vicarages was not expressly mentioned in the statutes of dissolution, "neither do they mention the *reparation of chancels*, *or payment of the stipends of curates*; yet both these burdens, as having rested upon the religious, passed from them to the King, and from the King to the grantees".[61]

3.56 However, it became settled law that the bishop could not require a lay rector to augment a vicarage out of the profits of their rectory. The courts generally held that impropriated rectories had become lay fees, and the bishop could not take property away from lay rectors that had been granted to them by the Crown.[62] Moreover, where

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57 Godolphin's Repertorium Canonicum, p 354. See also Phillimore's Ecclesiastical Law, p 1539: "Tithes which come to the crown by the statutes of dissolution, and are now vested in the lay impropriators, are subject to all the laws and incidents of other freehold property".

58 Gibson's Codex, vol 2, p 758.

59 See para 2.71 above.

60 *Wall v Smith* (1640), cited in R H Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (OUP 2004), p 460, fn 102.

61 Gibson's Codex, vol 2, p 758.

62 R H Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (OUP 2004), pp 459 to 460; Phillimore's Ecclesiastical Law, p 290; *Wallwin v Auberry* (1680) 86 E.R. 293; 2 Vent. 35. Gibson objected that the statutes of dissolution nowhere refer to rectories or tithes as "lay fees" but use their ecclesiastical names ("benefices", "parsonages", etc) (Codex, vol 2, p 758). However, it was arguable that those statutes had *implicitly* converted rectories to lay fees.

a lay rectory was subject to a vicarage, the bishop lost his power to dissolve the vicarage, as dissolution would leave no one to provide cure of souls to the parish.[63]

(c) The enforcement of chancel repair liability

3.57 As we discuss above, it does not appear to have been seriously disputed that lay rectors were liable to repair the chancels of their churches. By contrast, there was a great deal of uncertainty about how CRL could be enforced against lay rectors.

3.58 It was clear that a lay rector could be brought before the ecclesiastical courts and admonished to repair.[64] If the lay rector failed to comply, they were liable to be excommunicated. (We mention above that the bishop did not have the power to suspend or dismiss a lay rector.) The principal uncertainty concerned sequestration. We discuss in Chapter 2 that, if a spiritual rector failed to repair the chancel, the usual remedy was for the bishop to order sequestration of the profits of the rectory.[65] The report of an anonymous case in 1676 records the opinion of Chief Baron Turnour[66] that the ecclesiastical courts could grant sequestration of an impropriated rectory.[67] This case is often overlooked, however; most commentaries on ecclesiastical law refer to the decision in *Walwyn v Awberry* from 1677.[68] The judges expressed differing views on sequestration, but the dispute did not ultimately need to be resolved as the case was decided on the basis of a defect in the pleadings.

3.59 Chief Justice North (with the support of other unnamed Justices) reasoned that, because the statutes of dissolution had transformed the affected rectories into lay fees, they could no longer be subject to sequestration. He said that the process of sequestration developed to protect the possessions of the church from civil claims against a spiritual rector. If a spiritual rector's debts could be directly enforced against the possessions of the rectory, it might undermine the rector's discharge of his religious duties.[69] The same considerations did not apply in relation to the possessions of a lay rector.

3.60 Justice Atkyns disagreed. As some impropriators were corporations rather than natural persons, there would be no enforcement mechanism for CRL if sequestration were not to be available. A corporate impropriator could not be excommunicated. Justice Atkyns also argued that rectors did not have an unqualified interest in the profits of their rectories; they had a right to the surplus profits after discharge of their

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63 Godolphin's Repertorium Canonicum, p 197, citing *Parry and Banks' Case*.

64 We discuss admonishment or monition in Chapter 2 at paras 2.47 to 2.48. This point is taken for granted by all the judges in *Walwyn v Awberry*, which is the leading case on enforcement ((1677) 86 E.R. 866; 1 Mod. 258, p 261 by North CJ, Wyndham J and Atkyns J).

65 See paras 2.48 and 2.54 to 2.55 above.

66 The Chief Baron was the senior judge in the Court of Exchequer.

67 *Anonymous* (1676) 84 E.R. 1037; 3 Keble 829.

68 Note that there are three different reports of this case, with slightly different spellings.

69 (1677) 86 E.R. 866; 1 Mod. 258, p 261.

ecclesiastical duties. As the monasteries only had a limited interest in the rectorial property, the same limits applied when the property was transferred to the Crown.[70]

3.61 Finally, Justice Wyndham said that provisions in the statutes of dissolution saving the rights of third parties in rectorial property preserved the right of bishops to sequester.[71] It is Justice Wyndham's view that was preferred by legal commentators, including by Phillimore's Ecclesiastical Law, Gibson's Codex and Stephen's Treatise,[72] but the issue was never definitively resolved.

(d) Other repairing duties and waste

3.62 A further area of ecclesiastical law that might have ceased to apply to lay rectories (although it is unclear) concerned the maintenance of other parts of the rectorial property, aside from the chancel. CRL was only one aspect of a rector's repairing obligations. It appears at first sight that, like spiritual rectors, a lay rector should also have been subject to an obligation to maintain the parsonage house and to refrain from waste on the glebe land.[73]

3.63 It is unclear, however, whether these wider maintenance obligations were applied to lay rectors. We have only found one early case in which it was said that a lay rector was under an obligation to maintain the parsonage house.[74] There are also some early cases that suggest that, where the churchyard was vested in a lay impropriator, they were not entitled to cut down the trees in the churchyard except for the purpose of repairing the chancel.[75] All of the later cases we have identified concerning waste on the glebe land or disrepair to the parsonage house concern spiritual rectors. We do not know whether this limitation reflects the fact that lay rectors were not under these wider maintenance obligations, or whether these obligations did continue to apply but were rarely enforced (or, for example, that their enforcement was never litigated in a reported case).

3.64 There is a possible explanation for why these wider repairing obligations may have dropped away when rectories passed into lay ownership. In *Duke of Marlborough v St. John*, it was suggested that the constraints on a spiritual rector's use of the glebe land applied because a rector only had a life interest in the property.[76] By contrast, a lay rector did not merely have a life interest; they were free to transfer the rectorial

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70 (1677) 86 E.R. 1057; 2 Mod. 254, p 258.

71 (1677) 86 E.R. 866; 1 Mod. 258, p 261. Oddly, however, one of the other reports of *Walwyn v Awberry* ((1677) 86 E.R. 1057; 2 Mod. 254, p 257) states that Akyns J was the lone dissenter who said that sequestration was available. Either that alternative report was incorrect, or Wyndham J ultimately sided with North CJ.

72 Phillimore's Ecclesiastical Law, pp 1786 to 1787; Gibson's Codex, vol 1, p 223; Stephens' Treatise, p 282.

73 We discuss these wider repairing and maintenance obligations on spiritual rectors at para 2.38 above.

74 *Anonymous* (1676) 84 E.R. 1037; 3 Keble 829. Chief Baron Turnour said it was uncertain whether the profits of an impropriated rectory could be sequestered for failure to repair the parsonage house, but suggested a lay rector would clearly be subject to excommunication if they let it fall into decay.

75 Both *Bellamie's Case* (1615) 81 E.R. 471; 1 Rolle 255 and *Strachy v Francis* (1741) 26 E.R. 534; 2 ATK 217 concern lay rectors. (The case report for *Strachy v Francis* does not mention an impropriation, but it is mentioned in argument in *Greenslade v Darby* (1867-68) L.R. 3 Q.B. 421, p 426, that the rector was an impropriator.)

76 (1852) 64 E.R. 1068; 5 Deg. & Sm. 173, p 178.

property to a third party. Furthermore, if lay rectors had been required to keep all the rectorial property within a single title, and not to sell off parts of the property separately, there would have been a stronger case for imposing maintenance obligations. But as we discuss below, lay rectors could split up the rectorial property and sell the pieces separately. In such cases, the parsonage house could no longer provide a residence for *the* rector. Moreover, we think it was possible for a lay rector to transfer property out of the rectory (so that it ceased to be rectorial property). If a lay rector could diminish the income of their rectory by selling parts of it, it may not have made sense for them to be under repairing obligations which had the purpose of preserving the income from the rectory.

Enforcement against predecessors in title

3.65 While considering repairing obligations, we note a further uncertainty about the application of ecclesiastical law to lay rectors. A spiritual rector could pursue his predecessor in the spiritual courts if he had left the chancel (or the parsonage house[77]) in disrepair. The civil law also developed a cause of action allowing a rector to seek a contribution from his predecessor (or, if he had died, from his estate) in the temporal courts.[78] We cannot identify any reason why lay rectors would not be afforded the same remedies against their predecessors for dilapidations. Surprisingly, however, we are not aware of any reported case in which a lay rector brought a claim against a predecessor. The issue apparently remains unresolved by the courts.

Summary

3.66 We have detailed some ways in which ecclesiastical law ceased to apply to rectories that passed into lay ownership. There are several uncertainties, but in general, it appears that elements of ecclesiastical law were disapplied where they were incompatible with the lay ownership of rectories and the transmissibility of lay rectories. Ecclesiastical law that was compatible with lay ownership continued to apply, including a majority (if not all) of the law governing CRL.

THE DIVISION OF LAY RECTORIES

3.67 We have not so far addressed the most complex issue that arose as a consequence of lay ownership of rectories: the division of rectories. In theory, it might have been open to the courts to decide that the statutes of dissolution only gave the Crown the power to dispose of rectories to lay persons, but not to divide them into parcels. The statutes of dissolution did not contain an express power to divide rectories. Moreover, as Chief Justice Hobart said in *Colt and Glover v The Bishop of Coventry and Lichfield*, under ecclesiastical law "a benefice is so entire and indivisible, that it cannot be presented or commended by parts as the cure, without the fruits, nor the fruits without the cure, nor the glebe to one, and the tithes to another, or the like".[79]

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77 But not for causing waste on the glebe land: *Ross v Adcock* (1867-68) L.R. 3 C.P. 655.

78 Following *Jones v Hill* (1690) 83 E.R. 683; 3 Levinz 268 and *Sollers v Lawrence* (1743) 125 E.R. 1243; Willes 413. The action was described as "anomalous" (*Mason v Lambert* (1848) 116 E.R. 1069; 12 Q.B. 795, p 800 by Lord Denman CJ) but it was well-established and was put on a statutory footing by the Ecclesiastical Dilapidations Act 1871, s 34.

79 (1612) Hobart 140, p 153.

3.68 Nevertheless, from the outset, it appears that some rectories were parcelled up and transferred to separate owners. As an early example, in *Grymes v Smith*,[80] Richard Grymes owned the rectory of Lubbenham. It is recorded that he granted two thirds of the rectory to Thomas, his son, and the remaining third to Thomas, his grandson.

3.69 We are only aware of one case in which restrictions were applied to a lay rector's power to divide rectorial property. In *Clifford v Wicks and Townsend*,[81] a lay rector had purported to sell small parts of the chancel to a parishioner for seating and burials. It was argued on behalf of the parishioner that an impropriated rectory was a lay fee, and so was freely divisible like any other fee simple.[82] This argument was rejected; the transfers by the lay rector were held to be void. The Lord Chief Justice,[83] Lord Ellenborough, said that it was "the duty of the rector to retain such a power over the chancel as to enable him to see that it is applied to the purpose for which it was originally built".[84] The alienation of parts of the chancel breached that duty. Lord Ellenborough and Justices Bayley and Abbott all noted that, if a lay rector could convey one plot of land in the chancel to a parishioner, they could convey multiple plots. The chancel could be filled with the seats and sepulchres of the many recipients. Justice Holroyd held that the savings provisions in the statutes of dissolution saved the right of the bishop to restrict transfers of the church or churchyard without his consent.[85]

3.70 Given that lay rectories were divisible, there is a question about how pre-Reformation ecclesiastical law could apply to a part of a rectory. It was not possible to divide a rectory prior to the Reformation. Where an impropriator acquired an entire rectory, it is easy to see them as stepping into the shoes of the former spiritual appropriator. They had ownership of the church, the churchyard, the glebe and the tithes, giving them sufficient income and control over the church to discharge their repairing obligations. The application of ecclesiastical law becomes much less clear where a person acquired part of a rectory. For example, it is unclear how the rector's right to a seat in the chancel or the advowson of a vicarage could be split between multiple rectors.[86]

3.71 There are two matters of particular relevance to CRL that need to be clarified.

(1) First, if a lay rector X transferred a parcel of their glebe land or a portion of their tithes to Y, did Y automatically become a rector, or did Y merely become the owner of some *former* rectorial property? Would Y only become a rector if they

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80 (1588) 1 Gwillim 158. *Davis v Bellamies* (1639) 82 E.R. 395; March 24 concerned joint-tenants of a rectory. It was held that one tenant could sue for tithes by himself.

81 (1818) 106 E.R. 183; 1 B. & Ald. 498.

82 Above, pp 501 to 504.

83 By 1818, it had become customary to refer to the Chief Justice of the Court of King's Bench as "the Lord Chief Justice", although the modern judicial office of Lord Chief Justice did not yet exist.

84 (1818); 106 E.R. 183; 1 B. & Ald. 498, p 506.

85 Above, p 507 to 508. We note, however, that this argument would also imply that rectories could not be divided *at all* without the consent of the bishop (as the same restriction applied to spiritual rectors).

86 This problem was not necessarily unique to lay rectories. Prior to the Reformation, the advowson of a rectory was sometimes split between multiple persons, who would each present the (collectively) nominated rector with a portion of the benefice (N. Adams, "The Judicial Conflict over Tithes" (1937) 52(205) The English Historical Review 1, pp 4 to 5, fn 5).

were transferred a portion of the rectory itself? In other words, what we want to explore is whether there was a difference between the division of a *rectory* and the division of *rectorial property*.

(2) Secondly, if a parish had multiple lay rectors, all of whom were obliged to repair the chancel of the church, how was the liability to carry out repairs divided between them?

3.72 We discuss these two matters below. We focus especially on the first question, because of its potential consequences regarding CRL. If a person became a lay rector, who was subject to CRL, simply because they had acquired a piece of land that had belonged to a lay rectory, then CRL begins to look more like a burden on land than an obligation on a religious officeholder.

(1) Transfers of rectorial property and transfers of portions of the rectory

3.73 The first issue we raised above concerns the distinction between rectories and rectorial property. A spiritual rector who (with the consent of the bishop) sold a part of the glebe land or transferred a portion of his tithes thereby severed this property from the rectory. The property transferred ceased to be rectorial property; acquiring the property did not make the transferee a rector. We believe that the same principles originally applied to lay rectors. The courts apparently distinguished between the transfer of an impropriated rectory or a portion of a rectory, and the transfer of a piece of rectorial property. The rights and duties of the lay rector transferred with title to the rectory, rather than with the rectorial property.

Transfers of glebe land

3.74 We mention *Grymes v Smith* above, in which the rectory of Lubbenham was split into two parcels, and the older Thomas Grymes and the younger Thomas Grymes were both rectors. By contrast, in *Blinco v Barksdale*, the King had granted Blinco an area of glebe land of an impropriated rectory. It was argued (and apparently accepted) that Blinco "hath not the parsonage, but the land only".[87] Similarly, in *Clifford v Wicks and Townsend*, it was assumed that a person who acquired a small parcel of the freehold of the chancel from the impropriator for the purposes of burials or seating would not become a lay rector. Indeed, that was a key reason why the judges decided that a lay impropriator was not free to dispose of parcels of the chancel, because the transferee would not be subject to rectorial obligations.[88]

Transfers of tithes

3.75 The approach of the courts to transfers of portions of tithes is less clear. Before the fourth council of Lateran in 1215, the patron of a parish was able to grant a portion of the tithes of a parish to (for example) a religious house rather than to the rector.[89] The

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87 (1596) 822, Cro. Eliz 577, p 579.

88 (1818) 106 E.R. 183; 1 B. & Ald. 498, p 506.

89 It was frequently stated by the courts that, before the fourth council, a person could pay their tithes to whichever spiritual person they wished (see, for example, *The Dean and Chapter of Bristol v Clerke* (1553) 1 Gwillim 119, p 123). Gibson's Codex suggested that this is untrue, as many religious officials or houses had a clear entitlement to the tithes of a particular area from long before 1215 (vol 2, p 690). A grant of a portion of tithes was mentioned in *Wyld v Ward* (1829) 148 E.R. 966; 3 Y. & J. 3181: prior to the dissolution

canons of the fourth council restricted the patron's power to sever portions of tithes, but it remained possible for the patron to grant a portion of the tithes of a parish to a religious house with the consent of the bishop. Further, a religious house could prove title to a portion of tithes by showing receipt for a long period of time, dating back to before the rectory and the boundaries of the parish were established.

3.76 Where a spiritual rector owned a portion of tithes from another parish, the portion and his own rectory were separate interests. Even if the rector of that other parish – the parish from which the portion of tithes were payable – were to acquire that portion, the interests would not merge.[90] The tithes were permanently severed from the rectory. The rector could grant the portion of tithes to another spiritual person while retaining the rectory.[91]

3.77 Eagle on Tithes stated that the rule that applied to lay rectories was the same as applied to spiritual rectories before the dissolution of the monasteries: a title to a parcel of rectorial tithes is distinct from the rectory itself. By implication, a person who acquired a mere parcel of tithes from a lay rector did not thereby become a rector:

> The right of a person who is merely entitled to a parcel of rectorial tithes, differs very materially in its nature, as it does in its extent, from the right to the rectory itself. A right to a parcel of rectorial tithes does not confer upon its possessor any title analogous to the parochial or common law right of a rector.[92]

3.78 This distinction is supported by case law. For example, in *Boulton v Richards and Booth*, the defendant claimed to be the lay rector of the parish of Glendon. The court held that the defendant was merely a "portioner", the owner of a portion of tithes previously owned by the monastery of Pipewell. The court noted in particular that the monastery did not appear to be under any obligations to maintain the church or provide divine service.[93] The same distinction between title to a portion of tithes and title to a rectory was drawn in *Wyld v Ward* and *Lewis v Bridgman*.[94]

3.79 The interpretation of this case law is complicated, however, by the distinction between rectorial and non-rectorial tithes.[95]

(1) Before the council of Lateran in 1215, it was possible for the tithes of a particular area to have been granted to a religious house. This right to tithes

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of the monasteries, a portion of the tithes of the parish of Leckhampstead were transferred to the Abbot of Abingdon. See also *The Dean and Chapter of Bristol v Clerke* (1553) 1 Gwillim 119, p 123 and Burn's Ecclesiastical Law, vol 3, p 376.

90 *Sir Edward Coke's Case* (1620) 1 Gwillim 375.

91 Gibson's Codex, vol 2, p 691.

92 Eagle on Tithes, p 76.

93 (1819) 146 E.R. 874; 6 Price 483, pp 491 to 492.

94 See, for example, *Wyld v Ward* (1829) 148 E.R. 1148; 3 Y. & J. 192, p 193, where the court considered a portion of tithes held by the Abbot and convent of Abingdon as a distinct title from the rectory of Leckhampstead, and *Lewis v Bridgman* (1830) 57 E.R. 1016; 3 Sim. 316, p 327, where the court noted this was "a case where a person comes with a limited title [as a portioner] and not with a general title of either lay or spiritual rector or vicar".

95 See Eagle on Tithes, pp 119 to 120.

may have arisen before a parish church was established in the area. In these circumstances, the religious house would have possessed a portion of *non-rectorial* tithes – tithes that had never been linked to a rectory. These tithes clearly did not carry any liability to repair the parish church or any other rectorial duties.

(2) It was also possible for a rector to transfer a portion of tithes to a religious house with the consent of the patron and the bishop. In these circumstances, the religious house possessed a portion of *rectorial* tithes – tithes which had originally formed part of the rectory.

3.80 Both *Boulton* and *Wyld* concerned parcels of tithes that had existed since before the Reformation. It is unclear from the reports whether these parcels were originally granted out of a rectory. In *Lewis*, there was no discussion of when the parcel of tithes had been granted. It is not clear, therefore, to what extent these cases demonstrate that a portion of *rectorial* tithes was distinct from a portion of the rectory itself.

3.81 Further doubts arise from the decision of the Court of Arches in *The Bishop of Ely v Gibbons and Goody*. The case report describes the Bishop of Ely as "the impropriator of a portion of rectorial or great tithes" of the parish of Clare.[96] The case concerned whether the bishop was subject to CRL. The churchwardens argued that all parts of the rectory of Clare were subject to CRL and so anyone in receipt of rectorial tithes was liable.[97] We do not know from the report whether this argument was accepted, although the Court of Arches proceeded on the basis that the Bishop of Ely might have been subject to CRL. However, it is difficult to draw firm conclusions from the judgment. It is unclear from the report whether the Bishop of Ely had merely been granted a portion of the tithes of Clare or whether he had been granted a share of the rectory of Clare. The question of whether a portion of tithes could be severed from an impropriated rectory so that it no longer carried CRL was not explored. The focus of the case was on whether there was a custom in Clare for the parishioners, rather than the rector, to repair the chancel.

3.82 Notwithstanding the uncertainties in the case law, there are other indications that Eagle on Tithes was correct: that the transfer of a portion of tithes by a rector (whether spiritual or lay) did not make the transferee a rector.

3.83 First, the transfer of a portion of tithes and the transfer of a rectory were subject to different rules. Where the Crown had received a rectory on dissolution of the monasteries and transferred "the rectory" to a lay person, the transfer included all the tithes due to the rector even if tithes were not specifically mentioned.[98] The rectory included the whole bundle of rectorial rights. By contrast, the transfer of a specific portion of tithes would not transfer the rectory or any other tithes or rights. It was held that a portion of tithes was a separate title in gross.[99] As Chief Baron Manwood

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96 (1833) 162 E.R. 1405; 4 Hagg. Ecc. 156, p 156.

97 Above, p 160.

98 *Dixon's Case* (1619) 81 E.R. 696; 2 Rolle 118, *Grubbam v Grate* (1619) 81 E.R. 718; 2 Rolle 150.

99 *Futter v Booromes Case* (1584) 78 E.R. 22; Godb. 39.

expressed the point in *Caries Case*, there is a distinction between the transfer of "several, entire and distinct things" and the grant of a rectory.[100]

3.84 Secondly, it might be thought that there would be nothing left of a rectory if the lay rector were to divide up and dispose of the glebe land and tithes – in other words, that a rectory was nothing over and above the rectorial property. However, the ownership of a rectory, as opposed to a parcel of glebe land or tithes, would still confer valuable rights on the owner. Under the rule in *Clifford v Wicks and Townsend*, the rector would still own the freehold of the church and churchyard. They would still be entitled to the chief seat and rights of burial in the chancel. They would still be entitled to provide cure of souls, if canonically qualified. Furthermore, as we discuss above, the rector of a parish had a presumptive title to all the tithes of a parish unless and until a contrary title was proved.[101]

Leases of rectories

3.85 Our conclusion that a transfer of rectorial property was distinct from a transfer of the rectory is further supported by considering rectorial leases. In our 1983 consultation paper, we said the following about CRL:

> Although we are not aware of any direct authority on this question, it is our belief that at common law the liability falls on the freehold owner alone. We base that belief on the proposition that although the rectorial property might be let, the rectory was not a subject which lent itself to leasing. A tenant would accordingly not become a lay rector simply by virtue of his tenancy.[102]

3.86 On further analysis, we now believe that this proposition was incorrect. A rectory could be let, and the lessee became the rector. Thus, in *Wolley v Platt and Lowood*, the tenants of a bishop, who was the spiritual appropriator of a rectory, commenced a suit to recover tithes. Chief Baron Alexander said the following about the lessees:

> I cannot consider them in any other light than as a common rector. As the lessees, the lessor being the bishop, they are the rector of this parish; they have exactly all the same rights, in my view of the case, that any common rector has.[103]

3.87 Our 1983 Consultation Paper was correct, however, that a lessee of a parcel of glebe land or a portion of tithes was not a lessee of the rectory. In *Parkins v Hinde*, for example, it was held that a lease of glebe land would not include a lease of the rectorial tithes without specific reference to the tithes.[104] Conversely, if a rector were to

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100 (1585) 74 E.R. 256; 1 Leo. 281.

101 See paras 3.41 to 3.46 above.

102 (1983) Law Commission Working Paper No 86, para 3.9.

103 *Wolley v Platt and Lowood* (1824) 148 E.R. 196; M'Cle 468, p 473. Likewise, in *The Bishop of Ely v Gibbons and Goody* (1833) 162 E.R. 1405; 4 Hagg. Ecc. 156, p 162, it was conceded that the lessees of the great tithes (which had been appropriated by the bishop) were, in principle, liable for CRL.

104 (1587) 78 E.R. 419; Cro Eliz. 161.

let their rectory but reserve some of the glebe land, they would be obliged to pay tithes arising from the reserved glebe to the lessee (as the lessee would be the rector).[105]

3.88 This distinction between a lease of rectorial property and a lease of the rectory exactly parallels the distinction we have drawn between a transfer of the rectory and a transfer of rectorial property. Under the former, the transferee became the rector; under the latter, they did not.[106]

(2) The division of liability between rectors

3.89 The second area of uncertainty produced by the division of lay rectories concerns the division of liability for repairs to the chancel. This matter may be of great interest to lay rectors, because it affects how much money they may need to spend on repair of the chancel. However, the issue of how liability was split is not as relevant to our analysis of the nature of CRL as the issue concerning transfers of parcels of rectorial property.

3.90 Although we have distinguished between the transfer of a rectory and the transfer of a portion of rectorial property, it is clear that in many cases the title to a lay rectory itself was split between multiple persons.[107] All the lay rectors were bound by CRL.

3.91 In Chapter 2, we discuss the fact that CRL was not a liability to pay money.[108] It was a duty to perform repair works, albeit the duty was specifically to perform those works using the profits from the rectory. (By profits, we do not only mean money; the rector might use the timber from the glebe land for repairs.) When rectories passed into lay ownership in the 16th century, the courts recognised that lay rectors were still subject to CRL. There is no indication that the nature of the liability changed. It was still an obligation to perform works. Indeed, the nature of the liability caused a problem in *Neville v Kirby*. In that case, the churchwardens had carried out repairs to the chancel of the church and sought to recover their outlay from the lay rectors. The Court of Arches held that it had no power to order reimbursement. The rectors had an obligation to repair the church and the ecclesiastical court could issue a monition for them to fulfil their duty if the church were out of repair. But the church was now in good repair and the court had no jurisdiction to determine a money claim against a rector.[109] There were, however, secondary obligations relating to CRL that could give

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105 Gibson's Codex, vol 2, p 689.

106 There is a suggestion that a tenant could not be subject in CRL in *Dean and Chapter of St. Asaph v Oversees of Llanrhaiadr-yn-Mochnant* [1897] 1 QB 511 (p 514 by Lord Esher MR, and p 516 by Chitty LJ). The case was considering a hypothetical tenant of a tithe rentcharge owned by a lay rector, in order to determine the liability of the rector for the poor rate. It is notable that Lopes LJ commented that the hypothetical tenant in question would not have been given a lease of the chancel (p 515), which suggests that they would not have been a tenant of the *rectory* but only of rectorial property. The Court of Appeal did not disagree with the Divisional Court's assessment (p 512) that CRL is not a charge on the profits of the rectory but an obligation on the rector.

107 Burn's Ecclesiastical Law, vol 1, p 322 noted that it was "very frequently the case" for there to be multiple impropriators of a rectory. Cf Phillimore's Ecclesiastical Law, p 1787.

108 See paras 2.49 to 2.50 above.

109 [1898] P 160, p 167 by Lord Penzance. The obligation on parishioners to repair the nave of the church was different. It was an obligation to contribute via the levying of church rates (by the churchwardens). Consequently, the churchwardens could pursue parishioners for unpaid sums in the ecclesiastical courts (and apparently in the Chancery Court – see Burn's Ecclesiastical Law, vol 1, pp 379 to 380, citing *Nicholson v Masters* (unreported)).

rise to money claims. In particular, we mention above the fact that a rector or the bishop could pursue a former rector for a contribution to the costs of repairing the chancel.[110]

3.92 It is not clear how an obligation to perform repair works, rather than to pay for the works, could be split between multiple rectors. There is very little case law that touches upon this issue. However, there is an examination of the division of liability in Burn's Ecclesiastical Law.[111] Burn stated that, where there are multiple impropriators of the rectory and the chancel is out of repair, the churchwardens do *not* need to bring every impropriator before the ecclesiastical court. They could select who they would sue and the ecclesiastical court will merely admonish whichever rectors are before it to perform their duty. Burn wrote that "the court will not settle the proportion amongst the impropriators, but admonish all who are made parties to the suit to repair the chancel, under pain of excommunication". The rectors, he concluded, must settle their proportions amongst themselves.

3.93 The passage from Burn indicates that lay rectors were severally, not jointly, liable for chancel repairs. It suggests that the division of a rectory produced multiple separate benefices, all relating to the same church. Each rector was then under a separate obligation to repair the chancel. For that reason, the ecclesiastical court could admonish any rector who appeared before it to repair, regardless of whether other lay rectors also appeared.

3.94 Burn cited no cases in support of his claim. There may be arguments that he was mistaken. At first sight, division of a rectory would result in there being multiple co-rectors who were jointly liable to discharge the rectorial obligations (and jointly entitled to the exercise the rectorial rights). Moreover, even if rectors were separately liable, there appear to be cases in which CRL fractured into a proportional liability to contribute to repairs. We discuss in Chapter 2 that where there was both a rector and a vicar who were subject to CRL, they would contribute to repairs in proportion to their benefices.[112] It is notable, however, that the relevant passage from Burn was adopted by both Phillimore's Ecclesiastical Law and Stephens' Treatise.[113] It is likely, therefore, that Burn's statement reflected the long standing practices of churchwardens and the ecclesiastical courts.

3.95 Burn's reference to lay rectors settling the proportions in which they would contribute among themselves is puzzling. It suggests that the owners of portions of a lay rectory had a *right* to seek a contribution from one another. It is unclear how lay rectors could have a right to seek a contribution from one another if they are severally, and not jointly, liable.[114] In *Wickhambrook Parochial Church Council v Croxford*, the Court of Appeal agreed with Burn that CRL is a personal and several liability, not a joint

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110 See para 3.65 above.

111 Burn's Ecclesiastical law, vol 1, pp 322 to 323.

112 See para 2.72 above.

113 Phillimore's Ecclesiastical Law, p 1787; Stephens' Treatise, p 282.

114 Possibly under the modern law they might be found to have a right to recover a contribution under principles of unjust enrichment, but these cannot have been the historic basis for any right to a contribution.

liability, on lay rectors of the same parish.[115] Citing Burn, Lord Hanworth MR also said that a lay rector of a parish can obtain a contribution to the cost of repair from the other lay rectors.[116] But the Court of Appeal did not explain the basis of this right. We think there are three possibilities:

(1) First, Burn and *Wickhambrook* might have been wrong to find that the liability of lay rectors of the same parish was several and not joint. If the liability was in fact joint, it would explain why they had a right to seek a contribution from one another.

(2) Secondly, it may be that the common law developed a separate, bespoke right for lay rectors to obtain a contribution to the costs of repairs from one another that was not based on principles of joint liability. The right might have been similar to the right developed by the common law for a rector to obtain a contribution from a previous rector, which we discuss earlier in this chapter.[117]

(3) Thirdly, the passage from Burn's Ecclesiastical Law might have been misinterpreted (including by the court in *Wickhambrook*). Possibly lay rectors of the same parish had separate benefices, separate liabilities and no rights of contribution against one another. Burn may simply have been saying that, where several lay rectors were brought before the court and admonished to repair the same chancel, they would in practice need to agree how the repairs were to be carried out. It was therefore likely that they would agree that one rector would perform the work while the others contributed. This may explain why Burn only refers to a contribution being received from those rectors who were summoned to appear before the court (and not from others who were not summoned) – a claim that Lord Justice Romer said in *Wickhambrook* that he "could not accept".[118] In fact, we think this may be the only consistent reading of the passage by Burn.

3.96 We have not been able to determine which of these possibilities is correct. However, *Wickhambrook* is a binding authority, and so (unless a case goes to the Supreme Court) the current law is that the liability of lay rectors of the same parish is several, but they have rights of contribution against one another.

Is liability limited?

3.97 The Court of Appeal in *Wickhambrook* also decided that the liability of a lay rector for the costs of repairing the chancel is unlimited.[119] The liability may be greater than the value of the rectorial property, and it is not limited to the use of profits received from

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115 Lord Hanworth MR said that the authorities on CRL he cited in his judgment "clearly show that the liability is personal and several, not joint" ([1935] 2 KB 417, p 432). However, the only authority he cited that discussed the several nature of the liability was Burn's Ecclesiastical Law. The case law he cited supports the conclusion that the liability was personal (a burden of the rector's office) but the cases did not discuss whether the liability of a co-rector of a parish is several.

116 [1935] 2 KB 417, p 439.

117 See para 3.65 above

118 [1935] 2 KB 417, p 445.

119 Above, p 437 by Lord Hanworth MR, p 445 by Romer LJ.

the rectory. The Court of Appeal based its decision on an examination of the case law concerning the liability of lay rectors. In fact, the majority of the cases mentioned simply reiterated that a lay rector is subject to CRL, without considering what limitations may apply to this liability.[120] Two of the cited cases provided some support for the Court of Appeal's conclusion,[121] but the final two both indicated that the liability of a lay rector may be limited to their receipt of profits from the rectory.[122]

3.98 We note, however, that it was widely assumed prior to *Wickhambrook* that liability for CRL was limited to the receipt of profits from the rectory.[123] The passage from Burn's Ecclesiastical Law we discuss above also stated that, for a lay rector to be admonished by the ecclesiastical court, it would be necessary to show that they had received sufficient profits from the rectory to fund the repairs. Moreover, our examination of the liability of spiritual rectors in Chapter 2 indicates that CRL was specifically an obligation to repair the chancel *using the profits of the rectory*.[124] However, while the House of Lords has twice commented that it could be asked to consider whether *Wickhambrook* was correctly decided,[125] no attempt has yet been made to overturn the decision.

SUMMARY

3.99 We consider in this chapter the effect of the dissolution of the monasteries on the law governing rectories and CRL. We suggest that, when rectories were transferred into lay hands following the dissolution of the monasteries, the courts generally continued to apply ecclesiastical law to the impropriators of these rectories. Lay persons who acquired rectories from the Crown were treated as spiritual rectors, with the same rights and duties. Lay rectors were subject to CRL, but we do not believe that the nature of this liability fundamentally changed. It remained an obligation on the holder of a religious office to repair the chancel using the profits of their benefice. The main exception, where ecclesiastical law was not applied to lay rectors, was where its

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120 Namely: *Sergeant Davies Case* (1621) 81 E.R. 757; 2 Rolle 211; *Pense v Prouse* (1695) 91 E.R. 934; 1 Ld. Raym. 59; *The Bishop of Ely v Gibbons and Goody* (1833) 162 E.R. 1405; 4 Hagg. Ecc. 157; *Griffin v Dighton and Davis* (1864) 122 E.R. 767; 5 B. & S. 93; *Smallbones v Edney and Lunn* (1870) 17 E.R. 109; VII Moore N.S. 286; (1869-71) L.R. 3 P.C. 444.

121 In *Neville v Kirby* [1898] P 160, p 167, Lord Penzance (in giving a brief description of CRL) said that the ecclesiastical court would admonish a rector to repair the chancel if it was in disrepair, without mentioning the receipt of profits. In *Morley v Leacroft* [1896] P 92, a lay rector was admonished to repair, and there does not appear to have been an express allegation that he had received sufficient profits from the rectory to fund the repairs. However, it is likely on the facts of the case that the rector had received sufficient profits.

122 *Walwyn v Auberry* (1677) 86 E.R. 1057; 2 Mod. 254 and *Whinfield v Watkins* (1812) 161 E.R. 1059; 2 Phill Ecc 4. We discuss the judgment of Atkyns J in *Walwyn v Auberry* at para 3.60 above and at paras 4.43 to 4.45 below. In *Whinfield v Watkins*, it was specifically alleged that a sequestrator had received sufficient income from a rectory to fund the repairs (see p 1059).

123 For example, the Report of the Chancel Repairs Committee (1930) Cmd 3571 stated that the owner of rectorial property is "*to the extent of the profits derived by him* from his piece of the property, under the duty of maintaining the chancel" (p 6, our emphasis).

124 See paras 2.52 to 2.58 above.

125 *Representative Body of the Church in Wales* [1944] AC 228, p 239 by Viscount Simon LC; *Wallbank* [2003] UKHL 37; [2004] 1 AC 546, at [3] by Lord Nicholls, [82] by Lord Hobhouse, and [108] and [122] by Lord Scott.

application would have prevented lay ownership of rectories or prevented lay rectors from freely disposing of their property.

3.100 It should be noted that we have not yet considered how the case law concerning CRL developed from the turn of the 20th century. In Chapter 4, we examine this case law further, including the key decision of the High Court in *Chivers & Sons v Air Ministry* which took a different approach to the division of rectorial property than the cases we have examined in this chapter. Chapter 4 also examines further legislative developments that had an impact on CRL following the dissolution of the monasteries, particularly the enclosure of common land and the abolition of tithes, and traces the history of CRL up to the present day.

CONSULTATION QUESTION

3.101 As in Chapter 2, the issues we discuss in this chapter are complex. We welcome views from consultees about the legal analysis in this chapter, especially from those with knowledge of ecclesiastical law or the history of CRL.

Consultation Question 2.

3.102 We invite consultees to inform us if there are any relevant authorities, canons, or legal or historical commentaries which we have not considered in Chapter 3.

Chapter 4: Later developments in the law governing chancel repair liability

INTRODUCTION

4.1 In Chapter 2 we discuss the early history of chancel repair liability ("CRL"). CRL began as an obligation on parish priests (rectors) to use the property, given to them as part of their religious offices, to support the performance of their religious duties. These duties included providing divine service, maintaining the parsonage house, and maintaining the chancel of the church.

4.2 In Chapter 3, we examine whether the nature of CRL changed following the dissolution of the monasteries. During the dissolution, rectories that had been appropriated by the monasteries passed to the Crown and were given to lay persons. According to our analysis, the courts generally treated these persons as *rectors* (lay rectors) and applied the same ecclesiastical law to them as applied to spiritual rectors. The nature of CRL did not appear to change: it remained an obligation on the holder of a religious office, except the holder had become a lay person. The main differences were that lay rectors could not perform divine service (unless they happened to be canonically qualified and able to act as spiritual rectors) and lay rectors were free to dispose of the rectorial property. It was primarily in relation to these matters that ecclesiastical law had to be disapplied or modified.

4.3 It was less clear how ecclesiastical law should apply where rectories were divided. Our analysis of cases and commentary from the 16th to the 19th centuries suggested that there was a distinction between the division of a lay rectory and the division of rectorial property.[1] The title to a rectory could be divided and transferred to multiple owners, each of whom became a lay rector. Alternatively, a lay rector could transfer a portion of tithes or an area of glebe land to another person, without transferring a portion of the rectory. It appears that a person who merely acquired some rectorial property did not become a lay rector and was not subject to rectorial rights and obligations (including CRL).

The issues discussed in this chapter

4.4 Our discussion of CRL in Chapter 3 traces the history of the liability up to the 19th century. To complete our account and trace legal developments concerning CRL up to the present day, we need to examine three further matters.

(1) First, we examine two programmes of legislation that had a significant impact on the property of lay rectors. The process of enclosure from the 17th to the 19th century resulting in many rectorial rights over common land being replaced by grants of land. Then the abolition of tithes in the 19th century replaced lay rectors' rights to recover tithes with tithe rentcharges.

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1 See paras 3.73 to 3.88 above.

(2) Secondly, in the 20th century, it appears that a different understanding of CRL began to gain traction. CRL was treated in some case law as a burden that automatically transferred with any property that had belonged to a lay rectory. The Tithe Act 1936 was also drafted on the basis that CRL was a burden on the ownership of former rectorial property. The issue of how CRL relates to the ownership of land was later considered by the High Court in *Chivers & Sons Ltd v Air Ministry*.[2] The High Court held that anyone who acquired property that had belonged to a lay rectory became subject to CRL. The court held that a lay rector had no power to transfer portions of rectorial property *out of* the rectory; rectorial obligations necessarily transferred with rectorial property. We examine whether the changing views of CRL were justified and whether *Chivers* was correctly decided.

(3) Finally, we complete our examination of the history of CRL by considering some further legislative reforms in the 20th century. We examine the Welsh Church Act 1914 (which disestablished the Church in Wales), the Chancel Repairs Act 1932, and the reform of CRL binding on spiritual rectors.

(1) THE ENCLOSURE OF COMMON LAND AND THE ABOLITION OF TITHES

4.5 We start by examining the effects of the Inclosure Acts and the Tithe Acts on lay rectories and CRL. (We refer to "Inclosure" Acts, rather than "Enclosure Acts", because these statutes, from the 17th to the 19th century, and legal commentary on them use the old-fashioned spelling of the word.) We explain that, while these Acts transformed the nature of some pieces of rectorial property (in particular, replacing tithes with parcels of land and tithe rentcharges), their provisions do not appear to have altered the nature of CRL.

The Inclosure Acts

4.6 From the 17th to the 19th century, a series of Acts were passed concerning the enclosure of common land. These were generally Local Acts, applying to particular communities. Each Act identified (or allowed for the appointment of) local commissioners who were authorised to divide the community's common land into parcels. The commissioners were authorised to transfer the parcels to persons in the community who had rights and interests affecting the common land. On transfer, these rights and interests were extinguished and the grant of land provided compensation for their loss.

4.7 Where a parcel of land was granted in exchange for rights or interests that were being extinguished, it was common for the Inclosure Acts to specify the conditions on which the land would be held. By way of illustration, section 32 of the Thornton Marsh Inclosure Act 1799 provided that the parcels of land given to local landowners were to be held "under the same tenure, rents, customs, and services, and with such and like exceptions" as the interests and rights in lieu of which they were granted. Other Inclosure Acts included similar provisions.[3]

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2 [1955] 1 Ch 585.

3 See, for example, section 55 of the Louth (Lincolnshire) Inclosure Act 1801 and section 59 of the Enfield Inclosure Act 1801, which make identical provision.

4.8 Many of the rights and interests that were extinguished and replaced with grants of land by the Inclosure Acts were rectorial rights belonging to impropriators. For example, the Louth (Lincolnshire) Inclosure Act 1801[4] made provision for land to be allotted to the impropriate rector and the vicar in lieu of their rights to tithes from the common land. They were also allotted further land because some of the common areas that were being enclosed were open glebe land. The allotments were "in lieu of, and full satisfaction and compensation for," their lost glebe land and extinguished tithes.[5]

4.9 We noted in our 1983 consultation paper on CRL that many of the Inclosure Acts also allowed some or all of the tithes payable from enclosed common land to be converted into corn rents, which were rentcharges that varied with the price of corn.[6] For example, Enfield Inclosure Act 1801[7] authorised the creation of corn rents for the benefit of the lay impropriator, Trinity College Cambridge, if there should turn out to insufficient land that could be given to the college to compensate for the loss of tithes.

The effect of enclosure on chancel repair liability

4.10 Where a lay rector's right to tithes from common land or common glebe land was replaced by an allocation of land (or a corn rent) under the Inclosure Acts, there is a question whether the allocated land (or the corn rent) became rectorial property. Was this property held by the lay rector in their capacity as rector? If so then it would pass with a transfer of the rectory (although, according to our analysis in Chapter 3, it could also be transferred *out of* the rectory as a separate title).

4.11 There appears initially to have been some doubt about the effect of the Inclosure Acts. Regarding CRL in particular, the 1832 report by the King's Commissioners concerning the ecclesiastical courts noted that "there may be some question whether the general Rules applicable to Dilapidations could be extended to such Allotments" and recommended that it be clarified in legislation that these allotments are "deemed glebe".[8] The difficulty is that the Inclosure Acts did not expressly state that land allotted for glebe and tithes became rectorial property. The Acts may generally have intended that the allotted land would be held in the same capacity as the property rights it replaced, but we cannot confidently state that any land allotted under any Inclosure Act in place of rectorial property itself became rectorial property. The wording of the Acts varies, and each would have to be interpreted according to their own terms. However, it is widely assumed that land allotted to rectors under the Inclosure Acts became rectorial property.[9]

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4 Ss 32 to 36.

5 S 38.

6 Transfer of Land: Liability for Chancel Repairs (1983) Law Commission Working Paper No 86, para 2.24.

7 S 30.

8 The special and general reports made to His Majesty by the Commissioners Appointed to Inquire Into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales 1832, p 51.

9 For example, in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 AC 546, the land owned by the Wallbanks had been allotted to the impropriator of Aston Cantlow under the Aston Cantlow Inclosure Act 1742. Lord Scott said (at [101]) that "it is generally assumed that the allotted land then took the place of the tithes as the lay rector's rectorial property".

4.12 Importantly, we are not aware of any provision of the Inclosure Acts that altered the nature of CRL. If we are correct that CRL was an obligation that attached to the office or living of rector, then the transformation of some rectorial property from one form to another had no impact whatsoever on a lay rector's liability. They remained personally liable to repair the chancel, but the property belonging to the rectory had changed. Alternatively, if land allotted under the Inclosure Acts did not become rectorial property, then the contents of the relevant rectories was reduced, without affecting the liability of the rector. Furthermore, even if we were wrong – even if, for example, CRL were to be akin to a charge on the rectorial property – there would be a question about whether or not this charge transferred to land allotted to a lay rector. Either way, the Inclosure Acts left the nature of CRL untouched.

The Tithe Acts

4.13 As the process of enclosure was drawing to a close, a new statutory programme began, which aimed to abolish tithes in England and Wales. Rights to tithes were replaced by a new type of corn rent, known as a "tithe rentcharge".

4.14 The programme commenced with the Tithe Act 1836, which created a scheme for the landowners in a parish to reach an agreement that the parish tithes should be commuted and replaced with rentcharges.[10] In the absence of an agreement, the Tithe Commissions could value the tithes of the parish and replace them with an award of rentcharges.[11] Once an award by the Commissioners or an agreement by the parishioners had been confirmed, the lands of the parish were discharged from the payment of tithes.[12]

4.15 Section 71 of the Tithe Act 1836 provided that any person who had "any interest in or claim to any tithes or to any charge or incumbrance upon any tithes" would have the same right to or claim upon the rentcharge which replaced the tithes. It further provided that any person's estate in the rentcharge would be subject to "the same liabilities and incidents" as the estate the person previously owned in the tithes.

4.16 Although the 1836 Act required many amendments by 15 further Tithe Acts, the scheme for the commutation of tithes was ultimately so successful that, by 1890, Parliament decided it could safely repeal most of the provisions of the 1836 Act.[13]

4.17 As well as providing for the commutation of tithes into tithe rentcharges, the Tithe Acts included two sets of provisions allowing tithe rentcharges to be extinguished.

(1) First, where the same person owned both the tithe rentcharge and the fee simple of the land burdened by the rentcharge, the Tithe Act 1836 allowed the

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10 Tithe Act 1836, ss 17 to 28.

11 Tithe Act 1836, ss 35 to 56.

12 Tithe Act 1836, s 57.

13 The repeal was, however, subject to a saving provision in case any tithes were still payable in England and Wales: "this repeal shall not extend to any tithes which have not been commuted" (Statute Law Revision Act 1890, Sch 1).

landowner to execute a deed extinguishing the rentcharge by merging it with the fee simple.[14]

(2) Secondly, the Tithe Act 1846 introduced a right for the rentowner and the burdened landowner to agree the redemption of a low-value tithe rentcharge on payment of a statutory sum. This right was extended to other tithe rentcharges by the Tithe Acts 1860, 1878 and 1918 and some landowners were entitled to seek redemption without the agreement of the rentowner.

The effect of the Tithe Acts on chancel repair liability

4.18 It has generally been assumed that tithe rentcharges awarded to lay rectors under the Tithe Acts became rectorial property. Both the Court of Appeal in Dean and Chapter of *St. Asaph v Oversees of Llanrhaiadr-yn-Mochnant*[15] and the House of Lords in *Representative Body of the Church in Wales v Tithe Redemption Commission*[16] discussed tithe rentcharges on the assumption that their owners were lay rectors who were subject to CRL. The Report of the Royal Commission on Tithe Rentcharge in England and Wales 1936 likewise assumed that tithe rentcharges could be rectorial property.[17]

4.19 However, like the Inclosure Acts, the Tithe Acts are not explicit about whether the tithe rentcharges that replaced rectorial tithes became rectorial property. The answer to this question depends on the interpretation of section 71 of the Tithe Act 1836, which said that the tithe rentcharge would be subject to "the same liabilities and incidents" as the estate in tithes that it replaced. The difficulty with this provision is that it focuses specifically on the estate in tithes which was extinguished. The estate in tithes was part of a more expansive estate: the rectory, which had become a transferrable item of private property (a lay fee) following the dissolution of the monasteries. Section 71 is not clear whether tithe rentcharges were held in the same capacity – as part of the greater rectorial estate – as the extinguished tithes.

4.20 Regardless, the commutation of tithes does not appear to have altered the nature of CRL. According to our analysis in Chapters 2 and 3, CRL and other rectorial rights and obligations were incidents of the rectory, the ecclesiastical living, rather than incidents of the ownership of a particular piece of rectorial property. The replacement of tithes with tithe rentcharges had no impact on the lay rector's obligations, regardless of whether tithe rentcharges became part of the rectory. Even if our analysis were incorrect – for example, if CRL were in fact akin to a charge on the rectorial property – CRL would have transferred to the tithe rentcharges as a charge. The nature of the burden would not have changed.

Merger

4.21 Where the owner of a tithe rentcharge also owned the burdened land, and elected to merge the rentcharge with the freehold, section 1 of the Tithe Act 1839 explained the

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14 Tithe Act 1836, s 71

15 [1897] 1 QB 511.

16 [1944] AC 228,

17 See para 106 of the Report of the Royal Commission on Tithe Rentcharge in England and Wales (1936) Cmd 5095.

effect of merger. Section 1 provided that the land would be subject to "any charge, incumbrance, or liability" that previously affected the rentcharge. It further stated that any such charge, incumbrance, or liability was to have priority over any charge or incumbrance on the land.

4.22 In our 1983 consultation paper on CRL, we said that it was generally thought that section 1 operated to transfer the burden of CRL from a tithe rentcharge to the freehold of the land in which the rentcharge merged.[18] On further analysis, this understanding of the effect of section 1 appears to have been mistaken.

(1) First, we have found that CRL was not a burden on the ownership of any particular items of rectorial property, but a burden on the rectory (which conferred rights and obligations over and above the ownership of the rectorial property). The extinguishment of a tithe rentcharge would have had no impact on the obligations of the lay rector for as long as they owned the rectory. The only question is whether the freehold of the land in which the tithe rentcharge merged became part of the rectory. There is nothing in section 1 that says that the freehold was held for the same estate, or subject to the same incidents, or in the same capacity, as the tithe rentcharge. The provision only refers to the transfer of liabilities, charges and incumbrances.

(2) Secondly, even if we are wrong in Chapter 3, and title to a lay rectory (or at least, a portion of the rectory) automatically transferred with the ownership of any part of the rectorial property, CRL would still have been an obligation on the rector rather than a burden on the rectorial property. CRL was an aspect of *how* a tithe rentcharge was owned, not an external burden on that property. Consequently, we are not sure that it makes sense to speak of CRL transferring from one piece of property to another.

(3) Thirdly, even if CRL were to be construed as a type of burden on land, it is not clear that section 1 would have transferred CRL to the freehold. The focus of section 1 appears to be on *monetary* liabilities and obligations *secured on* land. This is why section 1 deals with whether charges, liabilities and incumbrances attached to the tithe rentcharge had priority over charges or incumbrances on the land – there was a question about which chargee would be paid first, or be able to exercise their remedies against land first. CRL was a personal obligation. It could not be enforced against land, whether by forfeiture, foreclosure, order for possession or order for sale. Prior to the Chancel Repairs Act 1932, CRL did not give rise to a money claim. It was not a type of burden that could compete with, or have priority over, charges on land.

Redemption

4.23 The Tithe Acts also made provision for tithe rentcharges to be redeemed. The Acts were generally silent on the effect of redemption. In our 1983 consultation paper, we said that it was unclear what happened to "the attendant chancel repair liability" when a tithe rentcharge was redeemed.[19] We said there were three options: (i) the liability disappeared; (ii) the liability transferred onto the land of the person who bought out

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18 Transfer of Land: Liability for Chancel Repairs (1983) Law Commission Working Paper No 86, para 2.13.

19 Above, para 2.27.

(and formerly paid) the rentcharge; or (iii) the liability transferred to the redemption money.

4.24 The discussion in our 1983 consultation paper was premised on the basis that CRL was an obligation that affected the ownership of rectorial property. If we are right that CRL attached to ownership of the rectory (which was a different interest), then the redemption of a tithe rentcharge should have had no effect on the obligations of the lay rector. It simply meant that the lay rector owned less rectorial property to support the performance of their obligations.

4.25 The issues discussed in our 1983 consultation paper could have arisen (a) if anyone who acquired rectorial property became a lay rector, or (b) if anyone who ceased to own rectorial property ceased to be a lay rector. There would then be a question whether the redemption of a rentcharge should be construed as a purchase of rectorial property, or whether the proceeds from redemption of a rentcharge became rectorial property. We do not know how these questions should be answered. However, we do not believe that, under the law at the beginning of the 19th century, ownership of a rectory transferred automatically with ownership of rectorial property.

(2) CHANGING ASSUMPTIONS ABOUT CHANCEL REPAIR LIABILITY IN THE 20TH CENTURY

4.26 We have explained that the Inclosure and Tithe Acts may have transformed rectorial property from one form to another, but that they did not alter the nature of CRL. However, these transformations of rectorial property appear to have accelerated the fracturing of lay rectories.[20] There was an increase in the number of cases concerning persons who had acquired portions of land allocated to lay rectors under the Inclosure Acts, or who had acquired tithe rentcharges, but who did not own the parish church or exercise the traditional rights of a lay rector.

4.27 In the 20th century, there appears to have been a partial shift in views concerning the nature of CRL and lay rectories. In two well-known cases and a significant Parliamentary report,[21] CRL was described as an obligation that automatically transfers with the ownership of any property that belongs to a lay rectory. Furthermore, the Tithe Act 1936 was drafted on the understanding that CRL was a burden on the ownership of any former rectorial property. The relationship between CRL and the ownership of land was eventually considered by the High Court in *Chivers & Sons Ltd v Air Ministry*.[22] The court held that CRL automatically transfers with the ownership of any rectorial property, and it no longer binds (and cannot be retained by) a former owner of rectorial property.

4.28 We examine these developments below. We proceed chronologically, starting with case law from the beginning of the 20th century. We then examine *Hauxton Parochial*

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20 The fracturing process was also accelerated by the creation of the Ecclesiastical Commissioners (by the Ecclesiastical Commissioners Acts 1836 to 1885) to review and reform the revenues of the church, who sold portions of rectorial property formerly held by bishops or deans and chapters of cathedrals.

21 Report of the Chancel Repairs Committee (1930) Cmd 3571.

22 [1955] 1 Ch 585.

Church Council v Stevens ("*Hauxton*"),[23] a widely reported decision of the ecclesiastical courts that led to the passing of the Chancel Repairs Act 1932. We consider the drafting of the Tithe Act 1936, and comments by the House of Lords in *Representative Body of the Church in Wales v Tithe Redemption Commission* ("The Welsh Tithe Case").[24] Finally, we examine the key decision in *Chivers* and later comments by the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* ("*Wallbank*").[25]

Lanchbury v Bode and other cases from the turn of the 20th century

4.29 Our starting point is two cases concerning the impropriated rectory of Haddenham from 1898 and 1901. The rectory was granted to the Dean and Chapter of Rochester following the dissolution of the monasteries. The Haddenham Inclosure Act 1830 extinguished the great tithes of the parish and allotted 348 acres of land to the Dean and Chapter in exchange. The 1830 Act contained standard provisions about how the allotted land was to be held. Section 58 of the 1830 Act stated that the allotted land shall be held "under the same tenure, rents, payments, fines, heriots, customs, and services" as the property for which it was exchanged. Section 66 stated that the allotted land was to be subject to the same "wills, limitations, conditions, settlements, uses, trusts, powers, provisos, rents, debts, charges, and incumbrances" as the property rights it replaced.

4.30 The Dean and Chapter later sold the majority of the allotted land to Mr Bode. There is no indication that Mr Bode acquired anything other than the land; in particular, he does not appear to have been given or exercised any rectorial rights.

4.31 The later of the two cases, *Charity Commissioners v Bode*, is only of passing interest. The Court of Appeal held that an annuity formerly paid by the impropriator of Haddenham for the support of the poor was a charge on the entirety of the rectorial property, which transferred onto each part of the allotted lands under section 66 of the 1930 Act.[26] The annuity was binding on Mr Bode, as owner of that land. Importantly, the Court of Appeal considered, but did not criticise, the decision of the High Court in the earlier case concerning Mr Bode that we discuss below.[27]

4.32 The earlier case, *Lanchbury v Bode*, is more significant for our discussion of CRL. The case concerned a custom in Haddenham for the rector to make available a bull and a boar for use by the parishioners' livestock for breeding purposes. It was accepted, for the purposes of argument, that this was a valid custom binding the rector of the parish.[28] Nevertheless, Mr Justice Kekewich held that this custom was not a type of

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23 [1929] P 240, p 244.

24 [1944] AC 228.

25 [2003] UKHL 37; [2004] 1 AC 546.

26 [1901] 2 Ch 750, p 758 by Stirling LJ.

27 Above, p 759 by Stirling LJ.

28 [1898] 2 Ch 120, pp 124 to 125.

obligation that could transfer to allotted land under section 58 of the 1930 Act and now bind Mr Bode as owner of part of that land.[29]

4.33 We do not think the judgment is meant to imply that the Dean and Chapter stopped being bound by the custom immediately after the enclosure. Both before and immediately after the enclosure, the Dean and Chapter was the sole lay rector and it was accepted for the purposes of argument that the custom bound the rector. Rather, the judge held that the custom could not have become a burden on the allotted land, which transferred with any part of it. It would be unreasonable and impractical to expect every subsequent owner of any small portion of the allotted land to provide a bull and a boar, and it was not clear the obligation could be divided into shares.[30]

4.34 Significantly, Mr Justice Kekewich drew a comparison with the traditional rights of a rector. Suppose that a lay rector had a right to a pew in the chancel, and was allotted land in exchange for their rectorial property. Mr Justice Kekewich asked whether a purchaser of any part of the allotted land would then also have a right to a pew.[31] The answer, he implied, is no. The judge explained: "the person who wishes to occupy the pew must claim by reason of some rectorial right, and the owner of lands allotted in lieu of tithes cannot claim any rectorial right".[32]

4.35 *Lanchbury v Bode* appears, then, to draw the same distinction we identify in Chapter 3 between rights and obligations of the rector (which transfer with the rectory) and burdens on the rectorial property. The transfer of rectorial property (the 278 acres) did not transfer an obligation of the rector. Importantly, we cannot see any reason why the same reasoning would not apply to CRL.

4.36 Broadly consistent views were expressed in other cases from the turn of the century.

(1) In *Dean and Chapter of St. Asaph v Oversees of Llanrhaiadr yn Mochnant*, the Divisional Court held that the repair of the chancel "was not an ecclesiastical due chargeable on the profits of the rectory … but a liability on the rector".[33] If CRL is not a burden on the profits of the rectory, then it may not bind a person who receives those profits. It is necessary to determine whether the person who receives the profits is the rector.

(2) In *Morley v Leacroft*, the Ecclesiastical Court explained CRL by saying that "the right to be rector and enjoy the profits and tithes of the rectory carried with it the duty of repairing the chancel of the parish church … the freehold of such church being vested in him".[34] The reference to the freehold of the church is significant, as it suggests a person who owns some former rectorial property, but does not

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29 Above, p 127.

30 Above, p 126.

31 Above, pp 126 to 127.

32 Above, p 127.

33 [1897] 1 QB 511, p 512.

34 [1896] P 92, p 93 by the Chancellor of Southwell.

enjoy "the right to be rector" and is not vested with the freehold of the church is not subject to CRL.

Hauxton Parochial Church Council v Stephens

4.37 A different account of CRL was given, however, in *Hauxton*.[35] The case drew widespread attention. Mr Stevens had been admonished by the Ecclesiastical Court to repair the chancel of Hauxton church. He failed to comply. At the time, the only means of enforcing the orders of the ecclesiastical court was via committal for contempt. Mr Stevens was imprisoned until he complied with his repairing obligations. Following this case, the Chancel Repairs Committee was appointed by the Lord Chancellor to consider reforms to the law governing the enforcement of CRL. The Committee's recommendations were implemented by the Chancel Repairs Act 1932 (which we discuss separately below[36]).

4.38 Due to its influence, it is worth examining *Hauxton* in detail. The Dean and Chapter of Ely was the impropriator of the rectory of Newton-with-Hauxton. The rectorial property appears to have consisted solely of the rectorial tithes of the parish. Under an Inclosure Act of 1798, the Dean and Chapter was allotted lands in substitution for these tithes. The Dean and Chapter granted a lease of the vast majority of the allotted land to Henry Hurrell. The lease included a covenant that the tenant would take responsibility for chancel repairs. The freehold of the allotted land later passed to the Ecclesiastical Commissioners, who sold it to Henry Hurrell in 1871. This sale was a sale of the land; it appears that the conveyance did not, at least on its face, purport to be a sale of the rectory. However, the sale was subject to a "perpetual covenant" that the landowner would repair the rectory. The land was later inherited by Arthur Hurrell, who sold it to Mr Stevens in 1916. The conveyance to Mr Stevens made no reference to the rectory or to the covenant to repair the chancel. The Hauxton Parochial Church Council later pursued Mr Stevens for the costs of chancel repairs.

4.39 The arguments of the parties were as follows.

(1) Mr Stevens argued that the transfer in 1871 was not a transfer of the rectory. He said that the rectory, with its liability for repairs, remained with the Ecclesiastical Commissioners. He further noted that he did not enjoy a seat in the chancel and was subject to some tithe rentcharges (presumably payable to the vicar, but that is not clear), which would not be the case if he were the rector. Mr Stevens also argued that, when he bought the property, he had no notice of any CRL.

(2) Hauxton Parochial Church Council maintained that CRL is a personal obligation imposed on a person who enjoys the profits of a rectory and who therefore should discharge the burden of CRL. The council claimed that notice of CRL was irrelevant; CRL was attached by the common law to the receipt of profits. It argued that, if liability only passed on the transfer of a rectory, a lay rector could transfer the rectory to A and all of the rectorial property to B. As A has no income from the rectory, A could never be pursued for chancel repairs. (This

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35 [1929] P 240.

36 See paras 4.87 to 4.91 below.

case took place before *Wickhambrook Parochial Church Council v Croxford*,[37] where it was held that a lay rector's liability is not limited to their receipt of profits from the rectory.)

4.40 The arguments in *Hauxton* surrounding the perpetual positive covenant and the requirement for notice are confusing. It may be relevant that the transfer by the Ecclesiastical Commissioners occurred (in 1871) during a period in which it was uncertain whether the burden of a positive covenant could (like the burden of a restrictive covenant) bind transferees of land in equity. These uncertainties were not settled until the Court of Appeal's decision in *Austerberry v Oldham Corporation* in 1885.[38] If the burden of a positive covenant was capable of binding transferees in equity, it would be relevant whether Mr Stevens was a purchaser for value without notice.

4.41 The judgment in *Hauxton* by the Chancellor of Ely is very brief. He held that Mr Stevens had notice of the CRL at the time he purchased the property in 1916, but that notice was irrelevant. The Chancellor of Ely cited the judgment of Justice Atkyns in *Walwyn v Awberry* that "it was agreed by all, that an impropriator is chargeable with the repairs of the chancel; but the charge was not personal but in regard of the profits of the impropriation".[39] The Chancellor of Ely said:

> It seems, therefore, clear on the above mentioned authorities that the liability in this case attaches to the profits accruing to the benefice (by which I mean the impropriated benefice), and the person who receives the profits becomes by virtue of such receipt liable for the repair of the chancel. On this aspect of the case, notice of the liability is not material in the sense that a purchaser can escape liability merely by pleading ignorance of the liability at the time of his purchase.

4.42 However, the basis for the Chancellor of Ely's decision is questionable. The judgment of Justice Akyns in *Walwyn v Awberry* was a minority judgment,[40] and this fact was not acknowledged in the judgment in *Hauxton*. The reference to a matter being "agreed by all" the Justices merely concerned the fact that an impropriator was liable for CRL. Indeed, that is not controversial: we explain in Chapter 3 that, following the dissolution of the monasteries, the courts treated impropriators of rectories *as rectors*, who (like spiritual appropriators) were also subject to CRL.[41]

4.43 As we explain in Chapter 3,[42] Justice Atkyns held that a lay rector was not vested with an unencumbered title to the rectorial property and its profits; he held that a lay rector was only entitled to the surplus profits left over after discharge of their rectorial

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37 [1935] 2 KB 417.

38 (1885) 29 Ch. D. 750.

39 *Hauxton Parochial Church Council v Stevens* [1929] P 240; *Walwyn v Awberry* (1677) 86 E.R. 1057; 2 Mod. 254, p 258. The Chancellor also cited two cases in which it held that a lay impropriator is liable for chancel repairs, which did not refer to the receipt of profits: *Sergeant Davies Case* (1621) 81 E.R. 757; 2 Rolle 211, and *Smallbones v Edney and Lunn* (1870) VII Moore N.S. 286; 17 E.R. 109; (1869-71) L.R. 3 P.C. 444.

40 See paras 3.58 to 3.61 above.

41 See paras 3.21 to 3.26 above.

42 See para 3.60 above.

obligations. The church had a proprietary interest in the initial (non-surplus) profits. It might have been a positive development if Justice Akyns' views had been widely adopted, but they were not. They were also inconsistent with the powers of the bishop where a rector had failed to discharge his repairing obligations. We focus on spiritual rectors; the powers available against lay rectors were even more limited.

4.44 The bishop had various remedies to deal with disrepair: admonition, suspension, dismissal, and sequestration. Admonition was an order that the rector should discharge his personal obligations. Where the bishop sequestered the profits of a rectory, the effect was that *future* profits of the rectory would be used for repairs. Dismissing the rector and appointing a replacement had the same effect. These remedies were not akin to civil, proprietary remedies: they did not allow the bishop to claw back misappropriated profits.

4.45 We discuss in Chapter 3 the fact that it was possible for the bishop or a new spiritual rector to pursue a *former* rector in the ecclesiastical courts who had left the chancel (or the parsonage house) in disrepair.[43] The purpose of this suit may have been to compel the former rector to make good his default and conduct the repairs, but it also appears that some former rectors were pursued for a contribution towards the costs of repairs. Spiritual rectors also had a parallel civil claim against a former rector. However, neither ecclesiastical nor civil law gave the bishop or the new rector any preferential claim to recover a contribution from the former rector. In fact, the claim for a contribution was *postponed* to the discharge of the former rector's (or his estate's) debts.[44] This would not have been the outcome if the church had a proprietary claim on the profits of the rectory.

4.46 The Chancellor of Ely's finding that CRL bound anyone who received the profits of a lay rectory was therefore based on an analysis of the law (in a minority judgment) that did not reflect the way in which CRL was enforced at the time or in the following centuries. The Chancellor of Ely gave no other reason for thinking that anyone who acquired rectory property would become bound by CRL. The cases and commentary we cite in Chapter 3 were not discussed.

4.47 It is possible that the decision in *Hauxton* was influenced by the parochial church council's argument, set out above, about whether a lay rector could free themselves from CRL and render the liability worthless by transferring the rectory and the rectorial property separately. The initial response to this argument is that it did not reflect the law. As we explain in Chapter 3, the title to a lay rectory was something over and above the title to a piece of rectory property. The lay rectory carried ownership of the church, a presumptive right to tithes, rights to seats or monuments in the chancel, and the burden of CRL. The ownership of a parcel of former rectorial property did not. Mr Stevens' argument appears persuasive.

4.48 The understanding of CRL adopted in *Hauxton* appears to have been influential. The Report of the Chancel Repairs Committee in 1930, which led to the passage of the Chancel Repairs Act 1932, discussed *Hauxton*. The 1930 Report explained that CRL

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43 See para 3.65 above.

44 *Bryan v Clay* (1852) 1 El. & Bl. 38; 118 E.R. 351.

was an obligation imposed by the common law on the owner of a *rectory*.[45] (We think this is not quite accurate: CRL was a burden of pre-existing ecclesiastical law which the courts continued to apply to rectories after they transferred into lay hands.) The Report noted that a lay rectory was a bundle of rights, properties and obligations acquired by the Crown from the monasteries.[46]

4.49 However, the Report claimed that, while CRL originally bound a single lay rector, "where the property of the rectory by sales or other transactions has passed to several owners … every several owner is, to the extent of the profits derived by him from his piece of the property, under the duty of maintaining the chancel".[47] No authority was cited for this proposition, apart from *Hauxton*.

The Tithe Act 1936

4.50 When the Tithe Act 1936 was drafted in the decade following *Hauxton*, the drafters of the Act adopted the same understanding of rectorial property and CRL as the Chancellor of Ely.

4.51 The Tithe Act 1936 extinguished tithe rentcharges and provided for the (former) rentowners to be compensated for the loss of their rights by the issue of Government stock. The drafters of the Act were aware that some tithe rentcharges belonged to lay rectors. It was assumed that, when those tithe rentcharges were extinguished, their owners would no longer be subject to CRL – in other words, that CRL bound an owner of rectorial property for as long as they were the owner but no longer.[48] Consequently, section 31 of the Act provided for some of the Government stock to be issued to the diocesan authority to compensate for the loss of the CRL.[49] Notably, section 31(1) of the Tithe Act 1936 referred to "liabilities to repair chancels of churches or other ecclesiastical buildings *arising from the ownership of tithe rentcharge*" (our emphasis).

4.52 For reasons we have already explored, it is arguable that the basis for the CRL provisions in the Tithe Act 1936 was misconceived. If CRL was an obligation on the owner of a rectory, and if a person did not become the (part-)owner of a rectory merely by acquiring some rectorial property, then section 31 of the Tithe Act 1936 was not needed. It arguably compensated the diocesan authority for a right that it had not lost. The extinguishment of a tithe rentcharge would destroy a piece of rectorial property, but it need have no impact on the liability of the lay rector.

4.53 Indeed, it is arguable that the 1936 Act should have treated all lay rectors in the same way it treated a few special classes of lay rectors under section 31(2). Where tithe rentcharges had been impropriated by spiritual rectors, the Ecclesiastical Commissioners, and various ecclesiastical corporations and educational institutions,

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45 Report of the Chancel Repairs Committee (1930) Cmd 3571, p 5.

46 Above, p 5.

47 Above, p 6.

48 See para 106 of the Report of the Royal Commission on Tithe Rentcharge in England and Wales (1936) Cmd 5095, which led to the Tithe Act 1936.

49 The relevant compensation related to the cost of carrying out any current repairs to the chancel and insuring it in respect of future repairs. The sum corresponded to the amount that would be payable under section 52 of the Ecclesiastical Dilapidations Measure 1923 (which permitted lay rectors to buy out their CRL).

the impropriator remained liable for CRL (and received all of the stock issued as compensation for the loss of the rentcharge).

4.54 The same misconception arguably also affects section 31(3) of the 1936 Act. Where the owner of a tithe rentcharge also owned the freehold of the land burdened by the rentcharge at the time of the Act, section 31(3) provided that the tithe rentcharge and the freehold would automatically merge. It further stated that the landowner "shall be subject to liability to repair" as if the freehold and rentcharge had been voluntarily merged under section 1 of the Tithe Act 1839.[50] However, as we discuss above, this appears to be a misdescription of the effect of section 1 of the 1839 Act. CRL does not appear to be "a charge, liability or incumbrance" that would pass on merger to the freehold title.

4.55 Nevertheless, despite these arguable misconceptions, only a few provisions of the Tithe Act 1936 had a direct effect on the nature of CRLs. Even section 31(3) did not directly provide that CRL transferred onto a freehold title on the automatic merger of a tithe rentcharge; it said that such mergers were subject to section 1 of the Tithe Act 1839. The only provisions that actually altered the nature of some CRLs are in Schedule 7 to the Act.

4.56 Schedule 7 dealt with cases in which a lay rectory had been divided so that multiple owners of tithe rentcharges were all subject to a liability to repair the *same* chancel. The schedule provided a method for working out an apportionment of the liability between the rentowners. All of their tithe rentcharges were extinguished by the 1936 Act, but it was possible that some of the rentowners remained subject to CRL (for example, because they were educational institutions specified under section 31(2)). Where such a rentowner remained subject to CRL, Schedule 7 changed their liability into a proportional liability. It did not otherwise affect the nature of that liability, or alter the relationship between the liability and the ownership of property.

The Welsh Tithe Case

4.57 Before examining the key case of *Chivers* below, we note some comments by the House of Lords in the Welsh Tithe Case.[51] The case concerned whether the abolition of ecclesiastical law in Wales by the Welsh Church 1914 (discussed further below) meant that the Commissioners of Church Temporalities in Wales (who owned a tithe rentcharge) was not an impropriator of a rectory. There was no debate that the Commissioners would be an impropriator, but for the application of the 1914 Act.[52]

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50 See also s 31(4), which stated that if a freehold and a tithe rentcharge had been merged before the 1936 Act came into force, the owner [of the freehold] for the time being shall be subject to liability to repair in like manner as if this Act had not passed".

51 *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228.

52 The case concerned the rectory of Llantwit Major that had been appropriated by the Abbey of Tewkesbury. Following the dissolution of the Abbey, the Crown divided the rectory and transferred one portion to the Earl of Lincoln and the other portion to the Dean and Chapter of Gloucester. The shares of both were later commuted into tithe rentcharges. The Welsh Commissioners acquired the tithe rentcharge of the Dean and Chapter. If the issue had arisen and been argued, it seems that the Welsh Commissioners must in fact have acquired the share of the rectory belonging to the Dean and Chapter, and not merely a piece of rectorial property.

4.58 In setting out the facts of the case, the Lord Chancellor, Lord Simon, said that "an owner of any kind of tithe rentcharge in Wales was, *in virtue of that ownership*, under a personal obligation to maintain or to contribute to maintaining the chancel of the church from whose parish the tithe rentcharge was derived" (our emphasis).[53] This comment was not based on an examination of prior case law and the way in which CRL related to the ownership in land was not at issue in the case.[54] However, Lord Simon's comment lends some support to the view of CRL adopted in *Hauxton* and by the drafters of the Tithe Act 1936.

Chivers & Sons Ltd v Air Ministry

4.59 The key case we need to consider in this chapter is *Chivers*, a decision of the High Court from 1955.[55] The case concerned the lay rectory of Oakington, which was acquired by Queens' College, Cambridge in 1560. Queens' College remained the sole lay rector until 1924, when it conveyed part of the rectorial lands to Chivers & Sons Ltd. In 1940, the college conveyed another part of the land to the Air Ministry. By the time of the decision in *Chivers*, the college owned none of the rectorial land (except, possibly, the freehold of the church – this issue was not examined). The chancel of the church in Oakington was in disrepair and Chivers & Sons Ltd (accepting that they were a lay rector) paid for the repairs. The matter in dispute was whether they were entitled to a contribution from the Air Ministry, which depended on whether the Air Ministry (and Chivers & Sons Ltd) were really rectors of the parish.

4.60 It was argued on behalf of the Ministry that the transfers by the college were silent regarding the transfer of shares of the rectory or the transfer of the burden of CRL. Consequently, the college remained the lay rector, although it no longer owned any rectorial property. Mr Justice Wynn-Parry disagreed. The judge held that CRL binds anyone who acquires any portion of rectorial property.[56]

4.61 Mr Justice Wynn-Parry cited the decision of the Court of Appeal in *Wickhambrook Parochial Church Council v Croxford*, which we examine in Chapter 3.[57] He stated that the judgments in that case proceeded "on the basis that the duty to repair the chancel arises out of the fact of owning the rectorial property or some of it".[58] He further held that a person who owns rectorial property, or enjoys rectorial profits, is subject to CRL; he said that the transfer of CRL rested "on the maxim that he who has the profits of the benefice should bear that burden".[59] Mr Justice Wynn-Parry therefore found it hard to see how Queens' College could retain liability for the repairing the chancel while disposing of all the rectorial property. He held that even an express reservation of the liability would have been of no effect.[60] The judge stated that a lay rector who had

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53 [1944] AC 228, p 231.

54 The comment was an obiter dictum: a judge's comment (in a judgment) which is not essential to their decision and which is consequently not binding on the same court or inferior courts in future cases.

55 [1955] 1 Ch 585

56 Above, pp 594 to 595.

57 [1935] 2 KB 417. See paras 3.95 to 3.98 above.

58 [1955] 1 Ch 585, p 594.

59 Above, p 593.

60 Above, p 595.

disposed of the whole of their interest in the rectorial property could not have been admonished to repair the church (although no authority was cited for this proposition).[61]

4.62 There are several grounds on which the decision in *Chivers* may be questioned, many of which arise from our discussion of CRL in Chapter 3. The judge did not consider whether there is a difference between the transfer of a rectory and the transfer of (former) rectorial property (the transfer of property *out of* a rectory). The Air Ministry cited Eagle on Tithes and some of the case law on portioners of tithes we cite in Chapter 3, but these points were not expressly addressed in the judgment.[62] Moreover, the judgment did not address the fact that ownership of a rectory conferred various entitlements over and above the enjoyment of the glebe land and tithes.

4.63 We discuss Mr Justice Wynn-Parry's contention that whoever had the profits of a rectory had to incur the burden of CRL in Chapter 3. The early case law on lay rectors and CRL does not appear to rely on this maxim but rather upon the fact that lay rectors had acquired rectories.[63] Furthermore, it is not clear that the decision of the Court of Appeal in *Wickhambrook* provided any support for the decision in *Chivers*. All that was *expressly* stated in *Wickhambrook* was that a *rector* or the owner of (part of) a *rectory*, whether spiritual or lay, is subject to CRL.[64]

4.64 We also note that Mr Justice Wynn-Parry did not consider whether the freehold of the church of Oakington was still vested in Queens' College. There does not appear to have been any evidence that the college had conveyed the church to anyone and, following *Clifford v Wicks and Townsend*,[65] there were restrictions on whether the freehold could have been divided. This aspect of the decision in *Chivers* has been the subject of academic criticism by Professor Sir John Baker.[66] If Chivers & Sons Ltd and the Air Ministry became lay rectors, then under the common law they should have been vested with the freehold of the church. That would mean that the transfer by Queens' College made the transferees co-owners of property that was not mentioned in the transfer. Alternatively, if the freehold of the church was not vested in the rectors, then the decision in *Chivers* severed rectorial obligations from the ownership of the church (the site where the obligations are to be carried out).[67] It also severed the "burden" of CRL from some of the "benefits" of being a lay rector, such as the right to the chief seat in the chancel.[68]

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61 Above, p 595.

62 See paras 3.75 to 3.84 above.

63 See paras 3.22 to 3.24 above.

64 [1935] 2 KB 417, p 432, by Lord Hanworth MR, and pp 443 to 444 by Romer LJ.

65 (1818) 1 B. & Ald. 498; 106 E.R. 183.

66 J H Baker, "Lay Rectors and Chancel Repairs" (1984) 100 The Law Quarterly Review 181, p 183.

67 We note that in *Neville v Kirby* [1898] P 160, where there were multiple lay rectors, it was expressly pleaded that each lay rector was entitled to the freehold of the chancel (p 162).

68 See *The Bishop of Ely v Gibbons and Goody* (1833) 4 Hagg. Ecc. 156; 162 E.R. 1405, p 162 by Sir John Nicholl. The bishop (who was the impropriator of the rectory) successfully claimed he was not subject to CRL because "he never had repaired the chancel, that he had no enjoyment of it, nor emolument from it, either as to seats, or burials, or monuments; but that the rights in respect thereof had always been exercised

4.65 Indeed, *Clifford v Wicks and Townsend* does not appear to have been brought to the court's attention in *Chivers*. *Lanchbury v Bode*, in which the High Court had taken a differing approach to the division of lay rectories following enclosure, was also not cited. Similarly, the court did not consider *The Duke of Portland v Bingham*, which we discuss in Chapter 3.[69] *Duke of Portland* established that responsibility for cure of souls technically still resided with the lay rector, who could minister to the parish if they were canonically qualified. The court in *Chivers* did not consider whether or how this responsibility could have passed to Chivers & Sons Ltd or the Air Ministry.

Considering the development of the law

4.66 Given the fracturing of rectorial property in the 19th century, the High Court in *Chivers* (and the consistory court in *Hauxton*) could have reviewed whether the law governing CRL had developed over time, so that CRL had started to pass automatically with the ownership of any rectorial property. This review was not carried out, because both cases were arguably decided based on a misunderstanding of the previous law. Furthermore, neither decision was appealed (to the Court of Arches, in the case of *Hauxton*, or the Court of Appeal, in the case of *Chivers*). Consequently, neither the Court of Arches nor the Court of Appeal were given the opportunity to consider whether they could or should make any incremental developments the common law governing CRL.

4.67 If the courts had considered whether the law governing lay rectories could or should have been developed, it is not clear what the outcome would have been. Deciding that CRL automatically attached to any piece of rectorial property did not ensure that the profits available to a lay rector would be preserved. For example, unlike spiritual rectors, there did not appear to have been any restrictions on whether lay rectors could commit waste on the glebe land or devalue the rectorial property. (Arguably, the courts missed an opportunity to prevent the dissipation of rectorial property shortly after the dissolution of the monasteries, when they decided not to apply restrictions under ecclesiastical law that would have prevented the division of lay rectories.) Furthermore, it is not clear that a person who acquires a small parcel of land that formerly belonged to a lay rectory – for example, a plot of land on which they build their home – and acquires no other rectorial rights is, in any reasonable sense, *profiting* from the rectory.[70] It is not obvious that, for reasons of fairness, such a person should take on the burden of CRL.

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank

4.68 Following *Chivers*, issues relating to CRL were not considered by the courts until the *Wallbank* litigation.[71] The nature of CRL and how it transfers with the ownership of land were not at issue in the case.

4.69 It is not clear whether the lay rectors, Mr and Mrs Wallbank, should have qualified as lay rectors according to our analysis in Chapter 3. The property they owned, Glebe

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by the vicar and churchwardens of the parish, and that from time immemorial the parishioners had by custom repaired the chancel."

69 (1792) 1 Hag. Con. 156; 161 E.R. 509; see paras 3.32 to 3.34 above.

70 This is especially so if the person had no notice of the CRL and bought the land for full value.

71 [2003] UKHL 37; [2004] 1 AC 546.

Farm, traced back to land allotted to the impropriator of the rectory of Aston Cantlow under an Inclosure Act of 1741 and represented at least the majority of land. It is not clear what conveyances of the rectory (or alternatively, of parcels of rectorial land) happened after that point, but the conveyances since 1918 described the property as being subject to CRL. As *Hauxton* and *Chivers* held that a person who acquires any rectorial property is automatically bound by CRL, the court has not considered how, in modern times, a conveyance of a part of a lay rectory might be distinguished from a transfer of property *out of* a rectory.

4.70 Several of the judges in *Wallbank* referred to CRL as a burden on any land that derives from an impropriated rectory. Lord Nicholls said that CRL is "a burdensome incident attached to the ownership of certain pieces of land". Lord Hope referred to CRL as "a burden on land, just like any other burden that runs with the lands" and said that "the enforcement of the liability under the general law is an incident of the property right which is now vested jointly in Mr and Mrs Wallbank".[72]

4.71 As in the Welsh Tithe Case, these comments carry weight but the nature of the relationship between CRL and land ownership was not in issue in the case.[73] The comments were also brief and not derived from any analysis in the speeches. Furthermore, a majority of the judges in *Wallbank* expressly relied upon the more-detailed account of the history and nature of CRL given by Lord Scott.[74] Lord Scott referred to CRL as an obligation that rested on a person in their capacity as lay rector.[75] Lord Scott also considered that *Chivers* should not be regarded as settled law. He said:

> Is it really the case that on every disposition of any part of former rectorial property, no matter how small and no matter what may be the intentions of the parties, express or implied, regarding the assumption by the transferee of chance repair liabilities, the transferee becomes willy-nilly by dint of inflexible legal principle a lay impropriator liable to chancel repairs? I doubt it.[76]

Conclusions from our survey of 20th century case law

4.72 *Chivers* is a binding authority on the County Court, but the decision would be only persuasive[77] if the High Court were to consider the nature of CRL in a fresh case. The decision in *Chivers* has attracted both support and criticism in decisions by the House of Lords. We have set out grounds on which it could be concluded that this case was wrongly decided. Given the potential lines of criticism, we are not confident that the

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72 Above, at [77].

73 As with the Welsh Tithe Case, these comments were obiter dicta: a judge's comments (in a judgment) which are not essential to their decision and which are consequently not binding on the same court or inferior courts in future cases.

74 [2003] UKHL 37; [2004] 1 AC 546, at [23] by Lord Nicholls, at [77] by Lord Hobhouse, and at [139] by Lord Rodger.

75 Above, at [100].

76 Above, at [109].

77 Meaning that the High Court would need to have regard to the decision in *Chivers*, and attach weight to the judgment, but would not be obliged to come to the same decision.

decision would be upheld if challenged in the future. However, *Chivers* has not been overruled to date.

4.73 Following *Chivers*, we think there are now three different conclusions that could be drawn concerning the nature of CRL and its connection to the ownership of land. (Note that both the second and third possible conclusions imply that anyone who acquires property that belonged to a lay rectory becomes subject to CRL.)

(1) First, it could be concluded that *Hauxton* and *Chivers* were wrongly decided (and that the criticism posed by Lord Scott in *Wallbank* was correct). CRL, and any other rectorial rights and obligations, still transfer with ownership of a lay rectory. CRL is an incident of the ecclesiastical living or office of lay rectory. It is not a burden on the ownership of land. The fact that a person has acquired some of the property of a lay rectory does not make them a lay rector. The conveyance needs to be scrutinised to see whether they were transferred the rectory, or a portion of the rectory, or just the land.

(2) Secondly, if *Hauxton* and *Chivers* were correctly decided, then a person who acquires any piece of rectorial property becomes a lay rector. Nevertheless, it could still be maintained that CRL is an incident of the rectory rather than a direct burden on the rectorial property. The office of the rector, or the rectorial living, automatically transfers with the land, but the office or living still exists. Its contents may now be attenuated – for some lay rectors, the only rectorial right or obligation that still exists is CRL. CRL remains a personal obligation on the rector.

(3) Thirdly, it could be concluded that the law governing lay rectories has evolved to such an extent that the nature of CRL has completely changed. Not only is a person who acquires formerly rectorial land automatically subject to CRL, that person is only described as a lay rector as an outdated mode of speech. A "lay rector" is simply someone who acquires land burdened by CRL. CRL should no longer be thought of as an incident of the office of rector. The office has dopped out of the picture. CRL has become an (unusual) burden on the ownership of some pieces of land that have a complex legal history.

4.74 Our analysis in Chapters 2 and 3 supports the first conclusion. That conclusion does raise some questions, however. Given the way the case law developed in the 20th century, the courts have not properly considered what might be involved in the transfer of a rectory today. It might be sufficient for the transfer of (a share of) a rectory if a transfer of land also refers to the transferee taking on rectorial rights and obligations. Alternatively, there may need to be specific transfer of the rectorial title. There could be a similarity with the transfer of manorial titles, which can still be traded today but are not registrable under the Land Registration Act 2002. We consider this issue further in Chapter 5.[78]

4.75 The second conclusion is also clearly arguable, given the support in *Hauxton* and *Chivers*. We cannot be certain how the issues would be determined by the Court of Appeal or the Supreme Court if *Hauxton* and *Chivers* were in future to be challenged.

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[78] See para 5.37, n 19, below.

There may have been good reasons to make an incremental development of the law governing lay rectories so that a share of a rectory automatically passed with ownership of any rectorial property. Nevertheless, we are not sure that a correct analysis of the law would place the burden of CRL on a landowner who acquires a small piece of former rectorial property (for example, to build their home). Such a landowner enjoys no rectorial rights and does not "profit" from their ownership of the land in any obvious sense

4.76 The third conclusion is the most difficult to defend, as it is hard to see how the nature of CRL could have evolved to such an extent over a few decades without reasoned, incremental development in the case law. Nevertheless, the third conclusion does represent how CRL is often perceived today, including by some of the judges in *Wallbank*. It is perceived to be, in the words of Lord Nicholls, "a burdensome incident attached to the ownership of certain pieces of land".[79]

(3) FURTHER LEGISLATION IN THE 20TH CENTURY

4.77 We conclude this chapter by tracing the continued development of the law governing CRL up to the present day. We examine four further legislative changes that affected CRL.

The Ecclesiastical Dilapidations Measure 1923

4.78 Section 52 of the Ecclesiastical Dilapidations Measure enables lay rectors to buy out their CRL by paying the costs of repairing the church and insuring it for the future to the relevant diocesan authority. The costs of buying out a CRL under section 52 are substantial and the provision is rarely used.

4.79 The drafting of section 52 is problematic. The provision does not address situations in which multiple lay rectors are responsible for the repairs of the same chancel. Under subsection (2), a lay rector can buy out their liability by paying a sum that would provide for future repairs "for which such person would otherwise have been liable". Under subsection (4), once a person buys out their liability, the chancel becomes repairable "in the same manner as the remainder of the church". If lay rectors are severally liable for the repairs of the church, subsection (2) requires any one rector to pay the entirety of the repair costs in order to discharge their liability. Furthermore, the outcome under subsection (4) is that all the lay rectors are discharged from their liability. Unlike Schedule 7 to the Tithe Act 1936, there no provision for distributing or making a proportional reduction to a lay rector's liability.

The disestablishment of the church in Wales

4.80 Under section 1 of Welsh Church Act 1914, from the date of disestablishment, the Church of England, insofar as it existed in and extended to Wales, ceased to be established by law. Under section 3, the ecclesiastical courts ceased to exercise any jurisdiction in Wales and the ecclesiastical law of the Church in Wales ceased to exist as law.

4.81 In 1914, before the Chancel Repairs Act 1932 (discussed below), CRL was only enforceable in the ecclesiastical courts. In *Tithe Redemption Commission v*

[79] [2004] 1 AC 546, at [16].

Commissioners of Church Temporalities in Wales,[80] the Court of Appeal held that the effect of section 3 of the 1914 Act was to abolish CRL in Wales (except insofar as it was saved by later provisions of the Act).

4.82 The decision of the Court of Appeal was reversed by the House of Lords in *Representative Body of the Church in Wales v Tithe Redemption Commission*,[81] but the House of Lords did not find it necessary to come to a view on the effect of section 3. The Lord Chancellor, Lord Simon expressed some doubts about whether CRL was an obligation under ecclesiastical law. He noted that the liability of a rector to repair the church is limited to the chancel by the custom of England and Wales, and furthermore that some commentators have referred to CRL as an obligation on lay rectors under the common law.[82]

4.83 Despite these doubts, we think that the preferable view is that CRL was an obligation under ecclesiastical law. The fact that a rector's duty to repair the church was restricted to the chancel by the custom of England and Wales does not mean that the duty arose by custom. Furthermore, even if the duty were founded in custom, some customs were incorporated into ecclesiastical law.[83] Moreover, it is true that the earliest reported cases that found that lay rectors are subject to CRL were decisions of the temporal courts. That does not mean, however, that CRL (as it applied to lay rectors) was a burden imposed by the common law. If it were, it would have been enforceable in the temporal courts rather than the ecclesiastical courts. Rather, as we explain in Chapter 3, the courts applied pre-existing ecclesiastical law to lay rectors because they viewed these persons as rectors.

4.84 We think, therefore, that section 3 abolished CRL in Wales, subject to the saving provision in section 28 which we discuss below. Even if that is incorrect, the abolition of the ecclesiastical courts made CRL unenforceable (subject to the saving provisions).

4.85 Section 28(1) of the 1914 Act provided that nothing in the Act shall affect "the liability of any lay impropriator of any tithe rentcharge to repair any ecclesiastical building" (although the provision did not apply to county councils). As CRL could only be enforced in the ecclesiastical courts (which had been abolished), section 28(2) allowed enforcement in the temporal courts as if the liability of the lay rector arose under a covenant with the Representative Body.

4.86 CRL therefore continued to be enforceable in Wales where a lay rector is in possession of a tithe rentcharge. Those tithe rentcharges were extinguished by the Tithe Act 1936, but as we discuss above, there are a few categories of case in which liability for chancel repairs continued. We note, however, that section 28 of the 1914 Act was silent about what happened to CRL binding the owners of glebe land or land allotted in exchange for rectorial property under the Inclosure Acts. If our interpretation of section 3 is correct, CRL ceased to exist (or at least ceased to be enforceable)

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80 [1943] 1 Ch 183, p 190 by Lord Greene MR.

81 [1944] AC 228.

82 Above, p 240.

83 See M Hill KC, *Ecclesiastical Law* (4th ed, 2018), para 1.37 to 1.38.

insofar as it bound these landowners. This effect of the 1914 Act may have been unintended.

The Chancel Repairs Act 1932

4.87 The Chancel Repairs Act 1932 was intended to abolish committal for contempt for failure to discharge a CRL, and to provide an alternative means of enforcing the liability as a civil debt. Section 1 abolished the jurisdiction of the ecclesiastical courts to enforce a CRL, while section 2 set out a new enforcement scheme in the County Court.

4.88 Importantly, the 1932 Act did not attempt to alter the nature of CRL; it piggybacked on the pre-existing law governing the liability. Where a person was brought before the court under section 2(3), the court could order them to pay the costs of repairing the chancel if the court found "that the defendant would, but for the provisions of this Act, have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court". Therefore, only persons who were subject to CRL under ecclesiastical law could be required to pay for repairs.

4.89 Proceedings under section 2 can only be brought by a parochial church council.[84] The council does not have a general right to bring a lay rector before the County Court. It may institute proceedings (under section 2(1) and (2)) only if (a) the chancel is in disrepair, and (b) it has served a notice of disrepair on the lay rector and waited for one month. Furthermore, if successful, the council will obtain a judgment against the lay rector enforceable as a civil debt. But the debt does not transfer to a new lay rector to whom the rectory is conveyed – the process under the 1932 Act gives the council a personal remedy against the lay rector that they sued. The new rector may be subject to CRL, but the parochial church council needs to bring a fresh claim if they wish to enforce the new rector's liability as a civil debt.

4.90 We explain in Chapter 2 that it is unclear whether a spiritual rector owed his repairing obligations to a particular class of persons. His obligations may have been similar to a public duty, owed to the world at large.[85] However, it may alternatively have been arguable that CRL was a duty owed to broad but delimited groups of persons (the parishioners and the church authorities, for example), As we discuss below, parochial church councils took over the responsibilities of churchwardens concerning repair of the church in 1921. From that date, proceedings for disrepair were brought by parochial church councils which, like the churchwardens, represented the interests of the parishioners.

4.91 Section 2(1) of the Chancel Repairs Act 1932 says that the parochial church council may bring proceedings against a person who "appears to be liable to repair the chancel". The 1932 Act does not expressly say that this liability is owed *to* the council. If CRL was akin to a public duty, its nature may not have been affected by the 1932 Act. The parochial church council may simply act as an enforcement authority under

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84 Chancel Repairs Act 1932, s 4(1).

85 See our discussion of where the benefit of CRL lies in paras 2.43 to 2.46 above.

the 1932 Act.[86] That would be consistent with the general approach taken by the 1932 Act: to change its enforcement mechanism of an existing liability but not to redefine that liability. However, if CRL should instead be construed as a private obligation owed to particular classes of person, the effect of the 1932 Act was to transfer the benefit of CRLs to parochial church councils.

Chancel repair liability and spiritual rectors

4.92 Finally, we conclude our analysis of the nature of CRL by considering how the law applying to spiritual rectors was reformed during the 20th century. As we explain in Chapter 2, it was a custom in England and Wales that the body (or nave) of the church was repaired by the parishioners.[87] The parishioners were liable to contribute to church rates levied by the churchwardens by summoning a vestry. The mandatory obligation on parishioners to contribute to the repairs was abolished by the Compulsory Church Rate Abolition Act 1868. The powers and duties of churchwardens, including "all powers, duties and liabilities" relating to "the care, maintenance, preservation and insurance of the fabric of the church" passed to parochial church councils under section 4 of the Parochial Church Councils (Powers) Measure 1921 (now section 4 of the Parochial Church Councils (Powers) Measure 1956).

4.93 Under section 52 of the Ecclesiastical Dilapidations Measure 1923, the incumbents of a parish (including spiritual rectors and vicars) were no longer obliged to repair or insure the chancels of their churches. Instead, the chancel was to be repairable "in the same matter as the remainder of such church". This meant that responsibility for chancel repairs passed to parochial church councils, who had taken over responsibility for maintaining the rest of the church in 1921. (We also note that parish priests are no longer vested with glebe land, following the Endowments and Glebe Measure 1976.)

4.94 As a result of these changes, the state of the law governing CRL in England might seem surprising. A religious obligation on parish priests to maintain the chancels of their churches using church revenues now applies exclusively to lay persons (and to a few religious institutions that acquired rectorial property as impropriators). The state of the law is no less surprising in Wales where ecclesiastical law no longer applies except insofar as it imposes CRL on particular lay persons.

The Chancel Repair (Church Commissioners' Liability) Measure 2025

4.95 On 3 April 2025, the Chancel Repair (Church Commissioners' Liability) Measure 2025 received royal assent. The measure has not yet been brought into force. The measure applies where the Church Commissioners are subject to CRL because they are the impropriator of rectorial property. It is designed to allow the Church Commissioners to sever the liability from the land, so that they will remain responsible for chancel repairs but can sell the affected land free of the liability.

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86 Similar to the way in which a highways authority is responsible for protecting public rights of way under the Highways Act 1980, s 130.

87 See para 2.40 above.

4.96 The policy underlying the measure has no impact on the issues we are considering in this consultation paper or the problems of land registration we discuss in Chapters 5 to 7. However, our analysis of CRL in this consultation paper potentially has two implications for the measure, one concerning its rationale and the other concerning its drafting.

(1) First, if our analysis in Chapter 3 is correct, and if the Court of Appeal or Supreme Court were to conclude that *Chivers* was wrongly decided, it may be possible for a lay rector to transfer rectorial land to a third party while retaining the rectory (and the associated CRL). It would then be open to the Church Commissioners to transfer rectorial land to a third party free of CRL without relying upon the measure.

(2) Secondly and more significantly, the power under the measure to sever CRL from the title to rectorial land applies where "a liability of the Church Commissioners to repair the chancel of a church had effect as an interest in or over land or as a contractual obligation" (see section 1(1)). Similarly, section 3(1) of the measure applies where the Church Commissioners acquire land and "a liability to repair the chancel of a church had effect as an interest in or over that land". However, as we discuss in Chapter 5, one possible conclusion that could be drawn from our analysis in Chapters 2 to 4 is that CRL is not an interest in or over land. If that conclusion were to be right, the 2025 measure would arguably have no application – it would not assist the Church Commissioners to dispose of rectorial land without the associated CRL.

CONSULTATION QUESTION

4.97 As in Chapters 2 and 3, we welcome views from consultees about the legal analysis in this chapter. We would especially welcome views from any consultees with knowledge of ecclesiastical law or the history of CRL.

Consultation Question 3.

4.98 We invite consultees to inform us if there are any relevant authorities, statutes, or legal commentaries which we have not considered in Chapter 4.

Chapter 5: Chancel repair liability, interests in land, and the Land Registration Act 2002

SUMMARY OF CHAPTERS 2 TO 4

5.1 In Chapters 2 to 4, we examine the history and nature of chancel repair liability ("CRL"). We explore the law governing CRL in detail because there is no other thorough analysis of the liability, and the nature of CRL is complex and obscure. In summary, our conclusions regarding CRL from these chapters are as follows.

5.2 In Chapter 2, we discuss the original nature of CRL. CRL was one of a bundle of duties that applied to parish priests. Specifically, these duties applied to the rector of a parish, who was a priest provided with a living to support their ministry. The rector was given ownership of the church and churchyard, a residence (the parsonage house) and land in the parish (glebe land). They were also given various rights and entitlements, including the right to collect tithes[1] from the residents of the parish. The rector enjoyed this property and the rectorial rights for as long as they occupied the office of rector. The income of the rectory supported the performance of the rector's duties: providing divine service and hospitality for the poor and maintaining the chancel of the church, the parsonage, and the glebe land.

5.3 In Chapter 3, we examine the transfer of rectories to lay persons. By the 16th century, many rectories had been acquired by monasteries. The monasteries enjoyed the income from the rectorial land and the tithes of the parish and deputised the provision of spiritual services to a vicar or curate. When the monasteries were dissolved by a series of Acts under Henry VIII and Edward VI, these rectories passed to the Crown. The Crown acquired the rectories themselves – the ecclesiastical livings – not merely the property that had supported these livings. The statutes of dissolution authorised the Crown to transfer these rectories to lay persons. In general, we find that the courts treated the lay persons who acquired rectories *as rectors*. Subject to some exceptions and modifications, the same ecclesiastical law applied to both lay rectors and spiritual rectors. They enjoyed many of the same rights, such as the right to the chief seat in the chancel, and were subject to many of the same duties, including CRL.

5.4 A few elements of ecclesiastical law were disapplied. Lay rectors could not minister to the parish, and so if there was no vicar, they were required to appoint a permanent curate. Furthermore, unlike spiritual rectors, lay rectors could not be dismissed by the bishop and were free to transfer their rectories to third parties. They were also free to dispose of the rectorial property. We explain in Chapter 3 that there was a distinction between a transfer of the rectory (the ecclesiastical living, with all of its associated property, rights and duties) and the transfer of a parcel of rectorial land, such as a portion of the tithes or an area of glebe land. The transfer of a piece of rectorial property did not make the transferee a lay rector.

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[1] See the glossary in Appendix 4 for the meaning of "tithe".

5.5 From the turn of the 20th century, however, the law governing CRL became less clear. As a result of the Inclosure Acts (spanning the 17th to 19th centuries, which enclosed common land in parishes in England and Wales and transferred it to private owners), the rights of many lay rectors to collect tithes from common land were replaced by allocations of land. It is generally understood that the allocated land became rectorial property. By the start of the 20th century, there appears to have been an increasing number of landowners who owned parcels of land that had been allocated to lay rectors but who did not own any other rectorial property or enjoy other rectorial rights. These landowners do not appear to have owned the freehold of the church, did not enjoy a seat in the chancel, did not have a right to appoint the vicar of the parish, and so on. Similarly, other persons acquired tithe rentcharges, which were created to replace tithes under the Tithe Act 1836, without acquiring any other rectorial property or rights.

5.6 Under the law that existed (according to our analysis) until around the mid-19th century, a person who acquired a piece of rectorial property did not become a lay rector. Only a person who was transferred the rectory or a share of the rectory became a lay rector and, as such, subject to CRL. However, as we discuss in Chapter 4, it was assumed in some 20th century legislation and in some case law that anyone who acquired former rectorial property was bound by CRL. This issue was directly considered, albeit briefly, by the Consistory Court of Ely (an ecclesiastical court) in *Hauxton Parochial Church Council v Stevens* ("*Hauxton*").[2] It was later considered in detail by the High Court in *Chivers & Sons Ltd v Air Ministry* ("*Chivers*").[3] Both courts held that a lay rector had no power to transfer a parcel of rectorial property without transferring the burden of CRL. CRL attached to each and every part of the rectorial property and could not be severed.

5.7 We explain in Chapter 4 that, given our analysis in Chapters 2 to 4 and following *Chivers*, there are three conclusions that could potentially be drawn regarding the nature of CRL.

(1) First, it could be concluded that CRL is still a personal obligation arising from the office of rector, which binds anyone who acquires the rectory or a portion of it, but which does not transfer automatically with the ownership of (former) rectorial land.

(2) Secondly, it could be concluded that CRL is a personal obligation arising from the office of rector, but ownership of (a portion of) the rectory automatically transfers with the ownership of rectorial land.

(3) Finally, it could be concluded that CRL has evolved into a burden on the ownership of any land that derived from a lay rectory, but that reference to the "rectory" is now redundant. CRL is now a direct burden on land.

5.8 The first conclusion is consistent with our analysis of the nature of CRL in Chapter 2 and of the transformation of CRL following the dissolution of the monasteries in Chapter 3. The second conclusion is supported by the decisions in *Hauxton* and

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2 [1929] P 240.

3 [1955] 1 Ch 585.

Chivers. Regarding the weight of those cases, *Hauxton* was a decision of the Consistory Court of Ely (a first-instance decision by the ecclesiastical courts). A decision of one consistory court is not binding on another, but decisions of other consistory courts are treated as persuasive and followed unless there is good reason to depart from them.[4] The decision of the High Court in *Chivers* is binding on the County Court (which is the court where proceedings are initially brought under the Chancel Repairs Act 1932). However, *Chivers* is persuasive rather than a binding authority in relation to other cases in the High Court, which could decide to depart from it. Neither the Court of Appeal nor the House of Lords or Supreme Court have ever been asked to confirm or overrule *Chivers*. The third conclusion represents a more radical departure from the history of CRL, but does have some support from observations by the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* ("*Wallbank*").[5] There is consequently an uncertainty about the legal nature of CRL as it exists today.

THE QUESTIONS CONSIDERED IN THIS CHAPTER

5.9 Our aim in this chapter is to return to the issues concerning land registration which we introduce in Chapter 1. We consider whether the Land Registration Act 2002 ("the LRA 2002") applies to CRL. Specifically, we consider whether the LRA 2002 requires CRL to be protected by entry of a notice in the register in order for the liability to bind a purchaser of registered land. If the LRA 2002 does not require CRL to be protected, then a purchaser of registered land might be bound by a CRL that does not appear in the register and of which they are unaware. Our consideration of this issue is informed by our analysis of CRL in preceding chapters.

5.10 In considering whether and how the LRA 2002 applies to CRL, we note that we cannot draw completely certain conclusions. We explain that, as the nature of CRL is unclear, the application of the LRA 2002 to CRL is also unclear. Our aim is to explore whether there could be reasonable *doubts* about whether CRL needs to be registered under the LRA 2002.

5.11 As we are considering whether there could be reasonable doubts about whether the LRA 2002 applies (or applies as expected) to CRL, we primarily focus on arguments that could support such doubts. However, the fact that we focus on exploring doubts about the application of the LRA 2002 should not be taken to suggest that we have reached a firm conclusion about whether or how the Act affects CRL. It is not possible to reach a firm conclusion on this issue given that there is no binding authority that has examined the legal nature of CRL in detail and, similarly, the courts have never considered the application of the LRA 2002 to CRL.

5.12 We do not give the same level of attention to counterarguments that could allay those doubts. The reason why we give potential counterarguments less focus is that, unless those counterarguments are overwhelmingly powerful, they cannot provide landowners (and their legal advisors) with *certainty* that the LRA 2002 applies to CRL as it does to other interests in land. As long as landowners lack certainty, they may wish to protect their position (or they may reasonably be advised to protect their

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4 M Hill KC, *Ecclesiastical Law* (4th ed 2018), paras 1.31 to 1.32.

5 [2003] UKHL 37; [2004] 1 AC 546.

position) by obtaining CRL searches and insurance. There will, moreover, still be a question whether the application of the LRA 2002 to CRL should be clarified.

5.13 In order to examine the application of the LRA 2002 to CRL, there is a preliminary issue that we need to consider: is CRL a type of *interest in land*? We need to consider this issue first because it is possible that, under the LRA 2002, only interests in land can be recorded in the register by entry of a notice. Relatedly, it is possible that the LRA 2002 only protects purchasers of land against unregistered *interests*, and that it does not provide any protection against other types of burden.

5.14 Our consideration of whether CRL is an interest in land is complicated by the uncertainties concerning the nature of CRL outlined above. The answer to our question may be different depending on whether CRL now attaches to the ownership of land or whether it is still an incident of a rectory. However, as we explain, there could be some uncertainty over whether CRL is an interest in land even if *Chivers* was correctly decided and CRL transfers automatically on a transfer of rectorial property.

5.15 This chapter is consequently divided into two parts. In the first part, we consider whether CRL is an interest in land. In the second part, we consider whether CRL is governed by the LRA 2002.

(1) IS CHANCEL REPAIR LIABILITY AN INTEREST IN LAND?

5.16 In order to consider whether CRL is an interest in land, we need first to understand what an interest in land is. A natural starting point is to say that an interest in land is a form of property right (namely, a right in real property) and to contrast property rights with personal rights. An illustration may help.

> X owns a plot of land. X promises (covenants) with Y that X will not use the land for business purposes. This promise may give rise to a legally enforceable personal obligation on X (if, for example, the promise is part of a valid contract with Y). Y can enforce this promise against X if it is breached. However, if the promise only gives rise to a personal obligation, Y cannot enforce the promise against anyone else. If X sells their land to Z, who starts conducting a business on the land, Y has no rights against Z. Y can only pursue X for breach of contract.
>
> However, a promise of this kind can give rise to an interest in land. If the promise is negative (to refrain from particular actions on the land), if it benefits land owned by Y, and if the parties intend it to bind X's successors, then it may give rise to a restrictive covenant.[6] A restrictive covenant is a property right. If X sells the land to Z and Z conducts business on the land, Y may be able to enforce the restrictive covenant against Z.

5.17 A property right has third-party effect precisely because it is a right that attaches to property (in this case, land) rather than to a person – the right is capable of following

[6] Under the principles in *Tulk v Moxhay* (1848) 41 E.R. 1345; 2 Ph. 774.

the property into the hands of a new owner. Nevertheless, while third-party effect may be a core characteristic of property rights, it is not definitive. As we explain below, some rights that are enforceable against successive owners of the land are not property rights. Moreover, some property rights that are enforceable against successive owners of land are not interests in that land (they are interests in something else).

5.18 We need a more detailed understanding of property rights in order properly to examine whether CRL is a form of property right or interest in land. Our focus is on the legal concept of property. However, there are several difficulties that may be encountered when trying to explore this concept.

5.19 First, one possible approach would be to try to formulate a comprehensive definition of "interest in land" or "property right", and then to see how it applies to CRL. We do not believe that this would be a useful exercise for the purposes of this consultation paper. A definition that we produced might or might not apply to CRL, but in either case it is likely to be contested. We do not think that we can resolve *doubts* about the status of CRL by attempting to define "interest in land" or "property right", because the doubts are likely simply to move and attach to our proposed definition.

5.20 Secondly, there are significant difficulties in providing a definition of "interest in land" or "property right" that is comprehensive, accurate and informative. There are archetypal examples of property rights affecting land – for example, a private right of way for one landowner to pass over a neighbouring landowner's property – and it might be possible to fashion a definition that applied in these clear cases. However, the concept of property, even when limited to property rights *in land*, has been extended in various directions to apply to less-obvious species of property. A comprehensive and unified definition of property rights in land would need to accommodate such disparate interests as estates in fee simple, derivative interests in land such as easements, rights of re-entry, estate contracts, choses in action, and so on. The definition would need to accommodate interests of different scope, including freehold interests, life interests, interests in remainder, and so on. It is not clear that there is a common thread that links these interests together, other than the fact that the law categorises them as species of property.

5.21 Thirdly, academic discussions of property often consider not only how the concept is applied by the courts in practice, but also how the concept *should* be applied. We wish to avoid debates about whether and how the concept of "property" could be developed or modified (for example to make its application more consistent). There is too great a variety of legitimate views.

5.22 Fourthly, it might be possible to list the various types of right or interest that have been recognised by the court as types of property. Yet compiling such a list would not explain what (if anything) these rights or interests have in common or why they are categorised together as property. More importantly, compiling a list would not explain how the court could determine whether a right that has not yet been categorised (such as CRL) should be recognised as a property right or interest.

5.23 Therefore, rather than trying to define "property right" or "interest in land", or engage in academic debates about how these concepts should be understood, we instead consider some archetypal characteristics of such rights and interests. These are not

necessarily defining features unique to property rights or interests in land; rather, they are characteristics that such rights and interests commonly possess. Our aim is to explore whether CRL possesses any of these features, because these are the issues that would need to be addressed in any examination of the proprietary status of CRL. An argument that CRL is or is not a property right would need to account for the fact that CRL possesses or lacks these features. Consequently, we consider below whether CRL—

(1) has third-party effect;

(2) may be granted by a landowner (carved out of a freehold interest in land);

(3) is sufficiently certain and, relatedly, is transmissible;

(4) has an identifiable owner; and

(5) gives rise to proprietary remedies.

5.24 However, there is an initial matter that we need to address before we examine these common features of property rights. The Law of Property Act 1925 ("the LPA 1925") provides a list of estates and interests in land that are capable of existing at law. We need to consider whether CRL falls within this statutory list, as there would be no need to examine the proprietary nature of CRL if the liability were to qualify as a property right by force of that statute.

Application of the Law of Property Act 1925

5.25 The LPA 1925 brought about a fundamental re-classification of interests in land. Part of the intention behind the Act was to limit the number of rights affecting land that were capable of being legal interests. In particular, it was intended that various types of feudal right should no longer be able to take effect at law.[7]

5.26 Consequently, section 1(1) of the LPA 1925 states that the only estates in land which are capable of subsisting or of being conveyed or created at law are (a) an estate in fee simple absolute in possession (freehold), or (b) a term of years absolute (leasehold). Section 1(2) then provides as follows:

> The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are—
>
> (a) An easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute;
>
> (b) A rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute;

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7 In introducing the Law of Property Bill in 1920 (a forerunner of the bill that became the LPA 1925), the Lord Chancellor, Lord Birkenhead, commented that "one of the great obstacles to easy dealing with land consists in the number and variety of legal interests and estates which can be created in regard to it" and explained that the bill was intended to address this issue (*Hansard* (HL), 3 March 1920, vol 39, col 258).

(c) A charge by way of legal mortgage;

(d) [Land tax, tithe rentcharge,][8] and any other similar charge on land which is not created by an instrument; and

(e) Rights of entry exercisable over or in respect of a legal term of years absolute, or annexed, for any purpose, to a legal rentcharge.

5.27 The LPA 1925 appears to create a hierarchical divide between the two legal estates in land and the list of legal interests in land. In Making Land Work, our 2011 report on easements, profits and restrictive covenants, we explained that only freehold and leasehold estates give right to exclusive possession of land. These are the only two "ownership" interests in land. Other lesser rights, such as easements, do not generally give a right to possession of the land, and never a right to exclusive possession.[9]

5.28 It should be noted that the LPA 1925 (and the LRA 2002, which carries over definitions from the LPA 1925) refers to both freehold and leasehold estates and the interests listed in section 1(2) as "legal estates", which are defined in section 1(4). The Court of Appeal in *Baker v Craggs* explained that the LPA 1925 uses the longer phrase "legal estates *in land*" when referring specifically to freehold and leasehold estates.[10] This terminology can cause confusion.

5.29 Under section 1(3) of the LPA 1925, all other estates, interests and charges take effect as *equitable* interests. The LPA 1925 did not state that there can be no other kinds of interest in land apart from those listed; rather, it changed the nature of any other interests from legal to equitable.

5.30 Altering the nature of an interest in land from legal to equitable changed the legal principles that applied to the interest on a transfer of the affected land. At general law, a person who acquires land takes it subject to all existing legal interests that affect the land, whereas an equitable interest is not binding on a person who purchases the affected land for value in good faith and without notice of the interest. This principle of the general law is of limited relevance to registered land, because the LRA 2002 contains its own rules for whether interests in land (equitable or legal) are binding on a purchaser or other transferee. However, the principle is relevant to transfers of unregistered land.[11]

5.31 The list of legal interests in land in section 1(2) is important for our purposes for two reasons. First, if CRL appears in the list, it may qualify as an interest in land by force of statute. Secondly, if CRL *is* an interest in land but does *not* appear in the list, then the LPA 1925 made CRL into an equitable interest. This does not affect our consideration of the proprietary nature of CRL, but it may mean that less land is

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8 The references to land tax and tithe rentcharges have now been repealed (by the Tithe Act 1936, Sch 9, and the Finance Act 1963, Sch 14) and those interests in land no longer exist.

9 Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327, para 2.3.

10 [2018] EWCA Civ 1126; [2018] Ch 617, at [5] by Henderson LJ.

11 The general-law principle concerning what interests bind a transferee of unregistered land has been modified by the Land Charges Act 1972, which we discuss in Chapter 7. But the 1972 Act is not a complete code and does not apply (for example) to CRL.

subject to CRL than is commonly assumed. It is possible that, if CRL became an equitable interest, it ceased to apply to many areas of unregistered land when they were transferred under the rule concerning good-faith purchasers for value without notice. We are not aware of any legal commentary that has considered the potential significance of section 1 of the LPA 1925 for CRL.

5.32 If CRL is listed in section 1(2), it appears that it must fall under paragraph (d): "and any other similar charge on land [to land tax or a tithe rentcharge] which is not created by an instrument". It is not clear that CRL can be described as a charge on land, but even if CRL is a type of charge in a broad sense of the term, it is not similar to a land tax or tithe rentcharge. Although CRL can now be enforced via a debt claim under the Chancel Repairs Act 1932, we explain in Chapter 4 that the 1932 Act does not appear to have changed the underlying nature of the liability.[12] It remains an obligation to perform repair works, rather than to pay for those works, although if there is a failure of performance, CRL gives rise to a debt claim under the 1932 Act. At the time that the LPA 1925 came into force, CRL could only be enforced by admonishing the lay rector to repair. It did not give rise to a financial remedy.[13] Furthermore, as we explore further below,[14] CRL does not give direct remedies against the affected land. CRL is therefore fundamentally unlike land tax or tithe rentcharges, the interests expressly mentioned in section 1(2)(d).

5.33 Although CRL does not appear to be caught by the plain text of section 1(2)(d), it is worth considering whether it was intended that CRL should be caught by the provision (or whether CRL was bundled with the various manorial rights that were intended to become equitable interests). We have not been able to find any indication that CRL was expressly considered. Under the forerunner of the bill that became the LPA 1925 – the bill published by the Committee on the Acquisition and Valuation of Land on the Transfer of Land in England and Wales in 1919[15] – *all* interests in land except for freehold and leasehold estates became equitable. The text in section 1(2) was added into later versions of the bill when the original bill was withdrawn. There does not appear to have been any discussion of CRL in the various reports that led to the LPA 1925, earlier versions of the Law of Property Bill, or Parliamentary debates. In fact, we have not been able to find any guidance on why particular interests were chosen to be listed in section 1(2).[16]

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12 See paras 4.87 to 4.91 above.

13 Although there was a financial remedy at common law against former rectors – see para 3.65 above.

14 See paras 5.49 to 5.53 below.

15 Report of the Committee on the Transfer of Land (1919) Cmd 424, p 21.

16 For those wishing to follow our research, we did not find any relevant information about section 1(2) (or section 1(2)(d) in particular) in the following sources: Special Committee Report of the General Council of the Bar on the Law of Property Bill, BCO/13/1 Minute book vol 1 (1909 – 1917); First Report of the Royal Commission on the Land Transfer Acts (1909) Cd 4509; Second Report of the Royal Commission on the Land Transfer Acts (1911) Cd 5483; Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales (1919) Cmd 424; *Hansard* (HL), 3 March 1920, vol 39, cols 253–276; *Hansard* (HL), 26 July 1920, vol 41, cols 486–529; *Hansard* (HC), 15 May 1922, vol 154, cols 89–175; *Hansard* (HC), 14 June 1922, vol 155, cols 383–463; Report of the Committee on the Law of Property Consolidation Bills (1924) Cmd 2271; Report from the Joint Select Committee on the Law of Property (Consolidation) Bill (1925) Cmd 76, HCP vii 111; J T Farrand, Wolstenholme and Cherry's Conveyancing Statutes: Volume 1 Law of Property Part 1 (13th ed 1972).

Third-party effect and relationship to land

5.34 Given that CRL is not listed as an interest in land in section 1 of the LPA 1925, we proceed to consider whether any features of the liability mark it out as a property right affecting land. We mention above that a key characteristic of property rights is that they attach to property. As a consequence, property rights are enforceable against successive owners of that property (or the world at large, insofar as anyone interferes with the property). They are not personal obligations that only affect specific individuals (for example, the parties to a contract).

5.35 At first sight, CRL possesses this characteristic. The liability does not only affect (for example) a parochial church council and the present owner of a rectory; it also binds future owners of the rectory. Furthermore, the liability might appear to attach to the ownership of land (namely land that derives from the property of a rectory that passed to the Crown following the dissolution of the monasteries).

5.36 However, caution is required. Not all rights that are enforceable against successive owners of land are property rights. The clearest exceptions are some forms of statutory right. For example, under Part 7 of the Environment Act 2021, a landowner can enter into a conservation covenant with a "responsible body" (a conservation body designated by the secretary of state under section 119 of the Act). A conservation covenant is an agreement between the landowner and the responsible body concerning the conservation of the land. However, such agreements have statutory effect: they are enforceable against successive owners of the land. We explained in our Conservation Covenants Report that a conservation covenant is not a property right; it creates a statutory burden on land.[17]

5.37 Although CRL is not a statutory obligation,[18] there are other ways in which it might seem to transfer with the ownership of land even though it is not a property right (or at least, not a property right *in the land*). We mention in our summary at the beginning of this chapter that there are three ways in which the current law governing CRL might be interpreted. According to two of those possible interpretations, CRL is still a burden on a rectory, understood as an ecclesiastical office or living. Depending on whether or not *Chivers* was correctly decided, the rectory may or may not transfer automatically with the ownership of rectorial land. Whichever is the case, it is arguable that CRL does not attach to the land itself, but to the office or living. It is one step removed from the land.[19] (On the third possible interpretation of the current law, however, CRL has evolved into a direct burden on land and there is no substantive sense in which the owner of former rectorial property takes on the office of lay rector. If this third

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17 Conservation Covenants (2014) Law Com No 349, paras 2.90 to 2.94. For a further exploration of the status of conservation covenants, see C Pulman and N Hopkins, "The Introduction of Conservation Covenants in English Law", in S Demeyere and V Sagaert (eds) *Contract and Property with an Environmental Perspective* (2020), p 214. The same reasoning applied to other common statutory burdens on land, such as planning agreements under section 106 of the Town and Country Planning Act 1990.

18 The statutes that dissolved the monasteries and transferred rectories to the Crown said nothing about CRL.

19 The distinction between a complex item of property that *includes* ownership of land, alongside other rights and obligations, and the ownership of the land itself is not unique to rectories. It also applied historically, for example, where a person owned the title to a manor, which included land but also included other manorial rights and obligations. Owning the manor was not the same thing as owning an area of manorial land.

interpretation were to be correct, many of the doubts about the proprietary status of CRL which we examine in this chapter would fall away.)

Interests that derive from freehold ownership

5.38 A separate characteristic that may help to distinguish property rights *in land* concerns their relationship with land ownership. Many familiar interests in land can be seen as rights that have been carved out of a freehold or leasehold estate in land. For example, the grant of a right of way to a neighbouring landowner transfers away some of the freeholder's or the leaseholder's rights to use and control their land to the neighbour. The neighbour then enjoys an aspect of the freeholder's or the leaseholder's right to pass over their land.

5.39 In *Rhone v Stephens*, Lord Templeman relied upon this feature of interests in land to explain why a restrictive covenant by a landowner may create an interest in land whereas a positive covenant may not. Lord Templeman stated:

> When freehold land is conveyed without restriction, the conveyance confers on the purchaser the right to do with the land as he pleases provided that he does not interfere with the rights of others or infringe statutory restrictions. The conveyance may however impose restrictions which, in favour of the covenantee, deprive the purchaser of some of the rights inherent in the ownership of unrestricted land.[20]

He commented later:

> Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property.[21]

5.40 A restrictive covenant transfers away, and thereby limits, some of a landowner's entitlement to their land. However, because ownership of land does not generally confer positive obligations, if a landowner gives another person the benefit of a positive covenant, they do not transfer to that person an aspect of their ownership of land.

5.41 This characteristic of interests in land could not apply to CRL. CRL is not an interest that a freeholder can create by a grant. Rather, CRL was imposed "from without". It was an obligation imposed on rectors by ecclesiastical law, not an obligation undertaken or right granted by rectors. It does not necessarily follow that CRL does not have proprietary status. However, insofar as there is doubt about the proprietary status of CRL, it may be relevant that this liability (being a positive obligation) could not be created by a landowner so as to take effect as an interest in land.

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20 [1994] 2 AC 310, p 317.

21 Above, p 318.

Certainty and transmissibility

5.42 In *National Provincial Bank v Ainsworth*, Lord Wilberforce suggested the following criteria which could help to determine whether an equitable right[22] that had come to be recognised by the courts qualified as a property right:

> …before a right or interest can be admitted into the character of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties and have some degree of permanence or stability.[23]

5.43 Lord Wilberforce did not present these criteria as being definitive of property rights (as opposed to being merely indicatory). Furthermore, we do not take his speech to imply that there could not be atypical property rights that were already clearly established by law (including, in theory, CRL). Lord Wilberforce's focus was on whether a new right recently recognised by the courts should be given the protections that the law reserves for items of property.

5.44 Nevertheless, if we consider the application of these criteria to CRL, this liability has sufficient permanence and stability, and is sufficiently clearly defined, to qualify as a property right. The burden of CRL can also be assumed by third parties (if they acquire the rectory). But we note that the benefit of CRL is not transmissible: CRL is not an item of property that can be traded. There is a contrast here with other rectorial rights, such as the advowson of the patron of a parish,[24] which was tradeable and was recognised to be an item of private property.

Ownership

5.45 An interest in land, like property rights in general, arguably requires an owner or beneficiary. The requirement for ownership is part of what distinguishes property rights from other burdens on land, including public rights. This requirement also helps distinguish rights in land from other obligations on landowners, such as those under the criminal law – the right to enforce an obligation on a landowner under the criminal law does not belong to the enforcement authority as an item of property.

5.46 Insofar as the rights connected to CRL have an owner or beneficiary, their ownership is complex. We explain in Chapter 2 that, historically, a wide variety of persons were able to enforce a rector's compliance with their repairing obligations before the ecclesiastical courts.[25] They included the rector's successors, the bishop, the parishioners (via the churchwardens), and the patron. We suggested that CRL might be better construed as a public duty, owed to the world at large. However, that suggestion could be mistaken; it might be preferable to analyse CRL as a duty owed to specific classes of person (although those classes were potentially very broad).

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22 The equitable right in issue was the right of a wife to the family home when her husband had left (which developed at a time when family homes were very often solely owned by the husband).

23 [1965] AC 1175, p 1261.

24 The right of the lord of the manor who had founded the parish to appoint the priest.

25 See paras 2.44 to 2.45 above.

5.47 As we discuss in Chapter 4,[26] it is not clear whether the Chancel Repairs Act 1932 altered the nature of CRL. The Act provided that a parochial church council can (once various statutory conditions are met) bring proceedings in the County Court to enforce CRL as if it gave rise to a civil debt. The effect of the Act may have been to shift the benefit of CRLs to parochial church councils. Alternatively, these councils may simply be the enforcement authority under the Act.

5.48 We note here that these uncertainties about where (if anywhere) the benefit of CRL lies also make it uncertain whether CRL can be construed as a property right or interest in land.

Proprietary remedies

5.49 Aside from third-party effect, perhaps the most important feature of property rights concerns the remedies that are afforded to their owners. The fact that a right gives rise to proprietary remedies might be a *consequence* of the fact that the right is a property right rather than a defining characteristic of property rights. Nevertheless, if a right does not give rise to proprietary remedies that is strong evidence that it is not a property right. Moreover, the fact that a right gives rise to proprietary remedies is not always a consequence of the fact that it is a property right – rights are sometimes said to qualify as proprietary *because* of the type of remedies to which they give rise.[27] For example, in Chapter 7 we discuss the history of equitable interests in the land.[28] We explain that various types of equitable interest in land came to be recognised *because* the beneficiary of the interest was able to obtain a proprietary remedy in the courts of equity.

5.50 If a right is an interest in property, it typically affords its owner powers to deal directly with that property. For example, the owner of a private right of way over land does not need to negotiate with or sue the owner of the servient land if trespassers block their footpath. They can sue the trespassers directly and obtain an injunction, or exercise self-help by entering the land and removing the blockage. Of course, not all property rights give their owners a right to possess, enjoy or use property; some give only a conditional right to take possession if a particular event should occur, while others (such as a restrictive covenant) only give their owners some measure of control over the property.

5.51 A significant difficulty with classifying CRL as an interest in land is that the liability does not, and never has, given rise to proprietary remedies. The rectorial property does not provide security for the performance of the rector's repairing obligations. CRL does not give the parochial church council (or anyone else) a right to take possession of or sell the rectorial property, or to control its use *in any way*. According to the Court of Appeal in *Wickhambrook Parochial Church Council v Croxford*, CRL is

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26 See paras 4.90 to 4.91 above.

27 See, for example, the decision of the Federal Court of Australia in *Smith Kline & French Laboratories Ltd v SDCSH* (1990) FCA 206 concerning whether confidential information is a form of "property". Gummow J said (p 168): "The degree of protection afforded by equitable doctrines and remedies to what equity considers confidential information makes it appropriate to describe it as having a proprietary character. This is not because property is the basis upon which that protection is given, but because of the effect of that protection".

28 See paras 7.5 to 7.7 below.

a personal obligation on a lay rector.[29] Before the Chancel Repairs Act 1932, CRL was enforced against a lay rector by monition – an order from the ecclesiastical courts that the rector do their duty – potentially followed by personal sanctions, such as excommunication or committal for contempt.

5.52 It is unclear whether the bishop had any power to sequester the profits of a rectory owned by a lay person.[30] Arguably, sequestration was only available against a spiritual rector because they were vested with the rectorial property to use for the purposes of the church and only had a limited interest in it. However, as we explain in Chapter 4, regardless of whether sequestration was available, ecclesiastical law did not give the church any proprietary remedy to recover rectorial profits misappropriated by a rector (whether spiritual or lay).[31]

5.53 Moreover, according to the Court of Appeal in *Wickhambrook*, a lay rector's liability for chancel repairs is not limited to the value of the rectorial property. The obligation may bind that person because they have acquired rectorial land, but the obligation is not conditioned by that property. As mentioned, the rectorial land does not provide security for any sum of money owed by a lay rector to the parochial church council; any monetary liability on the lay rector is entirely separate from the land. There are cases where interests in land are linked to contractual obligations which require a landowner to pay more money than their property is worth. For example, a mortgagor whose land is in negative equity owes the lender more money than their land is worth because the mortgagor has a personal, contractual obligation to repay the loan. A leaseholder may owe more in rent than their lease is worth because a lease has a contractual as well as a proprietary nature. CRL, however, lacks these contractual elements that help explain how a liability on land can outstrip the land's value.

Summary

5.54 Given the considerations explored above, we believe there could (at least) be reasonable doubt whether CRL is a type of interest in land. How strong that doubt is depends on what view is adopted concerning the nature of CRL, as we discuss at the beginning of this chapter.

5.55 If CRL can still be understood as an obligation on the holder of a religious office, then it is a poor candidate for a property right. On this understanding, the burden of CRL is not really transferring with the ownership of land. It is transferring with the rectory, which in turn may be transferring with the ownership of land. This point has considerable force if a rectory is a separate interest from the land included within it. The point still has force even if ownership of the rectory transfers automatically with title to rectorial land, as was held in *Chivers*.

5.56 If CRL has evolved into a direct burden on the ownership of land, then it may be possible to construe it as an interest in land. If it is an interest in land, it is highly unusual. CRL imposes a personal obligation that can now only be enforced via a debt claim under the Chancel Repairs Act 1932. It does not give rise to any proprietary

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29 [1935] 2 KB 417, p 437 by Lord Hanworth MR.

30 See paras 3.57 to 3.61 above.

31 See paras 4.44 to 4.45 above.

remedies. The liability requires the burdened landowner to carry out positive works, funded using the landowner's personal income. Moreover, these works are to be carried out on other land (the church), which the landowner does not own.

5.57 It is arguable that these features of CRL imply not simply that it is an unusual type of interest in land, but that it is not an interest in land at all. They indicate (but do not conclusively demonstrate) that CRL has *not* evolved into a direct burden on the ownership of land, but that its relationship to land is still being mediated by the office of rector.

(2) DOES THE LAND REGISTRATION ACT 2002 APPLY TO CHANCEL REPAIR LIABILITY?

5.58 We discuss above whether CRL is a type of *interest in land*. We conclude that there is a reasonable argument that CRL is *not* an interest in land, although the issue is uncertain and there are arguments to the contrary.

5.59 However, the central issue we are considering in this consultation paper concerns the registration of CRL under the LRA 2002. In particular, we are concerned with whether a purchaser of registered land could be bound by a CRL that is not recorded in the land register. The issue is one of certainty: is the application of the LRA 2002 to CRL clear beyond reasonable doubt?

5.60 As we explain below, the question of whether the LRA 2002 applies to CRL depends on whether or not CRL is "an interest affecting a registered estate" within the meaning of the Act. This phrase is used in key provisions of the LRA 2002 concerning the transfer of registered estates and the entry of notices. It is defined in section 132(3)(b): references to an interest affecting an estate are to "an adverse right affecting the title to the estate". The question we need to consider is consequently whether CRL may be *an adverse right affecting the title to an estate*. This question is distinct from the question of whether CRL is an *interest in land* but, as we explain below, these matters are closely related.

The LRA 2002: an overview

5.61 In order to explore the application of the LRA 2002 to CRL, we start by giving a brief overview of the relevant provisions of the Act. We focus only on the disposition of freehold estates, because the provisions governing leasehold estates and charges do not raise any different issues in relation to CRL. We do not discuss first registration of freehold estates in this chapter; the law governing first registration is discussed in Chapter 7.

5.62 The LRA 2002 repealed and replaced the Land Registration Act 1925 ("the LRA 1925") and made substantial changes to the law of land registration. Charles Harpum KC (Hon) and Janet Bignell KC explained in *Registered Land: Law and Practice under the Land Registration Act 2002* that:

> Because the new law and its underlying objectives are so different from the LRA 1925, authorities on the LRA 1925 are more likely to obscure than illuminate the meaning of the LRA 2002 and the rules made under it. They should therefore be

discarded and the Act interpreted according to its own wording and the policy that it seeks to implement.[32]

5.63 However, despite the extensive changes made by the LRA 2002, the extent to which it represented a break from the past should not be overstated. The LRA 2002 did not create the land registration regime in England and Wales. The register of title already existed under the LRA 1925 and under earlier legislation. Moreover, while the terminology of the LRA 2002 is often different, the Act does use some key concepts that were employed in earlier legislation, including the concept of an "overriding interest", discussed below.

Transfers of registered estates

5.64 Under section 27 of the LRA 2002, the transfer of a registered freehold estate needs to be completed by registration to take effect at law. The transferee needs to be registered as the new proprietor. Furthermore, grants of various types of interest affecting a registered freehold also need to be registered to take effect at law. These include the grant of a lease of more than seven years and the grant of an easement. Both the transfer of a freehold and the grant of an interest affecting a freehold are referred to as "dispositions" of the freehold. Dispositions that need to be registered to take effect at law under section 27 are called "registrable dispositions".

5.65 Sections 28 and 29 govern registrable dispositions of a registered freehold. Section 28 contains the basic rule that "the priority of an interest affecting a registered estate or charge is *not affected* by a disposition of the estate or charge" (our emphasis). In other words, the basic rule is that a person who acquires a freehold estate, or an interest affecting a freehold estate, takes it subject to all existing interests that bind the estate.

5.66 Although the rule in section 28 is called "the basic rule", most transfers of registered land are in fact governed by section 29. Section 29 sets out the effect of a registrable disposition of a registered freehold *for valuable consideration*. Section 29 consequently applies to all sales of registered land.[33]

(1) Under subsection (1), completion of the disposition by registration "has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration".

(2) Under subsection (2), an interest is protected if:

(a) it is the subject of a notice entered in the register (or is a registered charge);

(b) it is an overriding interest under Schedule 3; or

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[32] C Harpum and J Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002* (1st ed 2004), para 1.21. Charles Harpum was the Commissioner responsible for the Law Commission's and HM Land Registry's joint report Land Registration for the 21st Century: A Conveyancing Revolution (2001) Law Com No 171 ("the 2001 Report"), which was implemented by the LRA 2002.

[33] Where the transfer is not made for valuable consideration, the basic rule in LRA 2002, s 28 applies.

(c) it "appears from the register to be excepted from the effect of registration".[34]

5.67 Broadly speaking, section 29 ensures that a purchaser of registered land is only bound by interests that have been recorded in the register and overriding interests. The concept of an overriding interest is important under the LRA 2002. Overriding interests do not need to be recorded in the register in order to bind a purchaser of the estate which they affect. In general, the overriding interests listed in Schedule 3 are interests that are readily discoverable from a visual inspection of the land, or from making reasonable enquiries of any occupants of the land.

Notices

5.68 Section 29 refers to notices entered in the register. Section 32 of the LRA 2002 allows a person to apply to enter a notice in respect of "the burden of an interest affecting a registered estate or charge". A notice has two primary functions: it acts as an indication of a third party's possible interest in the land, and it protects the priority of that interest for the purpose of section 29. The entry of a notice does not guarantee that the corresponding interest exists or that it binds the estate to which the notice relates. Rather, the entry of the notice means that, *if* the interest exists and is binding on the estate, it will bind a purchaser of the registered estate under section 29.

The meaning of "interest affecting an estate"

5.69 Section 132(3)(b) of the LRA defines *an interest affecting an estate* as "an adverse right affecting the title to the estate or charge". This phrase is crucial for the purposes of the Act and is used in the key provisions we discuss above. Section 29 explains the consequences of a sale of a registered estate for *interests that affect the estate*. Moreover, under section 32, the scheme for protecting rights over land by entry of a notice is a scheme for protecting *interests affecting an estate*.

5.70 Many other key terms used by the LRA 2002 are also defined in section 132. In particular, the LRA 2002 relies on the definition of a "legal estate" in section 1 of the LPA 1925, which we discuss above at paragraph 5.28. The LPA 1925 uses "estate" as an umbrella term to refer to the two types of estate in land that can exist at law (freeholds and leaseholds) as well as to the interests and charges listed in section 1(2) (which include, for example, easements).

A note about equitable interests

5.71 We briefly discuss above at paragraphs 5.31 to 5.33 an uncertainty about whether CRL might be an *equitable* interest in land because it is not listed in section 1(2) of the LPA 1925. However, this uncertainty does not have significant consequences for whether the land registration regime applies to CRL. What is important is whether CRL may be affected by the priority provision in section 29, whether it can be protected by entry of a notice, and (formerly) whether it could be an overriding

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[34] This provision was included to deal with cases in which an estate is not registered with absolute title, but with possessory or qualified title (or good title, for leasehold estates). An estate may be registered with qualified title, for example, where there is a possible limitation on the proprietor's title that the registrar has not been able to confirm but that also cannot be disregarded. The register may record that the proprietor's title *may* be subject to the relevant limitation.

interest. These provisions refer to "interests" affecting a registered estate, but they do not distinguish between legal and equitable interests.[35]

Chancel repair liability and the Land Registration Act 2002

5.72 In Chapter 1, we discuss the historical treatment of CRL by land registration legislation and the complications that occurred when the LRA 2002 was passed.[36] We explain that, prior to the LRA 2002, CRL had been listed as an overriding interest under the LRA 1925. (The liability was first listed as an overriding interest under the Land Transfer Act 1897.) However, as we explore in Appendix 1, we have found no evidence that the legal nature of CRL was ever analysed. Although we cannot be certain given the lack of surviving documentation, it seems that CRL was listed as an overriding interest because (a) it was a liability about which conveyancers made enquiries during the sale of land, but (b) there were no plans to require CRL to be registered in order to bind purchasers of land.

5.73 As we explain in Chapter 1, when the LRA 2002 was originally passed by Parliament, it did not contain any provision for CRL. At the time, CRL had been held to be unenforceable by the Court of Appeal in *Wallbank*.[37] The Court of Appeal's decision was reversed by the House of Lords after the passage of the LRA 2002 but before the Act came into force.[38] Following the decision of the House of Lords, the Lord Chancellor made the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 ("the 2003 Order").[39] The 2003 Order listed CRL as an overriding interest under the LRA 2002, but only for a period of ten years (until 13 October 2013).

5.74 It was assumed that when CRL ceased to be an overriding interest it would be governed by the provisions of the LRA 2002 that we discuss above. It was assumed that CRL could be protected by entry of a notice under section 32 of the LRA 2002 and that, under section 29, a purchaser of a registered estate would not be bound by an unprotected CRL. However, the 2003 Order did not insert any provision into the LRA 2002 to ensure its application to CRL. Sections 29 and 32 of the LRA 2002 only apply to CRL if the liability is "an interest affecting a registered", which under the definition in section 132 means it must be "an adverse right affecting title to a registered estate".

5.75 We think there are reasons to doubt whether CRL is "an interest affecting a registered estate" for the purposes of the LRA 2002. We expressed some doubts about the application of the LRA 1925 to CRL in our 1985 report on CRL.[40] There, we said that "in view of the fact that the liability is not a charge on the land, it is arguable that it

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35 Some other individual provisions of the LRA 2002 distinguish between legal and equitable interests. For example, a legal easement may be an overriding interest under Sch 3 para 3 (if other requirements are met), but an equitable easement may not. These are not relevant to CRL.

36 See paras 1.30 to 1.39 above.

37 [2001] EWCA Civ 713; [2002] Ch 51.

38 [2003] UKHL 37; [2004] 1 AC 546.

39 SI 2003/2341.

40 Property Law: Liability for Chancel Repairs (1985) Law Com No 152

should not have been listed as an overriding interest [in the LRA 1925]".[41] Following our consideration of whether or not CRL is a proprietary interest earlier in this chapter, we can now explain the basis for these doubts in more detail. Arguably, CRL is a personal obligation on a lay rector – an incident of a rectory rather than a direct burden on the ownership of a particular piece of land.

5.76 We examine these uncertainties about the application of the LRA 2002 to CRL in more detail below. We start by considering some general issues about the interpretation of the LRA 2002. We then consider whether the definition of "interest affecting a registered estate" in the LRA 2002 could apply to CRL. We also examine difficulties in applying section 29 of the LRA 2002 given that CRL does not appear to "compete" in priority with other interests in land. These issues are related to, but are distinct from, the question we consider in the first part of this chapter about whether CRL is an interest in land.

Initial observations about the interpretation of the Land Registration Act 2002

5.77 As we discuss earlier in this chapter, our focus is on whether the application of the LRA 2002 to CRL is in doubt. We do not focus to the same extent on ways in which it could be argued that CRL *is* an adverse right affecting title to a registered estate under the LRA 2002. We do not suggest in this chapter that there could be no way of interpreting the LRA 2002 so that it applies to CRL, but merely that the application of the LRA 2002 to CRL is in doubt.

5.78 Nevertheless, we need to consider one argument that might seem to show that the court would interpret the LRA 2002 so as to apply to CRL (or that it is *highly likely* that the court would interpret the Act in this way). This argument is premised on the basis that Parliament *intended* CRL to be an adverse right affecting title under the LRA 2002. If that is correct, the court may endeavour to find a reading of the LRA 2002 according to which it applies to CRL (insofar as the wording of the Act admits of such a reading). However, as we explain below, the premise of this argument is questionable: it is not clear that Parliament intended the LRA 2002 to apply to CRL.

5.79 At the time that the LRA 2002 was passed, CRL had been held to be unenforceable by the Court of Appeal. The LRA 2002 made no provision for CRL. This was not an oversight. The lack of provision for CRL reflected a deliberate policy decision in our joint report with HM Land Registry from 2001, on which the LRA 2002 was based.[42] Thus, at the time the LRA 2002 was passed, it appears that Parliament did *not* intend the Act to apply to CRL because at the time CRL (in effect) did not exist. (Furthermore, although the LRA 2002 replaced the LRA 1925, we explain in Appendix 1 that we have found no evidence that Parliament ever considered whether CRL could be registrable under the LRA 1925, or under earlier legislation.)

5.80 However, there is a question of whether the 2003 Order can be used to aid the interpretation of the LRA 2002 and, in particular, whether the 2003 Order can be used to demonstrate that there was an intention that provisions of LRA 2002 (such as the priority provision in section 29) should apply to CRL. Delegated legislation may aid the interpretation of its parent Act, especially where the delegated legislation was issued

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41 Above, para 2.6, n 9.

42 Land Registration for the 21st Century: A Conveyancing Revolution (2001) Law Com No 271, para 8.75.

under a power to amend the parent Act and came into force at the same time as the Act (as in the case of the 2003 Order).[43] Yet in this instance, we think there is very little light that the 2003 Order can shine upon the interpretation of the LRA 2002.

(1) First, while secondary legislation can be used to provide an indication of the intention underlying its parent Act, this principle of interpretation typically applies where the meaning of the primary legislation is unclear, or where the primary legislation is general and the secondary legislation applies the statutory scheme in specific contexts. We are not sure that this principle of interpretation can be applied where the parent Act is clear and unambiguous and its intention is not in dispute. Because of the unusual circumstances surrounding the passage of the LRA 2002 and the *Wallbank* litigation, we *know* that, when the LRA 2002 was passed, there was no intention for the Act to apply to CRL. Indeed, there is no indication that Parliament applied any assumptions about whether the LRA 2002 was capable of applying to CRL.

(2) Secondly, the 2003 Order did not make any provision for CRL to be registered by entry of a notice and did include any amendment that would ensure that section 29 of the LRA 2002 would apply to CRL. The 2003 Order merely listed CRL as an overriding interest; it made no further changes to the LRA 2002.

(3) Thirdly, it was *not* the intention of the 2003 Order to make section 29 and other provisions of the LRA 2002 apply to CRL. The 2003 Order was issued following the decision of the House of Lords in *Wallbank* because it was thought that, without amendment, the LRA 2002 would *already* require CRLs to be protected by entry of a notice from the moment the Act came into force. It was thought that any CRLs affecting registered estates that were not so protected would immediately be at risk of being lost if the affected estates were to be sold. The aim of the 2003 Order was merely to delay the point at which CRLs needed to be registered by ten years, in order to give parochial church councils an opportunity to register their rights.

(4) Finally, the 2003 Order was drafted on the understanding that, from 13 October 2013, when CRLs ceased to be overriding interests, CRLs would need to be protected by entry of a notice or risk being lost on a sale of the affected land. Arguably, as we discuss in the remainder of this chapter, that assumption was incorrect. However, even if that assumption was incorrect, it does not follow that the 2003 Order was of "no effect".[44] It was effective in the minimal sense that it successfully amended the LRA 2002 by adding two paragraphs referring to CRL in Schedules 1 and 3. It was arguably also effective in a more substantial sense: the 2003 Order made it clear on the face of the Act that (for ten years) CRL did not need to be protected in the register in order to bind a purchaser of registered land. This was a useful, if short-lived, clarification, given the obscure nature of CRL.

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43 See *Hanlon v Law Society* [1981] AC 124, pp 193 to 194 by Lord Lowry.

44 We are consequently doubtful that any additional provisions concerning CRL can be *read in* to the 2003 Order based on the principle that Parliament is presumed not to legislate in vain. The 2003 Order did not legislate in vain – but it is arguable that it did not have the effect it was expected to have.

5.81 The drafting of the 2003 Order was based on the belief that CRL would already be caught by the key provisions of the LRA 2002 (including section 29). It was drafted on the expectation that, from 13 October 2013, CRLs would need to be protected by entry of a notice in order to bind purchasers of registered land. However, the 2003 Order was not intended to make the LRA 2002 apply to CRL; that was not its aim. Whether and how the LRA 2002 applies to CRL needs to be determined by considering the wording of the Act, which we now examine.

Section 132(3)(b): adverse right affecting the title of an estate

5.82 We need to consider whether CRL may be an interest affecting a registered estate. In section 132(3)(b) of the LRA 2002, an "interest affecting an estate" is defined as "an adverse right affecting the title to the estate". This definition can be divided into three components, each of which deserve separate comment:

(1) an adverse

(2) right

(3) affecting the title to the estate.

(1) Adverse

5.83 We discussed the requirement that the right must be "adverse" in our 2016 consultation paper, Updating the Land Registration Act 2002.[45] We noted that the requirement of adversity may cause problems in some cases. In particular, it may be useful to be able to record in the register the fact that the terms of a registered lease have been varied by agreement between the landlord and tenant. But if the variation is one that benefits the tenant (for example, by lowering the rent), it does not give the landlord any rights that *adversely* affect the leasehold title. It is consequently arguable that a notice of such a beneficial variation cannot be entered in the register.[46]

5.84 For our current purposes, however, there is no issue about whether CRL is adverse – it clearly imposes a burden upon the landowner. There is a question about whether CRL is adverse *to the landowner's title to their estate*, rather than to the landowner personally, but we discuss that matter in relation to the third element of the definition below.

(2) Right

5.85 It is arguable that the rights to which section 132(2)(b) of the LRA 2002 refers must be rights belonging to a defined beneficiary. The provision is defining "interests affecting an estate" and interests arguably require an interest-holder (an *interested* person). One indication that this is the case is provided by the provisions of the LRA 2002 dealing with notices. The interests affecting registered estates, defined by section 132(2)(b), can be protected by an entry of a notice under section 32. Section 34(1),

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45 (2016) Law Com Consultation Paper, No 227, para 12.37.

46 We did not ultimately recommend changing the definition of "interests affecting registered estates" in s 132 or the definition of notices in s 32. Rather, we recommended that land registration rules should enable the voluntary recording of information about lease variations in the register (Updating the Land Registration Act 2002 (2018) Law Com No 380, para 12.32, Rec 21).

which deals with the entry of notices, says that they may be entered on the application of "a person who claims to be entitled *to the benefit* of an interest" (our emphasis).

5.86 Under the Chancel Repairs Act 1932, a parochial church council has a statutory right to enforce a lay rector's repairing obligations. It is generally assumed that parochial church councils are the beneficiary of CRLs, and HM Land Registry accepts applications from such councils for the entry of notices relating to CRL. However, we discuss in Chapters 2 and 4 and earlier in this chapter whether a rector's repairing obligations are owed to a particular person or class of persons.[47] It is possible that CRL is similar to a public duty, owed to the parishioners of the relevant parish in general, rather than to a particular class of individuals, and that it has retained this status notwithstanding the Chancel Repairs Act 1932. It may be questioned whether CRL can be described as a "right" within the meaning of section 132(2)(b).

(3) Affecting the title to the estate

5.87 Finally, the adverse right must affect the title to an estate. A right that adversely affects the owner of land does not necessarily affect their title to land. For example, a landowner may enter into a variety of contractual obligations relating to their land – with a builder who fits a new conservatory, or with their electricity supplier. These obligations may adversely affect them (in the sense that they owe money to the builder or the supplier) but they do not affect their title to land.

5.88 One indication that a right affects title to land is that it would bind a new owner of the land were it to be transferred. However, the fact that the burden of a right transfers from person to person alongside the transfer of land does not by itself prove that the right *affects the title* to the land. As we mention when discussing whether CRL is an interest in land, when considering the transfer of this liability, it is easy to overlook an additional element. Unless CRL has now evolved into a direct burden on land, it passes with ownership of a lay rectory. That may still be the case even if (following *Chivers*) ownership of a lay rectory transfers automatically with the ownership of rectorial property. In our 1983 consultation paper on CRL, we said:

> …the repair of the chancel was a personal responsibility of the rector, and it remains so. It is easy, but misleading, to think of the liability as something directly attached to the rectorial property, especially if that property (as a result of substitution or otherwise) takes the form of land. The true position is that the acquisition of the rectorial property will usually be treated as the acquisition of the rectory (or of a share in it) as well, thus giving the acquirer the status of rector; and because he is rector, he is liable.[48]

5.89 Even if it is arguable that CRL is an adverse right affecting title *to a rectory* that does not mean that it is an adverse right affecting title *to a registered estate*. Rectories cannot be registered. All that can be registered is the rectorial land.

5.90 Moreover, a right that "adversely affects the title" is arguably a right that *conflicts with* or *detracts from* the registered owner's title to land. Whether CRL relates directly to the ownership of land or is mediated via ownership of a rectory, it does not appear to

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47 See paras 2.43 to 2.46, 4.90 to 4.91, and 5.46 to 5.47 above.

48 Transfer of Land: Liability for Chancel Repairs (1983), Law Commission Working Paper No 86, para 3.3.

restrict the owner's entitlement to use or control their property. CRL is an additional, positive obligation for the owner of the rectory or of the rectorial land to do something in relation to *other* land (namely, the church). If a lay rector fails to comply with their repairing obligations, the parochial church council can pursue them for a money judgment, but they have no rights to interfere with the lay rector's land, or with their title to the rectory or rectorial property.

The function of the LRA 2002

5.91 In addition to the specific issue explored above about the definition of "interests affecting a registered estate", there are also some more general grounds for thinking that the LRA 2002 may not apply to CRL. The definition in section 132(3)(b) does not exist in a vacuum. "Interests affecting a registered estate" are defined for the purposes of the Act. It is worth considering how the LRA 2002 Act in general functions, as this provides an indication of what sort of rights it was intended to govern.

Rules on priority

5.92 Some of the most important provisions of the LRA 2002 are concerned with *priority*. As we discuss in our summary of the LRA 2002 above, section 28 sets out a general first-in-time rule that the transfer of a registered estate does not affect the priority of an interest binding the estate. This rule reflects an underlying principle of property law: nemo dat quod non habet (no one can give what they do not have).[49] We give an illustration below.

> The owner of a freehold, A, grants a ten-year lease to B. The lease gives B the right to possess the property for ten years. A then transfers the freehold to C. The freehold title given to C does not entitle C to take immediate possession of the property. The right to possession had already been given away by A to B. The most that A could transfer to C was a freehold title that was subject to B's lease. In the language of property law, following the grant of lease, A only owned a reversionary interest in the property and could only transfer this reversion to C.

5.93 Section 29 deals with the postponement of interests on a transfer of a registered estate for valuable consideration. Interests that are not protected by the entry of a notice, and are not overriding, are postponed to the estate being transferred. Section 29 does not state that an unprotected interest is extinguished or becomes void. A postponed interest still exists, but it loses *priority* to the estate being transferred.[50] An illustration of postponement is below.

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[49] We discuss the nemo dat principle in relation to real property (land) in this chapter, but the principle applies also to transfers of personal property (chattels) and other categories of property.

[50] *Humphrey v Bennett* [2025] EWHC 448 (Ch), at [31].

The owner of a freehold, A, grants a restrictive covenant over their land to a neighbour, N, preventing the land from being used for business purposes. N fails to register a notice relating to the covenant. A grants a 10-year lease of the property to B for valuable consideration, which permits B to use the property for business purposes. Under section 29, N's restrictive covenant is postponed to B's lease. N has no right to prevent B from using the property for business purposes. However, when the lease ends and A resumes possession of the property, N will be able to enforce the covenant against A.

Priority and property

5.94 The priority rules in sections 28 and 29 of the LRA 2002 make sense when applied to property rights (the rights to which the nemo dat principle applies). If a landowner grants an interest affecting their land (I1) and then grants another interest (I2), the grant of I2 cannot detract from the grant of I1. I1 has priority as the first interest granted. This principle is reflected in the basic rule in section 28: the first in time prevails. Moreover, the special rule in section 29 works by imagining that interests in land had been granted in a different order. For example, if the grants of these interests were registrable dispositions and I1 was not registered, section 29 may treat I2 as if it were granted before I1. Section 29 is still relying on the same concept of priority that applies to property rights.

5.95 The same point can be explored from a different direction. The priority rules under the LRA 2002 make sense when applied to rights that can compete with one another. As explained by John Randall KC, sitting as a Deputy High Court Judge in *Hardy v Fowle*:

> there cannot in law be a "dead heat" between two mutually inconsistent and competing interests over a legal estate in land.[51]

5.96 The inability to have a "dead heat" between two competing interests in land reflects the fact that one interest will necessarily take priority over the other. By contrast, personal obligations – for example, contractual obligations – do not compete with one another in the same way that property rights can compete. A landowner cannot give away a property right that they do not possess. But a person may contract to do something that they cannot do. There is nothing, for example, to prevent X from contracting with Y that they will grow their hair long and contracting with Z that they will shave their head bald. Either Y or Z is going to be disappointed, but both contractual obligations may be valid. As Lord Justice Lewison said in *Vehicle Control Services Ltd v Revenue and Customs Commissioners*:

> there is no legal impediment to my contracting to sell you Buckingham Palace. If (inevitably) I fail to honour my contract then I can be sued for damages.[52]

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51 [2007] EWHC 2423, at [11].

52 [2013] EWCA Civ 186; [2013] RTR 24, at [22]. Lewison LJ's example is intended to be a striking illustration of the fact that a person can contract to do something they are not able to do and be held liable for damages

5.97 The importance of this point is that it would not make sense to apply the priority provisions in the LRA 2002 to contractual obligations. They are designed to apply to property rights. However, in the first part of this chapter, we discuss whether CRL is an interest in land (a type of property right). We conclude that there is a reasonable argument that it is not. If that argument turns out to be correct, then key provisions of the LRA 2002 (specifically, the crucial protection in section 29 for purchases of registered land) cannot apply to CRL.

The application of the LRA 2002 to non-proprietary rights

5.98 It may be objected, however, that the LRA 2002 makes provision for a few types of non-proprietary right. Consequently, the objection continues, there is no reason in principle why the LRA 2002 may not apply to CRL, even if it is not an interest in land.

5.99 Not all of the overriding interests listed under Schedule 3 to the LRA 2002 are property rights. Paragraph 6 of Schedule 3 refers to "a local land charge". Local land charges are, in general, obligations created under specific statutes that are enforceable by public bodies. For example, earlier in this chapter, we discuss conservation covenants.[53] Conservation covenants are registrable as local land charges.[54] They are not interests in land.

5.100 Nevertheless, we are not sure that any firm conclusions about the application of the LRA 2002 to non-proprietary rights can be drawn from the Act's treatment of local land charges. There is a wide array of different local land charges created by different statutory schemes, and more will probably be created in the future. Some of the local land charges created by these statutory schemes may be interests in land. Listing local land charges in general as overriding interests avoids any need to refer to particular types of local land charge in Schedule 3. It prevents any argument that a particular local land charge that is not listed in fact gives rise to a property right that could be postponed under section 29. Listing local land charges in general as overriding interests in Schedule 3 risks redundancy, but it does not risk any positive harm.

5.101 We also note that there have been several occasions on which the court has held that certain provisions of the LRA 2002 do not apply to a particular kind of right precisely because that right is not a property right. For example, in *Godfrey v Torpey*,[55] the High Court held, in order to qualify as "an interest affecting an estate" under section 87 of the LRA 2002, a pending land action must concern a dispute that affect title to the land. In *Elwood v Goodman*,[56] the Court of Appeal held that positive obligations which are enforceable against successive owners of land under the benefit-burden principle in *Halsall v Brizell*[57] do not need to be protected (and cannot be protected) by entry of

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when they inevitably fail. (The reference to a lack of "legal impediment" concerns contract law – it is not intended to imply that there are no other legal obstacles to a person agreeing to sell Buckingham Palace, such as possibly criminal liability for fraud.)

53 See para 5.36 above.

54 Environment Act 2021, s 120(1).

55 [2006] EWHC 1423 (Ch), at [6] by Peter Smith J.

56 [2013] EWCA Civ 1103; [2014] Ch 169, at [35] and [36] by Patten LJ.

57 [1957] Ch 169

a notice under the LRA 2002 because positive covenants are not property rights. In *Scott v Southern Pacific Mortgages*,[58] Lord Collins said that an interest of a person in actual occupation of land can be overriding under paragraph 3 of Schedule 3 to the LRA 2002 only if the interest is proprietary.

The potential consequences of our analysis

5.102 To summarise our discussion, CRL was listed as an overriding interest under the LRA 2002 for the first ten years that the Act was in force (and under previous land registration legislation). There was no requirement for CRL to be registered; the liability would bind, or fail to bind, a purchaser of a rectory or former rectorial land in accordance with the general law.

5.103 When the 2003 Order was made, it appears to have been assumed that, because CRL was listed as an overriding interest, the substantive provisions of LRA 2002 could apply to it. It was thought that CRL could be protected by entry of a notice in the register. Furthermore, it was thought that, by deleting CRL from the list of overriding interests in Schedule 3, the priority provisions in sections 28 and 29 of the LRA 2002 would apply to the liability.

5.104 We have explored some reasons to think that the assumption underlying the 2003 Order may have been wrong. It is arguable that CRL is not an interest in land and, correspondingly, that it is not an interest affecting an estate within the meaning of the LRA 2002. Removing CRL from the list of overriding interests may not have been sufficient to ensure that the substantive provisions of the LRA 2002 would apply to the liability.

5.105 If CRL does not qualify under the LRA 2002 as an interest affecting a registered estate, there are two significant consequences.

(1) First, it is not possible to protect CRL by entry of a notice. Notices can only protect interests affecting estates.

(2) Secondly, a person who purchases a registered estate that carries CRL may become bound by the liability regardless of whether the liability is recorded in the register. Section 29 of the LRA 2002 only protects a purchaser against unregistered interests that affect the registered estate.

In general, if CRL is not an interest affecting an estate, the key provisions of the LRA 2002, which we have been examining in this chapter, simply fail to engage with the liability.

5.106 Given the arguments explored in this chapter, we believe that there could be reasonable doubts about the application of the LRA 2002 to CRL. In Chapter 6, we consider whether these doubts could be resolved by amending the LRA 2002.

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58 [2014] UKSC 52; [2015] AC 386, at [59].

Part 2: Possible law reform

Chapter 6: Amending the Land Registration Act 2002: transfers of registered land

INTRODUCTION

6.1 In Chapter 1, we provide a brief introduction to chancel repair liability ("CRL") and explain the aims of our current project. Our focus is on purchasers of land. We are reviewing whether, and in what circumstances, a purchaser of land may be bound by CRL. We are not considering whether CRL should be reformed or abolished. Rather, we are considering whether a potential purchaser of land can know for certain whether they will become subject to CRL if they buy the land.

6.2 The issue is important, because the costs of repairing the chancel of a parish church can be considerable.[1] Furthermore, if a purchaser of land is unsure about whether they will become bound by CRL, they may need to pay for a chancel repairs search (a check of parish records offered by various providers) or buy insurance. Uncertainties about CRL can drive up the costs of conveyancing. It is also important that the law is clear, and obligations such as CRL ought to be certain.

6.3 In this chapter, we consider purchases of registered land. We examine purchases of unregistered land in Chapter 7. Transfers of registered land are governed by the Land Registration Act 2002 ("the LRA 2002"). Under the LRA 2002, a purchaser of registered land should be able to tell whether they may become subject to CRL by examining the register of title. If no notice of CRL is recorded against the title to the land at the time the purchase is completed, it should be clear that the purchaser will not be bound by the liability. However, that may not be the case.

6.4 In Part 1 of this consultation paper, we examine the history and nature of CRL in detail. The issues we discuss are complex, involving many legal technicalities. As the discussion in Part 1 may not be accessible for all consultees, we provide a summary of our conclusions below. In brief, our analysis exposes some uncertainties about the nature of CRL and how the LRA 2002 applies to it. It is possible that a purchaser of registered land may become bound by CRL even if it is not recorded in the register.

6.5 In this chapter, we consider whether the LRA 2002 should be amended. We have not drawn a definite conclusion that the LRA 2002 does not apply to CRL in the way that was expected. Rather, we have exposed some uncertainties about its application. If an amendment of the LRA 2002 is necessary, it would be intended to establish beyond doubt that CRLs are not binding on purchasers of registered land unless the liability is recorded in the register. We ask consultation questions about a possible amendment. In Chapter 8, we seek information from consultees about their experiences dealing with CRL so that we can gauge the impact of potential reforms.

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[1] We cite a case at para 1.8 above in which landowners faced a bill of £186,969.50 plus VAT for CRL.

Summary of our conclusions from Part 1

6.6 In Part 1 of this consultation paper, we discuss the history of CRL. The liability originated as an obligation on parish priests. Some parish priests were *rectors*, who were provided with a living to support their ministry to the parish. This living provided the rector with property to support their religious work. The property included a residence, other land (which could be farmed or let to tenants), and tithes, which were a type of ecclesiastical tax payable by the parishioners. As part of their religious office, a rector also had various duties. These included an obligation to use the proceeds of the living provided by their office to repair the chancel of the parish church. The office of rector together with the property granted to support that office is referred to as a "rectory".

6.7 By the 16th Century, many rectories had been acquired by monasteries. The monasteries took the income from the rectories and discharged some of the rectorial duties (including CRL), but appointed a deputy (a vicar or a curate) to minister to the parish. Following the dissolution of the monasteries in the 16th century, the Crown acquired these rectories. The Crown subsequently transferred them to lay (secular) persons, who became lay rectors. As lay rectors could not discharge all the religious functions of the office, the vicars or curates appointed by the monasteries needed to stay in place, or new vicars or curates needed to be appointed. However, lay rectors still enjoyed the income provided by the rectory. They were also required to discharge some of the rectorial obligations that did not involve the provision of religious services, including CRL.

6.8 Lay rectors were free to dispose of or divide their rectories. By the start of the 20th century, the property belonging to many lay rectories had come to be divided amongst multiple owners. We explain that the nature of the current law governing lay rectories and CRL is unclear. In particular, there is a question about how rectorial obligations now relate to the ownership of property that once belonged to a rectory. We identify three possible interpretations of the current law.

(1) First, it is possible that CRL is still an obligation that only binds the owner of a rectory. A rectory is a complex bundle of rights and obligations. A person becomes a lay rector by acquiring the rectory. They do not become a lay rector simply by acquiring land that used to belong to a rectory. This interpretation of the law is supported by our legal analysis in Chapters 2 to 4.

(2) Secondly, it is possible that the law governing lay rectories and CRL has evolved. Any person who acquires land that formerly belonged to a lay rectory is automatically transferred a share of the rectory, and is therefore subject to CRL. This interpretation of the law is supported by several decisions of the courts on CRL over the last century (although it is not supported by *all* of the modern case law).

(3) Thirdly, it is possible that the nature of CRL has completely changed so that the liability is now a direct burden on the ownership of any land that formerly belonged to a lay rectory. It is now redundant to refer to the owner of such as a "lay rector". They are simply a landowner.

6.9 We also consider the legal nature of CRL in Part 1. If either the first or the second interpretation of the law concerning CRL set out above is correct, there is a reasonable argument that CRL is not an interest in land. Rather, CRL is still a personal obligation on a lay rector. On the third interpretation, CRL may be construed as an (admittedly unusual) interest in land. If CRL is an interest in land, there may be no problem about the application of the LRA 2002 to CRL. However, the third interpretation has the least support from case law and commentary on the nature of CRL. We also explain in Chapter 5 that the third interpretation is in tension with some of the remedies relating to CRL and with some of the liability's characteristic features.[2]

6.10 If CRL is not an interest in land, then there is some uncertainty about whether the LRA 2002 could apply to it. We discuss in Chapter 5 whether CRL is an "interest affecting an estate"; a key phrase used in the LRA 2002.[3] We explain that there are some arguments which indicate that CRL is not an interest affecting an estate.

6.11 This is important because, from 13 October 2013, CRL ceased to be an overriding interest under the LRA 2002. An overriding interest is a right that binds a purchaser of registered land even if the interest is not recorded in the register. Given that CRL is no longer an overriding interest, two problems would arise if CRL were not to qualify as an "interest affecting a registered estate". (We discuss a further problem related to first registration in Chapter 7.)

(1) First, a person who purchases a registered estate that carries CRL may become bound by the liability regardless of whether the liability is recorded in the register. Section 29 of the LRA 2002 only protects a purchaser against unregistered "interests that affect the registered estate".

(2) Secondly, it would not be possible to protect CRL by entering a notice in the register under section 32 of the LRA 2002. Notices can only protect "an interest affecting a registered estate".

6.12 In summary, there is a risk that CRL is not an interest that affects a registered estate within the meaning of the LRA 2002. There is consequently a risk that key provisions of the LRA 2002 do not apply to CRL – that the LRA 2002 says nothing about the circumstances in which a person may or may not become bound by CRL.

REFORMING THE LAND REGISTRATION ACT 2002

6.13 The above summary of Part 1 of this consultation paper explains that there is not only an uncertainty about whether the LRA 2002 applies to CRL; there is also a more general uncertainty about how CRL relates to the ownership of land.

(1) One possibility, which is supported by our discussion in Chapters 2 to 4, is that a person only becomes liable for chancel repairs if they are transferred (part of) a rectory. Importantly, a person who specifically acquires a *rectory* (rather than a piece of land that used to belong to a rectory) should know that they may be subject to rectorial obligations including CRL. They do not need to consult the

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2 See paras 5.49 to 5.53, and 5.56 to 5.57 above.

3 Defined in LRA 2002, s 132(3)(b) as an "adverse right affecting the title to the estate."

Land Register in order to become aware of the liability because the liability is an aspect of the property – the rectory – that they are intentionally acquiring.

(2) Another possibility is that a person who acquires land that formerly belonged to a rectory automatically becomes subject to CRL. This is how the law has generally been interpreted by the court over the last century. A person who is acquiring land, rather than title to a rectory, may not know that the land formerly belonged to a rectory. In fact, if the records concerning the history of the property are incomplete, the purchaser may have no reasonable means of discovering that the land is former rectorial property, even with diligent research. If that is the case, it matters whether or not a purchaser can find out for certain that the land is free from CRL by consulting the Land Register.

6.14 We cannot assume that this uncertainty in the law will be resolved in the foreseeable future and we do not know what direction any such resolution would take. Litigation relating to CRL is rare. Furthermore, insofar as there is a risk that the current law is as described in paragraph 6.13(2) immediately above, a prudent purchaser of land will want to know whether they can rely on the register or should protect themselves by taking out CRL insurance. In considering the reform of the LRA 2002, we will proceed, therefore, on the basis that the second possibility, outlined in paragraph 6.13(2), is correct – that a person may become bound by CRL simply by acquiring former rectorial land.

The policy behind the Land Registration Act 2002

6.15 As mentioned in our summary of Part 1, we conclude that there could be reasonable doubts about whether CRL needs to be registered (by entry of a notice in the register) in order to bind a purchaser of registered land. We think there is some risk that a purchaser could be bound by an unregistered CRL.

6.16 We explain in Chapter 1[4] that the provisions in the LRA 2002 concerning CRL were inserted by an order made by the Lord Chancellor in 2003 ("the 2003 Order").[5] The 2003 Order ensured that CRL would be listed as an overriding interest under the LRA 2002 for ten years after the Act came into force (until 12 October 2013). As we mention above, an overriding interest is a right that binds a purchaser of registered land even if the interest is not recorded in the register. From 13 October 2013, Government announced that CRL would need to be protected by a notice in the register in order to bind a purchaser of registered land.[6]

6.17 Our analysis of the nature of CRL and its interaction with the LRA 2002 indicates that it is uncertain whether the 2003 Order had its expected effect. If a purchaser of registered land may still be bound by an unregistered CRL, then the LRA 2002 is not functioning in the way that was anticipated or in the way that it was widely assumed to function.

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4 See paras 1.34 to 1.37 above

5 The Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 (SI 2003/2341).

6 See the press release issued by the Department for Constitutional Affairs, quoted at para 1.37 above.

6.18 We therefore believe that the LRA 2002 should be amended so that its application to CRL is clear. This clarification should have two benefits. First, it should ensure that the LRA 2002 functions as anticipated and applies to CRL in line with public expectations. Secondly, as long as the application of the LRA 2002 to CRL is unclear, purchasers of registered land may be unsure whether they can rely on the register. They may reasonably decide to protect themselves by paying for a chancel repair search or taking out CRL insurance. Clarifying the application of the LRA 2002 could save purchasers of land these costs.

6.19 We are not reviewing the policy underlying the 2003 Order. In other words, we are not reconsidering whether CRL *should* be registrable under the LRA 2002. However, we note that the expected outcome of the 2003 Order was supported both by the analysis in our 1985 Report on CRL ("the 1985 Report")[7] and by the policy set out in our 2001 joint Report with HM Land Registry on land registration ("the 2001 Report").[8] We comment on each of those reports below.

The 1985 Report

6.20 Our 1985 Report identified multiple problems with CRL as it existed at the time. One of the key problems was an issue of knowledge or awareness.[9] CRL did not need to be registered under the Land Registration Act 1925 ("the LRA 1925") in order to bind a purchaser of registered land. It was an overriding interest and as such it bound purchasers without being on the register. Consequently, a purchaser needed to investigate whether the land they were acquiring was former rectorial property. Not only could these investigations be time-consuming and expensive, in some cases parish records were lost or incomplete. If a purchaser was acquiring land in an old parish, it could be very difficult to determine for certain whether or not the land could be burdened by CRL.

6.21 The 1985 Report did not primarily consider how this problem of knowledge could be resolved because it recommended that CRL should be abolished. However, in the event that CRL were not abolished, the 1985 Report recommended in the alternative that CRL should be registrable.[10] As it happens, the 1985 Report did not suggest that CRL should be registrable under the LRA 1925, but rather that it should be registrable as a local land charge.[11] However, the report was clear that, if this recommendation were to be adopted, then an unregistered CRL should not be binding on a purchaser of land.[12]

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7 Property Law, Liability for Chancel Repairs (1985) Law Com No 152.

8 Land Registration for the 21st Century: A Conveyancing Revolution (2001) Law Com No 271.

9 The 1985 Report, paras 3.1 to 3.4.

10 Above, Pt V and para 7.2.

11 Under the Local Land Charges Act 1975. The local land charges register generally records interests, rights and obligations affecting land that belong to or are enforceable by public bodies under various statutory regimes.

12 The 1985 Report, paras 5.9 and 7.2.

The 2001 Report

6.22 The Land Registration Bill published with our 2001 Report became the LRA 2002. The 2001 Report explains the policy objectives that underlie the Act. The report did not discuss the registration of CRL, because at the time CRL was unenforceable as the result of a decision by the Court of Appeal.[13] However, the arguments set out in our 2001 Report (particularly those arguments concerning overriding interests) strongly imply that a purchaser of registered land should not be bound by CRL unless it is recorded in the register.

6.23 The 2001 Report explained that the Land Registration Bill (which became the LRA 2002) sought to restrict the number of overriding interests as far as possible:

> The guiding principle on which it proceeds is that interests should be overriding only where it is unreasonable to expect them to be protected in the register.[14]

6.24 Chapter 8 of our 2001 Report discussed the overriding interests listed in the Land Registration Act 1925. It identified a variety of reasons why particular interests should or should not continue to be overriding interests under the Land Registration Bill. It is possible to extract five considerations from the discussion in the report that were particularly important for determining whether or not an interest should be overriding.

(1) Is the interest in land easy for a purchaser to discover, either by inspecting the land or by asking questions of its occupants? (If so, there is less reason to require the interest to be registered in order to bind a purchaser.)[15]

(2) Is the beneficiary of the interest likely to know of its existence and be aware of the need to register it?

(3) Is the interest of a type that deserves special protection, for example because its owner is vulnerable or would be especially prejudiced by its loss?[16]

(4) Is it feasible to register the interest?[17]

(5) Is the burden of the interest onerous?[18]

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13 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] EWCA Civ 713; [2002] Ch 51

14 Para 2.25.

15 See, for example, the 2001 Report's discussion of reversionary leases at para 8.10 and of easements which are not obvious from an inspection of the land at para 8.69, both of which may be difficult for a purchaser to discover.

16 See the discussion in the 2001 Report of the rights of occupiers at paras 8.53 and 8.54. We said in Land Registration for the 21st Century: A Consultative Document (1998) Law Com No 254, para 5.61, that "when people occupy land they are often unlikely to appreciate the need to take the formal step of registering any rights that they have in it. They will probably regard their occupation as the only necessary protection."

17 For example, the 2001 Report noted that rights to coal are difficult to register due to uncertainties about how far they extend (para 8.32).

18 This consideration was mentioned by the 2001 Report at para 8.35(4) when discussing five ancient miscellaneous interests, which we examine in more detail below

6.25 Furthermore, the 2001 Report discussed five miscellaneous rights affecting land:

(1) franchises (historic rights granted by the Crown, typically to hold a market or fair on the land);

(2) manorial rights (rights that may be left over where the land used to be part of a manor and held from the lord of a manor);

(3) crown rents (ancient rights that may exist where the relevant land was once granted by the Crown to a subject in return for a rent);

(4) non-statutory rights concerning the maintenance of embankments and sea walls (a unique liability that may bind properties next to rivers or the sea); and

(5) corn rents (obligations to pay an annual sum of money, generally to the Church Commissioners, calculated by reference to the price of corn, which were granted in replacement for tithes – ancient obligations to pay a tenth of the produce of land to the church).

6.26 These interests were all overriding interests under the Land Registration Act 1925. The 2001 Report explained that it had singled out these interests because:

(1) they are of ancient origin;

(2) they are of an unusual character that a buyer would not normally expect to encounter;

(3) they can be very difficult to discover; and

(4) they may be exceptionally onerous.[19]

6.27 Later in the report, we said the following about these five types of interest:

> All are relics from past times and are of an unusual character. Most of them can no longer be created. Those who have the benefit of such rights ought to be aware of them. These characteristics make them obvious and sensible candidates to be phased out [as overriding interests]. If such rights are to bind those who acquire registered land, they should be protected on the register.[20]

6.28 The 2001 Report concluded that these interests should be brought onto the register and should no longer be overriding. However, we also recognised the need "to strike a fair balance between (i) the interests of buyers, and (ii) the interests of the persons having the benefit of such rights who have not had to take any steps to protect them hitherto".[21] For this reason, the Report recommended that these rights should remain overriding interests for ten years, after which they would need to be registered in order to bind a purchaser of registered land.

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19 The 2001 Report, para 8.35.

20 Above, para 8.88(4).

21 Above, para 8.38.

6.29 The reason we highlight these passages from the 2001 Report is that many of these points are equally applicable to CRL. Like the manorial rights discussed in the 2001 Report, CRL is ancient, unusual, obscure and onerous. The existence of CRL is not readily discoverable from an inspection of land or from asking questions of the land's occupants. Parochial church councils, which are entitled to enforce CRL, are not vulnerable persons. We think it is reasonable to expect parochial church councils to register their interests (especially as it was widely thought that CRLs needed to be registered by 13 October 2013). Furthermore, parochial church councils have already shown that it is feasible for them to identify the CRLs which relate to their churches and apply to enter notices to protect them.

Our provisional proposal to amend the Land Registration Act 2002

6.30 We note above an uncertainty about the nature of CRL and whether it constitutes an interest in land. Regardless of whether CRL in technical legal terms currently constitutes an interest in land, we think it would be possible to amend the LRA 2002 so that it is clear that a purchaser of registered land is not bound by CRL unless it is recorded in the register at the time of the purchase.

6.31 In order to achieve the policies underlying the LRA 2002, our provisional proposal is that the LRA 2002 should be amended to clarify that:

(1) a notice relating to CRL can be entered in the register; and

(2) a purchaser of a registered estate will not be bound by CRL unless there is a notice of the liability recorded in the register.

We seek views from consultees concerning this potential amendment.

Consultation Question 4.

6.32 We provisionally propose that the LRA 2002 should be amended to clarify that:

(1) a notice is capable of being entered in the register of title in respect of chancel repair liability; and

(2) chancel repair liability only binds a purchaser of a registered estate where it is recorded in the register (by entry of a notice) at the time of the purchase.

Do consultees agree?

Retrospectivity

6.33 If the LRA 2002 were to be amended in line with our provisional proposals, we think that the amendment may need to operate retrospectively. The amendment may need to apply to applications that have been made to register a notice of CRL since the LRA 2002 came into force, and to transfers of registered estates that have taken place since 13 October 2013.

6.34 It is possible that the amendment of the LRA 2002 we propose would clarify but not change the law. We acknowledge in Chapter 5 that, if CRL has evolved over the years into a direct burden on land, CRL may already constitute an interest affecting a registered estate under the LRA 2002. Furthermore, it may be possible to interpret the LRA 2002 so that it applies to CRL even if CRL is a personal obligation rather than an interest in land. If either of those possibilities were to be the case, then even if our proposed amendment is deemed to have had effect since the LRA 2002 came into force, the amendment would not be genuinely retrospective. The amendment would merely clarify that the LRA 2002 has always applied to CRL.

6.35 However, we must address the possibility that the amendment of the LRA 2002 set out in Consultation Question 4 above could be a substantive change to the law. We explain in Chapter 5 that there are reasonable grounds on which it could be argued that the LRA 2002 does not apply to CRL. If those arguments were to be correct, then amending the LRA 2002 to apply it to CRL, and *backdating* the amendment to when the LRA 2002 came into force, would be a retrospective change to the law. There is a presumption that Parliament will not amend the law retrospectively. However, this is one of the rare cases in which, we think, retrospective legislation could be justified.

6.36 The primary reason for considering a retrospective amendment of the LRA 2002 is that it would bring the Act in line with widely held public perceptions of the current law and with Government guidance on the law (if, that is, the amendment changes the law at all). It is generally assumed that CRL is registrable (by entry of a notice) under the LRA 2002 and that a purchaser of registered land is not bound by an unregistered CRL. It was thought that parochial church councils needed to protect their rights to CRL by 13 October 2013 or lose them on a sale of registered land. Until 13 October 2013, CRL was listed as an overriding interest as a result of an order made by the Lord Chancellor amending the LRA 2002.[22] In explaining that order, Government announced that from 13 October 2013, "the liability will only bind new owners of registered land if it is protected by an entry in the register".[23] Furthermore, HM Land Registry's Practice Guide 66, on former overriding interests, states that if a notice relating to CRL (and other manorial rights) were not recorded against registered land, "a person who acquires the registered estate for valuable consideration by way of a registrable disposition after 12 October 2013 [would] take free from that interest".[24]

6.37 Furthermore, if the amendment in Consultation Question 4 above were only to apply *prospectively*, it would provide *future* purchasers of registered land with certainty about whether their land might be subject to CRL. However, it would provide no certainty to purchasers who had acquired land after 13 October 2013 but before the new amending provision came into force. Indeed, our discussion in Chapters 2 to 5 of this consultation paper highlights doubts about the application of the LRA 2002 to CRL since 13 October 2013, which our draft clause would not fully resolve unless it were retrospective. Furthermore, there is a risk that amending the LRA 2002 prospectively might itself be taken to imply that the LRA 2002 did not previously apply to CRL. There is a presumption that Parliament does not legislate in vain – if the LRA

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22 The Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003.

23 Press release of 24 September 2003 from the Department for Constitutional Affairs.

24 HM Land Registry, Practice guide 66: overriding interests that lost automatic protection in 2013 (April 2018), para 5.2.

2002 is amended to apply to CRL, readers of the legislation may conclude that the Act did not previously apply to CRL. The amendment could even prompt a rush of applications to register new notices relating to CRL.[25]

6.38 We need to consider, however, whether a retrospective amendment of the LRA 2002 could cause prejudice or unfairness to any parties. In particular, a retrospective amendment could, in theory, unfairly prejudice a parochial church council in the following scenario. Suppose that the council deliberately chose not to protect CRLs in its parish by the entry of notices in the register. Suppose that the council made this choice because it had analysed the law and reasoned that CRL, as a personal liability, was not an interest affecting a registered estate. Consequently, the council concluded that CRL was not registrable by entry of notices under the LRA 2002. In considering retrospectivity, we are currently working on the supposition that this parochial church council was *correct* – the LRA 2002 did not apply to CRL as expected. Amending the LRA 2002 retrospectively to apply to CRL would therefore alter the legal basis on which this council had reasonably acted.

6.39 We do not believe that it is likely that retrospectively amending the LRA 2002 would cause the type of unfair prejudice described above. We understand that parochial church councils were aware of the (apparent) need to register CRLs before 13 October 2013. We think it is unlikely that any parochial church councils reached a firm conclusion that the LRA 2002 did not apply to CRL and then arranged their affairs on that basis. (It is likely that there would have been a reported court case if a parochial church council had insisted that an unprotected CRL was nevertheless binding on a person who had purchased registered land after 13 October 2013). Moreover, our legal analysis of the nature of CRL in this consultation paper is new; we are not aware of any other *published* analysis (on which parochial church councils could be relying) that suggests CRL is not an interest in land.

6.40 However, we are keen to hear from parochial church councils about whether they could be prejudiced by a retrospective amendment of the LRA 2002. This will be a crucial piece of evidence for us in deciding whether to recommend a retrospective amendment in our final report.

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[25] In 2015, the House of Commons Justice Committee published a report on the ten-year transitional period applied by the LRA 2002, under which various manorial rights remained overriding interests until 12 October 2013 and then ceased to be overriding. The report noted the large number of unilateral notices (notices registered without the consent of the landowner) relating to manorial rights that were entered in the register in the lead up to 12 October 2013 and the concern that the entry of these notices caused landowners. The report is available here: https://webarchive.nationalarchives.gov.uk/ukgwa/20250109094401mp_/https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2016/03/cp227_land_registration_web.pdf (last visited 15 July 2025).

Consultation Question 5.

6.41 We provisionally propose that the amendment of the LRA 2002 set out in Consultation Question 4 should operate retrospectively.

Do consultees agree?

6.42 We invite consultees' views about whether a retrospective amendment of the LRA 2002 could cause any prejudice or unfairness to anyone affected by or with the benefit of a chancel repair liability.

The draft clause in Appendix 3

6.43 In Appendix 3, we set out a draft clause that would implement the provisional proposal in Consultation Question 4 above. The draft clause also contains a subsection that would apply the clause retrospectively, implementing the provisional proposal in Consultation Question 5 above. However, the drafting should not be taken to imply that we have made a decision on retrospectivity. The subsection on retrospectivity could be removed or retained following consultation, depending on our final conclusions concerning any potential prejudice that could be caused by the provision.

6.44 Appendix 3 includes an explanation of how the draft clause is intended to work. We welcome views from consultees on the clause, including on whether it would successfully ensure the application of the LRA 2002 to CRL and on whether the clause could have any consequences that we have not anticipated.

Consultation Question 6.

6.45 We invite consultees' views about the draft clause set out in Appendix 3, including about whether the clause could successfully implement our provisional proposals in Consultation Questions 4 and 5.

Application to Wales

6.46 The LRA 2002 applies in both England and Wales. The law governing the registration of land is not devolved to the Senedd Cymru.[26] However, we explain in Chapter 4 that the law governing CRL in Wales may be different to that in England.[27] We believe that CRL may be an obligation that arises under ecclesiastical law – which is law that governs the Anglican Church. As a result of the Welsh Church Act 1914,[28] ecclesiastical law no longer applies in Wales. We think that the abolition of

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26 Government of Wales Act 2006, Sch 7A, para 182.

27 See paras 4.80 to 4.86 above.

28 S 3.

ecclesiastical law would have meant that CRL no longer existed in Wales, were it not for a "saving" provision of the 1914 Act.[29]

6.47 This saving provision in the 1914 Act preserved CRL insofar as it bound the owner of an unusual property right known as a "tithe rentcharge". (We explain tithe rentcharges in Chapter 4.[30] They were abolished by the Tithe Act 1936, but in some cases the owner of the rentcharge remained subject to CRL.) It is not clear whether CRL still attaches to the ownership of any plots of land in Wales. We think that, in Wales, CRL may now only burden some ecclesiastical bodies of the Church in Wales which acquired tithe rentcharges from the Welsh Church Commissioners who were appointed under the 1914 Act.

6.48 We welcome any information from consultees about the extent to which CRL still exists in Wales and, in particular, about whether the liability attaches to any areas of land in Wales. Furthermore, we welcome views about whether our provisional proposal for the reform of the LRA 2002 requires any modifications relating to the law in Wales.

Consultation Question 7.

6.49 We invite consultees' views concerning chancel repair liabilities in Wales, including about which (if any) bodies are still bound by these liabilities and whether chancel repair liability burdens any land in Wales.

6.50 We invite consultees' views about whether our provisional proposals in Consultation Questions 4 or 5 for the reform of the Land Registration Act 2002 requires any modifications in relation to its application to land in Wales.

Equality impact

6.51 We are do not believe that the issues discussed in this chapter and the provisional proposal for reform which we put forward have a different impact, or are likely to have a different impact, on individuals or groups with particular characteristics, including those that are protected under the Equality Act 2010. These characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.[31] Nevertheless, we seek views from consultees about whether our provisional proposal may have equality impacts for which we have not accounted.

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29 S 28.

30 See paras 4.13 to 4.17 above.

31 Equality Act 2010, s 4.

Consultation Question 8.

6.52 We invite consultees to tell us if they believe or have evidence or data to suggest that our provisional proposals in Consultation Questions 4 or 5 could result in advantages or disadvantages to certain groups or based on certain characteristics (including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation).

Chapter 7: Unregistered land, first registration, and chancel repair liability

INTRODUCTION

7.1 In Chapter 6, we discuss the possible reform of the law governing transfers of registered land to deal with problems posed by chancel repair liability ("CRL"). In this chapter, we consider the possible reform of the law governing transfers and first registration of unregistered land.

7.2 We start by explaining the law governing transfers of unregistered land, focussing on the rules that govern whether a purchaser of unregistered land is bound by interests affecting the land. We examine the Land Charges Act 1972 ("the LCA 1972"). We then consider how these rules may apply to CRL, taking account of the fact that the law concerning CRL is uncertain or open to multiple interpretations because of doubts as to the nature of the liability.

7.3 We next explain the law governing first registration of unregistered land under the Land Registration Act 2002 ("the LRA 2002"). There are some uncertainties about how this law applies to CRL, which parallel the other uncertainties about the application of the LRA 2002 which we examine in Chapters 5 and 6. Under the LRA 2002, the sale of an unregistered freehold estate triggers an obligation on the purchaser to register the estate within two months.[1] If the purchaser fails to register the estate within that period, the transfer of the legal title becomes void (so legal ownership of the estate rebounds to the seller, who then holds it on trust for the buyer).[2] Consequently, while a sale of unregistered land starts off being governed by the law of unregistered conveyancing, the land will end up being brought within the legal regime for registered land.

7.4 We then discuss possible reform of the provisions of the LRA 2002 governing first registration and of the law governing unregistered conveyancing.

(1) We provisionally propose that the LRA 2002 should be amended to make clear that CRL must be noted in the register during first registration of an estate in order to continue to bind the estate. We also provisionally propose that it should be put beyond doubt that CRL can be the subject of a caution against first registration.

(2) Finally, we consider whether the law governing unregistered conveyancing is in need of reform. We explain that there could be a problem concerning CRL for purchasers of unregistered land but that the problem is confined to a narrow set of facts. We are uncertain whether there is a sufficiently strong need for changing the law governing unregistered conveyancing, and we do not make provisional proposals for reform. However, we seek consultees' views about

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1 LRA 2002, ss 4 and 6.

2 LRA 2002, s 7.

whether there are any reforms that should be considered. We also ask consultees about their experience in relation to CRL and unregistered land in Chapter 8.

THE LAW GOVERNING TRANSFERS OF UNREGISTERED LAND

7.5 The general rule at common law is that anyone who acquires land will take that land subject to all existing legal interests in the land. However, a purchaser of land for valuable consideration who has no notice of an equitable interest affecting the land will not be bound by that interest.

7.6 This general rule relies on a distinction between legal and equitable interests in land. The distinction arose at a time when there were separate courts of law and equity.

(1) Legal interests in land are those that were recognised and enforced by the courts of law. They either formed part of the common law of England and Wales or were created by Acts of Parliament. Many legal interests in land can only be granted if the landowner complies with particular formalities. The most significant of these formalities is set out in section 52(1) of the Law of Property Act 1925 ("the LPA 1925"): "All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed".[3]

(2) Unlike legal interests, equitable interests were not originally interests in land at all. Rather, where it would have been unconscionable for the landowner to insist on their strict legal rights, an aggrieved party could apply to the Lord Chancellor, and later to the Court of Chancery, for a remedy. The remedy given might have been that the applicant was treated *as if* they had a legal interest in the land. Over time, patterns emerged where the courts of equity would give the same remedy in many cases that raised the same kind of unconscionability, which developed into the recognition of forms of "equitable" interest.

7.7 As we discuss in Chapter 5,[4] the distinction between legal and equitable interests was partially codified by section 1 of the LPA 1925. Under subsection (1), freehold and leasehold estates are the only estates in land capable of existing at law, and subsection (2) lists all the interests which are capable of being legal interests in land. Under subsection (3), all other interests in land are equitable.

7.8 The common-law rule – that purchasers of land for value are bound by all legal interests but only bound by equitable interests of which they have notice – has been modified by statute. Where land is registered, transfers are governed by the LRA 2002. The distinction between legal and equitable interests is only of limited relevance under the LRA 2002.[5] Unless an interest is overriding, a purchaser of land is only bound by an interest (equitable or legal) affecting the land if the interest is recorded in the register. An overriding interest is an interest that does not need to be recorded in

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3 Various exceptions are, however, listed in section 52(2).

4 See paras 5.25 to 5.30 above.

5 See para 5.71 above.

the register in order to bind a purchaser of registered land. The lists of overriding interests under the LRA 2002 include both equitable and legal rights.[6]

7.9 By contrast, the common-law rule is still relevant to unregistered land. Its application is also modified by statute – by the LCA 1972 – but in a more limited way. The LCA 1972 is not a complete code and where it does not apply, the general common-law rule still operates.

The Land Charges Act 1972

7.10 Section 2 of the LCA 1972 lists various interests in land and obligations on landowners that can be registered as land charges. The list includes some of the most common equitable rights over land, including restrictive covenants and estate contracts.[7] However, the list of land charges is not limited to equitable interests and obligations. It includes various statutory charges on land. It also contains a legal interest in land: a puisne mortgage.[8]

7.11 The registration regime under the LCA 1972 is problematic.[9] In particular, land charges must be registered against the name of the estate owner whose estate is affected by the relevant interest.[10] A prospective purchaser of unregistered land cannot search for land charges registered against the (freehold or leasehold) *estate* they are intending to acquire. They must search for land charges registered against the name of the seller, and against the names of the seller's predecessors in title (potentially back to 1926 when the land charges regime came into force). Those names may appear from the seller's title deeds, but unless the parties agree otherwise, a seller of unregistered land is only required to demonstrate a 15-year root of title.[11]

The effect of registering a land charge

7.12 Under section 198 of the LPA 1925, the registration of a right or interest under the LCA 1972 is deemed to constitute actual notice of the right or interest to all persons who have any dealings with the land. Once a land charge is registered, therefore, a purchaser cannot take free of the corresponding right or interest under the equitable principle that protects purchasers for value without notice.

7.13 Section 198 is supplemented by the provisions in the LCA 1972 which deal with the consequences of failing to register a land charge. The LCA 1972 divides land charges into six classes (A to F). The majority of land charges are forms of financial liability on land, including various types of statutory charge, annuities, second mortgages and equitable mortgages. For most types of land charge, section 4 of the LCA 1972

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6 LRA 2002, Schs 1 and 3.

7 Equitable interests in land that a purchaser acquires once they have agreed an enforceable contract for the acquisition of the land.

8 Puisne" means "inferior" – puisne mortgages are typically second mortgages of land already incumbered by a first mortgage.

9 See the criticisms set out in *Megarry and Wade: the Law of Real Property* (10th ed 2024), paras 5-083 to 5-088.

10 LCA 1972, s 3(1).

11 LPA 1925, s 44(1), as amended by the Law of Property Act 1969, s 23.

provides that the relevant right or interest is "void as against a purchaser of the land charged with it or any interest in such land", unless the right or interest is registered as a land charge. A "purchaser" is defined under section 17(1) as "any person (including a mortgagee or lessee) who, for valuable consideration, takes any interest in land or in a charge on land".

7.14 Two groups of land charges require special mention:

(1) class C(iv) land charges, which are post-1925 estate contracts; and

(2) class D land charges, which include restrictive covenants and equitable easements.[12]

These classes of land charge are subject to a special rule. If not registered as land charges, such interests are "void as against a purchaser for money or money's worth … of a legal estate in the land charged with it".[13] Unlike other land charges, they are void only as against a purchaser of a legal interest in land, not as against a purchaser who acquires an equitable interest. Furthermore, they are only void as against a purchaser *for money or money's worth*, and so (for example) acquiring the land in consideration of a marriage will not suffice.

7.15 There are two other registers under the LCA 1972: the register of pending actions and the register of writs and orders affecting land. We do not discuss either register in this chapter, because neither is relevant to CRL.

The Local Land Charges Act 1975

7.16 It is also relevant to consider the provisions of the Local Land Charges Act 1975 ("the LLCA 1975"). This Act sets out a regime for registering local land charges, which can affect both registered and unregistered land. Broadly speaking, local land charges are charges, restrictions or obligations that benefit local authorities or other public bodies. Local land charges are generally statutory burdens on land, created under specific Acts of Parliament which provide for the local land charge to bind successive owners of a particular piece of land.

7.17 For example, under section 106 of the Town and Country Planning Act 1990, a landowner can agree with their local planning authority to undertake obligations concerning the use of their land (for example, to provide a certain number of parking spaces for the use of the public). Under subsection (3), the obligations are binding on the landowner and on any person deriving title from them. Subsection (11) states that a planning obligation is a local land charge for the purposes of the LLCA 1975.

7.18 The relevant local authority or public body generally has an obligation to register a local land charge against the affected land. However, a failure to register a local land charge does not make the charge void or unenforceable against a purchaser of that land. An unregistered local land charge is still binding on a purchaser. Rather, section

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12 Class D land charges also include Inland Revenue charges, but we do not discuss these.

13 LCA 1972, s 4(6).

10 of the LLCA 1975 contains a compensation scheme, which applies where a purchaser of land is bound by a local land charge that ought to have been registered.

Chancel repair liability and unregistered land

7.19 At the beginning of Chapter 6, we give a summary of the conclusions from our examination of CRL in Part 1 of this consultation paper.[14] We do not generally repeat that summary here, but we do reiterate two uncertainties concerning CRL. Each of these uncertainties has a bearing on transfers of unregistered land. For an explanation of the nature of CRL, rectories and rectorial property, see the summary in Chapter 6 or the detailed discussion in Chapters 2 to 5.

7.20 First, in Chapter 5, we examine section 1 of the LPA 1925.[15] Subsection (2) lists the interests in land that are capable of existing at law. All other interests are equitable under subsection (3). We note in Chapter 5 that CRL does not appear to be included under subsection (2). We explore some doubts about whether CRL is an interest in land. If CRL is an interest in land, however, then it arguably became an equitable interest when section 1(3) of the LPA 1925 was brought into force. CRL is not registrable as a land charge under the LCA 1972. If CRL has become an equitable interest, it is only binding on a purchaser of unregistered land if they have notice of the liability.

7.21 Secondly, we note in Chapter 4 that there is an uncertainty about how a person becomes bound by CRL.

(1) On one interpretation of the law, a person only becomes bound if they are transferred a (portion of) a lay rectory, which is a bundle of property, rights and obligations that used to belong to parish priests. A person who acquires a rectory should know that they may be subject to CRL.

(2) However, on another interpretation of law (following, in particular, the decision of the High Court in *Chivers & Sons Ltd v Air Ministry* ("*Chivers*")[16]), any person who acquires property that used to belong to a lay rectory automatically becomes subject to CRL.

7.22 If CRL was not transformed into an equitable interest by the LPA 1925, then (in line with our analysis in Chapters 2 to 4) CRL binds the owner of a lay rectory as a matter of law, not equity. Furthermore, if the decision in *Chivers* was correct, a person who acquires former rectorial property automatically becomes a lay rector, subject to CRL. Consequently, on one possible interpretation of the law, a purchaser of unregistered land may become bound by CRL regardless of whether they knew about, or could have discovered, the existence of the liability.

7.23 In Chapter 6, we discuss the prejudice that may be caused to a person who acquires land and becomes bound by a CRL of which they had no knowledge (and could not

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14 See paras 6.6 to 6.12 above.

15 See paras 5.25 to 5.33 above.

16 [1955] Ch 585.

reasonably have acquired knowledge).[17] We explain that the LRA 2002 was expected to ensure that a purchaser of registered land will not become bound by a CRL unless it is recorded in the register. We offer a provisional proposal in Chapter 6 intended to ensure that the LRA 2002 does indeed have this effect. Our proposal is of no assistance, however, to purchasers of unregistered land, who may still be bound by a CRL of which they are not aware.

THE LAW GOVERNING FIRST REGISTRATION

7.24 We mention at the beginning of this chapter that, under the LRA 2002, the sale of an unregistered freehold estate triggers an obligation on the purchaser to apply for first registration of the estate. Importantly, a sale of unregistered land takes effect before first registration takes place. The purchaser does not need to apply for first registration in order to become the legal owner of the land – they become the legal owner as soon as the conveyance of unregistered land is completed. Whether the purchaser is bound by an interest affecting the land is determined, in the first instance, by the law governing transfers of unregistered land, set out above.

7.25 However, when a purchaser of unregistered land applies for first registration, they bring the land within the scheme of the LRA 2002. The LRA 2002 applies a further layer of rules that determine what interests remain binding on the estate following first registration.

7.26 Section 11 of the LRA 2002 describes the effect of the first registration of a freehold estate with absolute title.[18] . Section 11(4) states that the first registered proprietor, registered with absolute title, is vested with the estate "*subject only* to the following interests affecting the estate at the time of registration" (our emphasis):

(1) interests which are the subject of an entry in the register in relation to the estate;

(2) "overriding interests" listed in Schedule 1 to the Act; and

(3) interests acquired under the Limitation Act 1980 (meaning interests of adverse possessors of the land) of which the purchaser has notice.

7.27 Subsection (5) clarifies that first registration does not affect trusts of land: the estate is vested in the first registered proprietor subject to the interests of any beneficiaries under the trust.

7.28 We discuss the nature of overriding interests in Chapter 6, where we note that an overriding interest binds a purchaser of registered land even if the interest is not recorded in the register.[19] In relation to first registration, an overriding interest is an

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17 See paras 6.20 to 6.21 above.

18 Most estates are registered with absolute title, but an estate may be registered with a lesser title "where some evidence is lacking or a defect in the title is apparent, so making it unsafe for HM Land Registry to guarantee the owner absolutely against the risk of some other person claiming a right in the land" (HM Land Registry, Practice guide 42: upgrading the class of title (February 2020), para 2.1).

19 See para 6.11 above.

interest that will *continue* to bind the estate even if the interest is not recorded in the register during first registration.

7.29 It may not be immediately obvious what section 11 means when it refers to the first registered estate being bound by interests which are the subject of an entry in the register. As the estate is being registered for the first time, there is no registered title and so there are *no* entries in the register. However, section 11 is referring to entries that are made in the register during the process of first registration. The LRA 2002 does not specify which interests are to be entered in the register. This issue is addressed by the Land Registration Rules 2003 ("the LRR 2003")[20] and the application form for first registration which is prescribed by HM Land Registry (Form FR1).

(1) Under rule 28 of the LRR 2003, an applicant for first registration must disclose any overriding interests affecting the estate of which they are aware. These interests will then be recorded in the register by the registrar. After an overriding interest has been recorded by the entry of a notice in the register, it ceases to be overriding.[21] If the notice were in future to be removed, the interest would not become overriding again, and so it would be lost on a subsequent sale of the registered estate.

(2) Form FR1 requires an applicant for first registration to state (in box 12) whether the estate is subject to any interests other than the overriding interests that are disclosed under rule 28.

(3) Under rule 35 of the LRR 2003, "the registrar must enter a notice in the register of the burden of any interest which appears from his examination of the title to affect the registered estate".

7.30 There are, furthermore, two other ways in which interests affecting an estate may come to the registrar's attention during first registration (and so may come to be recorded in the register).

7.31 First, an interest affecting an unregistered estate may be registered as a land charge. HM Land Registry manages the register of land charges, in addition to the register of title for registered land. The LRA 2002 and the LRR 2003 do not explicitly state what the registrar must do if an interest is registered as a land charge but the interest is not mentioned in form FR1 or revealed in the documents of title submitted with the application for first registration. However, HM Land Registry's Practice Guide 1 on first registrations states that applicants are required to carry out a search for land charges registered against the name of the person from whom they acquired the unregistered land.[22] (They are not required to conduct any search for charges registered against the names of that person's predecessors in title.) The results of the search must be sent to HM Land Registry. If an interest is revealed by the land charges search, it must be addressed in box 12 of form FR1. We also note that rule 17 of the LRR 2003 permits the registrar to refuse to proceed with an application if they consider "the

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20 SI 2003 No 1417.

21 LRA 2002, s 29(3).

22 HM Land Registry, Practice guide 1: first registrations (December 2024), para 4.4.5.

production of any further documents or evidence or the giving of any notice is necessary or desirable". Rule 30 permits the registrar to require an applicant for first registration to make further searches and enquiries, give notices to other persons, or advertise their application.

7.32 Secondly, the LRA 2002 includes a scheme for registering cautions against first registration. Anyone who claims to be entitled to an interest affecting an unregistered estate in land may apply to register a caution against the first registration of that estate.[23] If HM Land Registry receive an application to register the affected estate, they must notify the cautioner about the application.[24] This gives the cautioner an opportunity to object if the application for first registration does not mention their interest. If the objection cannot be resolved by agreement, it will be referred to the First-tier Tribunal.[25]

7.33 There is nothing to stop the beneficiary of an interest that is registered as a land charge from also protecting their interest by registering a caution against first registration. Registering a caution can help ensure that the interest will not be overlooked during first registration.

First registration and chancel repair liability

7.34 Until 13 October 2013, CRL was listed as an overriding interest in Schedule 1 to the LRA 2002. It was listed in Schedule 1 because of an order made by the Lord Chancellor in 2003 amending the LRA 2002 ("the 2003 Order").[26] We discuss the circumstances in which the 2003 Order came to be made in Chapter 1.[27] It was expected at the time of the 2003 Order that, from 13 October 2013, CRL would only bind an estate following first registration if it were recorded in the register by entry of a notice.

7.35 In Chapter 5, we discuss some uncertainties about whether the LRA 2002 applies to CRL. We summarise our conclusions in Chapter 6.[28] It is arguable that CRL is not an interest in land, and consequently it is also arguable that it is not "an interest affecting an estate" for the purposes of the LRA 2002.

7.36 It is therefore also arguable that CRL is not affected by section 11 of the LRA 2002. Section 11 of the LRA 2002 determines whether interests that affect an unregistered estate will continue to bind the estate when first registration is completed. The provision says nothing about other rights or obligations on landowners that do not constitute interests affecting an estate. It is therefore possible that CRL will continue to bind the proprietor of an estate following first registration even if a notice relating to

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23 LRA 2002, s 15(1).

24 LRA 2002, s 16(1).

25 LRA 2002, s 73(7). The registrar may only decide not to refer the matter to the tribunal if they are satisfied the objection is "groundless" (s 73(6)).

26 The Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 (SI 2003 No 2341).

27 See paras 1.34 to 1.39 above.

28 See paras 6.6 to 6.12 above.

the liability is not entered in the register. The provisions on first registration in the LRA 2002 may not have the effect in relation to CRL that they were expected to have.

7.37 Moreover, if CRL is not an interest affecting an estate, then it is not possible to lodge a caution against first registration relating to CRL. Cautions can only be lodged on the application of a person who claims to be "entitled to an interest affecting a qualifying estate".[29]

Mistakes on first registration

7.38 We also note an issue about mistakes on first registration which we discussed in our 2018 report Updating the Land Registration Act 2002 ("the 2018 Report").[30] Under Schedule 4 to the LRA 2002, the registrar and the court have the power to alter the register for the purposes of correcting a mistake. The term "mistake" is not defined.[31] It has been clarified in case law that mistakes are not confined to administrative errors by the registrar.[32] Suppose that a fraudster impersonates the owner of a property and purports to sell it to an innocent third party. HM Land Registry registers the third party as the new owner of the property. It is established in case law that such a registration is a mistake regardless of whether there was any fault by the registrar.[33]

7.39 Consider the following example concerning the first registration of an estate that is subject to CRL.

> An unregistered freehold is subject to a CRL. The owner, F, is unaware of the fact that their land is affected by CRL (and has no reason to suspect that this CRL exists). Furthermore, the parochial church council has not registered a caution against first registration relating to the CRL.
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> F applies for first registration. F does not mention the CRL in their application form (Form FR1). The existence of the CRL is not revealed in the documents of title. Consequently, the registrar completes the registration of the freehold without entering a notice of the CRL against the title. If the LRA 2002 functions as intended, then, since CRL is no longer an overriding interest, section 11(4) should ensure that the (newly registered) freehold estate is no longer subject to CRL.
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> (We note that, as mentioned above, the LRA 2002 may not function as intended and section 11(4) might not apply to CRL.)

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29 LRA 2002, s 15(1)(b).

30 (2018) Law Com No 380.

31 For the purposes of indemnities, para 11(1) of Sch 8 to the LRA 2002 clarifies that a "mistake" can include anything mistakenly omitted from the register as well as anything mistakenly included in it, but provides no further guidance.

32 *Baxter v Mannion* [2011] EWCA Civ 120; [2011] 1 WLR 1594, at [25] by Jacob LJ.

33 "A registration obtained by a person not entitled to apply for it would be mistaken" (*Baxter v Mannion* [2011] EWCA Civ 120; [2011] 1 WLR 1594, at [24] by Jacob LJ). See also *NRAM Ltd v Evans* [2017] EWCA Civ 1013; [2018] 1 WLR 639, at [53] by Kitchin LJ.

7.40 In the circumstances described above, the applicant (F) has not breached their duty by failing to mention CRL in their application form. Moreover, the registrar does not appear to have breached their duty under rule 35 of the LRR 2003 – the existence of CRL was not revealed by their examination of the title.

7.41 We explained in our 2018 Report that, where an unregistered estate is burdened by an interest and the estate is registered for the first time, the register may contain a mistake if the interest is not recorded. Our discussion in the 2018 Report was not specific to CRL, but we were particularly concerned with interests that ceased to be overriding on 13 October 2013 (which include CRL and several ancient manorial rights). The notion of a mistake is substantive, not procedural. In the 2018 Report, we explored an argument from academic commentary on the LRA 2002 that first registration is not generally intended to affect what interests are binding on an estate.[34] If the state of a landowner's title is not fully reflected in the register following first registration, that may imply that the register contains a mistake. The law is unclear; the question of what actions or omissions may qualify as a mistake during first registration has not yet been comprehensively considered by the court.

7.42 It is therefore possible that the parochial church council may be able to apply to have the register altered to record their CRL. If the council's application is successful, the CRL will then become binding on F once again. Furthermore, if the alteration of the register prejudicially affects F's title, then it would count as "rectification" under the LRA 2002.[35] The issue of whether an alteration counts as rectification is important. Where the register is rectified, or where the court or the registrar refuse to make an alteration that would have amounted to rectification, an indemnity may be payable under Schedule 8 to the LRA 2002.[36] Consequently, the outcome of the parochial church council's application may be that either F or the council seeks to argue that an indemnity should be paid out of HM Land Registry's indemnity fund, depending on whether the register is rectified.

7.43 We made the following recommendation in our 2018 Report (Recommendation 30):

> We recommend that alteration or rectification of the register should not be possible in respect of an interest that ceased to be overriding on 13 October 2013, where first registration of the affected estate takes place on or after that date. An exception should be made, however, where on first registration HM Land Registry omitted a notice in relation to that interest that should have been entered under rule 35 of the LRR 2003, or overlooked a caution against first registration.[37]

7.44 Government is still considering whether to accept Recommendation 30.[38]

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34 2018 Report, paras 13.232 to 13.235.

35 LRA 2002, Sch 4, para 1.

36 LRA 2002, Sch 8, para 1(1)(a) and (b)

37 2018 Report, para 13.266, Recommendation 30. The recommendation would be implemented by clause 23 of the Land Registration (Amendment) Bill published with our report.

38 Department for Business and Trade, Department for Business, Energy and Industrial Strategy, *Law Commission review of the Land Registration Act 2002: government full response* (updated March 2021) paras 24 to 29,

REFORMING THE LAW: FIRST REGISTRATION AND UNREGISTERED CONVEYANCING

7.45 Following our summary, set out above, of the law governing transfers of unregistered land and concerning first registration under the LRA 2002, in the remainder of this chapter we consider two possible reforms of the law.

(1) First, we make a provisional proposal to amend the LRA 2002 to clarify that a CRL that is not recorded in the register during first registration ceases to bind the newly registered estate. We also provisionally propose that the LRA 2002 should be amended to put beyond doubt that CRL can be protected by lodging a caution against first registration. These proposals parallel the provisional proposal for reform of the LRA 2002 we made in Chapter 6.[39]

(2) Secondly, we consider whether any further reform is needed to the law of unregistered conveyancing. We consider whether there are circumstances in which a purchaser of unregistered land may be bound by a CRL of which they were unaware and could not reasonably have become aware. We explain that there is still a potential problem with unregistered conveyancing, but we think that it can only arise in very few cases and that it is not easy to solve. We seek consultees' views on whether the law of unregistered conveyancing needs reform and about the nature of any reform.

Reforming the Land Registration Act 2002: first registration and cautions

7.46 In Chapter 6 we explain that, contrary to the expectations at the time of the 2003 Order and the widespread public understanding of the effect of that order, the LRA 2002 may not apply to CRL in the way that was anticipated. There may have been no problem when CRL was listed as an overriding interest under the LRA 2002, because overriding interests are rights that do not need to be registered in order to continue to effect registered land. When CRL ceased to be an overriding interest on 13 October 2013, it was generally understood that it would be subject to the substantive provisions in the LRA 2002, including section 11 on first registration and the LRA 2002's scheme for lodging cautions. Nevertheless, there is a risk that CRL is not an interest affecting a registered estate (as defined by the LRA 2002), and so these provisions of the Act may fail to apply to CRL.

7.47 In order to ensure that the LRA 2002 has the effect that was expected, we provisionally propose in Chapter 6 that the application of the LRA 2002 to CRL should be clarified.[40] That provisional proposal focusses on transfers of registered land and the registration of notices. However, the same considerations that we discuss in Chapter 6 apply equally to first registration. The expectation behind the 2003 Order was that CRL would not override first registration, and so CRLs that are not recorded in the register should cease to bind following first registration. It was also expected

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https://webarchive.nationalarchives.gov.uk/ukgwa/20241208140419/https://www.gov.uk/government/publications/land-registration-act-2002-government-response-to-the-law-commission-review/law-commission-review-of-the-land-registration-act-2002-government-full-response (last visited 15 July 2025).

39 See Consultation Question 4 at para 6.32 above.

40 See Consultation Question 4 at para 6.32 above.

that parochial church councils would be able to protect themselves by lodging cautions against first registration relating to CRL.

Our provisional proposal

7.48 We therefore provisionally propose that the LRA 2002 should be amended to clarify its application to CRL during first registration. We seek views from consultees concerning this potential amendment.

Consultation Question 9.

7.49 We provisionally propose that the Land Registration Act 2002 should be amended to clarify that:

(1) chancel repair liability only binds an estate following first registration where the liability is recorded in the register (by entry of a notice) during first registration; and

(2) a caution against first registration is capable of being lodged in respect of chancel repair liability.

Do consultees agree?

Retrospectivity

7.50 We explain in Chapter 6 that the amendment we provisionally propose in Consultation Question 4 to the provisions in the LRA 2002 governing transfers of registered land may need to operate retrospectively (and so be backdated to the time when the LRA 2002 came into force). The same considerations apply to our provisional proposal in Consultation Question 9 above. Applying the amendment retrospectively would ensure the LRA 2002 has functioned in the way in which it was widely assumed to function. It would also prevent questions arising (potentially from the analysis in this consultation paper) about the effect of first registrations on CRL that have taken place since 13 October 2013 but before the amendment we proposed is implemented.

7.51 However, as in Chapter 6, we are keen to hear from consultees (and, in particular, from parochial church councils) about whether amending the LRA 2002 retrospectively could cause any unfairness or prejudice.

Consultation Question 10.

7.52 We provisionally propose that the amendment of the Land Registration Act 2002 set out in Consultation Question 9 should operate retrospectively.

Do consultees agree?

7.53 We invite consultees' views about whether a retrospective amendment of the Land Registration Act 2002 could cause any prejudice or unfairness to anyone affected by or with the benefit of a chancel repair liability.

The draft clause in Appendix 3

7.54 The draft clause set out Appendix 3 would implement the provisional proposals in Consultation Questions 9 and 10 above, in addition to the provisional proposals in Chapter 6. Appendix 3 explains how the draft clause implements these proposals. We welcome views from consultees on the clause, including on whether the draft clause would successfully ensure that LRA 2002's provisions governing first registration would apply to CRL and on whether the clause could have any consequences that we have not anticipated.

Consultation Question 11.

7.55 We invite consultees' views about the draft clause set out in Appendix 3, including about whether the clause could successfully implement our provisional proposals in Consultation Questions 9 and 10.

Application to Wales and equality impact

7.56 We also repeat the questions we asked in Chapter 6 about the application of our provisional proposals to land in Wales, and about the impact of our provisional proposals on individuals or groups with particular characteristics, including those that are protected under the Equality Act 2010. A fuller discussion of Welsh devolution and of equality impacts under the 2010 Act can be found in Chapter 6.[41]

Consultation Question 12.

7.57 We invite consultees' views on whether our provisional proposals in Consultation Questions 9 and 10 require any modifications in relation to their application to Wales.

[41] See paras 6.46 to 6.52 above.

Consultation Question 13.

7.58 We invite consultees' views if they believe or have evidence or data to suggest that our provisional proposals in Consultation Question 9 or 10 could result in advantages or disadvantages to certain groups or based on certain characteristics (including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation).

Does the law governing unregistered conveyancing also need reform?

7.59 The second possible law reform we consider in this chapter concerns transfers of unregistered land. We start by considering whether there is a problem with unregistered conveyancing – specifically, whether purchasers of unregistered land may become bound by CRLs of which they are unaware and have no reasonable means of discovering. We conclude that there may be a problem, but we think it arises far more rarely than might seem to be the case initially. We explain that we are not sure that this problem is sufficiently likely to arise to call for law reform, but we set out some possible solutions. Each of these possible solutions have their drawbacks. We seek consultees' views about whether law reform is required and, if it is required, about the approach that should be taken.

Is there a problem concerning chancel repair liability and unregistered conveyancing?

7.60 We explain above that the legal status of CRL and how it relates to the ownership of land is uncertain.[42] However, on one interpretation of the law, which is supported by some 20th century case law, CRL is a legal burden that automatically binds anyone who purchases land that formerly belonged to a lay rectory.

7.61 It is possible, therefore, that a purchaser of unregistered land may become bound by a CRL that is not mentioned in the conveyance or the title deeds to the land. Furthermore, CRL is not registrable as a land charge under the LCA 1972 or as a local land charge under the LLCA 1975. At first sight, therefore, CRL may present a conveyancing trap for purchasers of unregistered land – they might acquire land subject to a liability about which they have no knowledge, and which is not taken into account in determining the price of the land. Moreover, the burden of CRL may be severe. These are the same considerations that we discuss in Chapter 6, which explain why the 2003 Order only preserved CRL in the list of overriding interests under the LRA 2002 for ten years and which motivated our provisional proposals for reform of the LRA 2002.

7.62 However, the circumstances in which a purchaser of unregistered land may become bound by a CRL of which they had no knowledge are rarer than they might appear. First, the vast majority (89%) of land in England and Wales is registered.[43] Some of the remaining unregistered land belongs to the Crown, and some consists of estuaries and foreshore that could not be subject to CRL. Given that a purchase of unregistered

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42 See paras 7.19 to 7.22 above.

43 HM Land Registry, *Annual Report and Accounts 2023-24: Working together* (2024), p 4.

land triggers an obligation to apply for first registration, purchases of unregistered land will continue to become increasingly rare. That said, at the present time, transactions involving unregistered land still occur with reasonable frequency. For example, HM Land Registry completed 7,124 applications for first registration by account holders in May 2025, having received similar numbers in previous months in 2025 and 2024.[44]

7.63 Secondly, the registers of land charges and local land charges are not the only registers that a purchaser of unregistered land will examine. They will also check the register of cautions against first registration. (They could also obtain a chancel repair search, although one of the issues addressed in this consultation paper is whether these additional conveyancing costs can be avoided.) Our provisional proposal in Consultation Question 9 above would ensure that cautions relating to CRLs can be lodged. However, we understand that parochial church councils with the benefit of CRLs affecting unregistered land are likely to have taken steps to lodge cautions in the run up to 13 October 2013, to avoid the risk that those liabilities might be lost on first registration after they ceased to be overriding interests.

7.64 We are keen to know whether our understanding is correct. Therefore, in responding to our consultation question below (Consultation Question 14), we would welcome confirmation from parochial church councils about whether they have the benefit of any CRLs affecting unregistered land that they have not yet protected by lodging a caution. If CRL appears in the register of cautions against first registration, a purchaser of unregistered land should be able to discover the existence of the liability. If most CRLs affecting unregistered land are now the subject of cautions, then there may be little need to reform the law of unregistered conveyancing to ensure that CRLs can come to the attention of purchasers of unregistered land.

7.65 Thirdly, if a purchaser of unregistered land is unaware that the land is subject to CRL (because it is not mentioned in the title deeds) *and* no caution against first registration relating to the CRL has been lodged, it is likely that the purchaser will ultimately not be bound by the liability in any case. A purchase of unregistered land triggers an obligation to apply for first registration. If the applicant is unaware of any CRL, CRL is not mentioned in the title deeds, and no caution has been lodged, the liability is unlikely to come to the registrar's attention. The registrar will not know to enter a notice of the liability in the register. Consequently, if our provisional proposal concerning section 11 of the LRA 2002 were to be implemented, the purchaser of the unregistered land would not be bound by the CRL once first registration is completed.

7.66 There is still a risk that a parochial church council could apply to alter the register after the completion of first registration, so that CRL becomes binding on the purchaser once again. However, this potential problem is addressed by Recommendation 30 from our 2018 Report, which we discuss above.[45] This recommendation would prevent the register from being altered following first registration to record a CRL that had not been revealed in the documents of title or been the subject of a caution.

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44 HM Land Registry, Transaction Data, "Number and type of applications by all account customers", https://use-land-property-data.service.gov.uk/datasets/td/download (last visited 15 July 2025).

45 See paras 7.38 to 7.44 above.

7.67 Notwithstanding the above, there is a small possibility that a parochial church council might realise that unregistered land subject to CRL has been sold and notify HM Land Registry about the existence of the liability before the completion of first registration. We think that it is only in these rare circumstances that a purchaser of unregistered land may end up being bound by a CRL of which they had no knowledge. We are not sure that there is a sufficiently strong case to reform the law of unregistered conveyancing to deal with this narrow set of facts, particularly given that any reform is likely to place additional administrative costs on HM Land Registry and parochial church councils. However, we welcome consultees' views about whether reform might be justified.

Options for reform

7.68 If consultees believe that there is a case for reforming the law of unregistered conveyancing to ensure that a purchaser of unregistered land can never be bound by a CRL which they could not reasonably have discovered, we think there are three possible reforms that could be considered.

(1) First, CRL could become a local land charge. Unlike other local land charges, the LLCA 1975 could provide that unregistered CRLs are not binding on purchasers of the affected land, rather than providing for compensation to be payable.[46]

(2) Secondly, the LRA 2002 could be amended so that, if a caution against first registration relating to CRL has not been lodged, the registrar *must not* enter a notice of the CRL during first registration of the affected land. In other words, a CRL that is not protected by a caution would always cease to bind an estate on first registration.

(3) Thirdly, the LCA 1972 could be amended so that CRL becomes registrable as a land charge.

7.69 We can, however, see that all three of these options could raise difficulties.

Registration as a local land charge

7.70 The local land charges regime applies to *both* registered and unregistered land and is separate from both the land charges register under the LCA 1972 and the register of title under the LRA 2002 (although the LRA 2002 lists local land charges as overriding interests[47]). If we were to make CRL a local land charge, in order to deal with registration issues concerning unregistered land, we would thereby make it an overriding interest under the LRA 2002. This would undermine our provisional proposals for reform of the LRA 2002 in Chapter 6 and in this chapter.

7.71 Consequently, if we were to make CRL into a local land charge, we may need to specify that, unlike other local land charges, it is *not* an overriding interest. Further, we

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46 A similar approach was taken by the Environment Act 2021, s 120, in relation to conservation covenants. Conservation covenants are local land charges, but the scheme for compensation in the LLCA 1975 does not apply to them. Instead, s 120 modified the application of the LLCA 1975 so that unregistered conservation covenants are not binding on transferees of the affected land.

47 LRA 2002, Schs 1 and 3, para 6.

would only want CRL to be a local land charge in respect of unregistered land. We are not aware of any other local land charge that functions in this way (that is, one that is not an overriding interest and that ceases to be a local land charge when the land it affects becomes registered). We think that a change along these lines may have an adverse effect on the cohesion of the local land charges register, which generally applies across both registered and unregistered land and, in registered land, is an overriding interest. We would also need to consider how to ensure that a local land charge relating to CRL is removed from the register when the affected land becomes registered.

Imposing consequences on a failure to lodge a caution against first registration

7.72 It may be possible to amend the LRA 2002 so that, in relation to CRLs alone, a caution against first registration needs to be lodged if a CRL is to continue to bind an estate following first registration. However, this option for reform involves using cautions in a way in which they were not intended to function. Cautions against first registration were intended to ensure that a person with an interest in land is notified about an application for first registration. They were not intended to have a substantive effect on that person's interests. As such, this approach risks undermining the cohesion of the LRA 2002.

Registration as a land charge

7.73 Finally, the LCA 1972 could be amended so that CRL is listed as a type of land charge. The consequence of this amendment would be that CRL would not be binding on a purchaser of unregistered land unless it is recorded in the land charges register.

7.74 This option for reform may raise some difficulties related to the way in which the register of land charges functions. As we mention in our summary of the law above, land charges are registered against the name of the landowner. If CRL were to become a land charge, parochial church councils would need to register these liabilities in the land charges register or they would be lost on a sale of the affected land. A parochial church council may have records of what land in their parishes is former rectorial land that may be affected by CRL. However, we are concerned that a parochial church council may have difficulty in ascertaining who owns the relevant unregistered land. They may then have difficulty in registering land charges against the names of the relevant landowners.

A transition period

7.75 If any of the three reforms set out above were to be pursued, there would be a question about whether the reform should be subject to a transition period. When the law was changed under the LRA 2002 so that CRL ceased to be an overriding interest, the change was made subject to a ten-year transition period. This period gave parochial church councils time to work out whether they had the benefit of any CRLs and to register them.

7.76 If CRL were to become registrable as a local land charge or a land charge, parochial church councils would need to be given a period of time in which to register CRLs that affect unregistered land. This period of time should be of sufficient length to allow parochial church councils to investigate the ownership of unregistered land subject to CRLs and to arrange the registration of local land charges or land charges. They

might also need to be given further time to lodge cautions against first registration if the consequences of failing to lodge a caution were to be changed.

7.77 However, parochial church councils should already be aware of whether they have the benefit of any CRLs affecting unregistered land. They were previously aware of the need to register cautions against first registration before 13 October 2013 because, after that date, CRLs affecting unregistered land might otherwise be lost on first registration. If consultees believe that there are grounds to reform the law governing unregistered conveyancing, we seek consultees' views about the appropriate length of any transitional period that should apply to the reform.

Consultation question

7.78 As we explain above, we are not currently convinced that there is a case for reforming the law governing CRL and unregistered conveyancing, except in relation to whether CRL can be protected by a caution against first registration (addressed in our provisional proposal in Consultation Question 9). However, we invite consultees' views on this point, and if reform is required, about which of the approaches outlined above is preferable. We also welcome views from parochial church councils about whether they have the benefit of any CRLs affecting unregistered land that they have *not* yet protected by lodging a caution.

Consultation Question 14.

7.79 We invite consultees' views about whether the law governing unregistered conveyancing should be reformed to ensure that a purchaser of unregistered land is not bound by chancel repair liability unless it appears in an appropriate register.

7.80 If consultees consider that reform is required, we invite consultees' views as to whether:

(1) chancel repair liability should be registrable as a local land charge under the Local Land Charges Act 1975;

(2) chancel repair liability should not be binding on an estate that is registered for the first time unless a caution against first registration relating to the liability has been lodged under the Land Registration Act 2002; or

(3) chancel repair liability should be registrable as a land charge under the Land Charges Act 1972.

7.81 If any of these reforms were to be pursued, we invite consultees' views about what transitional period should be applied to give parochial church councils a reasonable opportunity to protect any chancel repair liabilities that benefit them.

Chapter 8: The potential impact of reform

INTRODUCTION

8.1 In Chapters 6 and 7, we discuss the potential reform of the law governing the transfer of registered and unregistered land to deal with the issues arising from chancel repair liability ("CRL"). Chapter 6 focuses on possible amendments to the Land Registration Act 2002 ("the LRA 2002") in order to establish beyond doubt that CRLs are not binding on purchasers of registered land unless the liability is recorded in the register. Chapter 7 concerns potential reform of the law governing transfers and first registration of unregistered land.

8.2 In order to assess the potential impact of the provisional proposals for reform put forward in Chapters 6 and 7, we would like to hear from consultees about their experiences concerning CRL. This chapter provides a list of questions which we invite consultees to answer where they have relevant views, information or data.

EVIDENCE CONCERNING THE POTENTIAL IMPACT OF REFORM

8.3 We currently have two sources of information regarding the number of property transactions that involve CRL searches or insurance.

(1) In 2017, the Conveyancing Association assisted us by conducting a survey of its members concerning CRL. There were 129 responses from members of the Conveyancing Association. The data provided suggests that conveyancers undertake a CRL search in relation to roughly 25% of purchases of land. Additionally, the survey results suggest that CRL insurance is taken out without a prior search (called "non-search insurance") in roughly 30% of cases. The full results of this survey are set out in Appendix 2.

(2) Stakeholders in the insurance industry have told us that the five largest insurers who provide CRL insurance issue in the region of 150,000 policies each year. This estimate does not take into account polices offered by smaller providers.

8.4 In the 2023 to 2024 financial year, there were nearly one million property transactions in England and Wales with a value of £40,000 or more.[1] We have been told that CRL searches typically cost in the region of £30 to £40 for residential properties, but might cost up to £100 for larger tracts of land. In general, CRL insurance starts at around £15, but prices vary, particularly where there is greater risk that a property is subject to CRL.

8.5 At £15 each, the 150,000 insurance policies issued by the largest insurance providers amount to £2,250,000 per year. The data from the Conveyancing Association

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[1] Specifically 991,520 transactions (extrapolated from HM Revenue & Customs official statistics for property transactions over £40,000, available here: https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fmedia%2F685938505225e4ed0bf3cf29%2FMPT_Tab_Jun_25.ods&wdOrigin=BROWSELINK) (last visited 15 July 2025).

suggests that CRL insurance is obtained more frequently (possibly taking into account insurance offered by small providers). If 30% of property transactions include a £15 CRL insurance policy, that amounts to £4,500,000 per year. Obtaining CRL searches for £30 each in 25% of property transactions is a further £7,500,000 per year. These calculations do not account for cases where CRL insurance or searches are more expensive.

8.6 As the above information from the Conveyancing Association was collected in 2017, we are interested in obtaining more up-to-date data. Furthermore, the 2017 survey was directed only at solicitors and conveyancers. We would like to hear from a broad range of consultees who have encountered CRL in different capacities and have different perspectives concerning the liability. We would like to understand, for example, if owners of land are aware that their land is subject to CRL and how owners became aware of the existence of the CRL. We would also like information about the extent to which CRL is being enforced, so we are keen to hear from any owners of land who have been asked to pay for repairs to the chancel of their parish church. Additionally, we would like to obtain a fuller understanding of the insurance market relating to CRL and of conveyancers' practices and experiences in respect of CRL.

Consultation Question 15.

8.7 We invite consultees' views on the following matters.

8.8 Where consultees have been involved with the acquisition of land after 12 October 2013, we seek information about:

(1) whether a notice of chancel repair liability was registered against the property;

(2) whether a chancel repair search and/or chancel repair liability insurance was obtained;

(3) the costs of any search and/or insurance that was obtained; and

(4) if a search was carried out or insurance was obtained, the reason why a search or insurance was thought to be necessary.

8.9 Where consultees have been involved with multiple acquisitions of land that have occurred after 12 October 2013 (whether in a professional capacity as a conveyancer or solicitor, or otherwise), we seek information about:

(1) the number and percentage of cases in which a chancel repair search was carried out;

(2) the number and percentage of cases in which chancel repair liability insurance was taken out following a search;

(3) the number and percentage of cases in which chancel repair liability insurance was taken out without a search (called "non-search insurance"); and

(4) the average costs of—

(a) a chancel repair search;

(b) insurance following a search; and

(c) non-search insurance.

8.10 We invite consultees to specify whether and how any of their answers to the above questions depended on whether a notice of chancel repair liability was recorded against the title to the relevant land.

Consultation Question 16.

8.11 We invite consultees to specify whether their answers to the questions in Consultation Question 15 differ in respect to residential and commercial property.

Consultation Question 17.

8.12 We invite consultees who own or have had dealings with property affected by chancel repair liability to provide information about:

(1) whether they have been called upon to pay for repairs to the chancel of their parish church;

(2) whether they knew that they were liable for chancel repair liability prior to being called upon to pay for repairs and, if they did know, through what means (for example, because of a notice on the register at the time the land was acquired);

(3) if they have been requested to pay for repairs on multiple occasions, the frequency of these requests;

(4) the cost of any repairs for which they have paid; and

(5) whether they have ever "bought out" a chancel repair liability under section 52 of the Ecclesiastical Dilapidations Measure 1923, and if so, the amount that was required to compound the liability.

8.13 We invite consultees to tell us whether they have ever disputed their obligation to provide or pay for chancel repairs, or the extent of their liability for repairs, and about the outcome of any such dispute.

Questions for specific groups of consultees

8.14 We also seek further information from specific groups of consultees, namely:

(1) solicitors and conveyancers who have acted in relation to purchases of land affected by CRL, or where CRL searches or insurance were obtained;

(2) insurers, especially those providing CRL-related products; and

(3) church bodies, including dioceses, the Church Commissioners, and parochial church councils.

Solicitors and conveyancers

8.15 Given the amount of time that has passed since the Conveyancing Association's 2017 survey, we would welcome further information from solicitors and conveyancers regarding their experience with CRL and the use of CRL searches and insurance. We also wish to understand more about the reasons why solicitors or conveyancers may advise a client to arrange a chancel repair search or take out CRL insurance.

Consultation Question 18.

8.16 We invite views from consultees who are solicitors or conveyancers concerning the circumstances in which they might—

(1) advise a client who is purchasing registered land to conduct a chancel repair search or to obtain chancel repair liability insurance; or

(2) provide information about chancel repair liability insurance or searches to a client.

8.17 We also invite consultees to explain whether their advice or provision of information would change depending on whether or not there is a notice of chancel repair liability recorded against the title to the land.

Insurers

8.18 We also seek information from consultees in the insurance industry about the types of cover relating to CRL that are available and the premium(s) payable for a policy, and about the possible effects of our provisional proposals to amend the LRA 2002 on the insurance market.

Consultation Question 19.

8.19 We invite consultees in the insurance industry to provide information about:

(1) the number of chancel repair liability insurance policies they offer per year;

(2) what types of chancel repair liability insurance policy they offer;

(3) the average premium for different types of policy; and

(4) what factors affect the premium of a policy.

Consultation Question 20.

8.20 We invite views from consultees in the insurance industry about how the premium for obtaining chancel repair liability insurance would be affected if purchasers of registered land only seek chancel repair liability insurance where there is a notice of the liability registered against the land.

Church bodies

8.21 Finally, we seek evidence from church bodies, including dioceses, the Church Commissioners, and parochial church councils, about the extent to which they rely on

CRLs to fund the repair of parish churches. Furthermore, we welcome any information that can be provided by parochial church councils concerning the enforcement of CRLs, disputes over CRLs, and the level of payments they receive under CRLs.

Consultation Question 21.

8.22 We invite views from consultees who are church bodies, including dioceses, the Church Commissioners, parochial church councils and their advisors, concerning the following matters.

(1) To what extent have payments made by individuals who were subject to chancel repair liability been an important source of funds for parochial church councils in providing for the maintenance of parish churches, and to what extent are parochial church councils expecting to rely upon these payments in the future?

(2) On how many occasions have any parochial church councils claimed a contribution to the costs of repairing the chancel of their parish church from a person who is subject to chancel repair liability, and what sums of money have been claimed?

(3) If any parochial church councils have recovered payments under a chancel repair liability, did they need to take enforcement action under the Chancel Repairs Act 1932?

(4) Have any parochial church councils registered, or tried to register, a notice relating to chancel repair liability since 13 October 2013?

(5) Have any parochial church councils entered a caution against first registration relating to chancel repair liability since 13 October 2013?

Evidence concerning unregistered land

8.23 As we explained above, the survey conducted by the Conveyancing Association in 2017 was primarily concerned with CRL and registered land. However, we are also interested in obtaining information about the cost implications of CRL in relation to the conveyancing of unregistered land.

Consultation Question 22.

8.24 Where consultees have been involved in the acquisition of unregistered land (whether in a professional capacity as a conveyancer or solicitor, or otherwise), we invite them to tell us about:

(1) whether the land is or might be subject to chancel repair liability (regardless of whether a claim for payment has been made); and

(2) where the land is known to be subject to chancel repair liability, how that has become known (for example, through a caution against first registration or otherwise).

Consultation Question 23.

8.25 Where consultees have been involved in the acquisition of unregistered land (whether in a professional capacity as a conveyancer or solicitor, or otherwise), we invite them to tell us the amount paid for:

(1) a chancel repair search;

(2) insurance following a search; and

(3) insurance taken out without a search (called "non-search insurance").

8.26 Where consultees have been involved with multiple acquisitions of unregistered land (whether in a professional capacity as a conveyancer or solicitor, or otherwise), we seek information about:

(1) the number and percentage of cases in which a chancel repair search was carried out;

(2) the number and percentage of cases in which chancel repair liability insurance was taken out following a search;

(3) the number and percentage of cases in which non-search insurance was taken out; and

(4) the average costs of—

(a) a chancel repair search;

(b) insurance following a search; and

(c) non-search insurance.

Chapter 9: Consultation Questions

Consultation Question 1.

9.1 We invite consultees to inform us if there are any relevant authorities, canons, or legal or historical commentaries which we have not considered in Chapter 2.

Paragraph 2.76

Consultation Question 2.

9.2 We invite consultees to inform us if there are any relevant authorities, canons, or legal or historical commentaries which we have not considered in Chapter 3.

Paragraph 3.102

Consultation Question 3.

9.3 We invite consultees to inform us if there are any relevant authorities, statutes, or legal commentaries which we have not considered in Chapter 4.

Paragraph 4.98

Consultation Question 4.

9.4 We provisionally propose that the LRA 2002 should be amended to clarify that:

(1) a notice is capable of being entered in the register of title in respect of chancel repair liability; and

(2) chancel repair liability only binds a purchaser of a registered estate where it is recorded in the register (by entry of a notice) at the time of the purchase.

Do consultees agree?

Paragraph 6.32

Consultation Question 5.

9.5 We provisionally propose that the amendment of the LRA 2002 set out in Consultation Question 4 should operate retrospectively.

Do consultees agree?

9.6 We invite consultees' views about whether a retrospective amendment of the LRA 2002 could cause any prejudice or unfairness to anyone affected by or with the benefit of a chancel repair liability.

Paragraph 6.41

Consultation Question 6.

9.7 We invite consultees' views about the draft clause set out in Appendix 3, including about whether the clause could successfully implement our provisional proposals in Consultation Questions 4 and 5.

Paragraph 6.45

Consultation Question 7.

9.8 We invite consultees' views concerning chancel repair liabilities in Wales, including about which (if any) bodies are still bound by these liabilities and whether chancel repair liability burdens any land in Wales.

9.9 We invite consultees' views about whether our provisional proposals in Consultation Questions 4 or 5 for the reform of the Land Registration Act 2002 requires any modifications in relation to its application to land in Wales.

Paragraph 6.49

Consultation Question 8.

9.10 We invite consultees to tell us if they believe or have evidence or data to suggest that our provisional proposals in Consultation Questions 4 or 5 could result in advantages or disadvantages to certain groups or based on certain characteristics (including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation).

Paragraph 6.52

Consultation Question 9.

9.11 We provisionally propose that the Land Registration Act 2002 should be amended to clarify that:

(1) chancel repair liability only binds an estate following first registration where the liability is recorded in the register (by entry of a notice) during first registration; and

(2) a caution against first registration is capable of being lodged in respect of chancel repair liability.

Do consultees agree?

Paragraph 7.49

Consultation Question 10.

9.12 We provisionally propose that the amendment of the Land Registration Act 2002 set out in Consultation Question 9 should operate retrospectively.

Do consultees agree?

9.13 We invite consultees' views about whether a retrospective amendment of the Land Registration Act 2002 could cause any prejudice or unfairness to anyone affected by or with the benefit of a chancel repair liability.

Paragraph 7.52

Consultation Question 11.

9.14 We invite consultees' views about the draft clause set out in Appendix 3, including about whether the clause could successfully implement our provisional proposals in Consultation Questions 9 and 10.

Paragraph 7.55

Consultation Question 12.

9.15 We invite consultees' views on whether our provisional proposals in Consultation Questions 9 and 10 require any modifications in relation to their application to Wales.

Paragraph 7.57

Consultation Question 13.

9.16 We invite consultees' views if they believe or have evidence or data to suggest that our provisional proposals in Consultation Question 9 or 10 could result in advantages or disadvantages to certain groups or based on certain characteristics (including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation).

Paragraph 7.58

Consultation Question 14.

9.17 We invite consultees' views about whether the law governing unregistered conveyancing should be reformed to ensure that a purchaser of unregistered land is not bound by chancel repair liability unless it appears in an appropriate register.

9.18 If consultees consider that reform is required, we invite consultees' views as to whether:

(1) chancel repair liability should be registrable as a local land charge under the Local Land Charges Act 1975;

(2) chancel repair liability should not be binding on an estate that is registered for the first time unless a caution against first registration relating to the liability has been lodged under the Land Registration Act 2002; or

(3) chancel repair liability should be registrable as a land charge under the Land Charges Act 1972.

9.19 If any of these reforms were to be pursued, we invite consultees' views about what transitional period should be applied to give parochial church councils a reasonable opportunity to protect any chancel repair liabilities that benefit them.

Paragraph 7.79

Consultation Question 15.

9.20 We invite consultees' views on the following matters.

9.21 Where consultees have been involved with the acquisition of land after 12 October 2013, we seek information about:

(1) whether a notice of chancel repair liability was registered against the property;

(2) whether a chancel repair search and/or chancel repair liability insurance was obtained;

(3) the costs of any search and/or insurance that was obtained; and

(4) if a search was carried out or insurance was obtained, the reason why a search or insurance was thought to be necessary.

9.22 Where consultees have been involved with multiple acquisitions of land that have occurred after 12 October 2013 (whether in a professional capacity as a conveyancer or solicitor, or otherwise), we seek information about:

(1) the number and percentage of cases in which a chancel repair search was carried out;

(2) the number and percentage of cases in which chancel repair liability insurance was taken out following a search;

(3) the number and percentage of cases in which chancel repair liability insurance was taken out without a search (called "non-search insurance"); and

(4) the average costs of—

(a) a chancel repair search;

(b) insurance following a search; and

(c) non-search insurance.

9.23 We invite consultees to specify whether and how any of their answers to the above questions depended on whether a notice of chancel repair liability was recorded against the title to the relevant land.

Paragraph 8.7

Consultation Question 16.

9.24 We invite consultees to specify whether their answers to the questions in Consultation Question 15 differ in respect to residential and commercial property.

Paragraph 8.11

Consultation Question 17.

9.25 We invite consultees who own or have had dealings with property affected by chancel repair liability to provide information about:

(1) whether they have been called upon to pay for repairs to the chancel of their parish church;

(2) whether they knew that they were liable for chancel repair liability prior to being called upon to pay for repairs and, if they did know, through what means (for example, because of a notice on the register at the time the land was acquired);

(3) if they have been requested to pay for repairs on multiple occasions, the frequency of these requests;

(4) the cost of any repairs for which they have paid; and

(5) whether they have ever "bought out" a chancel repair liability under section 52 of the Ecclesiastical Dilapidations Measure 1923, and if so, the amount that was required to compound the liability.

9.26 We invite consultees to tell us whether they have ever disputed their obligation to provide or pay for chancel repairs, or the extent of their liability for repairs, and about the outcome of any such dispute.

Paragraph 8.12

Consultation Question 18.

9.27 We invite views from consultees who are solicitors or conveyancers concerning the circumstances in which they might—

(1) advise a client who is purchasing registered land to conduct a chancel repair search or to obtain chancel repair liability insurance; or

(2) provide information about chancel repair liability insurance or searches to a client.

9.28 We also invite consultees to explain whether their advice or provision of information would change depending on whether or not there is a notice of chancel repair liability recorded against the title to the land.

Paragraph 8.16

Consultation Question 19.

9.29 We invite consultees in the insurance industry to provide information about:

(1) the number of chancel repair liability insurance policies they offer per year;

(2) what types of chancel repair liability insurance policy they offer;

(3) the average premium for different types of policy; and

(4) what factors affect the premium of a policy.

Paragraph 8.19

Consultation Question 20.

9.30 We invite views from consultees in the insurance industry about how the premium for obtaining chancel repair liability insurance would be affected if purchasers of registered land only seek chancel repair liability insurance where there is a notice of the liability registered against the land.

Paragraph 8.20

Consultation Question 21.

9.31 We invite views from consultees who are church bodies, including dioceses, the Church Commissioners, parochial church councils and their advisors, concerning the following matters.

(1) To what extent have payments made by individuals who were subject to chancel repair liability been an important source of funds for parochial church councils in providing for the maintenance of parish churches, and to what extent are parochial church councils expecting to rely upon these payments in the future?

(2) On how many occasions have any parochial church councils claimed a contribution to the costs of repairing the chancel of their parish church from a person who is subject to chancel repair liability, and what sums of money have been claimed?

(3) If any parochial church councils have recovered payments under a chancel repair liability, did they need to take enforcement action under the Chancel Repairs Act 1932?

(4) Have any parochial church councils registered, or tried to register, a notice relating to chancel repair liability since 13 October 2013?

(5) Have any parochial church councils entered a caution against first registration relating to chancel repair liability since 13 October 2013?

Paragraph 8.22

Consultation Question 22.

9.32 Where consultees have been involved in the acquisition of unregistered land (whether in a professional capacity as a conveyancer or solicitor, or otherwise), we invite them to tell us about:

(1) whether the land is or might be subject to chancel repair liability (regardless of whether a claim for payment has been made); and

(2) where the land is known to be subject to chancel repair liability, how that has become known (for example, through a caution against first registration or otherwise).

Paragraph 8.24

Consultation Question 23.

9.33 Where consultees have been involved in the acquisition of unregistered land (whether in a professional capacity as a conveyancer or solicitor, or otherwise), we invite them to tell us the amount paid for:

(1) a chancel repair search;

(2) insurance following a search; and

(3) insurance taken out without a search (called “non-search insurance”).

9.34 Where consultees have been involved with multiple acquisitions of unregistered land (whether in a professional capacity as a conveyancer or solicitor, or otherwise), we seek information about:

(1) the number and percentage of cases in which a chancel repair search was carried out;

(2) the number and percentage of cases in which chancel repair liability insurance was taken out following a search;

(3) the number and percentage of cases in which non-search insurance was taken out; and

(4) the average costs of—

(a) a chancel repair search;

(b) insurance following a search; and

(c) non-search insurance.

Paragraph 8.25

Appendix 1: The historical treatment of chancel repair liability in land registration legislation

INTRODUCTION

1.1 In Chapter 5, we discuss whether the Land Registration Act 2002 ("the LRA 2002") applies to chancel repair liability ("CRL"). We explore some grounds on which it could be concluded that CRL is not an interest affecting a registered estate for the purposes of the LRA 2002.

1.2 However, we note that land registration statutes have made provision for CRL for more than a century. Under earlier land registration legislation, CRL was listed as an overriding interest – an interest that does not need to be recorded in the register in order to bind a purchaser of a registered estate. CRL was first included as an overriding interest under the Land Transfer Act 1897. It continued to be so listed under the Land Registration Act 1925. CRL ceased to be an overriding interest under the LRA 2002 on 13 October 2013.

1.3 We state in Chapter 5 that, although CRL was treated as an overriding interest under several land registration statues, there does not appear to have been any detailed analysis of the nature of this obligation.[1] Rather, it appears that those who framed the legislation simply considered what matters were commonly of concern to purchasers of land or were commonly revealed during the conveyancing process. If the relevant Acts were not going to require these matters to be registered, they were listed as overriding interests. There is no evidence that the question of whether these matters *could* otherwise have been registered under, or affected by, these Acts was considered. To explain, we briefly trace the history of land registration below and examine, in particular, the treatment of CRL.

THE LAND REGISTRY ACT 1862

1.4 The law of land registration can be traced back to the Land Registry Act 1862 ("the LRA 1862"),[2] which was the first statute allowing landowners to register their ownership of land. Registration was voluntary, rather than compulsory. Ultimately, this Act failed to bring about the registration of more than 507 titles, primarily because of its demanding requirement for exact property boundaries to be recorded.[3]

1.5 The LRA 1862 introduced some key concepts that were adopted by later legislation. It contained a title guarantee and introduced the concept of an overriding interest.

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1 See Chapter 5, para 5.72, above.

2 "An Act to facilitate the Proof of Title to, and the Conveyance of Real Estates", 25 & 26 Vict. Cap. 53. Repealed in full by LRA 2002, s 122.

3 The LRA 1862 was also hindered by the fact that only perfect or "indefeasible" titles could be registered. See: Report of the Commission on the Operation of the Land Transfer Act 1862 (1870) C 20, 40 to 45, and 53; and, Dr J. Howell, "Deeds Registration in England: A Complete Failure?", *Cambridge Law Journal* 58(2), 366 to398, p 375.

Section 20 of the LRA 1862 stated that, upon registration, a person was deemed to be "absolutely and indefeasibly possessed of and entitled to such estates, rights, powers, and interests as shall be defined and expressed in such record". They were vested with the estate subject to "any registered charges or incumbrances", and also any charges and interests listed in section 27 (which were an early version of overriding interests).

1.6 Section 20 of the LRA 1862 used the term "incumbrances" for those interests that needed to be registered in order to be binding on a registered estate. Consequently, it referred to the matters listed in section 27 as "charges and liabilities not to be deemed incumbrances".[4] The list in section 27 included, among other things, land tax, tithe rentcharges, easements, and leases for a term of less than 21 years. Notably, section 27 did *not* refer to CRLs. Whilst a version of the draft Bill from 1861 appears to have listed CRL as an interest "not constituting an incumbrance",[5] this was taken out and was not included in the final draft. We have not been able to discern why this was the case.

1.7 It is worth noting, however, that the use of the term "incumbrance" in the LRA 1862 was inconsistent. In section 140, an "incumbrance" was defined as a mortgage, charge, or one of a variety of other monetary liabilities on land.[6] Various provisions in the Act use the term "incumbrance" in this sense and distinguish "mortgages, charges, and incumbrances" from "estates, powers, and interests".[7]

1.8 In fact, there is a third meaning of "incumbrance" found in a report and draft bill that provided the initial basis for the LRA 1862. In 1854, a draft bill "For the Registration of Title in Ireland" was introduced by Vincent Scully QC, an Irish barrister and Member of Parliament. The bill was published in 1857, alongside a report that reviewed English law relating to the registration and transfer of land ("the 1857 Report").[8] In the Report, Mr Scully QC explained that despite the Bill concerning land transfers in Ireland, "slight alterations" would allow it "equally [to] apply to England".[9] Clause 15 of the bill defined "incumbrance" as:

> any legal or equitable charge by mortgage, lien, judgment, decree, rule, or order, crown bond, recognizance, legacy, portion, trust, or otherwise, whereby any sum of

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4 LRA 1862, s 27.

5 CRL was also listed as a liability "not to be deemed an incumbrance" in a draft bill from 1868 which was intended to amend the LRA 1862. This draft bill was published alongside the Land Commission's report in 1870 that reviewed the operation of the LRA 1862.

6 LRA 1862, s 140: "…'Incumbrance' shall mean any legal or equitable Mortgage in Fee or for any less Estate, and also any Money secured or charged on Land by a Trust, or by Judgment, Decree, or Order of any Superior Court of Law or Equity, and also any Legacy, Portion, Lien, or other Charge whereby a gross Sum of Money is secured to be paid, and also any annual or periodical Charge which by the Instrument creating the same, or by any other Instrument, is made repurchasable on Payment of a gross Sum of Money, and also any Arrear remaining unpaid of any annual or periodical Charge, for Payment of which Arrear a Sale of any Land charged therewith might be decreed by a Court of Equity."

7 See the requirement for Registrar Statements contained in s.7 of the LRA 1862.

8 Report of the Commissioners Appointed to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land (1857) [2251].

9 Above, p 72.

money is secured upon or made payable out of any land; and includes a chief or other rent, annuity, or other annual or periodical charge or payment. *And also, any easement.* (Our emphasis.) [10]

1.9 We note this vacillation between different meanings of "incumbrance" for two reasons. First, the same ambiguity continued to be found in later legislation, including the LRA 1925. The LRA 2002 swept away references to incumbrances and instead referred to "interests affecting a registered estate". Secondly, it is worth noting that CRL does not appear to have been an incumbrance according to any of the definitions we discuss above. CRL was not a charge on land or a monetary liability. It was an obligation to perform works, but not an obligation that was secured against land. It also does not appear to have been registrable under the LRA 1862.

THE LAND TRANSFER ACT 1875

1.10 In 1868, a Land Transfer Commission was appointed to inquire into the failure of the LRA 1862. The Commission's report, published in 1870, led to the enactment of the Land Transfer Act 1875 ("the LTA 1875"). Earlier draft bills made provision for compulsory registration, but the LTA 1875 was not passed until those provisions were removed.[11] Ultimately, the LTA 1875 failed to attract the registration of more than 48 titles in its first four years – a failure that was said to have been mainly caused by the voluntary nature of the registration system.[12]

1.11 Sections 7 and 13 of the LTA 1875 Act provided for the first registration of freehold and leasehold land, respectively. Following registration, section 7 vested a freehold estate in the newly registered proprietor "together with all rights, privileges, and appurtenances belonging or appurtenant thereto." Similarly, section 13 provided that possession of the land is deemed to vest in the leaseholder "with all implied or expressed rights, privileges, and appurtenances attached to such estate." Sections 7 and 13 also provided that the newly registered estates were subject—

(1) to incumbrances entered on the register; and

(2) to liabilities, rights, and interests declared by the LTA 1875 not to be incumbrances (which were listed in section 18);

but the estates were "free from all other estates and interests whatsoever".[13]

1.12 Unlike the LRA 1862, the LTA did not define the term "incumbrance". It appears from sections 7 and 13 that incumbrances were matters that could be registered under the LTA 1875 and that were not overriding interests listed in section 18. Moreover, the reference to the registered estate being free from all *other* estates and interests suggests that both incumbrances and the liabilities, rights and interests listed in section 18 were themselves supposed to be estates and interests.

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10 Above, 80.

11 See the Second Report of the Royal Commission on the Land Transfer Acts (1911) Cd 5483, p 9.

12 Above, p 10.

13 LTA 1875, ss 7 and 13.

1.13 The list of non-incumbrances in section 18 was a significant expansion on the list that was included in section 27 of the LRA 1862. The list included, for example, a liability to repair highways by reason of tenure, succession duty, a tithe rentcharge, and a right of way. Moreover, CRL appears to have been originally included in early versions of section 18. Clause 11(3) of the Land Titles and Transfer Bill 1873 included "the liability to repair the chancel of any church by reason that the hereditaments were part of any rectory". The Land Titles and Transfer Bill 1874 changed the phrasing, and instead clause 36(3) read: "the liability to repair a church or any part thereof". Ultimately, the reference to CRL was removed in the Land Titles and Transfer Bill 1875 which became the LTA 1875. As with the LRA 1862, we have been unable to discern why CRL was ultimately removed from the list.

1.14 There does not appear, however, to have been any detailed consideration of the nature of the liabilities, rights and interests that were listed in section 18 or whether (as the wording of sections 7 and 13 suggests) they were types of estate or interest that would need to be registered under the Act if not listed as exceptions. Instead, the matters that were listed were things that would typically be of interest to a purchaser of land and would be revealed either in the documents of title or in response to standard conveyancing enquiries. In a debate in the House of Lords on The Land Titles and Transfer Bill 1874, Alfred Marten MP responded to some criticism of clause 36 by saying that—

> the matters in question—namely, tithes, land tax, liability to repair highways and churches, rights of common and fishing, tenancies of less than 21 years, &c.—were such as were sure to be similarly treated in the ordinary particulars and conditions of sale. [14]

1.15 Similarly, Brickdale and Sheldon's *Commentary on the Land Transfer Acts* said the following about the rights and liabilities that were not incumbrances for the purposes of the LTA 1875:

> With the exception of succession duty and estate duty, and leases for more than three years, the matters thus excluded from the effect of registration are matters which are not commonly disclosed on an abstract of title, and as to which prudent purchasers under the present system of conveyancing are accustomed to rely on the particulars, or to make extraneous inquiry.[15]

1.16 This same sentiment was reiterated by Edward Holt in 1878:

> As the several liabilities, rights, and interests, mentioned in this section are not to be affected by registration, it will be incumbent on a purchaser of registered land to inquire as to the existence of any of them as in the case of an ordinary purchase. They are, however, mostly liabilities, the existence or non-existence of which would

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[14] *Hansard* HL Deb. (7 July 1874), vol 220, col 1244.

[15] C.F. Brickdale and W.R. Sheldon, *The Land Transfer Act 1875 and 1897 with a Commentary on the section of the Acts* (1899), p 16.

not appear from the title, but could only be ascertained by personal inquiries, or inquires on the spot.[16]

1.17 The overriding interests (non-incumbrances) listed in section 18 of the LTA 1875 were, therefore, a mixture of different types of interest, right or liability about which a purchaser of land was likely to discover by making standard enquiries. There was no detailed consideration of whether these matters would be registerable if they were not listed under section 18. In fact, the Royal Commission on the Land Transfer Acts, which examined the LTA 1875, suggested that these interests, rights and liabilities would be *incapable* of being registered. It stated that the LTA 1875 treats—

> certain rights and interests (unless noted by the Registrar) as *outside the system of registration altogether*, and leaves all registered land subject to them, except where in any particular case their existence is negatived. (Our emphasis.) [17]

1.18 Accordingly, it appears to us that the categories of overriding interests were initially settled based simply on practical conveyancing policy. Each updated list in subsequent land registration Acts reflected what matters that the drafters considered the purchaser would discover without having to rely on the register.

THE LAND TRANSFER ACT 1897

1.19 On 22 May 1878, a Select Committee of the House of Commons was appointed to "enquire and report whether any and what steps ought to be taken to simplify the title to land, and to facilitate the transfer thereof, and to prevent frauds on purchasers and mortgages on land".[18] However, the Committee's 1878 report mainly focussed on why the LTA 1875 had only attracted the registration of 48 titles. The report concluded that it was mainly because:

> the public or their professional advisers have deliberately made up their minds that the advantages offered are too speculative and remote to compensate for the immediate and certain outlay and trouble. [19]

1.20 The 1878 report also noted that, absent a compulsory registration scheme, the Act was unlikely to attract registration on a large scale. Between 1885 to 1895, at least three bills providing for compulsory registration were proposed.[20] Finally, in 1897, Lord Halsbury introduced the bill that became the Land Transfer Act 1897 ("the LTA 1897"), under which the Privy Council was able to declare that the sale of freehold land in certain counties was not to have been effected properly until the purchaser was registered as proprietor of the land.[21]

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16 E.H. Holt, *The Land Transfer Act, 1875 (38 & 39 Vict. Cap. 87)* (Shaw & Sons, 1876), p 62.

17 Second Report of the Royal Commission on the Land Transfer Acts (1911) Cd 5483, p 15.

18 The reference under which the Select Committee of the House of Commons was appointed, commonly known at the time as "Mr Osborne Morgan's Committee."

19 Second Report of the Royal Commission on the Land Transfer Acts (1911) Cd 5483, p 10.

20 Above, p 12.

21 LTA 1897, s 20.

1.21 The First Schedule to the LTA 1897 updated section 18 of the LTA 1875, providing that "the liability to repair the chancel of any church" was to be included in the list of non-incumbrances. The LTA 1897 was the first time that CRL was included in the list, as it previously only appeared in draft bills. We have not been able to determine why it was thought that CRL needed to be addressed in 1897, when it had not been addressed in 1862 or 1875, or why the phrase added to section 18 did not follow the Land Titles and Transfer Bill of 1873 and refer to rectorial property. We note that the LTA 1897 passed through Parliament at great speed.[22]

LAND REGISTRATION ACT 1925

1.22 Following the recommendations in reports published in 1911 and 1919,[23] the LTA 1875 and 1897 were amended by the Law of Property Act 1922 and subsequently consolidated by the Land Registration Act 1925 ("the LRA 1925"). One of the main changes made by the LRA 1925 was the introduction of compulsory registration on an area-by-area basis.[24]

1.23 Section 70 of the LRA 1925 made provision for the "liability of registered land to overriding interests". The list of overriding interests (specifically, section 70(1)(c)) included a reference to a "liability to repair the chancel of any church", copying the wording of the LTA 1897.

1.24 Section 70(1) stated that such interests "shall not be treated as incumbrances within the meaning of this Act". The LRA 1925 followed the LTA 1875 in using the term "incumbrance" for interests, rights and liabilities that needed to be registered in order to bind a purchaser of registered land. However, it also followed the LRA 1862 by using the term "incumbrance" inconsistently. Section 3(xvi) defined "overriding interests" as "all the *incumbrances*, interests, rights, and powers not entered on the register but subject to which registered dispositions are by this Act to take effect" (our emphasis).

1.25 Interestingly, like the LTA 1875, some aspects of the wording of the LRA 1925 suggest that "overriding interests" under section 70 were types of "estate or interest". Both section 5 of the LRA 1925, which concerned first registration, and section 20, which concerned registered dispositions of freeholds, said that the registered proprietor was vested with a freehold estate subject to incumbrances and other entries on the register, and subject to overriding interests. They stated that the estate would be vested in the proprietor "free from all *other* estates and interests" whatsoever (our emphasis). But we have found no indication that, during the preparation or passage of the LRA 1925, there was any detailed consideration of the status of the interests, rights and liabilities listed in section 70. In general, the list appears to have been carried over from previous legislation.

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22 The Second Report of the Royal Commission on the Land Transfer Acts (1911) Cd 5483, notes at p 12 that the LRA 1897 passed through the House of Commons so quickly it featured "certain verbal errors, which, no doubt, would have been corrected if time had permitted".

23 Second Report of the Royal Commission on the Land Transfer Acts (1911) Cd 5483; the Report of the Committee on the Transfer of Land (1919) Cmd 424.

24 LRA 1925, s 120.

SUMMARY OF OUR HISTORICAL RESEARCH

1.26 CRL was included as an overriding interest under LRA 2002 for ten years and was listed as an overriding interest under the LRA 1925 and the equivalent provisions of the LTA 1975 (after its amendment by the LTA 1897). However, the inclusion of CRL (and many other types of interest) as an overriding interest does not appear to have resulted from an investigation of its nature. It also does not appear to have resulted from an investigation of whether CRL is a type of burden on land that could, in theory, be registrable under land registration legislation.

1.27 CRL was not listed as an overriding interest at all for the first 35 years from the original introduction of land registration. The early lists of overriding interests, in the LRA 1862 and the LTAs 1875 and 1897, were lists of matters in which a purchaser of land would take an interest, and which would likely be the subject of enquiries during the conveyancing process. We have not found any consideration of whether the listed overriding interests would have been caught by the substantive provisions of the relevant Acts were they not to have been listed. Furthermore, we have not found any indication that the addition of CRL as an overriding interest by the LTA 1897 reflected a concern that, if it were not listed, purchasers of the affected land might not be bound by the lability. It appears that it was simply listed as a further matter about which a purchaser of land would normally make their own enquiries.

1.28 At the very least, it is not possible to conclude from examining the past treatment of CRL by land registration legislation that it is the type of interest or obligation to which the legislation was intended to apply. Whether CRL is registrable, and how it fits within the language of the LRA 2002 and its predecessors, are questions that were never directly addressed.

Appendix 2: Evidence from the Conveyancing Association

2.1 In 2017, the Conveyancing Association kindly agreed to conduct a survey of solicitors and conveyancers who were members of various professional bodies about their experiences of chancel repair liability while conducting conveyances of land.[1] We are very grateful for the data provided. The survey asked a total of six questions, which are reprinted below along with a summary of the responses.

Question 1: In what percentage of cases do you undertake a Chancel Repair Liability Search?

Percentage of cases	Response %	Number of responses
0%	54.0%	68
Less than 25%	15.1%	19
Between 25%-50%	0.8%	1
Between 50%-75%	0.8%	1
Over 75%	29.4%	37

Question 2: From the percentage of cases in Question 1, what percentage will take out chancel repair liability insurance?

Percentage of cases taking out insurance	Response %	Number of responses
0%	52.0%	64
Less than 25%	15.4%	19
Between 25%-50%	12.2%	15
Between 50%-75%	8.9%	11
Over 75%	11.4%	14

[1] Responses were received from members of the Conveyancing Association, Chartered Institute for Legal Executives, Bold Legal Group, and the Society of Licensed Conveyancers.

Question 3: In what percentage of cases do you place non-search insurance?

Percentage of cases for non-search insurance	Response %	Number of responses
0%	40.9%	52
Less than 25%	20.5%	26
Between 25%-50%	0.8%	1
Between 50%-75%	5.5%	7
Over 75%	32.3%	41

Question 4: What is the average cost of a search, non-search insurance, and insurance following a search?

Cost of:	Response average	Number of responses
A search	£28.44	71
Non-search insurance	£20.93	71
Insurance following a search	£67.43	61

Question 5: Are the answers to your questions above any different for non-residential property transactions?

Answer options	Response %	Number of responses
Yes	9.4%	12
No	37.0%	47
N/A	53.5%	68

Question 6: In respect to non-residential property, what is the average cost of a search, non-search insurance, and insurance following a search?

Cost of:	Response average	Number of responses
A search	£30.67	12
Non-search insurance	£32.14	7
Insurance following a search	£271.82	11

2.2 The data collected by the Conveyancing Association indicates that non-search insurance is the most popular form of chancel repair liability insurance. The data illustrates that non-search insurance (costing around £20) is much cheaper than insurance following a search (costing around £67), presumably because insurance is usually only taken out after a search if the search reveals a potential chancel repair liability. Additionally, the data indicate that chancel repair searches are typically more expensive (at around £28) than non-search insurance.

Appendix 3: Draft clause and commentary

A DRAFT CLAUSE THAT WOULD IMPLEMENT OUR PROVISIONAL PROPOSALS

Application of Land Registration Act 2002 to chancel repair liability

(1) In section 132 of the Land Registration Act 2002 (general interpretation), after subsection (3) insert—

"(4) Where—

(a) the owner of an estate in land is liable to repair the chancel of a church, and

(b) the liability arises in connection with the fact that the land (or part of it) is or used to be rectorial land,

the liability (referred to in this section as a "chancel repair liability") is, for the purposes of this Act, an adverse right affecting the title to the estate.

(5) Where, as a result of this Act—

(a) an estate in land ceases to be subject to a chancel repair liability, or

(b) a chancel repair liability is postponed to an interest under a disposition,

the owner of the estate or interest is not, for any purpose, subject to the liability.

(6) In relation to a chancel repair liability, references in this Act to a person entitled to, or to the benefit of, an interest affecting an estate are references to the responsible authority under the Chancel Repairs Act 1932."

(2) The amendment made by this section is to be treated as always having had effect.

COMMENTARY ON THE DRAFT CLAUSE

3.1 The draft clause set out above is designed to implement the provisional proposals in Consultation Questions 4, 5, 9 and 10. We do not know, in advance of consultation, whether consultees will be supportive of these proposals or whether they will identify any particular problems or limitations with them. Nevertheless, ensuring the application of the Land Registration Act 2002 ("the LRA 2002") to chancel repair liability ("CRL") has some technical challenges, and it is useful to obtain consultees' views on whether this clause would successfully implement our provisional proposals. For that reason, Consultation Questions 6 and 11 in Chapters 6 and 7 ask consultees to share their views on the drafting of this clause. To assist consultees, we explain below how we understand the draft clause to function and comment on salient aspects of its drafting.

How the draft clause is intended to function

3.2 The draft clause inserts additional subsections into section 132 of the LRA 2002. Section 132 is an interpretation provision, explaining the meaning of various terms and phrases used in the Act. Subsection (3)(b) of section 132 defines the phrase "an interest affecting an estate or charge":

> (3) In this Act---
>
> ……
>
> (b) references to an interest affecting an estate or charge are to an adverse right affecting the title to the estate or charge, …

3.3 This definition is important for the purposes of the LRA 2002. In particular, the following provisions of the LRA 2002 all operate in relation to interests affecting estates.

(1) Section 11(4) (which governs the effect of the first registration of a freehold estate) says that the estate is vested in the registered proprietor "subject only to the following *interests affecting the estate* at the time of registration" (our emphasis). Section 11(4) then refers to interests recorded in the register, overriding interests listed in Schedule 1, and particular rights of adverse possessors.

(2) Section 29(1) (which governs the effect of a disposition of a registered estate for valuable consideration) says that the registration of the disposition "has the effect of postponing to the interest under the disposition any *interest affecting the estate* immediately before the disposition whose priority is not protected at the time of registration" (our emphasis). Section 29(2) then explains how the priority of an interest can be protected, including (importantly) if the interest is the subject of a notice in the register or is an overriding interest listed in Schedule 3.

(3) Section 32(1) (which defines "notices") says that "a notice is an entry in the register in respect of the burden of *an interest affecting a registered estate or charge*" (our emphasis).

3.4 Three new subsections are added to section 132 of the LRA 2002 by the draft clause. The principal clarification of the LRA 2002 (which should ensure that the Act applies to CRL) is made by new subsection (4). New subsections (5) and (6), which we discuss separately below, clarify additional matters.

3.5 New subsection (4) supplements the existing definition of "interest affecting an estate or charge" in section 132(3)(b). It confirms that CRL is an adverse right affecting title to that estate for the purposes of the LRA 2002. Subsection (4) is thereby intended to ensure that the definition in subsection (3)(b) will apply to CRL, so that CRL qualifies as an interest affecting an estate under the LRA 2002. As a result, the provisions of the LRA 2002 listed above (sections 11, 29 and 32) should all apply to CRL without needing further specific amendment. The draft clause should thereby implement our provisional proposals on transfers of registered estates, notices, and first registration (in Consultation Questions 4 and 9) via a single provision.

Dealing with uncertainties in the law

3.6 In our summary of Part 1 of this consultation paper at the beginning of Chapter 6,[1] we note that the current law governing CRL and how the liability relates to the ownership of land is uncertain. Our discussion in Part 1 indicates that three different interpretations could be adopted of the law that currently governs CRL.

(1) **Interpretation 1**: first, we explain that CRL may be a personal obligation that binds lay rectors; it may be an obligation that attaches to the religious office or living of a rector. Furthermore, on a correct interpretation of the law, it is possible that a person only becomes a lay rector if they acquire a rectory – the bundle of rights and obligations, including rectorial property, that comprises the living. On this interpretation of the law, a person who acquires land that used to belong to a rectory does not automatically become a lay rector (and so is not automatically bound by CRL). The transfer would need to be scrutinised to determine whether they had acquired the rectory itself or merely the former rectorial land.

(2) **Interpretation 2**: secondly, the law may be as set out in Interpretation 1 above, subject to one development. It may be that a person who acquires land that belongs to a lay rectory automatically becomes a lay rector (and subject to CRL). This is the interpretation of the law adopted by the High Court in *Chivers & Sons Ltd v Air Ministry*.[2] CRL is still an obligation on the holder of a religious office, but the obligation transfers with the ownership of land because the office transfers with the ownership of land.

(3) **Interpretation 3**: thirdly, CRL may have evolved into a direct burden on the ownership of land that formerly belonged to rectories. A person who acquires former rectorial land is automatically subject to CRL, but they do not acquire the office of rector (and do not become a lay rector in any substantive sense). CRL is a burden on the title to the relevant land, rather than a burden on a rectory.

3.7 We cannot be certain which of these interpretations would be adopted by the Court of Appeal or the Supreme Court if they were in future to hear a case concerning the nature of CRL. Consequently, we need to consider how the draft clause would apply should any one of these interpretations prove to be correct.

3.8 In considering how the clause would apply, the key provision to review is the definition of CRL set out in new subsection (4). Subsection (4) applies where the owner of an *estate in land* is liable to repair a chancel. Under the LRA 2002, an "estate in land" is a freehold or leasehold estate.[3] Furthermore, the liability to repair the chancel must relate to the ownership of that estate in land. Under subsection (4)(b), the liability must

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1 See Chapter 6, paras 6.6 to 6.12, above.

2 [1955] 1 Ch 585.

3 The LRA 2002, s 132(1), states that "legal estate" has the same meaning as in the Law of Property Act 1925. The LRA 2002 does not specifically define the phrase "estate in land". However, under the Law of Property Act 1925, s 1(1), the phrase "estate in land" means an estate in fee simple or a term of years absolute (colloquially, a freehold or leasehold estate). The term "estate" has a broader meaning, encompassing various other legal interests in land, including easements and mortgages. See *Baker v Craggs* [2018] EWCA Civ 1126; [2018] 3 WLR 401, at [24] to [31] by Henderson LJ.

arise in connection with the fact that the land comprised within the estate belongs or used to belong to a rectory. Consequently, if any person or body is subject to a liability to repair the chancel, and that liability is *not* related to their ownership of land, then the draft clause does not make any provision in relation to their liability. This is the outcome that should be expected: the LRA 2002 makes provision for the registration of land, transfers of registered land, and the effect of such transfers. The LRA 2002 should not affect a liability that is unrelated to the ownership of land.

3.9 Having noted this point about the definition of CRL in the draft clause, we can consider the three possible interpretations of the current law governing CRL, and their interaction with the draft clause, in more detail.

Interpretation 1

3.10 On Interpretation 1, CRL is not a burden on the ownership of land; the liability transfers with ownership of a rectory. Moreover, a person who acquires land that belongs to a rectory does not become subject to CRL unless they acquire the rectory. A person does not acquire a rectory automatically when they acquire rectorial land, although what would be involved in a transfer of a rectory today is not entirely clear.

3.11 If Interpretation 1 were to be correct, we think that the draft clause might not apply to CRL at all – that the draft clause may be wholly or largely redundant. On Interpretation 1, if a landowner is subject to CRL, their liability does not arise in connection with the fact that they own rectorial land. They could own that land without being liable. It arises in connection with the fact that they own a rectory.

3.12 However, the potential redundancy of the clause may not matter: if Interpretation 1 were to be correct, the LRA 2002 arguably should not apply to CRL. On this interpretation, CRL transfers with ownership of a rectory. A rectory is not a registrable interest in land under the LRA 2002. The transfer of rectories is governed by the general law rather than the law of land registration. The LRA 2002 would govern the transfer of freehold or leasehold estates that are part of a rectory, but transfers of these estates would not themselves carry CRL Moreover, a person who was acquiring a rectory would be aware that they may be subject to CRL without needing to rely on the land register.

Interpretation 2

3.13 As with Interpretation 1, on Interpretation 2 CRL is not a burden on the ownership of land, but an incident of the ownership of a rectory. However, ownership of (a part of) a rectory transfers automatically with the ownership of rectorial land. Interpretation 2 is the interpretation of the law that our provisional proposals are particularly intended to address. As CRL is not a burden on the ownership of land, it is arguable that CRL is not an “interest affecting an estate” within the meaning of the LRA 2002. Nevertheless, CRL is a liability that passes with the ownership of land, and it may bind a purchaser of land who has no knowledge of the liability. Consequently, on Interpretation 2, there is a need to ensure that CRL is registrable under the LRA 2002 (so that purchasers of land are aware of the liability), and the LRA 2002 arguably needs amendment to ensure CRL’s registrability.

3.14 We think that CRL would be caught by the definition in new subsection (4) if Interpretation 2 were to be correct. Where a landowner is subject to CRL, their liability

would arise immediately from their ownership of a rectory, but their ownership of a rectory would arise (automatically) from their ownership of rectorial land. Consequently, we think that their liability would arise "in connection with the fact that" their land is rectorial land. Subsection (4) would then clarify that the landowner's CRL qualifies as an adverse right affecting the title to their estate.

Interpretation 3

3.15 If Interpretation 3 were to be correct, there would be a question about whether the draft clause is needed to make the LRA 2002 apply to CRL. If CRL is a direct burden on land, then it may already qualify as an adverse right affecting title to an estate under the LRA 2002, without the Act requiring any amendment. However, even on Interpretation 3, there could be questions about the legal status of CRL, given that the liability gives rise to personal remedies against a landowner that do not relate to (and are not conditioned by) the landowner's land. Even on Interpretation 3, there may therefore be some benefit in clarifying the application of the LRA 2002 to CRL.

3.16 On Interpretation 3, we think that CRL would be caught by the definition in new subsection (4). The definition expressly refers to a liability of a landowner that arises in connection with the fact that their land *used to be* rectorial land. This part of the definition is particularly directed at Interpretation 3, under which land which used to be (but is no longer) rectorial property still carries CRL as a direct burden.

Conclusion

3.17 We think that the definition of CRL in new subsection (4) is sufficiently broad to apply to any liability to repair a chancel *that transfers with the ownership of freehold or leasehold land* (whether it transfers directly or indirectly with that ownership). Regardless of which of the three interpretations of the current law governing CRL proves to be correct, we think that the draft clause will ensure that a purchaser of land will not, *by virtue of acquiring the land itself*, become bound by CRL unless the liability is recorded in the land register. If the court were to decide that Interpretation 1 is the correct one, a purchaser of rectorial land might in theory still be bound by a CRL which is not recorded in the register notwithstanding the provisions of the draft clause. However, such a purchaser could only become bound if they chose to acquire the rectory in addition to the rectorial land. The acquisition of rectories is not a matter that is governed (or that was intended to be governed) by the LRA 2002.

Subsections (5) and (6)

3.18 We also comment on the two further subsections added by the draft clause to section 132 of the LRA 2002, which deal with specific problems concerning CRL discussed in this consultation paper.

The purpose of subsection (5): chancel repair liability as a personal liability

3.19 New subsection (5) is intended to address the concerns we discuss in Chapter 5 about the application of the priority provisions in the LRA 2002 to CRL.[4] If CRL is a personal liability, then it arguably does not make sense to say that an estate in land is not "subject to" CRL or that CRL is "postponed to" other interests in land (under

[4] See Chapter 5, paras 5.92 to 5.97, above.

sections 11 and 29 of the LRA 2002). Consequently, while new subsection (4) may ensure that the LRA 2002 applies to CRL (because subsection (4) states that CRL is an adverse right affecting an estate in land), it may still be unclear *how* the priority provisions of the LRA 2002 in sections 11 and 29 apply to CRL.

3.20 Subsection (5) addresses this problem. The subsection clarifies that, if the LRA 2002 provides for an estate in land no longer to be subject to CRL or for the estate to have priority over CRL, this means that the owner of the estate is not bound by CRL. The subsection helps explain how the LRA 2002 should apply to CRL if it is a personal liability that transfers with the ownership of land.

The purpose of subsection (6): the benefit of chancel repair liability

3.21 New subsection (6) is intended to address the problems concerning the ownership of the benefit of CRL which we discuss in Chapters 2, 4 and 5.[5] Parochial church councils have the right to enforce CRL under the Chancel Repairs Act 1932, but that statutory right arises only once a chancel is in disrepair and a statutory notice has been served on liable landowners. It is not clear who, if anyone, has the benefit of a CRL before the 1932 Act is engaged. It is arguable that CRL is not owned by or owed to any particular class of persons, but that it is owed to anyone with a legitimate interest in the repairs of the chancel.

3.22 Under section 34(1) of the LRA 2002, a person can apply for the entry of a notice relating to an interest in land only if they claim to be entitled to the benefit of that interest. New subsection (6) of section 132, added by the draft clause, clarifies that parochial church councils have the benefit of CRL for the purposes of the LRA 2002. Subsection (6) thereby clarifies that parochial church councils have standing to apply for the entry of notices to protect CRLs in their parishes.

Retrospectivity

3.23 Finally, the draft clause includes a provision (in subsection (2)) that applies the changes made by the clause to section 132 of the LRA 2002 retrospectively. Subsection (2) does not state that these changes (new subsections (4) to (6)) are to be treated as if they came into force on 13 October 2013 (when the majority of the LRA 2002's provisions came into force). The amendment made by the clause operates on the LRA 2002 as a whole, and some of the Act's provisions did not come into force on that date.

3.24 Subsection (2) of the clause instead states that new subsections (4) to (6) of section 132 are to be treated as always having had effect. This wording might seem to suggest that subsections (4) to (6) are being given effect from before the LRA 2002 came into force (from the limits of legal history). However, new subsections (4) to (6) operate only within the context of the LRA 2002 and so the effect of the retrospectivity provision is effectively to backdate these subsections to the time(s) when the LRA 2002 came into force. Moreover, the wording used by subsection (2) appears in retrospective amendments of legislation that are already on the statute book.

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5 See Chapters 2, 4 and 5, paras 2.43 to 2.46, 4.90 to 4.91, and 5.46 to 5.47, above.

Appendix 4: Glossary

Advowson: the right to nominate a person as the incumbent of a parish (as the rector or the vicar). The advowson of a rectory originally belonged to the founder of the parish (usually the lord of the local manor), and the advowson of a vicarage originally belonged to the rector (out of whose rectory the vicarage was established). However, advowsons are independent property rights, which were freely tradeable until their sale was prohibited by the Benefices Act 1898 (Amendment) Measure 1923.

Anglican churches: the protestant churches that derive from the Church of England and share its theology.

Appropriation / Appropriator: an appropriation is the appointment of a religious institution (such as a monastery), or the *current and future* holders of a religious office (such as the abbot of a monastery), as perpetual rector of a parish. The perpetual rector is called the appropriator.

Benefice: the collection of property and rights (such as the right to collect tithes) that provided a living for the incumbent of a parish.

Canon law: the law of the church (whether the Church of England or the Roman Catholic Church).

Chancel: the eastern end of a church, containing the altar, often divided from the main body of the church (the nave) by a step.

Chancel repair liability: the subject of this consultation paper – an obligation to keep the chancel of a church in good repair.

Charge (on land): a right in land that provides security for the performance of an obligation on the landowner (usually by entitling the owner of the charge to take possession of or sell the land if the obligation is not performed). Charges typically secure the payment of money, but obligations to *do* something (for example, to perform a contract) can also be secured by a charge. The term “charge” is also sometimes used more loosely to refer generally to financial liabilities and other obligations that burden land.

Churchwardens: lay members of a parish appointed to represent the interests of the parishioners, to assist the incumbent by facilitating the provision of church services, and to take ownership of and responsibility for the church’s goods and chattels.

Consistory court: the ecclesiastical court of a diocese, which deals with the application of ecclesiastical law and with ecclesiastical disputes in the diocese. The bishop originally acted as the judge of the consistory court, but that function has since been passed to the chancellor of the diocese, who represents the bishop.

CRL: an abbreviation for chancel repair liability.

Curate: a member of the clergy who provided cure of souls in the parish as a deputy for the rector or vicar. Curates could, historically, be dismissed at will by the rector or vicar.

However, where rectories were impropriated by lay rectors, some curates of the affected parishes became perpetual curates, meaning their curacies became permanent offices and they became primarily responsible for cure of souls in the parish.

Cure of souls: also referred to as care of souls – the religious ministry to the parish provided by the rector, vicar or curate.

Dean and Chapter: the governing body of a Cathedral, consisting of the dean and a group of canons or prebendaries (members of the clergy who assist with the administration of the cathedral).

Diocese: the primary type of administrative area in the Church of England, comprising multiple parishes, administered by a bishop and archdeacon (a senior priest with administrative responsibilities).

Dissolution of the monasteries: the process by which, from 1535 to 1547, monasteries and other religious institutions in England and Wales were dissolved by a series of Acts of Parliament under Henry VIII and Edward VI, and their property transferred to the Crown.

Disestablishment of the Church in Wales: the process under the Welsh Church Act 1914 by which the Church in Wales ceased to have special legal status and ecclesiastical law ceased to apply in Wales.

Ecclesiastical courts: the courts of the Church of England that have exclusive jurisdiction to administer ecclesiastical law. Disputes and applications under ecclesiastical law are initially heard by the Consistory Court of the relevant diocese. Appeals lie to the Court of Arches (for the Archdiocese of Canterbury) or the Chancery Court of York (for the Archdiocese of York). Further appeals lie to the Judicial Committee of the Privy Council (formerly the Court of Delegates).

Ecclesiastical law: the law of the Church of England (which ceased to apply in Wales following the disestablishment of the Church in Wales) enforceable in the ecclesiastical courts. Ecclesiastical law is a part of the general law of England and, formerly, Wales (and the various Church Measures we cite in this consultation paper are approved by Parliament and have the force of statute).

Equitable interest (in land): interests in land which, historically, were not enforceable in the courts of law but which could be enforced by bringing a case before the Lord Chancellor and later the Court of Chancery. Since the unification of the courts of equity and the courts of law in the 19th century, equitable interests are now enforceable in the courts in general.

Fee simple: a type of estate in land (a) that the owner is free to transfer to whomever they wish, and (b) that is not granted for a limited period of time (and so, in principle, the estate may last forever). Estates in fee simple are often colloquially referred to as “freehold estates”, although technically freehold is a form of tenure rather than a type of estate.

Fee tail / Fee entail: an antiquated type of estate in land that can no longer exist at law. Similarly to a fee simple, a fee tail was not granted for a limited period of time (and so, in principle, it could have lasted forever), but the estate could only pass to specified heirs (for example, only to direct descendants).

Freehold: a form of tenure under which a person holds land without being required to provide any services to their landlord (who in most cases will now be the Crown rather than an intermediate lord). Freehold evolved from free and common socage, under which land was held in exchange for agricultural services. The requirement to provide these agricultural services has now dropped away. “Freehold” is also colloquially used as the term for an estate in fee simple held on freehold tenure.

Glebe land: land which forms part of the benefice of a rectory or vicarage, and which belongs to and generates income for the rector or vicar.

Impropriation / Impropriator: an impropriation is the grant of a rectory to a lay person (the impropriator) who is entitled to pass the rectory on to their heirs or other persons (depending on the terms of the grant). An impropriation is similar to an appropriation, in that a rectory is permanently granted to a particular person. However, an appropriation is permanent because the appointed rector is a spiritual corporation, whereas an impropriation is permanent because the rectory has become an item of private property (an estate in fee simple or fee tail) that can be transferred to a new owner without that person needing to be appointed as rector by the bishop.

Inclosure Acts: a series of Acts of Parliament passed between 1603 and 1876 which privatised common land. Many of these Acts provided lay rectors with plots of land in exchange for extinguishing their right to tithes and other rights affecting common land.

Incumbent (of a parish): the priest (whether a rector, vicar, or perpetual curate) with primary responsibility for providing cure of souls in the parish.

Interest in land: a right that affects land directly, rather than merely affecting the current owner of the land. Interests in land are capable of being enforced against successive owners of the land (or anyone who interferes with the land). The nature of interests in land is discussed in detail in Chapter 5.

Lay person: a person who is not ordained as a member of the clergy (that is, in the Anglican Church, as a deacon, priest or bishop).

Lay rector: a lay person who owns a rectory. A lay person is only capable of owning a rectory if the rectory was originally transferred to the Crown under the 16th century statutes dissolving the monasteries and was then transferred by the Crown to that person or their predecessors in title

Leasehold estate / a term of years: a type of estate in land under which the estate owner (the leaseholder) is given exclusive possession of land for a period of time, usually in exchange for payment of a rent. Leaseholds and fee simples are the only estates in land that can exist at law under section 1(1) of the Law of Property Act 1925.

Legal interests (in land): interests in land recognised by the common law of England and Wales (or created by Acts of Parliament). The common law was modified and codified by section 1(2) of the Law of Property Act 1925, which lists the interests in land capable of existing at law.

LPA 1925: an abbreviation for the Law of Property Act 1925.

LRA 1925: an abbreviation for the Land Registration Act 1925, the Act which used to govern registered land in England and Wales. The Land Registration Act 1925 was repealed and replaced by the Land Registration Act 2002.

LRA 2002: an abbreviation for the Land Registration Act 2002, the Act which currently governs registered land in England and Wales.

Nave: the main body of a church, where the parishioners sit, often divided from the eastern end of the church (the chancel) by a step.

Nemo dat quod non habet (nemo dat): a common law principle that no one can convey title (ie give ownership) to something that they do not own. The translation of the Latin is "no one gives what they do not have".

The Ordinary: another term for the bishop, who exercised *ordinary* ecclesiastical jurisdiction.

Parochial church council: the executive committee of a parish which is responsible for the financial affairs of the parish and for maintenance of church-owned property. Most parochial church councils are registered charities.

Parish: an area within a diocese which is ordinarily served by a single priest. A "parishioner" is a resident of a parish.

Parson: another term for the rector.

Parsonage: another term for the rectory. The term "parsonage" is also sometimes used to refer to the house provided to the parson/rector. In this consultation paper, we use the phrase "parsonage house" when referring to this residence.

Patron (of a parish): the owner of an advowson who was entitled to nominate the rector or vicar of the parish.

Rector: originally the priest who was given responsibility for providing cure of souls in a particular parish and who was vested with the church property in the parish to support their ministry (including the parsonage house, the freehold of the church and churchyard, the glebe land, and the right to collect tithes from residents in the parish). However, religious corporations also came to be appointed as rectors and, following the dissolution of the monasteries, some lay persons became rectors as well. They enjoyed the property and other rights of the rector, but had to appoint a deputy (a vicar, or curate) to minster to the parish.

Rectory: the office and living belonging to the rector, including (a) the property that supported the rector's ministry (the parsonage house and glebe land), (b) the rector's rights (for example, to collect tithes and to enjoy the chief seat in the chancel), and (c) the rector's obligations (including cure of souls, support for the poor, and CRL). The term "rectory" is also sometimes used to refer to the house provided to the rector.

Rectorial property: property which belongs to a rectory and provides a living for the rector.

The Reformation: the break between the Church of England and the Roman Catholic Church that took place under Henry VIII following the Act of Supremacy 1534, when the monarch became the head of the Church of England in place of the Pope.

Registered land: land whose ownership is recorded in the land register (the register of title) kept by HM Land Registry. Registered land is governed by the Land Registration Act 2002.

Sequestration: a method of enforcement under which a person is authorised to take possession of property and use the income from the property to service a debt or discharge unperformed obligations.

Tithe: a form of ecclesiastical tax entitling the tithe-owner to a tenth of the produce of land or animals born in the parish (or money paid in lieu). The term “tithe” derives from the old English word for a “tenth”.

Tithe rentcharge: under the Tithe Acts 1836 and subsequent legislation, rights to tithes were changed (the technical term is “commuted”) into tithe rentcharges. These were a type of corn rent secured on land: a financial burden on land that entitled the owner (called the “rentowner”) to an annual sum payable by the owner of the burdened land that varied in accordance with the price of corn.

Unregistered land: land whose ownership has not been recorded in the land register (the register of title) kept by HM land registry. The ownership of unregistered land is instead established by deeds of title.

Vicar: (from the Latin “vicarius”, meaning substitute) a vicar was a member of the clergy appointed to provide cure of souls in a parish as a substitute for the rector (whether because the rectory was held by a religious corporation or a lay person who could not provide cure of souls, or because the rectory was “sinecure”, meaning the office did not carry responsibility for cure of souls).