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**DEBT RECOVERY IN THE GAMBIA:
CONSULTANCY REPORT
AND
DRAFT LEGISLATION ON INSOLVENCY,
MORTGAGES AND ENFORCEMENT
OF JUDGMENTS
(FINAL)**

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U.S.A.I.D./The Gambia

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DEBT RECOVERY IN THE GAMBIA:

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**REPORT ON CONSULTANCY
FOR THE DRAFTING OF LEGISLATION
IN THE AREAS OF
INSOLVENCY, MORTGAGES AND ENFORCEMENT OF JUDGMENTS**

A. Introduction

1. By letter dated March 28, 1992, we the undersigned were engaged by Checchi and Company Consulting, Inc., of 1730 Rhode Island Avenue, N.W., Washington D.C. 20036-3193, U.S.A. as short-term specialists in legislative drafting in the areas of bankruptcy, mortgages and enforcement of court judgments under a contract to assist USAID/Banjul and the Ministry of Justice of The Gambia in the preparation of a draft Bankruptcy Act, Mortgage Act, Sheriff's Act and in the performance of other related duties described in the scope of work previously provided to us. This assignment was set within, and was to be the beginning of, a larger programme for the provision by USAID to the Gambia Government of assistance in the modernisation and improvement of the legal infrastructure of the Gambian financial sector. Our engagement with Checchi and Company began on March 31, 1992.

2. According to the Work Schedule agreed with Checchi, the assignment was to proceed in four stages. These stages were:

Stage One: Field Research;

Stage Two: Legislative Drafting

Stage Three: Field Discussions;

Stage Four: Final Report Preparation.

The agreed number of man-days for the assignment was 91. USAID/Banjul increased this by a further 15 days.

3. The assignment was planned to end in mid-August, 1992. That time schedule has been kept.

B. Stage One of Assignment: Field Research

1. Stage one of the assignment was undertaken in The Gambia by Fiadjoe alone in April/May. This was done after consultation with Amissah in London, during which

the approach to the consultancy, the methodology for the drafting and the course for the research were determined.

2. On his visit to The Gambia Fiadjoe met with and interviewed members of USAID/Banjul, including Ms. Bonnie Pounds, the AID Representative, and Mrs. Sarah Adam, the Project Officer responsible for our assignment; members of the Ministry of Justice, including Honourable Hassan Jallow, the Minister of Justice and Attorney General, Mrs. Amie Bensouda, Solicitor General and Legal Secretary, and Mr. Chernon Jallow, the Legal Draftsman; members of the Judiciary, including the Mr. Justice Ayoola, the Chief Justice, Mr. Justice Patrick Amin, the President of the Court of Appeal and Law Reform Commissioner, and Mrs. A. Ngum, the Master of the Supreme Court; members of the Bar, bankers, accountants and other persons interested, whether as contributors to or potential users of the results of the project under consideration. A full list of the personnel interviewed is attached to this Report as Annex A.
3. We have, in each of the Explanatory Notes attached to the individual legislative proposals, set out the results of the interviews and other researches conducted. Reference would have to be made to those Notes for a more complete statement of our findings, the decisions we took as a result of those findings and the justification given for the proposals made. But for convenience and ease of comprehension, we here set out an abridged version of the findings of the Field Research. They are as follows:

(a) With regard to Mortgages, the finding was that the Existing Regulatory Regime in The Gambia had no statute of its own on the subject. The law which has hitherto regulated the regime is the English law on mortgages as at 1881. This is so by virtue of the provisions of section 119 of the Constitution of the Republic of The Gambia (1970) which continued laws existing prior to its enactment, and section 2 of the Law of England (Application) Act [Cap.5], which rendered applicable to The Gambia "the common law, the doctrines of equity, the statutes of general application in force in England on the first day of November, 1888". These provisions had ensured that the laws on mortgages enacted in the English Conveyancing and Law of Property Act of 1881 applied in The Gambia. Whether and which other enactments on the subject are applicable as a result of the provisions on the application of English laws is a matter of some complexity and speculation.

The Field Research disclosed that among the legal profession, practitioners in the area of mortgages law were very few in number. None had any real complaints against the law as it now stood. But this may have been due to the fact that there had not been much, if any litigation, over the validity of mortgage documents or actions taken under them, and that in any case the lawyers may have felt themselves

adequately remunerated for the mortgage documents they drew up under the prevailing law. From existing precedents, practitioners have been able to fashion the rules to suit the needs of their clients. The situation in The Gambia made it necessary for the draftsman of a mortgage deed to include all covenants, rights, obligations and other material he could possibly think of as potentially relevant, however remote, in his document, thus producing a document which was unnecessarily complicated and of some prolixity.

The effect of the absence of a mortgages law of its own in The Gambia could be highlighted by reference to the following consequences:

1. with its dependence on the English law at the cut-off date given in the Law of England (Application) Act, The Gambia had been denied the benefit of any statutory modernisation in the English law of mortgages since 1881;
2. since the English Conveyancing and Law of Property Act, 1881 is not generally available in The Gambia, what the law is - even in its archaic form - is not known to those who need to consult it within the country;
3. the existing regime is a serious drawback on the development thrust of The Gambia and the harnessing of credit for economic growth;
4. the archaic nature of the law of mortgages cannot be divorced from the regulatory regime on enforcement of rights in The Gambia which has so far displayed some unresponsiveness to modern demands;
5. the Gambia lacks a simple, standard form of mortgage deed to guide draftsmen, a fact which has led to some prolixity in the drafting of deeds with the consequent attraction of high legal fees borne by the ultimate consumer - the public.

In sum, the absence of a modern law of mortgages has reinforced the widely-held view that the present regime could not support the modern financial processes of the market place. Indeed, it provides formidable constraints on the expansion and strengthening of regulations governing the money market. For example, there is no systematised mortgage lending at all in The Gambia nor is one envisaged by the banking community in the near future. Such pessimistic prognosis is premised on the unresponsiveness of the existing regime.

(b) With regard to the Sheriff's Law the position found was that under the Existing Regulatory Regime two pieces of legislation regulated the appointment and functions of the Sheriff. These are the Sheriffs Act [Cap.6:05] of the Laws of The Gambia and the Rules of the Supreme Court, which are the rules of procedure for the Supreme

Court made, as subsidiary legislation, under section 72 of the repealed Supreme Court Ordinance [Cap 5 of 1955 Revision] and saved by Section 57 of the Courts Act, 1964 [Cap.6:01].

Between them, they govern the regulatory regime for the enforcement of judgments. The Sheriffs Act, whose origin dates as far back as 1883, essentially speaks to the appointment of a Sheriff, Deputy Sheriffs and Bailiffs. The Sheriff's duties and responsibilities are not addressed by the Act. The detailed rules as to how a judgment is enforced are to be found in the Rules of The Supreme Court. The Rules of the Supreme Court are made by the Rules Committee whose activities are carried out without publicity, and whose Rules are couched in technical language and available principally only to lawyers.

The Sheriff has always been the head of the Police force, who at present is the Inspector General of Police (IGP). In colonial times, the Chief of Police, as the trusted lieutenant of the Governor, combined in his office the principal posts of Chief Fire Officer, Chief Customs Officer, Chief Immigration Officer and Sheriff. While the demands of modern government have resulted in a diminution in the wider portfolio of the head of the Police force, somehow he seems, by "oversight", to have retained his duties as the Sheriff. We consider this not only anomalous but from the point of view of administrative efficiency, quite undesirable. This perception is shared by everybody we interviewed.

The regime suffers from the following fundamental faults:

1. the Sheriff's powers are today reposed in the wrong functionary, namely, the IGP;
2. the Sheriff's subordinate, the Bailiff, as a result, has a divided loyalty between the Judiciary and the Police, who are primarily a criminal and not a civil law enforcement agency, with the result that he finds it impossible to say at any one time to whom he is accountable; the situation is aggravated by the fact that the IGP - the Sheriff - is accountable to the Ministry of the Interior, while his subordinate, the Bailiff, is under the Ministry of Justice, thus creating confusion in the lines of authority, and difficulty in monitoring the performance by the Bailiff of his duties;
3. due to the lack of definition of "process" in the Sheriffs Act, the impression is wrongly given that it deals not only with the enforcement process but with all process emanating from the Courts; but as a matter of practice, writs and summonses for appearance before the Courts which are the usual instruments thought of as process are dealt with not by the Sheriff or his Bailiffs but by process servers operating under the Registrars of the Courts;

4. the manpower is so woefully inadequate that execution of all judgments is laid at the door of the one Bailiff in office; and

5. the Bailiff lacks basic infrastructural support to carry out his duties efficiently.

The last two faults are not matters for legislative reform, and do not, therefore, constitute a subject for us on this assignment. But they, nevertheless, have to be addressed by the appropriate authority in the appropriate manner if the system for the enforcement of judgments is to improve. Redress of the first three, on the other hand, requires legislative backing.

Enforcement of judgments, like the enforcement of appearances of parties and necessary witnesses before the Courts, is part of and incidental to the process of dispute settlement. It is not a Police matter; it does not involve the functions related to the prevention, detection and prosecution of crime which a Police force is primarily established to perform. To ask the Police to enforce civil judgments, by, for example, attachment and sale of property, is to distract them from what they are established to do. All reason and practical good sense dictate that the Courts which deliver the judgments should be responsible for ensuring their enforcement.

(c) With regard to the **Bankruptcy or Insolvency law**, some active shortcomings in the legal regime for the enforcement of debt repayments, were highlighted in the Report entitled "**Assessment of the Legal and Regulatory Environment Affecting the Gambian Financial Sector**". The Report recommended the enactment of a bankruptcy law which "would clearly delineate creditors' priorities in the event of bankruptcy" (p.8. para.9), and the development of "a meaningful framework to assist in the analysis of the role the legal system can play in supporting and facilitating the modernisation, expansion and deepening of the financial sector in The Gambia" (p.9, para.1). One other concern raised by the Report was the absence of a machinery to provide supporting measures to minimize lender and borrower risk (p.10, para.6 ii).

Bankruptcy is, under the Existing Regulatory Regime, governed by two legal regimes. Company insolvency is regulated under the Companies Act, whereas personal insolvency is governed by the Insolvency Act, 1967. The Companies Act regulates the affairs of trading companies and associates. The Insolvency Act, 1967 is designed "**to regulate the law relating to insolvent debtors and for matters connected therewith and incidental thereto.**"

The latter's philosophy is to exact imprisonment for acts of insolvency! (See sections 5 & 8). Besides, indebtedness in the paltry sum of "one hundred and fifty pounds" is a condition for personal insolvency. An elaborate court process is then set out in the Act with a view to satisfying these conditions of insolvency.

We cannot but observe that the philosophy of the Act is completely out of step with modern ideas, that the conditions for insolvency are unrealistic and the machinery for vindicating same is not cost-effective.

The Companies Act, on the other hand, has no specific provision dealing with insolvency as such except through the indirect means of a winding up action.

In any case, no sound reason exists for maintaining two separate regimes of insolvency. The existing legal regime has no machinery for the proper investigation of indebtedness with a view, for example, to discovering concealed assets. There is also no machinery in place to distinguish the dishonest borrower from the honest but reckless one. Nor is there any provision in the law whereby the honest trader who runs into financial distress can purge his fault and make a fresh start.

The Field Research showed clearly that there was, indeed, a lack of strong infra-structural legal support base for creditors and the absence of a fair scheme for the protection of honest debtors. That situation thus spoke to a powerful case for the reform of the wholly inadequate laws of debtor and creditor, designed to protect the interest of both. In our view, an enhanced insolvency legislation could help to strengthen the harnessing of credit as an engine of economic and financial growth.

We found that the title "bankruptcy" was regarded by many as pejorative. Hence, our use of the title "Insolvency Act" for our legislative proposal on bankruptcy. We also found that the rules on liquidations incorporated in the Companies Law, 1950 of The Gambia were based on pre - 1948 English Companies Law, rules which at the minimum need updating and necessary revision. We recommend that such a review be undertaken as a matter of urgency consequential upon our present mandate.

We identified a clear need for long-term financing which at present is denied because of the absence of a properly functioning regulatory framework.

C. Stage Two of Assignment: Legislative Drafting

1. Armed with the results of the Field Research we proceeded to draft the required legislation during the month of June. As we were opposed to drafting by committee, the method adopted was for each of us to undertake the drafting of a particular piece of legislation with an obligation to review placed on the other. The objective was to produce draft Bills on the areas for approval and adoption by the Ministry of Justice for presentation to Parliament for enactment. Each piece of legislation was to be accompanied by an explanatory note giving the results of the field research and brief reasons for the provisions proposed. These drafts were submitted to Checchi and Company at the end of June for presentation to USAID/Banjul to invite comments

on them from interested parties in The Gambia.

2. The draft legislation in its revised form arrived at after the Field Discussions in Stage Three of the Assignment is annexed hereto together with the explanatory notes marked:

- Mortgages Act [Draft] - Annex B.1;
- Explanatory Note on the Draft Mortgages Act - Annex B.2;
- Sheriff's and Civil Process Act [Draft] - Annex C.1;
- Explanatory Note on the Draft Sheriff's and Civil Process Act - Annex C.2;
- Insolvency Act [Draft] - Annex D.1;
- Explanatory Note on the Draft Insolvency Act - Annex D.2.

3. We hope that these draft pieces of legislation, when enacted, will correct the deficiencies disclosed by the Field Research and provide fresh parameters within and through which the needs of the people of The Gambia could be satisfied. We hope that they achieve the aim of simplifying the law in the respective areas by bringing together the principles which should apply in The Gambia derived from the common law and relevant legislation where it exists and by disposing of the archaic, inaccessible, ineffective or inadequate statutes which currently apply. We, accordingly, so recommend them to the appropriate Gambian authorities.

D. Stage Three: Field Discussions

1. This stage was undertaken by us in July. Both of us visited The Gambia this time. Before our arrival in The Gambia, we had had sight of some of the comments made and had attempted to make such corrections as we thought justified. In The Gambia we interviewed once more the principal parties who had shown interest in our venture and obtained whatever comments they had from them. The necessary revisions in the draft were made, which resulted in the final drafts annexed hereto.

E. Stage Four: Final Report Preparation

1. This stage, involving the preparation of this Report after our Field Discussions in The Gambia, will be completed with the signing by us of this Report.

F. Other Findings and Recommendations

1. **The Complementary Requirements:** Our assignment was principally for the purpose of producing draft legislation. One obvious truth which our investigations emphasised was that improvement and modernisation of a system cannot be achieved through the enactment of legislation alone. Without manpower of the appropriate strength and calibre the best law in the world cannot be applied. Without the necessary supporting equipment and effective working systems, the most qualified manpower cannot produce desired results. When complaints are made of the enforcement of mortgages through the Courts, the remedy does not lie solely in the provision of a modern law of mortgages. Judgments will not necessarily be better enforced merely because a new Sheriff's law has been enacted. Nor will the financial sector be improved by virtue only of the enactment of the new legislation on insolvency. An apposite illustration of this last observation is the fact that The Gambia has since 1967 been regulated by a law on personal insolvency without most people knowing about it.

We got the impression that the inputs complementary to the legal regime necessary for the development and improvement of the financial sector are being addressed by the Gambian authorities. We would like to add our voice to the recommendation which, no doubt would already have been made, that for the improvement of the administration of law, efforts must be made to secure for the Judicial Service and the legal services, the required number of judges, magistrates, lawyers, administrative and para-legal staff. The question of training of lawyers needed to man services, the continuing education of judges and lawyers to keep them updated in modern developments in the law and the mechanisms for the delivery of their services, and the training of trainers to maintain the training momentum, should not be forgotten. Courses and seminars must be regularly organised for the personnel in the Judicial and Legal Services, including the Superior Court judges. Appropriate responses to the need for equipment for efficient management and for the introduction and maintenance of more efficient systems of recording judicial proceedings and of monitoring the progress of cases, are, we understand, already being organised.

2. **Workshops on New Legislation:** We recommend that after the legislative proposals have been enacted, workshops be organised to introduce and explain them to potential users, such as judges, lawyers, judicial administrators, accountants, bankers and other interested members of the public. Consideration should be given to making such workshops a regular follow-up feature of all major pieces of legislation.

The workshops should be directed at target groups, such as members of the Judiciary, the Bar, Government officials with related responsibilities, the accountants, bankers and interested persons in the commercial world. The workshops should take the form of group discussions among these members in groups round a table presided over by a moderator. For the type of participants contemplated, a series of formal lectures would be undesirable. It would be better if they exchanged ideas based on their understanding and relevant experiences of the subject-matter of the legislation. The proceedings should start with a short introduction of between ten to twenty minutes, depending on the size and complexity of the subject by a facilitator, followed by the discussion. The facilitator would lead the discussions of the group. The period of the workshop will depend on the number and scope of the legislation and the number of groups to be accommodated in any particular workshop.

With reference to the three pieces of legislation now proposed, it is suggested that the workshop be organised by the Ministry of Justice and USAID/Banjul, i.e. the sending out of invitations to participants, arrangement of conference facilities for up to thirty persons, preferably with seating round a table. We would be happy to participate in the moderation and facilitation aspects of the workshop. Consideration should, however, be given to whether these tasks should not be undertaken by Gambians. The workshop itself should take about a week. Taking into account the time which should be allowed for the enactment by Parliament of the legislation, for further study by the participants of the Acts as passed and other relevant material, and for a long enough date to enable inclusion by participants in the plans of affected persons, we would propose a fixture sometime in January 1993.

3. **Short Monographs on Major Pieces of Legislation Undertaken:** The Gambia, like most developing countries, lacks textbooks written on its own laws. The usual sources of explanatory material available to its lawyers and other interested persons are the texts on the English law, which are not written with any particular Gambian development or peculiarity in view. These texts, with their comments on current English laws which are not necessarily applicable to The Gambia, can often be misleading as expositions of the law of The Gambia. **It, therefore, occurs to us that, together with the workshops, a method of disseminating knowledge of Gambian law**

is to commission the publication of short monographs on the major pieces of legislation enacted in The Gambia. The scheme to modernise the financial sector laws provides a wonderful opportunity for The Gambia to start publishing such short monographs. The monographs should explain in simple narrative form the objects of the legislation, its provisions, analyzing and relating them to other relevant provisions in the enactment and other enactments, and like matters. This should benefit not only lawyers, but interested laymen in The Gambia and other users abroad. With modern methods of text-reproduction, publication of these monographs should neither be difficult nor expensive. They could be sold to recover cost. **We would, in connection with this project, recommend monographs on the Mortgages and Insolvency Acts. They could, if required, be done by the consultants after the acceptance of their proposals for legis'ation. The practice could be developed to cover all major pieces of legislation, whether in the financial sector or not, and should provide a modest guide of the law of The Gambia on the particular subjects.**

4. Basic Books and Journals: Closely related to the need for materials specifically directed to the Gambian law is the need for background information on the law generally. The building of the new Supreme Court provides opportunity for equipping The Gambia with a modern up to date law library. We are sure the Gambian authorities have already given the matter some consideration. The proximity of the Supreme Court to the Ministry of Justice makes it practical and easy to develop a joint library, with joint holdings belonging to the two of them located in either or both premises. Library-building, however, is an expensive business, and we would not suggest that funds from this project be used for furnishing The Gambia with such a facility if other pressing claims need to be met. **Were project funds available to equip a fully fledged law library, we would be the first to support their use for that purpose. Without funds of that magnitude, some more modest approach needs to be made. In that case, the complete library will have to be financed from other sources, and we would recommend, as a minimum, a contribution from project funds to enrich the law library with basic law books and law journals from Commonwealth and American jurisdictions on the areas covered by this USAID programme. Law journals are important because they inform readers of current thinking and developments, and stimulate thinking on law reform. A law librarian should be invited to advise on which law texts to buy and which journals to subscribe to.**

5. Need for Integrated Law Reform: To have a comprehensive framework of legislation within which an efficient and effective financial sector could develop and operate in The Gambia, further legislative measures on various aspects of the sector

would be required immediately. We were pleased to note that the Gambian authorities had this issue firmly in mind. We were privileged to have sight of a document agreed between the Ministry of Justice and USAID/Banjul indicating the legislative measures which needed to be tackled immediately. The list of areas and their groupings are as follows:

- Business Organization
 - Companies Act;
 - Partnership Act;
 - Business Registration Act;
- Business Transactions
 - Hire/Purchase;
 - Leasing;
 - Bills of Lading;
 - Bills of Exchange;
 - Contracts;
- Property Law
 - Land Registration Act;
 - Mortgages Act (already being drafted);
 - Conveyancing and Law of Property Act;
- Procedures and Practices
 - Evidence;
 - Rules of Court.

We would like to supplement this list by the addition of the following areas:

- **Stock Exchange legislation;**
- **Pledges and Liens - this is urgent, because, while we have dealt with the use of immovable property as collateral for loans in the draft Mortgages Act, we have not covered the use of movable property, e.g. shares, as such collateral;**
- **Sale of Goods (revision);**
- **Administrative Justice - this would involve the simplification and enactment of the administrative law and administrative tribunals.**

Further, we would recommend a continuing review of existing legislation to ensure that they are revised and brought up to date.

6. **The Time-frame for this Project:** We should mention a constraint from which this project suffered. That is the time given to it. We do not know whether its planning was based on any actual experience of drafting anywhere. But it seems to us that the time allocated for some of the stages of the project was inadequate. Legislative drafting could well be done by giving the draftsman a comprehensive brief and leaving him to write up the law. It could also be done, as was done in this project, by investigation and the writing up of the law afterwards. Having regard to the present circumstances of The Gambia, with the work pressures on the Ministry of Justice and other instructing Ministries, the former approach, could not, obviously be adopted for this project, and the latter could not be avoided, not only for this project, but for future similar projects. But whatever method is adopted, legislative drafting for the draftsman involves study, discussion, reflection and writing. That writing is not exactly the same as continuous narrative exposition. The time required for it is always difficult to judge, but should be easier to estimate after the receipt of full instructions by way of a brief or after the investigation.

The consultancy was originally for 91 working days, of which 16 were allocated to actual drafting. Bearing in mind the size of some of the legislation, this was indeed short. We do not know how the number of days for the drafting or for the consultancy as a whole was arrived at. We know that without the additional 15 days granted by USAID/Banjul in the course of the consultancy, the work could not have been done.

We would like to see in future adequate time, based on an assessment of the actual size of the work, allocated to the drafting of the legislation. For this purpose we recommend that the consultants should be involved in the planning of the project. We recommend that the number of man-days allocated to drafting should be fixed only after the field research has determined the scope of the legislation.

G. Acknowledgments

We were warmly welcomed in The Gambia and our task was facilitated at every turn by the Ministry of Justice and USAID/Banjul. Hon.Hassan Jallow gave us the benefit of his mature judgment, and Mrs.Amie Bensouda and Mr.Cherno Jallow were throughout our many discussions our unfailing guides on the law and values of The Gambia. We would like to mention specially Mrs.Sarah Adam, our Project Officer, upon whom we imposed with our requests without hesitation and who always

responded positively. To all of them we extend our very warm thanks.

We would also like to thank all those whom we interviewed and who provided us with various insights into the different aspects of legislation on which we sought views in The Gambia. We were most impressed with the contribution of the Accountants Council. Their interest in the project was marked by their Chairman, Mr. Kabba Jallow, bringing his whole Council to meet and discuss with us their view of our proposals. We were struck by the force of their arguments and the vigour with which they advanced them. The discussions were most stimulating and led to our avoiding some mistakes.

Finally, we would like to thank all those who made it possible for us to have this opportunity of working on this project for The Gambia.

ANNEX A

**LIST OF PERSONNEL INTERVIEWED
DURING FIELD RESEARCH**

**LIST OF PERSONNEL INTERVIEWED
DURING FIELD RESEARCH**

Honourable Mr.Justice E.Olayinka Ayoola, Chief Justice;

Honourable Mr.Justice P.D.Anin, President of the Court of Appeal of The Gambia and Chairman of the Law Reform Commission;

Honourable Mr.Hassan Jallow, Minister of Justice and Attorney General;

Mrs.Amie Bensouda, Solicitor and Legal Secretary, Ministry of Justice;

Mr.Alieu Ngum; Permanent Secretary, Ministry of Finance;

Mrs.Aminata Ngum, Master of the Supreme Court;

Alhaji Pa Harley Ceesay, Principal Registrar, Supreme Court;

Mr.Ousainou Darboe, Deputy Chairman of the Law Reform Commission;

Mr.Ted Sow, Secretary of the Law Reform Commission;

Miss Ida Drammeh, Legal Practitioner;

Mr.Kabba Jallow, Chairman, Accountants Council;

Mr.Paul Bird, Resident Manager, Peat Marwick, Accountants;

Mr.Peter Smith, Pannell Kerr Forster, Accountants;

Mr.Robert Maddocks, Auditor to Internal Audit Inspector, Gambia Commercial and Development Bank (GCBD);

Mr.Mass Loum, Chief Audit Inspector, GCDB;

Mr.Mike Knight, Managing Director, Meridien Bank;

Mr.Anthony Bigwood, Deputy Managing Director, Meridien Bank;

Mr.David Able Thomas, BICI;

Mr.Calum Buchanan, Managing Director, Standard Chartered Bank, Gambia;

Mr.Graham Yates, Deputy Manager, Standard Chartered Bank, Gambia;

Mr.Ben Carr, Consultant in Banking and Finance (former Managing Director of GCDB);

Mr.Nuha Marenah, Head of Recoveries Unit, GCBD;

Mr.Jobarteh, Loans Department, GCDB.

ANNEX B.1

MORTGAGES ACT [DRAFT]

MORTGAGES ACT [DRAFT]

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MORTGAGES ACT

An Act to regulate the law of Mortgages

PART I - GENERAL PROVISIONS

1. Short Title

This Act may be cited as the Mortgages Act, 1992.

2. Interpretation

(1) In this Act, unless the context otherwise requires -

"encumbrancer" includes any person entitled to the benefit of an encumbrance;

"mortgagee" includes any person from time to time deriving title through the original mortgagee;

"mortgagor" includes any person from time to time deriving title through the original mortgagor or entitled to redeem a mortgage according to his interest in the mortgaged property;

"purchaser" means a purchaser in good faith for valuable consideration and includes a lessee or mortgagee who acquires an interest for valuable consideration.

(2) In this Act -

- (a) a reference to a prior mortgage or encumbrance is a reference to one that ranks in priority above another mortgage or encumbrance on the same property;
- (b) a reference to a subsequent mortgage or encumbrance is a reference to one that ranks in priority below another mortgage or encumbrance on the same property.

3. Nature of a mortgage

(1) A mortgage for the purposes of this Act is a contract charging immovable property as security for the due repayment of debt and any interest accruing thereon or for the performance of some other obligation for which it is given, in accordance with the terms of the contract.

(2) A mortgage shall be an encumbrance on the property charged, and shall not, except as provided by this Act, operate so as to change the ownership, right to possession or other interest (whether present or future) in the property charged.

(3) A mortgage may be created in any interest in immovable property which is alienable.

4. Act to govern all mortgages

A mortgage of immovable property shall only be capable of being effected in accordance with the provisions of this Act, and every transaction which is in substance a mortgage of immovable property, whether expressed as a mortgage; charge, pledge of title documents, outright conveyance, trust for sale on condition, lease, hire purchase, conditional sale, sale with right of repurchase or in any other manner, shall be deemed to be a mortgage of immovable property and shall be governed by this Act.

5. Mortgages evidenced by writing

(1) No mortgage shall be enforceable unless -

- (a) it is evidenced by writing signed by the mortgagor or by his agent authorised in writing to sign on his behalf; or
- (b) it is exempted from the necessity of writing by the operation of the rules of equity including the rules relating to fraud, duress, hardship, unconscionability and part performance; or
- (c) it is exempted from the necessity of a writing by any enactment, in the case of a customary law transaction.

(2) Every writing evidencing a mortgage shall be registered in accordance with the Land (Registration of Deeds) Act [Cap 57:01]

(3) A registrar empowered to register instruments in accordance with the Land (Registration of Deeds) Act [Cap 57:01] may, in addition to any power given to him by that

Act, refuse to register any writing evidencing a mortgage unless the writing -

- (a) states the name and address of each mortgagor and each mortgagee;
- (b) states the nature of the mortgagor's interest in the property which is mortgaged and the extent to which that interest is subject to the mortgage;
- (c) identifies the mortgaged property by reference to its location and boundaries (which may be by reference to an official plan) or to a previously registered writing describing the same property;
- (d) where the mortgage secures the payment of money, states the date on which payment is due and states the principal sum lent or to be lent or if the sum to be lent is indeterminate the writing so states, and if further advances are to be made and secured by the mortgage the writing so states.

(4) Every writing evidencing the transfer or encumbrance of a mortgage or any interest in a mortgage, or a discharge of a mortgage in accordance with section 24, shall be registered in accordance with the Land (Registration of Deeds) Act [Cap 57:01]

PART II - EFFECT OF A MORTGAGE

6. Extent of mortgaged property

(1) Every mortgage is effectual to create a charge upon all interests and rights which the mortgagor has in the property mortgaged, or which he enjoys as an incident of his interest in the mortgaged property.

(2) Subsection (1) shall apply only if and as far as a contrary intention does not appear expressly or by necessary implication, and shall have effect subject to the provisions of the mortgage.

7. Acts secured by mortgage

Unless a contrary intention appears expressly, a mortgage shall be security only for the performance of the act or acts provided in the mortgage and not for any performance promised in any past or future contract.

8. Liability of mortgagor

Unless a contrary intention appears expressly or by necessary implication, the mortgagor shall be personally liable, as well as liable on the mortgage security, for the performance of the act or acts secured by the mortgage.

9. Mortgage to more than one person

(1) Unless a contrary intention appears expressly or by necessary implication, a mortgage made to two or more mortgagees or transferred to two or more transferees or securing performance to two or more obligees shall, as against the mortgagor, transferor or obligor or any person deriving interest through the mortgagor, transferor or obligor and without prejudice to the rights of the mortgagees, transferees or obligees among themselves, be deemed to be made to the mortgagees or transferred to the transferees or secured to the obligees as joint holders with right of survivorship.

(2) Subsection (1) shall apply notwithstanding any notice to the mortgagor, transferor or obligor or person deriving an interest through any or all of them of a severance of the joint holding after the mortgage.

10. Implied covenants on creation of mortgage

Unless a contrary intention appears expressly or by necessary implication, there shall be implied the covenants relating to the right to mortgage, quiet enjoyment, freedom from encumbrances, further assurance, maintenance, repairs and protection of the mortgage security in the terms set out in Part I of the First Schedule; and where the mortgaged property includes a leasehold as to that leasehold there shall be implied the further covenants relating to validity and past and future observance of the lease in the terms set out in Part II of the First Schedule.

11. Implied covenants joint and several

Unless a contrary intention appears expressly or by necessary implication, in a mortgage or transfer of a mortgage where two or more persons are expressed to mortgage or transfer or to join as covenantors, an implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are two or more mortgagees or transferees an implied covenant with them shall be deemed to be a covenant with them jointly unless the performance secured by the mortgage is secured to them in shares or distinct sums, in which case the implied covenant shall be deemed to be a covenant with each in respect of

the share or distinct sum secured to him.

12. Right to title documents

(1) Unless a contrary intention appears expressly or by necessary implication,

- (a) the prior mortgagee shall, as against the mortgagor, be entitled to possession of all of the mortgagor's title documents which relate exclusively to the mortgaged property;
- (b) where during the life of the mortgage the mortgagor becomes entitled to possess any title document relating exclusively to the mortgaged property it shall be the duty of the mortgagor to deliver that document to the then prior mortgagee.

(2) A mortgagee having possession of a mortgagor's title documents shall keep them whole, uncancelled and undefaced and shall be liable in an action for damages for any wilful or negligent failure so to do, and shall deliver them upon timely performance of the act or acts secured by the mortgage or upon redemption to the then prior mortgagee, and if there be no mortgagee then to the mortgagor or person succeeding to title through the mortgagor.

(3) Where the mortgagee has possession of title documents, the mortgagor at any reasonable time, on his request and at his own expense, shall be entitled in person or through an agent to inspect and make copies or extracts from any such document.

13. Insurance

(1) Both the mortgagor and the mortgagee have an insurable interest in the mortgaged property.

(2) Unless a contrary intention appears expressly or by necessary implication,

- (a) where the mortgagor has covenanted to insure all or any part of the mortgaged property and fails to do so as required by the terms of the mortgage, the mortgagee shall be entitled, after giving notice in writing to the mortgagor, to insure and keep insured the mortgaged property against loss or damage by theft, fire, earthquake or other natural disaster; and the premiums paid by the mortgagee for any such insurance shall be secured with the same priority as the mortgage and, where the mortgage secures payment of money, shall be added to the principal sum with interest at the same rate as on the principal sum;

- (b) where the mortgagor has covenanted to insure all or any part of the mortgaged property and the insurance has been effected by the mortgagor, or on behalf of the mortgagor by the mortgagee, all money received on such insurance shall be applied in making good the loss or damage in respect of which the money is received unless the mortgagor elects to apply all or part of it toward the performance of the act or acts secured by the mortgage.

14. Transfer by mortgagor

(1) Unless a contrary intention appears expressly or by necessary implication, a mortgagor may transfer all or any part of his interest in the mortgaged property at any time without the concurrence of the mortgagee.

(2) The transfer of all or any part of his interest in the mortgaged property shall not relieve the mortgagor of his personal liability on any covenant in the mortgage.

(3) In a transfer of a mortgage from a mortgagor for valuable consideration, unless a contrary intention appears expressly or by necessary implication, the transferee shall be deemed to have covenanted to indemnify the mortgagor's personal liability on any covenant in the mortgage.

(4) Unless a contrary intention appears expressly or by necessary implication, it shall be implied that the mortgagor covenants to give notice to the mortgagee of any transfer of all or any part of the mortgagor's interest in the mortgaged property by the mortgagor subsequent to the mortgage:

Provided that notwithstanding any provision to the contrary failure to give notice shall not invalidate the transfer.

(5) In this section, a transfer includes a sale, lease, encumbrance or other disposition.

15. Transfer by mortgagee

(1) A mortgagee may transfer all or any part of his interest in the mortgage at any time without the concurrence of the mortgagor, so however that any transfer shall be void and of no effect if it purports to make any disposition of the mortgagee's interest in the mortgaged property without making the same disposition of the right to performance of the act or acts secured by the mortgage.

(2) Unless a contrary intention appears expressly or by necessary implication, a transfer of a mortgage by a mortgagee operates to transfer the whole interest of the mortgagee to the transferee, including -

- (a) the right to demand, sue for, recover and give receipts for performance of the act or acts secured by the mortgage, including performance then due or becoming due thereafter; and
- (b) the benefit of all securities for performance including collateral securities, and the benefit of and right to sue on all covenants with the mortgagee and the right to exercise all powers of the mortgagee.

(3) In this section, a transfer includes a sale, lease, encumbrance or other disposition.

16. Illegal, void and voidable transactions

(1) Where the performance of an act or acts secured by the mortgage is illegal, or derives from a contract which is illegal, the mortgage shall to that extent not be enforceable, so however that a court may order the return of title documents or the removal of any clog on the title to the mortgaged property.

(2) Where the performance of an act or acts secured by the mortgage derives from a contract which is void or voidable at the mortgagor's option, the mortgage shall to that extent not be enforceable, so however that a court may order restitution as a condition to the return of title documents or the removal of any clog on the title to the mortgaged property.

17. Remedies of mortgagee on default

Upon failure of performance of an act or acts secured by the mortgage the mortgagee may do either or both of the following:-

- (a) sue the mortgagor or the obligor or both on any personal covenant to perform;
- (b) realise his security in the mortgaged property in all or any of the ways provided in this Part, and in no other way notwithstanding any provision to the contrary in the mortgage.

18. Appointment of receiver on default

(1) Upon failure of performance of an act or acts secured by the mortgage the mortgagee may apply to the court for the appointment of a receiver, and unless the court is satisfied that no grounds exist for appointment of a receiver the court shall appoint a receiver.

(2) The court may empower a receiver appointed under this section to take possession of the mortgaged property, to collect by demand, action in the name of the mortgagor or mortgagee, or otherwise all income including arrears accruing from the mortgaged property, to give valid receipts for all income collected, and to do any other act necessary or proper to manage the property including the making of repairs and improvements, so however that no such repair or improvement shall bind the mortgagor, mortgagee or property until approved by the court.

(3) A receiver appointed under this section shall be liable to account at any time ordered by the court.

(4) A receiver appointed under this section shall be entitled to retain out of money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a fee or commission at such rate as the court in its discretion shall determine, in priority to all other claims on such money.

(5) Unless otherwise directed by the court, a receiver appointed under this section shall apply all income received by him from the property as follows and in the order listed:-

- (a) in discharge of all rents, taxes, rates and other required outgoings affecting the mortgaged property;
- (b) in payment of annual sums or other payments, and the interest on all principal sums, due and having priority to the mortgage in right whereof he is receiver;
- (c) in payment of the premiums of insurance payable in accordance with the mortgage and the cost of effecting necessary repairs;
- (d) in payment of all interest accruing due in respect of any principal money due under the mortgage;
- (e) in or towards the discharge of any principal money due under the mortgage;

and shall pay the residue, if any, to the person who, but for the possession of the receiver,

would have been entitled to receive the income or who is otherwise entitled to the mortgaged property.

(6) Any provision in a mortgage authorising the appointment of a receiver upon failure of performance of an act or acts secured by the mortgage other than as provided in this section shall be void and of no effect.

19. Mortgagee in possession

(1) Upon failure of performance by the mortgagor of an act or acts secured by the mortgage the mortgagee shall be entitled, as against the mortgagor and any person deriving an interest in the mortgaged property through him whose interest is subsequent to that of the mortgagee, to possession of the mortgaged property, except that in the case of default in the payment of principal or interest secured by the mortgage, the mortgagee's right to possession may be exercised only after thirty days' notice in writing to the mortgagor or such longer period as the mortgage may provide.

(2) A mortgagee entitled to possession under this section shall be entitled -

- (a) to enter and take possession of the mortgaged property if that may be done peaceably; or
- (b) to assert his right to possession by an action for possession.

(3) A mortgagee in possession shall be liable to account to the mortgagor for any income, whether in cash or in kind, derived from the mortgaged property which he has received or without wilful default might have received from the time of taking possession, and to pay over to the mortgagor any excess on the amounts due on the mortgage.

(4) In accounting under this section the mortgagee in possession shall be liable:-

- (a) for any failure to be diligent in realising any sum due to the mortgagee from the mortgaged property;
- (b) at a fair market value for his own occupation rent if he occupies all or part of the mortgaged property;
- (c) for any unreasonable injury to or neglect of mortgaged property caused by his wilful or negligent act or omission.

(5) In accounting under this section the mortgagee in possession shall:-

- (a) not be entitled to any compensation for personally managing the mortgaged property, but an agent appointed by him to manage the property shall be entitled to such compensation as may be approved by the court;
- (b) be allowed the cost of any reasonable repairs or improvements made to protect the value of the mortgaged property or to maintain or increase the income from the mortgaged property; and to the extent that any such sums exceed the income from the mortgaged property they shall be secured with the same priority as the mortgage and where the mortgage secures the payment of money shall be added to the principal sum with interest at the same rate as on the principal sum.

(6) A mortgagee in possession shall have power from the date of his possession to collect by action or otherwise any income from the mortgaged property, including arrears to which he would have been entitled had he owned the mortgaged property since the date of the mortgage.

(7) A mortgagee in possession, unless he otherwise agrees, is not bound by any lease, profit or licence entered into by the mortgagor subsequent to the mortgage unless the tenant, profit holder or licensee took his interest as a purchaser for value without notice of the mortgage.

(8) A mortgagee in possession shall be entitled to transfer all or any part of his interest in the mortgaged property, including his right to possession, as provided in section 15.

20. Judicial sale

(1) Upon failure of performance of an act or acts secured by the mortgage the mortgagee may apply to the court for an order for judicial sale of the mortgaged property, and upon being satisfied as to the existence of grounds for the application the court shall, upon such conditions as it deems just and equitable, grant an order for judicial sale of all or part of the mortgaged property.

(2) In considering what condition if any to attach to an order for judicial sale the court shall have regard to what opportunity if any the mortgagee has afforded to the mortgagor or obligor or both to remedy the failure or performance.

(3) A judicial sale ordered under this section shall be by public auction unless the mortgagor and all encumbrancers subsequent to the mortgagee requesting the judicial sale and of whom he has notice at the time of the sale agree to a private sale and the terms of the sale are approved by the court.

(4) Any sale ordered by the court under this section shall not take place until the expiration of thirty days after the date of the order.

(5) Prior to a judicial sale ordered under this section the mortgagee requesting the judicial sale shall give notice of the sale to the mortgagor and every encumbrancer of whom he has notice of such period of time as shall be approved by the court.

(6) Failure to give such notice shall not affect the judicial sale but shall render the mortgagee personally liable for any loss caused thereby.

(7) Neither the mortgagor nor any encumbrancer, including the mortgagee who requested the judicial sale and any mortgagee prior or subsequent to him, shall be precluded from purchasing the mortgaged property at a judicial sale ordered under this section:

Provided that a purchase by a mortgagee who requested the judicial sale or his nominee shall not take effect until approved by the court.

(8) The court ordering the judicial sale may make any order for conveyance, or vesting order, proper for giving effect to the sale, and the court may authorise the registrar or other officer of the court to execute on behalf of the mortgagor and the mortgagee who requested the judicial sale, a conveyance granting the interests of the mortgagor and the mortgagee in the mortgaged property to the purchaser at the judicial sale.

(9) The purchaser at the judicial sale ordered under this section shall take title to the mortgaged property free of all interests to which the mortgage of the mortgagee who requested the judicial sale has priority, and free of that mortgage, but subject to all interests which have priority to that mortgage, and shall be entitled as against any person to all title documents relating exclusively to the mortgaged property other than those title documents held by a person with an interest having priority to the mortgage of the mortgagee who requested the judicial sale.

(10) Notwithstanding any provision to the contrary in the mortgage a judicial sale ordered under this section shall be the only manner in which a mortgagee may foreclose rights to redeem the mortgaged property.

(11) The proceeds from a judicial sale ordered under this section shall, as the court directs, either be deposited in court for distribution as ordered by the court or shall be held in trust for distribution by the mortgagee who requested the judicial sale.

(12) Proceeds from a judicial sale shall be distributed-

- (a) first, in payment of all expenses properly incurred as incidental to the judicial sale or any prior attempted judicial sale;

- (b) secondly, in payment of all sums secured by the mortgage or with the same priority as the mortgage;
- (c) thirdly, in payment in the order of priority of any encumbrances subsequent to that of the mortgagee who requested the judicial sale; and
- (d) the residue to the mortgagor or his successors in interest.

(13) Where a mortgagee holding in trust for distribution proceeds from a judicial sale ordered under this section is in doubt as to the proper distribution of all or part of those proceeds he may apply to the court for direction and may if the court so orders deposit the proceeds in court.

(14) The title of a purchase at a judicial sale ordered under this section shall not be impeachable on the ground that the order for the judicial sale was improperly or irregularly ordered.

21. Priorities

(1) Except as otherwise provided by this or any other enactment or by express agreement among encumbrancers, priorities among encumbrancers shall be in order of time of registration, the first encumbrance in time having priority, subject to the operation of the rules of equity including the rules of fraud, estoppel for gross negligence or otherwise, purchasers for valuable consideration without notice of prior interests and the priority of legal over equitable interests where the equities are equal.

(2) For the purposes of this section, including the application of the rules of equity, notice may be actual or constructive; and a purchaser shall be deemed to have constructive notice of any fact which would have been disclosed by a reasonable inquiry as to-

- (a) the possession and contents of title documents;
- (b) the title of the property to a good root of title more than 20 years old; and
- (c) the rights of any person occupying the property.

(3) In determining priority among mortgages tacking shall be permitted in the following cases:

- (a) with the express agreement of an intermediate encumbrancer a subsequent mortgage shall have priority over the mortgage held by that intermediate encumbrancer;
- (b) where a mortgage is expressed to secure further advances any such advances shall have priority to the full extent secured over any subsequent encumbrancer unless that encumbrancer was a purchaser for valuable consideration without notice of the prior mortgage.

(4) In determining priorities among encumbrances there shall be no consolidation of encumbrances so that a mortgagor seeking to redeem any one mortgage shall be entitled to do so without performing any act secured by any separate mortgage made by him or by any person through whom he claims, solely on the property mortgaged by the mortgage which he seeks to redeem.

(5) In determining the incidence of obligations secured by mortgage the rules of equity relating to contribution, exoneration and marshalling shall apply.

22. Methods of redemption

(1) Any person entitled to redeem mortgaged property may redeem by -

- (a) performing all of the acts secured by the mortgage which have yet to be performed; and
- (b) compensating the mortgagee by payment of interest costs and other expenses due in respect of any failure to have timely performance of the acts secured by the mortgage.

(2) A tender of performance and compensation under subsection (1) sufficient to redeem the mortgaged property shall, if refused by the mortgagee, have the effect of relieving the person offering to redeem from any obligation to pay compensation for any further delay in performance of the acts secured by the mortgage.

(3) Redemption may, but need not, be by an action for redemption.

23. Judicial sale in lieu of redemption

(1) Any person entitled to redeem mortgaged property may have an order for judicial sale instead of an order for redemption in an action brought by him either for redemption alone, or for judicial sale alone or for judicial sale or redemption in the alternative.

(2) In a judicial sale ordered at the instance of a person entitled to redeem mortgaged property, the provisions of section 20 shall, mutatis mutandis apply.

24. Written discharge

(1) A mortgage shall be redeemed upon acceptance of a tender of performance and compensation under section 22 or upon an order for redemption; but a person who redeems shall be entitled to require the mortgagee to issue a written discharge.

(2) Where a written discharge is issued to a subsequent encumbrancer, co-owner, or to any person other than the mortgagor or successor to his entire interest in the mortgaged property, it shall operate as a transfer of the mortgagee's interest in the mortgage.

(3) In a written discharge given under this section the same covenants shall be implied as if the person who executes the discharge had been expressed to transfer as mortgagee subject to any interest prior to the mortgage.

PART III - MISCELLANEOUS

25. Model precedents

Instruments in the form of the model precedents contained in the Second Schedule, or in similar form or using expressions to a similar effect, shall, in regard to form and expression, be sufficient to create or transfer a mortgage.

26. Application

(1) This Act shall apply to all mortgages created after the commencement of this Act.

(2) Notwithstanding the provisions of section 4, a mortgage created, and in existence, before the commencement of this Act shall remain valid and operative under its terms and conditions and in accordance with the law applicable before the commencement of this Act, subject to such modifications as to enforcement by way of appointment of a receiver or judicial sale as are necessary to bring such mortgage into conformity with the provisions of this Act.

27. Repeal

The Conveyancing and Property Law Act 1881 in so far as it relates to mortgages shall cease to be in force in The Gambia.

FIRST SCHEDULE (Section 10)**IMPLIED COVENANTS****PART 1 - IMPLIED COVENANTS BY MORTGAGOR**

There shall be implied the following covenants by the mortgagor:-

1. That the mortgagor alone, or with the consent or concurrence of all other persons whose consent or concurrence is required, has full power to mortgage the property expressed to be mortgaged by him in the manner in which it is expressed to be mortgaged.
2. That it either or both the mortgagee and persons deriving title through the mortgagee lawfully enter into possession of the mortgaged property, the mortgagor and every person concurring in the mortgage by his direction and every person deriving title through the mortgagor (other than a person having an interest to which the mortgage is expressly made subject) shall not interfere with, interrupt or disturb the lawful possession of such person in possession.
3. That the mortgaged property is freed and discharged from, or otherwise by the mortgagor sufficiently indemnified against, all interests, encumbrances, claims and demands whatsoever, other than those to which the mortgage is expressly made subject.
4. That the mortgagor and every person concurring in the mortgage by his direction, and every person deriving title through any of them, and every other person having or rightfully claiming any interest in the mortgaged property other than an interest to which the mortgage is expressly made subject will, from time to time and at all times on the request of the mortgagee or any person deriving title through him, execute and do all such lawful assurances and things for further or more perfectly assuring the title to the security interest as such person may reasonably request, the expenses in respect of this covenant to be borne by the mortgagor during the life of the mortgage and thereafter by the person making the request.
5. That the mortgagor and every person deriving an interest through the mortgagor, other than a person having an interest to which the mortgage is expressly made subject, will at all times during the life of the mortgage preserve, protect, repair and maintain the mortgaged property so as not to diminish its value below what is

reasonably required as security for the performance of any act secured by the mortgage but which has yet to be performed.

**PART II - IMPLIED COVENANTS BY MORTGAGOR
OF LEASEHOLD PROPERTY**

There shall be implied the following covenants by the mortgagor:-

1. That the lease is at the date of the mortgage a good, valid and effectual lease of the mortgaged property and is in full force, unforfeited and unsurrendered, and has not become void or voidable.
2. That all rents reserved by, and all the covenants, conditions and agreements contained in, the lease and to be paid, observed or performed by the mortgagor and persons deriving title through him have been paid, observed and performed up to the time of the mortgage.
3. That the mortgagor, or the person deriving title through him, will at all times during the continuance in force of the mortgage pay, observe and perform or cause to be paid, observed and performed, all rents reserved by the lease and all covenants, conditions and agreements contained in the lease, which he or they are bound to pay, observe and perform.

SECOND SCHEDULE**MODEL PRECEDENTS (Section 25)****FORM I - FORM OF MORTGAGE FOR FREEHOLD PROPERTY**

THIS MORTGAGE is made the day of, 19... between the mortgagor of, in The Gambia and the mortgagee of in The Gambia.

WHEREAS the mortgagee has agreed to lend to mortgagor the sum of..... dalasi (D.....) and the mortgagor has agreed to give a charge on the property described in this instrument to the mortgagee as security for the loan [or here substitute the agreement underlying the mortgage security]

The parties hereby agree as follows:

1. By a conveyance made the day of, 19... between of and the mortgagor (registered number) the property known as (hereinafter referred to as "the property") was conveyed to the mortgagor for ever.
2. In consideration of the sum of dalasi (D.....) [here state the amount in words and figures] now paid by the mortgagee to the mortgagor (the receipt of which the mortgagor hereby acknowledges) [or if the full amount of the consideration has not been received, here substitute for the acknowledgement of the receipt of the full amount acknowledgment of any amount received and the terms arranged for the transfer of further amounts], the mortgagor covenants with the mortgagee to pay [here state the terms of repayment of the principal and interest].
3. The mortgagor hereby mortgages the property to the mortgagee to secure payment of the principal money, interest and other money hereby covenanted to be paid by the mortgagor.
4. [Add covenant to insure buildings and any other provisions desired].
- 5 The property consists of a house and land bounded [description of boundaries] and is indicated by the colour red on the plan attached to the aforementioned conveyance which

shows the relevant measurements.

signed by

The Mortgagor in the presence of:

signed by

The Mortgagee in the presence of:

FORM II - FORM OF MORTGAGE FOR LEASEHOLD PROPERTY

THIS MORTGAGE is made the day of, 19... between the mortgagor of in The Gambia and the mortgagee of in The Gambia.

WHEREAS the mortgagee has agreed to lend to mortgagor the sum of..... dalasi (D.....) and the mortgagor has agreed to give a charge on the property described in this instrument to the mortgagee as security for the loan [or here substitute the agreement underlying the mortgage security]

The parties hereby agree as follows:

1. By a lease agreement made the day of, 19... between of and the mortgagor (registered number) the property known as (hereinafter referred to as "the property") was leased to the mortgagor for a term of years on terms and conditions described in that lease.
2. In consideration of the sum of dalasi (D.....) [here state the amount in words and figures] now paid by the mortgagee to the mortgagor (the receipt of which the mortgagor hereby acknowledges) [or if the full amount of the consideration has not been received, here substitute for the acknowledgement the receipt of the full amount acknowledgment of any received and the terms arranged for the transfer of further amounts], the mortgagor covenants with the mortgagee to pay [here state the terms of repayment of the principal and interest].

3. The mortgagor hereby mortgages the property to the mortgagee to secure payment of the principal money, interest and other money hereby covenanted to be paid by the mortgagor.

4. [Add covenant to insure buildings and any other provisions desired].

5 The property consists of a house and land bounded [description of boundaries] and is indicated by the colour red on the plan attached to the aforementioned lease document which shows the relevant measurements.

signed by

The Mortgagor in the presence of:

signed by

The Mortgagee in the presence of:

FORM III - FORM OF TRANSFER OF MORTGAGE

THIS TRANSFER OF MORTGAGE is made the day of, 19... between the transferor of..... in The Gambia and the transferee of in The Gambia.

1. This Transfer is supplemental to a mortgage made the [here state the date of the original mortgage] between [give name and address of the mortgagor] and the transferor (registered number [state the registered number of the mortgage]) upon the property known as [give the description of the property, eg as in the original mortgage].

2. In consideration of the sums ofdalasi (D.....) and dalasi (D.....) [here state the amounts for principal and interest given by way of consideration for the transfer in words and figures] now paid by the transferee to the transferor, being the respective amounts of the principal money and interest now owing in respect of the said mortgage (the receipt of which the transferor hereby acknowledges), the transferor hereby transfers to the transferee the benefit of the said mortgage and all his rights thereunder.

signed by.....

The Transferor in the presence of:

signed by

The Transferee in the presence of:

FORM IV - FORM OF DISCHARGE OF MORTGAGE

THIS DISCHARGE OF MORTGAGE is made the day of, 19... by of in The Gambia.

1. This Discharge is supplemental to a mortgage made the [here state the date of the original mortgage] between [give name and address of the mortgagor] and the mortgagee (or transferor) (registered number [state the registered number of the mortgage] upon the property the property known as [give the description of the property, eg as in the original mortgage].

2. I, of..... in The Gambia hereby acknowledge that I have this day of 19... received the sum of dalasi (D.....) representing the balance remaining owing in respect of the principal money secured by the said mortgage together with all interest and costs.

3. The property is accordingly discharged from the said mortgage.

signed by

The Mortgagee (or Transferee, as the case may be), in the presence of:

ANNEX B.2

**EXPLANATORY NOTE ON
THE DRAFT MORTGAGES ACT**

Note on the Draft Mortgages Act

A. The Existing Regulatory Regime

The Gambia has no statute regulating mortgages. The English law on mortgages as at 1881 applies to The Gambia by virtue of section 119 of the Constitution of the Republic of The Gambia (1970) which continues existing laws, and section 2 of the Law of England (Application) Act [Cap.5], which renders applicable to The Gambia "the common law, the doctrines of equity, the statutes of general application in force in England on the first day of November, 1888". These provisions ensure that the laws on mortgages enacted in the English Conveyancing and Law of Property Act of 1881 apply in The Gambia. What other enactments on the subject are applicable as a result of the provisions on the application of English laws is a matter of some complexity. Section 3 of the Law of England (Application) Act also continued in force "All Acts of Parliament of the United Kingdom declared to extend or apply The Gambia, which had effect as part of the law of The Gambia immediately before the eighteenth day February 1965." Simple as this sounds, it is not easy to say whether any statutes on mortgages were so declared by the British Parliament to extend or apply to The Gambia. Even in England old statutes are not readily available to the ordinary legal practitioner. Besides, recent editions of English law books on mortgages contain expositions involving changes to the law enacted by the 1881 Act without reference to that law thereby making it difficult, if not dangerous, to ascertain from them the true state of the law in The Gambia. The situation in The Gambia has made it necessary for the draftsman of a mortgage deed to include all covenants, rights, obligations and other material he can possibly think of potentially relevant, however remote, thus producing a document which is unnecessarily complicated and of some prolixity.

It is important, in the circumstances, that The Gambia should have its own legislation on as many subjects on which it needs regulation as soon as it possibly can. Mortgages, by virtue of the support that they give to economic development through lending is one such subject. The draft Act now submitted simplifies the law of mortgages by bringing together the principles which should apply in The Gambia derived from the common law and the relevant legislation and disposing of the English statute which currently applies. It defines the mortgage transaction, specifies the rights and obligations of the parties, and states the consequences of entry into the mortgage relationship.

B. The Findings of the Field Research

Among the legal profession, practitioners in the area of mortgages law were very few in number. None had any real complaints against the law as it now stands. But this may be due to the fact that there has not been much, if any litigation, over the validity of mortgage documents or actions taken under them, and that in any case the lawyers may feel themselves adequately remunerated for the mortgage documents they draw up under the prevailing law. From existing precedents, practitioners have been able to fashion the rules to suit the needs of their clients. Two specific problems were, however, identified.

Under the prevailing law a mortgage, technically, involves a conveyance of the property by the mortgagor to the mortgagee. That gives the mortgagee the legal mortgage over the property. The mortgagee takes possession of the title deeds. All mortgages of the property not involving a conveyance of a legal estate in the property become equitable mortgages, and take precedence after the legal mortgage. The first problem disclosed by the field research was the generally acknowledged view that equitable mortgages were difficult to enforce in The Gambia because foreclosure proceedings had to pass through the courts and also because of the elusive nature of property ownership in The Gambia. Certainly, the worst experiences had occurred with the GCDB which was now veering to the conclusion that all its equitable mortgages were "useless".

Secondly, experience seems to suggest that even with legal mortgages, foreclosure without reference to the courts was not always risk-free. In one glaring example, GCDB could not enforce its legal mortgage against a defaulting debtor because neither the Sheriff nor the Police would assist the judgment creditor in the absence of a court order.

The effect of the absence of a mortgages law of its own in The Gambia could be highlighted by reference to the following consequences:

1. With its dependency on the English law at the cut-off date given in the Law of England (Application) Act, The Gambia has been denied the benefit of any statutory modernisation in the English law of mortgages since 1881.
2. Since the English Conveyancing and Law of Property Act, 1881 is not generally available in The Gambia, what the law is - even in its archaic form - is not known to those who need to consult it within the country.
3. The existing regime is a serious drawback on the development thrust of The Gambia and the harnessing of credit for economic growth.
4. The archaic nature of the law of mortgages cannot be divorced from the regulatory regime on enforcement of rights in The Gambia which has so far displayed some unresponsiveness to modern demands.

5. The Gambia lacks a simple, standard form of mortgage deed, which has led to some prolixity in the drafting of deeds with the consequent attraction of high legal fees borne by the ultimate consumer - the public.

In sum, the absence of a modern law of mortgages has reinforced the widely-held view that the present regime cannot support the modern financial processes of the market place. Indeed, it provides formidable constraints on the expansion and strengthening of regulations governing the money market. For example, there is no systematised mortgage lending at all in The Gambia nor is any envisaged by the banking community in the near future. Such pessimistic prognosis was premised on the unresponsiveness of the existing regime.

The attached draft Act will hopefully help to change this climate and encourage the development of a new lending policy and also the harnessing of the large pools of under-utilized capital in The Gambia seeking profitable domestic investment outlets.

C. The Provisions of the draft Act

The philosophy behind a modern mortgages law is to bring together in simple form the common law and the prevailing statutory rules on mortgages but modernised and properly adapted to suit the peculiar environment of The Gambia. The proposed legislation seeks to provide this requirement.

With respect to the mortgagor's liability, a dual basis of liability is proposed - liability against the mortgaged property in combination with the personal liability of the mortgagor. This is because the mortgage which provides a collateral for the underlying loan contract is separate from that contract; the loan contract is not merged into or superseded by the mortgage agreement. Just as the mortgagee is not asked to take the mortgagor's property which is higher in value in satisfaction of the loan, so a mortgagee should not be asked to forfeit the rest of his loan repayment if upon a sale of the property under the Act the proceeds fail to satisfy the mortgage. Upon a default, therefore, the mortgagee would have the option to proceed against the mortgagor either on the mortgage or against him personally. The principal advantage here for the mortgagee is that in the event that a mortgaged property yields insufficient funds to meet the obligation of the mortgagor, the mortgagee may recover the difference from the mortgagor personally. This should help to eliminate some difficulties revealed in the field study where the sale of mortgaged property had not yielded enough revenue to satisfy the mortgagor's debt.

Our proposal is that the mortgage should be confined to immovable property. Securities involving movable property should be governed by separate charges, pledges and liens. The usual covenants of a mortgagor should be implied by the statute; any additions to, alterations or variations of these implied covenants in a particular mortgage could be made in the mortgage document. The law should by its certainty and accessibility give confidence

to mortgagees and thereby encourage them to lend upon the mortgage security, but it is also important that mortgagees should not be unfairly treated under the law. It is, therefore, proposed that enforcement of the mortgage, where a mortgagor defaults, should be under the supervision of the Courts. Under the draft Act, there will be foreclosure, sale of the security, appointment of receivers to manage etc. But all that will be under the supervision of the Courts. Foreclosure by the mortgagee as a remedy will be abolished. Sale of the mortgaged security should only be by judicial sale. The appointment of a receiver should be by the Court, the Act setting out the powers which a receiver should have and the order in which he should apply proceeds. Accordingly, the provisions of the Act set out the following:

Section 2 is the interpretation section.

Section 3 This section states the nature of a mortgage and emphasises its character as a security transaction, creating encumbrances rather than a new ownership interest. The property is, therefore, not required to be conveyed, as was the case under the old law, by the mortgagor to the mortgagee in order to create the security. Although the definition covers legal and equitable interests in the property, i.e. the possibility of giving in mortgage not only a legal interest but an equitable interest as well, as a consequence of limiting mortgages to charges, there is no need for the distinction between the mortgage which conveys the property as the legal mortgage and other mortgages which only qualify as equitable mortgages. The order in which several mortgagees of the property are satisfied from the property mortgaged depends on the rule on priorities which is stated in section 21 as depending on actual or constructive notice of prior charges.

For the avoidance of doubt, the proposed definition makes it clear that a mortgage transaction is essentially a charge over immovable property. This thus distinguishes the mortgage from a lien which is a charge over chattels.

The character of a mortgage under this Act charges the property which is appropriated or identified as the security to be proceeded against in the case of default. It also provides for the occasional case of a mortgage made to secure an obligation other than the repayment of a debt, eg. to secure the construction of a building, the building contractor/mortgagor charging some property owned by him as security which the owner/mortgagee can proceed against upon default in constructing the building as agreed. Section 3(3) applies the statute to any alienable interest which could be created in immovable property.

Section 4 applies the Act to all non-possessory security transactions involving immovable property. The Act applies regardless of the form chosen to express the mortgage, though it is hoped that in future the simple forms contained in the Second Schedule will be generally used. It will be for the Court to determine in each case whether the transaction

in substance is a mortgage. The essence of a mortgage is that specific property is identified as security for the promised performance of an obligation, the mortgagor retaining the right of ownership subject to the security interest. This section is designed to prevent attempts to take what is in substance a mortgage outside the ambit of the Act.

This section together with section 26 which applies the provisions of the Act to all mortgages created after the commencement of the Act, makes it quite clear that all mortgages, by whatever name called, will after the enactment of the Act be regulated by the proposed legislation.

Section 5: By this section, a mortgage is unenforceable unless evidenced in writing, subject to certain equitable exceptions. Further, the Act is intended to help develop public and investor confidence in the system by introducing compulsory registration of all mortgages, transfers in such mortgages and discharges thereof. It should thus be easy to determine the status of any property which is offered as a collateral to secure a loan by means of a simple search, and also the determination of priorities of charges affecting the property because of the notice which registration is deemed to give.

Section 6: This section provides that unless there is an express or implied intention to the contrary, a mortgage extends to the mortgagor's entire interest in the property and rights incidental to the property.

Section 7: By this section, unless a contrary intention appears expressly, a mortgage can be security only for the performance of the obligation(s) specified in the agreement. Thus if the mortgage does not expressly provide for future advances or for past debts, the mortgage will not secure performance of those obligations. An intention cannot be implied under the section.

Section 8: The section implies a term making the mortgagor personally liable for the performance of the act or acts secured by the mortgage. Thus the mortgagee will have the option of proceeding against the mortgagor either on the mortgage or on the personal obligation. This will allow him to recover a deficiency judgment against the mortgagor if the mortgaged property turns out to be insufficient to meet the obligation. A surety or guarantor who does not wish to be personally liable for the performance of the act or acts secured by the mortgage should make express provision excluding his personal liability.

Section 9: The section sets out an implied term to permit the mortgagors, obligors and persons taking through them to deal with joint mortgagees, transferees and obligees as if they were joint tenants rather than tenants in common and on the death of one of the

tenants to be able to deal exclusively with the survivor. This provision is merely one of convenience for conveyancing since it has no application in determining rights among the parties deemed to be the joint tenants.

Section 10 implies covenants similar to those implied in the conveyance of interest in land, with the addition of covenants to deal with the special need to protect the mortgagee's security interest in the mortgaged property.

Section 11 sets out an implied term derived from the English law of Property Act, 1925 (ch.20). The section implies covenants to or by joint parties.

Section 12 provides an implied term to carry out the usual practice whereby title documents are transferred to the prior mortgagee and handed down to succeeding mortgagees as mortgages are discharged. The section also provides for access to title documents.

Section 13 (1) makes clear that both the mortgagor and the mortgagee may insure their interests in the mortgaged property. Subsection (2) implies a term permitting the mortgagee to effect insurance and secure the premiums if the mortgagor defaults on his promise to insure. Subsection (3) implies a term requiring the mortgagor to use the proceeds of insurance to repair the mortgaged property or at his option to discharge the mortgage.

Section 14 (1) preserves the mortgagor's right to transfer his interest in the mortgaged property at any time. If the mortgagee has protected his interest by registration the transferee from the mortgagor will always take his interest subject to the mortgage. Accordingly the mortgagee is not prejudiced and there is no reason to restrict the mortgagor's powers of alienation.

Section 14 (2) requires a novation to relieve the mortgagor of his personal liability on mortgage covenants.

Section 14 (3) protects the mortgagor/transferee by providing an implied covenant on the part of the transferee to indemnify the mortgagor should the mortgagor be compelled to perform on his personal covenants with the mortgagee. This is necessary since a mortgagor remains liable on his personal covenants even after he has conveyed away his entire interest in the mortgaged property. Only a novation, substituting the transferee for the mortgagor with the agreement of the mortgagee, can relieve a mortgagor of his liability on his personal covenants.

Section 14 (4) implies a covenant binding the mortgagor and all persons deriving an interest

through him to advise the mortgagee of transactions involving the mortgaged property. The reason is that although a mortgagee who registers his mortgage is protected against all dispositions by the mortgagor subsequent to the mortgage, he may be called upon to determine who is the next most senior encumbrancer, or he may wish to make further advances not included in the original mortgage and therefore require information of subsequent transactions, or he may wish to be kept informed of the occupation of the property so that he may select the most appropriate remedy open to him.

Section 15 (1) permits the mortgagee to alienate his interest in the mortgage at any time. Of course if the mortgagor is not notified of the transfer he will be protected in continuing to direct performance to the original mortgagee. The proviso to the subsection recognises the essential nature of the mortgage as a security transaction and therefore prohibits the transfer of the mortgage without the simultaneous transfer of the obligation secured by the mortgage.

Section 15 (2) provides that transfers of a mortgagee's interest in a mortgage will be an absolute discharge transferring all the mortgagee's interest including his rights and powers. Under this subsection the transferee will be in exactly the same position as the mortgagee from whom he took his interest.

Section 16. This section distinguished between two types of unenforceable agreements. Section 16(1) deals with mortgages based on performance of an act which is illegal or derives from a contract which is illegal. In this situation the mortgagor should not be put on terms as a condition for retrieving title documents or removing any clog on the title of the mortgaged property. The Court may order the return of documents or the removal of any clog unconditionally.

Section 16 (2), on the other hand, deals with agreements which are unenforceable because performance of an act secured by the mortgage derives from a contract which is void or voidable at the mortgagor's option, but is not illegal. In this situation the Court may order restitution as a condition predicated upon the return of title documents or the removal of any clog on the title, thus giving relief upon equitable terms. The mortgage might be void or voidable at the mortgagor's option if, for example, property which the mortgagor did not have the exclusive right to alienate or mortgage was mortgaged without the consent of the appropriate persons who should consent to such mortgage.

Section 17 specifies remedies available to a mortgagee upon default. It restricts the mortgagee to the remedies provided in the Act notwithstanding any provision in the mortgage. Foreclosure as a remedy (other than by judicial sale under section 20) is abolished.

Section 18. Under this section, the Court may appoint a receiver upon default by the obligor or mortgagor. Subsection (6) prohibits the appointment of a receiver except by Court order under this section. The reason is that the receiver appointed by the mortgagee becomes the agent of the mortgagor yet the mortgagor has no choice in his selection and will be bound by his acts whether honest or not. The Act seeks to give the mortgagor the protection of Court supervision for dealings with the mortgaged property by third parties. Thus it also provides that a security may be realised only by judicial sale. This section also indicates the powers which may be given to a receiver and the usual order in which proceeds from the property are to be applied.

Section 19 gives the mortgagee a right to possession only after default, and subject to certain conditions. Under this section a mortgagee in possession may lease the mortgaged property, but the lease will be subject to the mortgagor's right to redeem. Thus on a lease from the mortgagee in possession the lessee will usually wish to obtain the agreement of the mortgagor as well.

Section 20 provides for the realisation of the mortgage security and foreclosure by judicial sale. All other methods of foreclosure are excluded. Before an order for judicial sale takes effect the Court may, however, give the mortgagor an opportunity to make good the default. A judicial sale terminates the mortgage and all encumbrances subsequent to the mortgage.

Section 21 sets out the rules for determining priority of interests in mortgages. It restricts the application of the equitable rule of tacking which was developed from application of the rule that a mortgagee who had the legal estate should prevail over other mortgagees of whose securities he had no notice when he made his advance. As stated in Fisher and Lightwood on Law of Mortgage (10th ed.1988) at page 484:

"If a legal mortgagee made a further advance on the security of the estate, and had at the time of the further advance no notice of a second mortgage, his legal estate gave him priority to the further advance.... The same principle applied also where, after a legal mortgage to A, and a second mortgage to B, there was a third mortgage to a different person, C, who made his advance without notice of the second mortgage. If he took a transfer of A's mortgage, he had priority, not only in respect of the first mortgage but, by virtue of the legal estate, in respect of the third as well. Consequently he could tack the third mortgage to the first and so squeeze out the second."

The application of the doctrine as described could lead to hardship. In this draft, therefore, tacking is restricted to situations where the intervening encumbrancer agrees to the tacking of the further transaction to the prior one or where the mortgage makes express provision for the extension of the security to further advances.

The equitable doctrine of consolidation whereby a mortgagee holding distinct mortgages from the same mortgagor in which the legal dates for redemption have passed may, against certain persons and in certain circumstances, treat the mortgages as one and decline to accept redemption of any unless all are redeemed at the same time, is also, because of the hardship it could cause, abolished.

Section 22 provides the methods of redemption under the Act. The essence of redemption is that the performance is rendered and compensation paid for any delay in timely performance. No rules are laid down for determining compensation as this may vary from case to case; in the majority of cases, compensation simply taking the form of payment of interest. The section does not require any notice of intention to redeem. Redemption may, but need not, be by Court action.

Section 23 assists a person entitled to redeem where a mortgagee who has obtained the appointment of a receiver or has himself taken possession refuses to seek a judicial sale of the mortgaged property. By seeking an order for judicial sale under the section a mortgagor is put in the position to liquidate his debt.

Section 24 makes redemption complete upon making sufficient performance and compensation or upon judgment for redemption. The person who redeems is entitled to a written receipt, and this may be registered under section 5(5).

Section 25 and the Second Schedule give convenient precedents for the commonest forms of mortgage document, expressed in clear simple language.

Section 26 applies the Act to all mortgages created after the commencement of the Act. It also saves mortgages according to the law in existence immediately prior to the coming into force of the Act.

Section 27 puts an end to the application of the Conveyancing and Law of Property Act of 1881, in so far as it relates to mortgages, to The Gambia.

ANNEX C.1

SHERIFF'S AND CIVIL PROCESS ACT [DRAFT]

SHERIFF'S AND CIVIL PROCESS ACT [DRAFT]

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SHERIFF'S AND CIVIL PROCESS ACT

An Act for the establishment of the Department of the Sheriff and the regulation of matters connected therewith

PART I - GENERAL PROVISIONS

1. Short Title

This Act may be cited as the Sheriff's and Civil Process Act, 1992.

2. Interpretation

In this Act unless the context otherwise requires -

"Bailiff" includes an Assistant Bailiff, a police officer or such other person appointed to assist or perform the duties of a Bailiff;

"the Court" means the Court of Appeal, the Supreme Court or the Magistrates' Court;

"Judgment" means a decision of the Court, either interlocutory or final, on a dispute referred to the Court, and may include an order made incidental to or in consequence of the decision;

"Order" means a mandate or direction of the Court which may, but need not, be embodied in a judgment;

"Party" includes a person who sues out or defends a writ or summons in, or otherwise brings an action or application before, or who obtains a judgment or order from, the Court;

"Process" means a summons, judgment summons, writ, including writ of attachment, writ of *feri facias*, writ of possession or writ of sequestration, warrant of arrest of an absconding defendant, warrant to arrest a ship, or other legal process by which appearance before or obedience to the Court is secured or decrees, judgments and orders are enforced;

"Rules of Court" means the Rules of the Court of Appeal, the Supreme Court, the Magistrates' Courts or such other Rules which regulate the procedures of the respective Courts;

"Sheriff" includes Under Sheriff.

PART II - ESTABLISHMENT OF OFFICE OF SHERIFF

3. Establishment of the Sheriff's office, appointment and duties of Sheriff

(1) There is hereby established within the Judicial Service the office of the Sheriff.

(2) The Sheriff shall be appointed by the Judicial Service Commission.

(3) Subject to the overall supervision of the Chief Justice, the Sheriff shall be responsible for all matters assigned by this or any other Act, or by direction of the Chief Justice, to his office.

(4) Without prejudice to the generality of subsection (3), the duties of the Sheriff shall include responsibility for -

(a) execution of process issued by or through the Court;

(b) supervision of all subordinate officials appointed to his office;

(c) the efficient administration of the business of his office; and

(d) any other duties assigned to him by any other enactment or by the Chief Justice.

(5) The Sheriff shall, with respect to the proper performance of his duties, be directly accountable to the Chief Justice.

4. Appointment and duties of Under Sheriff and Bailiffs etc.

(1) The Judicial Service Commission may from time to time appoint Under Sheriffs and Bailiffs for The Gambia or any part thereof, and such officers may, subject to the overall supervision of the Sheriff, perform such duties of the Sheriff as relate to the execution of process of the Court within that part of The Gambia in respect of which they are appointed, and all such officers shall have the same powers and protection in the execution of such office as the Sheriff.

(2) Every Bailiff shall before exercising any of the powers or duties of his office make a declaration, which shall be exempted from stamp duty, in the form set out in the Schedule to this Act, or to the like effect, before a Judge or Magistrate for that part of The Gambia

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in respect of which he has been appointed.

PART III - EXECUTION OF PROCESS

5. Execution of judgments and orders

(1) Subject to any instructions given by the Sheriff, any duty of the Sheriff relating to the execution of any process may be performed by any Bailiff; and any Bailiff, who is in possession of any such process shall be presumed to be duly authorised and shall for all the purposes of such execution, and matters connected therewith, be an officer of the Court.

(2) The execution of all process shall be carried out in accordance with the Rules of Court and the directions of the Court.

(3) A Bailiff performing the duties of the Sheriff shall act with despatch, diligence and due care and shall, subject to the provisions of sub-section (2), ensure that the duties are carried out in accordance with any instructions given by the Sheriff.

6. Modes of enforcing judgments and orders

(1) Without prejudice to any other process which may be issued by the Court, where a judgment or order is: -

(a) for land or other immovable property, the judgment or order may be enforced by the issue of a writ of possession;

(b) for a specific movable, or the specific performance of any contract, or to do or abstain from doing any particular act, the judgment or order may be enforced by the seizure, if practicable, of the specific movable and the delivery thereof to the party to whom it shall have been adjudged, or by sequestration of his property and keeping the same under sequestration until further order of the Court, or if alternative damages be awarded, by levying such damages in the mode provided for the execution of a decree for money;

(c) against a person in respect of whom an order of arrest has been issued who is not or cannot be found or who has been taken in custody for refusing to obey a judgment or order, the Court may make an order for the issue of a writ of sequestration against his property;

(d) for money, the judgement or order may be enforced by the attachment

and sale of the property of the party against whom the judgment or order is made.

(2) The Rules of Court shall make provision giving further details of persons and property against which, and circumstances and manner in which, process may be executed.

7. Execution of *feri facias*

(1) A writ of *feri facias* issued by the Court, shall empower the Sheriff, or any other officer having the execution thereof, to -

(a) seize and take any money, currency notes, bank notes of any bank and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose property such writ of *feri facias* is issued;

(b) pay or deliver to the party at whose instance such writ is issued any money or bank notes which shall be so seized, or a sufficient part thereof; and

(c) hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount of such writ directed to be levied or so much thereof as shall not have been otherwise levied or raised.

(2) The Sheriff or any Bailiff may sue in his own name for the recovery of the sum or sums so secured, if and when the time of payment thereof shall have arrived.

(3) The payment to the Sheriff or Bailiff by a party liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security; and the Sheriff or Bailiff shall pay over to the party at whose instance such writ was issued the money so to be recovered, or such part of it as shall be sufficient to discharge the amount directed to be levied by such writ.

(4) If after satisfaction of the amount so to be levied, together with Sheriff's fees and expenses, any surplus shall remain in the hands of such Sheriff or Bailiff, such surplus shall be paid to the party against whom such writ was issued.

(5) Notwithstanding anything contained in this section, no Sheriff or Bailiff shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note,

bond, specialty, or other security, unless the party at whose instance the such execution ordered shall enter into a bond with two sufficient sureties for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, and the expense of such bond shall be deducted out of any money to be recovered in such action.

8. Protection of Sheriff

The Sheriff shall not be liable to be sued for any act or omission of any Bailiff in the execution of any process which shall have been done or may have occurred, either through disobedience or neglect of the orders or instructions given by the Sheriff or in the absence of any orders or instructions given by the Sheriff.

PART IV - MISCELLANEOUS MATTERS

9. Maintaining records and making returns

(1) Every Bailiff shall maintain a proper and accurate record of any process entrusted to him for execution and of any process executed by him in the course of duty; and each such Bailiff shall make a return to the Sheriff at the end of every month showing the status of every such process, giving in particular:-

- (a) the date of receipt of each such process executed by him;
- (b) if the process has been executed, the date, time and place of its execution; and
- (c) if the process has not been executed, the reasons for failure or delay in executing it.

(2) The Sheriff shall maintain at his office a register into which shall be entered information submitted in the monthly return of every Bailiff on the status of all process assigned to the Bailiff for execution within the Bailiff's area, and shall submit a report containing such information once every quarter to the Chief Justice, with a copy to the Attorney General.

(3) Any member of the public may inspect the register maintained by the Sheriff during official working hours and may take copies of such parts of the register as required by him upon payment of the prescribed fee.

10. Complaints and applications for directions

(1) Notwithstanding any other remedy available in law, a party at whose instance process is issued who is prejudiced, aggrieved or dissatisfied with the manner in which a Bailiff carries out execution of the process may lay a complaint against the Bailiff with the Sheriff, who shall forthwith investigate the complaint, take such action as justified by the result of the investigation, and inform the complainant of the action taken.

(2) The Sheriff shall have power to impose such disciplinary penalty including dismissal as he deems fit upon finding that the complaint against the Bailiff is justified.

(3) A party dissatisfied with the action taken by the Sheriff upon his complaint may petition the Chief Justice for redress.

(4) Without prejudice to the provisions of sub-sections (1) to (3), a party dissatisfied with the conduct of a Bailiff in the execution of a process issued in his favour may apply to the Court which issued the process for directions as to the manner of its execution.

11. Fees

(1) The Chief Justice may from time to time by order published in the Gazette prescribe the fees payable for the execution by the Sheriff of any process and matters connected therewith. Until such time as fees are prescribed under this Act, the fees payable immediately prior to the coming into force of this Act shall apply.

(2) The Sheriff shall demand and receive the fees set out in the Rules in force from time to time, and shall pay them to the Accountant-General at the end of every month, and the said fees shall form part of the revenue of The Gambia.

(3) The Sheriff may demand and have fees pertaining to his office before doing any act which he may be required to do.

12. Repeal

The Sheriffs Act [Cap.6:05] is hereby repealed.

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SCHEDULE**Declaration by Bailiff (or Assistant Bailiff)**

I,, do hereby solemnly and sincerely declare that I will not use or exercise the office of Bailiff (or Assistant Bailiff) corruptly during the time that I shall remain therein, neither shall nor will I accept, receive, or take by any colour, means or device whatsoever or consent to the taking of any manner of fee or reward of any person or persons or betwixt party and party above such fees as are allowed for the same by law, but will, according to my power, truly perform my duty during the time that I shall remain in the said office.

(signed).....
Bailiff (or Assistant Bailiff).

TAKEN before me this..... day of.....

(signed).....
Judge (or Magistrate).

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ANNEX C.2

**EXPLANATORY NOTE ON
THE DRAFT SHERIFF'S AND CIVIL PROCESS ACT**

Note on the Draft Sheriff's and Civil Process Act

A. The Existing Regulatory Framework:

Two pieces of legislation currently regulate the appointment and functions of the Sheriff. These are the Sheriffs Act, Cap 6:05 of the Laws of The Gambia and the Rules of the Supreme Court, which are the rules of procedure for the Supreme Court made, as subsidiary legislation, under Section 72 of the repealed Supreme Court Ordinance (Cap 5 of 1955 Revision) and saved by Section 57 of the Courts Act, 1964 (Cap 6:01).

Between them, they govern the regulatory regime for the enforcement of judgments. The Sheriffs Act essentially speaks to the appointment of a Sheriff, Deputy Sheriffs and Bailiffs. The Sheriff's duties and responsibilities are not addressed by the Act. The detailed rules as to how a judgment is enforced are to be found in the Rules of The Supreme Court. The Rules of the Supreme Court are made by the Rules Committee whose activities are carried out without publicity, and whose Rules are in technical language and available principally to lawyers only.

The records show that The Gambia has had a Sheriff's Law since 1883. That law has been amended 4 times, in 1884, 1928, 1953 and latterly in Cap 6:05. The latest amendment was designed so as to enable the appointment of the Sheriff to be made by the Public Service Commission.

During all these years, the Sheriff has been the head of the Police force, who is at the present the Inspector General of Police (IGP). The field research provided a useful insight into the reason why the IGP has been the preferred choice as The Sheriff. In colonial times, the Chief of Police, as the trusted ally of the Governor, held the principal posts of Chief Fire Officer, Chief Customs Officer, Chief Immigration Officer and Sheriff. While the demands of modern government have caused a denudation in the wider portfolio of the IGP, somehow by "oversight" he seems to have retained his duties of principal Judicial Officer as the Sheriff. We consider this not only anomalous but from the point of view of administrative efficiency, quite undesirable.

Indeed, not a single person interviewed during the field research favoured the retention of the present structure for the enforcement of judgments. The existing regulatory regime commands neither the confidence nor enthusiasm of any interested person interviewed. All, without exception, agreed that the present arrangements were fraught with grave structural difficulties and needed a complete overhaul.

The existing regulatory regime suffers from the following fundamental faults:

- i) **The Sheriff's powers are today reposed in the wrong functionary, namely, the IGP;**
- ii) **The Sheriff's subordinate, the Bailiff, as a result, has a divided loyalty between the Judiciary and the Police, who are primarily a criminal and not a civil law enforcement agency, with the result that he finds it impossible to say at any one time to whom he is accountable;**
- iii) **Due to the lack of definition of "process" in the Sheriffs Act, the impression is wrongly given that it deals not only with the enforcement process but with all process emanating from the Courts, but as a matter of practice, writs and summonses for appearance before the Courts which are the usual instruments thought of as process are dealt with not by the Sheriff or his Bailiffs but by process servers operating under the Registrars of the Courts;**
- iv) **The manpower is so woefully inadequate that execution of all judgments is laid at the door of the one Bailiff in office; and**
- v) **The Bailiff lacks basic infrastructural support to carry out his duties efficiently.**

The last two faults are not matters for legislative reform, and we do not propose to address them further in this Note. Redress of the first three, on the other hand, requires legislative backing.

The IGP - The Sheriff - is accountable to the Ministry of the Interior. His subordinate, the Bailiff is under the Ministry of Justice. This, in itself is a prescription for confusion in the lines of authority. The Bailiff - whatever else he may be -is first and foremost an officer of the Court. But because the Bailiff operates between the Courts and the IGP, it has been difficult to closely monitor his duties. It is not unknown for situations to arise where neither head of authority is able at a particular moment to determine where the Bailiff is and by whose authority. Such position of the Bailiff which gives rise to divided loyalties merely provides continuing opportunity for inefficiency due to lack of proper supervision and monitoring. It must be a matter of surprise if the Bailiff himself has a clear idea of whom to turn to for guidance and support in times of difficulty.

The trial process represents a logical trinity: the trial itself, judgment and execution. The Courts that deliver judgments do have a legitimate interest in ensuring that those judgments are executed and that their work is not rendered futile. Enforcement of judgments, like the enforcement of appearances of parties and necessary witness before the Courts, is part of or incidental to the process of dispute settlement. It is not a Police matter; it does not involve the functions which a Police force is primarily established to perform, ie. the prevention, detection and prosecution of crime. To ask the Police to enforce civil judgments, by, for example, attachment and sale of property, is to distract them from what they are established to do. No institution has a better interest in ensuring the efficient

enforcement of the judgments delivered by the judges than the Judiciary itself. And logically, it is the Judiciary which should have the responsibility for the supervision of the enforcement of those judgments.

B. Suggested Reforms

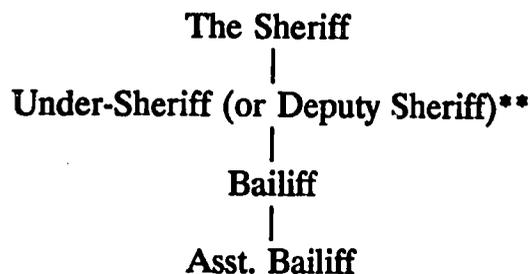
B.1 The New Law:

In the draft Sheriff's and Civil Process Act we recommend a new streamlined structure for the enforcement of judgments. The draft now submitted presents an Act which combines ideas from the existing Sheriffs Act with new provisions which define the functions of the Sheriff and his Bailiffs and other subordinate officers in the enforcement of judgments and orders of the Courts, and make provision designed to raise the standards of performance of the Bailiffs and otherwise restore confidence in the enforcement system. Such for example, are the provisions for keeping proper records and making periodic returns. By far the most significant reform we propose is to take away the functions of the Sheriff from the IGP and to create the office of Sheriff within the Judicial Service whose duty should be to discharge these functions. The new law is styled: The Sheriff's and Civil Process Act.

That title can be justified on the simple ground that it equates more realistically than the previous title of Sheriffs Act does, the task of the Sheriff with the actual enforcement process.

B.2 The New Structure:

In place of the existing command structure, we recommend that the Sheriff's office should have the Sheriff at the apex and the Assistant Bailiff at the bottom. In diagrammatical form it should be as follows:



**** Post may be filled by the Senior Magistrate in the Provinces.**

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It is recommended that this structure be built into the establishment of the Judicial Service as the Sheriff's office. That is taken care of by section 3(1) of the submitted draft.

B.3 The Duties of The Sheriff's Bailiff:

One of the lacunae in the Sheriffs Act is that it never really spoke of the duties and responsibilities of the Bailiff. The draft proposed in section 3(3) and (4) sets out in simple, clear language the broad responsibilities and duties of the Sheriff; and in section 4(1) shows that the duties of a Bailiff are to perform those duties of the Sheriff as relate to the execution of process. As the function of serving process like writs and summonses for the appearance of parties and witnesses before Court is in The Gambia performed by process servers under the Court Registrar, who function separately from the officers executing the judgments of the Court, we considered whether we should continue this dichotomy or merge the two functions in the same institution. With the new office of the Sheriff established within the Judicial Service, the argument for keeping the service of process for appearance in Court separate from the execution conducted under the IGP loses much of its force. The key to a delimitation of the extent of the Sheriff's duties with respect to execution lies in the definition of the word "process". We have decided to give process the wider meaning, that is embracing execution with respect to writs, summonses, judgments and orders. That can be found in section 2 of the draft. If the execution of process must continue to be confined to the execution of judgements and orders alone, it will only take the simplest alteration in the definition of "process" to achieve this object.

Section 5(2) and (3) of the draft requires that a Bailiff should carry out each execution with despatch, diligence and due care, and according to the Rules of Court, the directions of the Court and the instructions of the Sheriff. If he does not, his conduct will lay him open to the complaint procedure in section 10, and in any case will come to the attention of his superiors, the Sheriff, the Chief Justice and to the attention of the Attorney General, and eventually become public knowledge when a report on it is laid before Parliament, as provided for in section 9.

B.4 Maintaining Records and Making Regular Returns:

To ensure the credibility of and accountability in the new structure, a system of maintenance of records and making of regular returns by a Bailiff on all executions assigned to him is included in section 9 of the draft. It is felt that monthly returns would not be inappropriate in view of the fact that the present practice imposed on magistrates requires returns of the same frequency even though they carry far more onerous responsibilities. We propose that the returns should disclose details as to the results of the execution. For executions which are not concluded, reasons must be given for the failure or delay. The returns should also indicate the date and time of execution which will give the order in which the executions were carried out.

B.5 Public Register:

We propose in section 9(2) and (4) that these returns should be recorded in a public Register to be kept by the Sheriff in his office which the public can access upon the payment of a prescribed fee. We have given some thought to the type of sanctions which would make the Sheriff and his Bailiffs more efficient and lead to a restoration of public confidence in the system. We concluded that the most effective sanction would be publicity. If the Bailiffs do not do their work properly, the Sheriff should know, and if he does not do anything about it, his Chief Justice must also know.

Whether or not the judicial system is functioning properly is a matter of public concern. Judicial independence requires that the judges must be absolutely free to decide cases before them according to their appreciation of the evidence and the law. It does not mean that if the Courts are not functioning properly in moving cases or having their judgments or orders enforced, nothing should be done by those responsible for the governance of a country to correct that situation. If A brings an action against B, whether A gets judgment or is thrown out is a matter solely for the trial judge. If he is wrong, only an appellate Court should correct him. But assuming that the judge gives judgment for A, whether the Courts are able to ensure that the judgment awarded him is satisfied by B, or whether that judgment can be enforced through any legal machinery at all is not the concern of the judge alone. It is a matter which concerns everyone with responsibility for ensuring that the established system of administration of justice works, and indeed of every member of the public likely to use the Courts or even interested in that administration. If the officers of the Court concerned know that their conduct is open to public scrutiny, they would be more careful about how quickly or diligently they perform their functions.

In conformity with this thinking we propose in section 9(2) and (3) a system whereby the Sheriff reports on the status of executions of process to the Chief Justice, with a copy to the Attorney General, once a quarter. The Attorney General may have to answer questions in Cabinet or Parliament on the performance of the Courts. That, together with the right of members of the public to inspect and take copies of relevant entries in the register kept by the Sheriff should give as powerful a protection as any system of publicity can offer.

B.6 Right of the Judgment Creditor to Apply to the Court:

We, of course, expect that in the ordinary course of things that the Sheriff will take up all cases of non-execution administratively. However, by way of additional legal safeguard, we have proposed in section 10(1), (2) and (3) that a party who is not satisfied with the conduct of the Bailiff in executing process may complain to the Sheriff, who should investigate the complaint immediately and take appropriate action. If the complainant is not satisfied with the action taken by the Sheriff, he may petition the Chief Justice. We also reserve to the interested party in section 10(4) a right to apply to the Court which issued the process for

further directions as to the manner of enforcement of the judgment or order if he is not satisfied with the manner in which the execution has proceeded before.

B.7 Detailed Rules as to Conduct of Execution:

It is usual to provide in the Supreme Court Rules the actual mechanics of execution detailing, inter alia, the Court's power to stay execution, how the sale may be conducted, what statutory notices may be given, whether the sale may be made by public auction or by private treaty etc. etc. We think that it would still be necessary for such detailed rules of procedure to be done by subsidiary Rules. The conduct of the Sheriff and his Bailiffs in the execution of process has by section 5(2), been accordingly made subject to the Rules and any directions given by the Court.

B.8 Scale of Fees:

At present, by S 6 (1) of the Sheriffs Act, the Sheriff shall demand, and receive the fees set out in the Rules of the Supreme Court in force from time to time. The current fees were fixed a considerable time ago, and is accordingly, quite unrealistic for today. As we have put the Sheriff's office under the Judicial Service, we think that the Chief Justice should be the appropriate person to fix the fees from time to time. That would ensure that changes in the value of currency or of the cost of service rendered are reflected quickly in the fees needed to keep the system running efficiently. Section 11(1) of the draft gives power to the Chief Justice to prescribe the fees from time to time. But until new fees are prescribed, the fees obtaining immediately before the coming into force of this Act will apply.

ANNEX D.1

INSOLVENCY ACT [DRAFT]

INSOLVENCY ACT, 1992 [DRAFT]

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INSOLVENCY ACT, 1992

An Act to consolidate and amend the enactments relating to company insolvency, the insolvency and bankruptcy of individuals, the regulation of insolvency practice, the public administration of insolvency, the licensing of insolvency practitioners and other matters connected therewith.

Enacted by the Parliament of The Gambia

PART I

GENERAL PROVISIONS

1. Short Title

This Act may be cited as the Insolvency Act, 1992

2. Interpretation

In this Act unless the context otherwise requires -

"address" includes place of residence, place of business and any post office box number habitually used;

"admitted proof" means a proof admitted under subsection 1 of section 35 or subsection 5 of section 88 of this Act;

"after-acquired property" has the meaning assigned to it by subsection 2 of section 46 of this Act;

"application for judicial consideration" has the meaning assigned to it by subsection 1 of section 37 of this Act;

"appointed day" means the day on which this Act comes into force under section 107 of this Act;

"appointed discharge date" has the meaning assigned to it by subsection 3 of section 50 of this Act;

"business" includes a trade or profession;

"Court" means the Gambia Court of Appeal, or the Supreme Court;

"director" includes any person occupying the position of director of a company by whatever name called;

"document" includes summons, notice, order and other legal process, and registers;

"Minister" means the Minister responsible for the administration of this Act;

"property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property;

"relevant time" has the meaning assigned to it by subsections 7 and 10 of section 4 of this Act;

"records" includes computer records and other non-documentary records.

PART II

ADMINISTRATION ORDERS WITH RESPECT TO INSOLVENT COMPANIES

MAKING ETC. OF ADMINISTRATION ORDER

3. Making of an Administration Order

(1) Without prejudice to the provisions of the Companies Act Cap 95:01 with respect to the winding up of companies, the Court may make an administration order in relation to a company if -

- (a) satisfied that a company is or is likely to become unable to pay its debts within the meaning given to that expression by this Act; and

(b) it considers that the making of an order under this section would be likely to achieve one or more of the purposes mentioned below.

(2) An administration order is an order directing that, during the period for which the order is in force, the affairs, business and property of the company shall be managed by a person ("the administrator") appointed for the purpose by the court.

(3) The purposes for which an administration order may be made are-

(a) the survival of the company, and the whole or any part of its undertaking, as a going concern;

(b) the approval of a voluntary arrangement between the company and its creditors;

(c) the sanctioning under the Companies Act of a compromise or arrangement between the company and any such persons as provided for in the Companies Act Cap 95:01; and

(d) a more advantageous realisation of the company's assets than would be affected on a winding up;

and the order shall specify the purpose or purposes for which it is made.

4. Application of administration order to be by petition

(1) An application to the Court for an administration order shall be by petition presented either by the company or the directors, or by a creditor or creditors, or by all or any of those parties, together or separately.

(2) Where a petition is presented to the Court for an administration order -

(a) notice of the petition shall be given forthwith to any person who has appointed, or is or may be entitled to appoint, a receiver of the company, and to such other persons as may be prescribed; and

- (b) the petition shall not be withdrawn except with the leave of the court.
- (3) Where the Court is satisfied that there is a receiver of the company, the Court shall dismiss the petition unless it is also satisfied-
- (a) that the person by whom or on whose behalf the receiver was appointed has consented to the making of the order; or
 - (b) that, if an administration order were made, any security by virtue of which the receiver was appointed would -
 - (i) be liable to be released or discharged under this Act (transactions at an undervalue and preferences);
 - (ii) to be avoided under this Act (avoidance of floating charges).
- (4) A company enters into a transaction with a person at undervalue if -
- (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or
 - (b) the company enters into a transaction with that person for the consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth of the consideration provided by the company.
- (5) The Court shall not make an administration order under this section in respect of the transaction at an undervalue if it is satisfied -
- (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
 - (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company.
- (6) Where the company has at a relevant time given a preference to any person, the office holder may apply to the court for an order under this section.

(7) The Court may, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not given that preference.

(8) For the purposes of this Act, a company gives a preference to a person if -

(a) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, and

(b) the company does anything or suffers anything to be done which has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.

(9) The time at which a company enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into, or the preference given -

(a) in the case of a transaction at an undervalue or of a preference which is given to a person who is connected with the company (otherwise than by reason only of being its employee), at a time in the period of two years ending with the onset of insolvency,

(b) in the case of a preference which is not such a transaction and is not so given, at time in the period of six months ending with the onset of insolvency, and

(c) in either case, at a time between the presentation of a petition for the making of an administration order in relation to the company and the making of such an order under petition.

(10) Where a company enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (9) hereof, that time is not a relevant time for the purpose of this section unless the company -

(a) is at that time unable to pay its debts within the meaning of this Act, or

- (b) becomes unable to pay its debts within the meaning of this section in consequence of the transaction or preference;

but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company.

(11) A floating charge on the company's undertaking or property created at a relevant time is invalid except to the extent of the aggregate of -

- (a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied to the company at the same time as, or after, the creation of the charge,
- (b) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the company, and
- (c) the amount of such interest (if any) as is payable on the amount falling within subsections (i) or (ii) hereof in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.

(12) The time at which a floating charge is created by a company is a relevant time for the purposes of this section if the charge is created-

- (a) in the case of a charge which is created of a person who is connected with the company, at a time in period of two years ending with the onset of insolvency,
- (b) in the case of a charge which is created in favour of any other person, at a time in the period of twelve months ending with the onset of insolvency, or
- (c) in either case, at a time between the presentation of a petition for the making of an administration order in relation to the company and the making of such an order on that petition.

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(13) Subject to subsection (3), on hearing a petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit.

(14) Without prejudice to the generality of subsection (13), an interim order under that subsection may restrict the exercise of any powers of the directors or of the company (whether by reference to the consent of the court or of a person qualified to act as an insolvency practitioner in relation to the company, or otherwise).

5. (1) During the period beginning with the presentation of a petition for an administration order and ending with the making of such an order or the dismissal of the petition -

- (a) no resolution may be passed or order made for the winding up of the company;
- (b) no steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement, except with the leave of the court and subject to such terms as the court may impose; and
- (c) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the leave of the court and subject to such terms as aforesaid.

(2) Nothing in subsection (1) requires the leave of the court

- (a) for the presentation of a petition for the winding up of the company;
- (b) for the appointment of a receiver of the company; or
- (c) for the carrying out by such a receiver (whenever appointed) of any of his functions.

(3) Where -

- (a) a petition for an administration order is presented at a time when there is a receiver of the company; and
- (b) the person by or on whose behalf the receiver was appointed has not consented to the making of the order;

the period mentioned in subsection (1) is deemed not to begin unless and until that person so consents.

6. Effect of administration order

(1) On the making of an administration order -

- (a) any petition for the winding up of the company shall be dismissed; and
- (b) any receiver of the company shall vacate office.

(2) Where an administration order has been made, any receiver of part of the company's property shall vacate office on being required to do so by the administrator.

(3) During the period for which an administration order is in force -

- (a) no resolution may be passed or order made for the winding up of the company;
- (b) no receiver of the company may be appointed;
- (c) no other steps may be taken to enforce any security over the company's property, or to repossess goods in the company's possession under any hire-purchase agreement, except with the consent of the administrator or the leave of the Court and subject (where the Court gives leave) to such terms as the court may impose; and
- (d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the Court and subject (where the Court gives leave) to such terms as the court may deem fit.

(4) Where at any time a receiver of the company has vacated office under subsection (1)(b), or a receiver of part of the company's property has vacated office under subsection (2)-

(a) his remuneration and any expenses properly incurred by him, and

(b) any indemnity to which he is entitled out of the assets of the company,

shall be charged on and (subject to subsection (3) above) paid out of any property of the company which was in his custody or under his control at that time in priority to any security held by the person by or on whose behalf he was appointed.

(5) Neither a receiver who vacates office under subsection (1)(b) nor a receiver who vacates office under subsection (2) shall be required on or after so vacating office to take any steps for the purpose of complying with any duty imposed on him under this Act, especially the duty to pay preferential creditors.

7. Contents of document issued by company or administrator

(1) Every invoice, order for goods or business letter which, at a time when an administration order is in force in relation to a company, is issued by or on behalf of the company or the administrator, being a document on or in which the company's name appears, shall also contain the administrator's name and a statement that the affairs, business and property of the company are being managed by the administrator.

(2) If default is made in complying with this section, the company and any of the following persons who without reasonable excuse authorises or permits the default, namely, the administrator and any officer of the company, shall be liable to a fine.

ADMINISTRATORS**8. Appointment of administrator**

(1) The administrator of a company shall be appointed by the administration order.

(2) If a vacancy occurs by death, resignation or otherwise in the office of the administrator, the Court may by order fill the vacancy.

(3) An application for an order under subsection (2) may be made-

(a) by any continuing administrator of the company; or

(b) where there is no such administrator, by a creditors' committee established under section 18; or

(c) where there is no such administrator and no such committee, by the company or the directors or by any creditor or creditors of the company.

9. Powers of administrator

(1) The administrator of a company -

(a) may do all such things as may be necessary for the management of the affairs, business and property of the company, and

(b) without prejudice to the generality of paragraph (a), shall have the powers of a liquidator specified in Schedules I, II, III of this Act.

(2) The administrator shall also have power -

(a) to remove any director of the company and to appoint any person to be a director of it, whether to fill a vacancy or otherwise, and

(b) to call any meeting of the members or creditors of the company.

(3) The administrator may apply to the Court for directions in relation to any particular matter arising in connection with the carrying out of his functions.

(4) Any power conferred on the company or its officers, whether by this Act or the Companies Act Cap 95:01 or by the memorandum or articles of association, which could be exercised in such a way as to interfere with the exercise by the administrator of his powers shall not be exercisable except with the consent of the administrator, which may be given either generally or in relation to particular cases.

(5) In exercising his powers the administrator is deemed to act as the company's agent.

(6) A person dealing with the administrator in good faith and for value shall not be concerned to inquire whether the administrator is acting within his powers.

10. Disposal of property by administrator

(1) The administrator of a company may dispose of or otherwise exercise his powers in relation to any property of the company which is subject to a security to which this section applies as if the property were not subject to the security.

(2) Where, on an application by the administrator, the Court is satisfied that the disposal (with or without other assets) of -

(a) any property of the company subject to a security to which this subsection applies, or

(b) any goods in the possession of the company under a hire-purchase agreement,

would be likely to promote the purpose or one or more of the purposes specified in the administration order, the Court may by order authorise the administrator to dispose of the property as if it were not subject to the security or to dispose of the goods as if all rights of the owner under the hire-purchase agreement were vested in the company.

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(3) Subsection (1) applies to any security which, as created, was a floating charge; and subsection (2) applies to any other security.

(4) Where property is disposed of under subsection (1), the holder of the security has the same priority in respect of any property of the company directly or indirectly representing the property disposed of as he would have had in respect of the property subject to the security.

(5) It shall be a condition of an order under subsection (2) that -

(a) the net proceeds of the disposal, and

(b) where those proceeds are less than such amount as may be determined by the Court to be net amount which would be realised on a sale of the property or goods in the open market by a willing vendor, such sums as may be required to make good the deficiency,

shall be applied towards discharging the sums secured by the security or payable under the hire-purchase agreement.

(6) Where a condition imposed in pursuance of subsection (5) relates to two or more securities, that condition requires the net proceeds of the disposal and, where paragraph (b) of that subsection applies, the sums mentioned in that paragraph to be applied towards discharging the sums secured by those securities in the order of their priorities.

(7) A copy of an order under subsection (2) shall, within 14 days after the making of the order, be sent by the administrator to the Registrar of Companies to be registered.

(8) If the administrator without reasonable excuse fails to comply with subsection (7), he shall be liable to a fine of Dalasi _____ and, for continued contravention, to a daily default fine of Dalasi _____.

11. Duties of administrator

(1) The administrator of a company shall, on his appointment, take into his custody or under his control all the property to which the company is or appears to be entitled.

(2) The administrator shall manage, the affairs, business and property of the company -

(a) at any time before proposals have been approved (with or without modifications) under section 18, in accordance with any directions given by the Court, and

(b) at any time after proposals have been so approved, in accordance with those proposals as from time to time revised, whether by him or a predecessor of his.

(3) The administrator shall summon a meeting of the company's creditors if -

(a) he is requested to do so by one-tenth, in value, of the company's creditors, or

(b) he is directed to do so by the Court.

12. Discharge of administration order

(1) The administrator of a company may at any time apply to the Court for the administration order to be discharged, or to be varied so as to specify an additional purpose.

(2) The administrator shall make an application under this section if -

(a) it appears to him that the purpose or each of the purposes specified in the order either has been achieved or is incapable of achievement, or

(b) he is required to do so by a meeting of the company's creditors summoned for the purpose.

(3) On the hearing of an application under this section, the Court may by order discharge or vary the administration order and make such consequential provision as it thinks fit, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order it thinks fit.

(4) Where the administration order is discharged or varied the administrator shall, within 14 days after the making of the order effecting the discharge or variation, send a copy of that order to the Registrar of Companies.

(5) If the administrator without reasonable excuse fails to comply with subsection (4), he shall be liable to a fine and, for continued contravention, to a daily default fine.

13. Removal of administrator from office

(1) The administrator of a company may at any time be removed from office by order of the Court and may resign his office by giving notice of his resignation to the Court.

(2) The administrator shall vacate office if -

(a) he ceases to be qualified to act as an insolvency practitioner in relation to the company, or

(b) the administration order is discharged.

(3) Where at any time a person ceases to be administrator, the next two subsections shall apply.

(4) His remuneration and any expenses properly incurred by him shall be charged on and paid out of any property of the company which is in his custody or under his control at that time in priority to any security.

(5) Any sums payable in respect of debts or liabilities incurred, while he was administrator, under contracts entered into or contracts of employment adopted by him or a predecessor of his in the carrying out of his or the predecessor's functions shall be charged on and paid out of any such property as is mentioned in paragraph (4) in priority to any charge arising under that subsection.

For this purpose, the administrator shall not be taken to have adopted a contract of employment by reason of anything done or omitted to be done within 14 days after his appointment.

14. When administrator released from liability

(1) A person who has ceased to be the administrator of a company shall be released from liability as administrator with effect from the following time, that is to say -

- (a) in the case of a person who has died, the time at which notice is given to the Court that he has ceased to hold office;
- (b) in any other case, such time as the Court may determine.

(2) Where a person is released under this section, he is, with effect from the time specified above, discharged from all liability both in respect of acts or omissions of his in the administration and otherwise in relation to his conduct as administrator.

ASCERTAINMENT AND INVESTIGATION OF COMPANY'S AFFAIRS**15. Issuing and publication of administration order**

(1) Where an administration order has been made, the administrator shall -

- (a) forthwith send to the company and publish in the prescribed manner a notice of the order, and
- (b) within 14 days after the making of the order, send a copy of the order to the Registrar of Companies and to such other persons as may be prescribed,
- (c) within 28 days after the making of the order, unless the Court otherwise directs, send such a notice to all creditors of the company (so far as he is aware of their addresses).

(2) If the administrator without reasonable excuse fails to comply with this section, he shall be liable to a fine of Dalasi _____ and, for continued contravention, to a daily default fine of Dalasi _____.

16. Persons required to give information regarding company affairs

(1) Where an administration order has been made, the administrator shall forthwith require some or all of the persons mentioned below to make out and submit to him a statement in the prescribed form as to the affairs of the company.

(2) The statement shall be verified by affidavit by the persons required to submit it and shall show -

- (a) particulars of the company's assets, debts and liabilities;
- (b) the names and addresses of its creditors;
- (c) the securities held by them respectively;
- (d) the dates when the securities were respectively given; and
- (e) such further or other information as may be prescribed.

(3) The persons referred to in subsection (1) are -

- (a) those who are or have been officers of the company;
- (b) those who have taken part in the company's formation at any time within one year before the date of the administration order;
- (c) those who are in the company's employment or have been in its employment within that year, and are in the administrator's opinion capable of giving the information required;
- (d) those who are or have been within that year officers of the company.

In this subsection "employment" includes employment under a contract for services.

(4) Where any persons are required under this section to submit a statement of affairs to the administrator, they shall do so (subject to subsection 5) before the end of the period of 21 days beginning with the

day after that on which the prescribed notice of the requirement is given to them by the administrator.

(5) The administrator, if he thinks fit, may -

- (a) at any time release a person from an obligation imposed on him under subsection (1) or (2); or
- (b) either when giving notice under subsection (4) or subsequently, extend the period so mentioned;

and where the administrator has refused to exercise a power conferred upon him by this subsection, the Court, if it thinks fit, may, upon application, exercise it.

(6) If a person without reasonable excuse fails to comply with any obligation imposed under this section, he shall be liable to a fine of Dalasi _____ and, for continued contravention, to a daily default fine of Dalasi _____.

ADMINISTRATOR'S PROPOSALS

17. Presentation and statement of proposals

(1) Where an administration order has been made, the administrator shall, within 2 months (or such longer period as the Court may allow) after the making of the order -

- (a) send to the Registrar of Companies and (so far as he is aware of their addresses) to all creditors a statement of his proposals for achieving the purpose or purposes specified in the order, and
- (b) lay a copy of the statement before a meeting of the company's creditors summoned for the purpose on not less than 14 days' notice.

(2) The administrator shall also, within 2 months (or such longer period as the Court may allow) after the making of the order, either -

- (a) send a copy of the statement (so far as he is aware of their addresses) to all members of the company, or
- (b) publish in the prescribed manner a notice stating an address to which prescribed members of the company should write for copies of the statement to be sent to them free of charge.

(3) If the administrator without reasonable excuse fails to comply with this section, he shall be liable to a fine of Dalasi _____ and, for continued contravention, to a daily default fine of Dalasi _____.

18. Decision on statement of proposals

(1) A meeting of creditors shall be summoned by the administrator to decide whether to approve the administrator's proposals.

(2) The meeting may approve the proposals with modifications, but shall not do so unless the administrator consents to each modification.

(3) Subject as above, the meeting shall be conducted in accordance with the provisions of this Act.

(4) After the conclusion of the meeting, the administrator shall report the result of the meeting to the Court and shall give notice of that result to the Registrar of Companies and to such persons as may be prescribed.

(5) If a report is given to the Court under subsection (4) that the meeting has declined to approve the administrator's proposals (with or without modifications), the Court may by order discharge the administration order and make such consequential provision as it thinks fit, or adjourn the hearing conditionally or unconditionally, or make any interim order or any other order that it thinks fit.

(6) Where the administration order is discharged, the administrator shall, within 14 days after the making of the order affecting the discharge, send a copy of that order to the Registrar of Companies.

(7) If the administrator without reasonable excuse fails to comply with subsections (4) and (6), he shall be liable to a fine of Dalasi _____ and, for continued contravention, to a daily default fine of Dalasi _____.

19. Revised Statement of Proposals

(1) This section applies where -

- (a) proposals have been approved (with or without modifications) under section 18; and
- (b) the administrator proposes to make a revision of those proposals which appear to him substantial.

(2) The administrator shall-

- (a) send to all creditors of the company (so far as he is aware of their addresses) a statement of his proposed revisions; and
- (b) lay a copy of the statement before a meeting of the company's creditors summoned for the purpose on not less than 14 days' notice;

and he shall not make the proposed revision unless it is approved by the meeting.

(3) The administrator shall also either -

- (a) send a copy of the statement (so far as he is aware of their addresses) to all members of the company, or
- (b) publish in the prescribed manner a notice stating an address to which members of the company should write for copies of the statement to be sent to them free of charge.

(4) The meeting of creditors may approve the proposed revision with any modification, but shall not do so unless the administrator consents to the modification.

(5) After the conclusion of the meeting, the administrator shall give notice of the result of the meeting to the Registrar of Companies and to such persons as may be prescribed.

20. Termination of administration order

(1) An administration order may be terminated upon the successful implementation of the order.

(2) Where the administration order is discharged, the administrator shall, within 14 days after the making of the order effecting the discharge send a copy of that order to the Registrar of Companies; and if without reasonable excuse he fails to comply with this subsection, he shall be liable to fine of Dalasi _____ and, for continued contravention, to a daily default fine of Dalasi _____.

(3) Without prejudice to the provisions of this Act, in the event that no administration order is made, the creditors of the company may have recourse to a creditors' winding up under the Companies Act 95:01.

PART III**THE INSOLVENCY OF INDIVIDUALS****CHAPTER I****THE OFFICIAL TRUSTEE****21. The Official Trustee**

(1) There shall be an Official Trustee, whose post shall be a Public Service post.

(2) Any act required or authorised to be done by or in relation to the Official Trustee may instead be done by or in relation to any Public Servant for the time being authorised in that behalf either by the Official Trustee or under any enactment, and a Public Servant shall be presumed to be so authorised unless the contrary is shown.

(3) References to the Official Trustee in any enactment shall be taken to include all Civil Servants authorised or presumed to be authorised as aforesaid.

(4) Where he considers it necessary for the exercise of his functions, the Official Trustee may avail himself for appropriate payment of the services of persons who are not Civil Servants.

22. Appeal by aggrieved person

(1) Any person aggrieved by an act done by the Official Trustee in the exercise of his functions under this Act may appeal to the Court, which shall make such order as it thinks fit.

(2) If any person refuses or fails to comply with a requirement made by the Official Trustee under this Act, the Official Trustee may apply to the Court, and the Court may order the requirement to be carried out.

(3) If the Official Trustee is in doubt as to any matter arising in connection with his functions under this Act he may apply to the Court for directions.

23. The Insolvent Estates Fund

(1) There shall be a public fund to be known as the Insolvent Estates Fund, to which shall be credited all sums received by the Official Trustee under this Act and to which shall be debited all sums disbursed by him thereunder.

(2) There shall be an account within the Insolvent Estates Fund to which shall be credited all sums received by the Official Trustee by way of fees and other charges, in this Act referred to as the Fees Account.

(3) All payments required or authorised by this Act to be met out of the Insolvent Fund are hereby charged on that Fund.

24. The Insolvency Register

(1) The Official Trustee shall make and keep a register to be known as the Insolvency Register, in which, as respects every debtor in relation to whom a protection order is made, the following information shall be recorded as it becomes available, that is to say,

- (a) the name and address of the debtor, any previous names of the debtor, and any change in the debtor's name or address which is notified to the Official Trustee;
- (b) the date of the making of the protection order;
- (c) the date on which the protection order ceases to have effect, and the reason for its ceasing to have effect;
- (d) if an insolvency order is made, the date of the making of the order, the date on which the debtor is discharged and the date on which the insolvency proceedings are terminated;
- (e) if the debtor is adjudged bankrupt, the date of the adjudication, the appointed discharge date and any alteration in that date;

(f) if a participation order is made, the date of the making of the order and, if the debtor's discharge is revoked by virtue of the order, a statement to that effect.

(2) Where an administration order is made in respect of a deceased debtor, the following information shall be recorded in the Insolvency Register as it becomes available, that is to say,

(a) the name and last address of the debtor, and any previous names of the debtor;

(b) the date of the making of the administration order; and

(c) the date of termination of the administration.

(3) The Insolvency Register shall at all reasonable times be open for public inspection on payment of such fee, if any, as may be prescribed.

(4) The Official Trustee shall, on application being made by any person in the prescribed form, and on payment of the prescribed fee, provide copies of any entry in the Insolvency Register.

25. Publication of information contained in Insolvency Register

(1) Whenever any information requires to be recorded in the Insolvency Register, the Official Trustee, in addition to recording the information in the Register, shall also cause it to be published in the Gazette within fourteen days after it becomes available to him.

(2) As soon as may be after the end of each June and December, the Official Trustee shall cause a notice to be published in the Gazette giving the names, including former names, and addresses of all bankrupts, together with the dates on which they were adjudged bankrupt and their appointed discharge dates.

26. Immunity of Official Trustee

(1) No liability shall attach to the Official Trustee in respect of any breach of a duty imposed on him by or under this Act, and, except in so far as may result from an order made under subsection (3) of section 62 of this Act, no liability shall attach to the Government in respect of any such breach.

(2) Nothing in this section shall affect the institution against a Civil Servant of any criminal proceedings or of disciplinary proceedings.

27. Report by Official Trustee

As soon as may be after the end of each December, the Official Trustee shall prepare a report giving details of the operations of this Act during the previous year, and the report shall be laid before the House of Representatives.

CHAPTER II

INSOLVENCY PROCEEDINGS WITH RESPECT TO INDIVIDUALS

PETITIONS

28. Initiation of insolvency proceedings

(1) Insolvency proceedings in respect of a debtor shall be initiated by the presentation of a petition to the Official Trustee in the prescribed manner, and accompanied by the prescribed fee, for the making by him of an interim order, to be known as a protection order, enabling the debtor's assets to be conserved for the protection of his creditors until his affairs have been considered by the Court.

(2) A petition shall not be presented in respect of two or more debtors except where debts are owed by those debtors jointly.

(3) Where a petition has been presented, the Court may, on an application being made by the Official Trustee, restrain the institution or continuance of any civil proceedings by or against the debtor other than proceedings by a secured creditor for the realisation of his security.

(4) A petition may be withdrawn or amended, with the consent in writing of the Official Trustee, at any time before a protection order is made.

29. Petition in respect of debtor by creditors

(1) A petition may be presented in respect of a debtor by any one or more of his creditors if his indebtedness to the petitioner, or, as the case may be, the petitioners collectively, in liquidated sums payable immediately amounts to at least five thousand dalasis and if,

- (a) the debtor has, within the preceding three months, given notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts; or
- (b) the sheriff has, within the preceding three months, and in pursuance of a writ of *feri facias*, issued in The Gambia in respect of the debtor, taken possession of any of the debtor's property and either sold the property or retained it for at least twenty-one days; or
- (c) any of the debtor's creditors is entitled to proceed with the execution, by means of a writ of *feri facias* issued or issuable in The Gambia of a judgment or order obtained against the debtor not less than seven days previously.

(2) Where any of the petitioners is a secured creditor,

- (a) the value and description of the security shall be specified in the petition; and
- (b) for the purpose of applying the five thousand dalasis limit under the preceding subsection the amount of the secured debt shall be reduced by the value of the security as specified.

30. Debtor may present petition with respect to himself

(1) A petition may be presented by a debtor in respect of his own affairs if he is insolvent and his indebtedness in liquidated sums payable immediately amounts to at least five thousand dalasis.

(2) If any of his said indebtedness is to a secured creditor then, unless the total of unsecured debts amounts to at least five thousand dalasis in liquidated sums payable immediately, the debtor shall specify the value and description of the security in his petition and, for the purpose of applying

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the five thousand dalasis limit under the preceding subsection, the amount of the secured debt shall be reduced by the value of the security as so specified.

31. Service of creditor's petition

(1) A copy of a creditor's petition shall be served on the debtor by the petitioner on or before the day on which it is presented.

(2) After seven days have elapsed following the presentation of a petition, the Official Trustee shall consider the petition and evidence in support, thereof, together, in the case of a creditor's petition, with any representations made by the debtor and evidence in support thereof; and if the petition is not withdrawn and the Official Trustee considers that it was duly presented he shall make a protection order thereon;

Provided that he shall not make a protection order if it appears to him that, owing to payments by the debtor or other change of circumstances, the debtor's total indebtedness in liquidated sums payable immediately, including indebtedness to persons who are not parties to the petition, has, after deduction of the value of securities held in respect thereof, fallen below five thousand dalasis.

(3) Where the Official Trustee is of opinion that a petition was not duly presented or that the indebtedness of the debtor has been reduced as aforesaid he shall, if the petition has not been withdrawn, give notice to the petitioner and, in the case of a creditor's petition to the debtor that the petition is dismissed.

(4) Where two or more petitions are presented in respect of a debtor a protection order made on any of the petitions shall be deemed to have been made on all of them.

(5) After a protection order has been made no further petition shall be presented in respect of the debtor before the termination of the insolvency proceedings.

PROTECTION ORDERS**32. Effect of subsisting protection order**

While a protection order has effect,

- (a) existing and after-acquired property of the debtor shall vest in the Official Trustee in accordance with sections 57 and 58 of this Act and shall be conserved by him in accordance with section 63 thereof;
- (b) the debtor shall be subject to the duties and disabilities specified in sections 45, 46, 47, 48 and 49 of this Act;
- (c) no civil proceedings by or against the debtor shall be instituted or continued without the leave of the Court.

33. Duty of debtor to disclose own statement of affairs

(1) Within seven days after the making of a protection order, or such longer period as the Official Trustee may allow, the debtor shall lodge with the Official Trustee a statement of his affairs conforming to the following subsection, unless such a statement has been lodged previously.

(2) The statement of affairs shall contain,

- (a) particulars of the debtor's existing and potential assets and of all other property in his possession or control;
- (b) a list of creditors, showing the amounts and due dates of debts and particulars of securities held;
- (c) particulars of the debtor's transactions during such period as the Official Trustee may specify;
- (d) a statement of the reasons for the debtor's insolvency unless he denies that he is insolvent,

together with such additional information as may be required by rules or by the Official Trustee.

34. Official Trustee to be informed of arrangements with creditors

Within seven days after the making of a protection order, or such longer period as the Official Trustee may allow, the debtor, if he wishes to make a proposal for an arrangement with creditors, may lodge details of the proposal with the Official Trustee.

35. Provable debt and proof of debts

(1) In this Act "provable debt" means an obligation the value of which is capable of assessment in money, being,

- (a) any obligation which, apart from this Act, would have been enforceable by the creditor against the debtor at the date on which the protection order was made, or
- (b) any existing or future obligation, other than an obligation unenforceable by virtue of the law relating to limitation of actions, which, by reason of some transaction which took place before the said date, might, apart from this Act, have become enforceable by the creditor against the debtor after that date.

(2) At any time while a protection order has effect any creditor may lodge with the Official Trustee a statement, to be known as a proof of debts, in accordance with subsection (3).

(3) A proof of debts shall be in two parts, the first part containing brief particulars of,

- (a) the values and due dates of provable debts alleged by the creditor to be outstanding in his favour against the debtor and the nature and value of any securities held by the creditor in respect of such debts;
- (b) the values and due dates of any obligations outstanding in the debtor's favour against the creditor, being obligations which would be provable debts if a protection order has been made against the creditor on the date on which the protection order was made against the debtor;

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- (c) the nature and value of securities of any description held by the debtor in respect of such obligations as are mentioned in paragraph (b);
- (d) the total values of the aforesaid debts, obligations and securities;

and the second part containing details of the transactions from which the said debts and obligations arose.

(4) A copy of the first part of any proof lodged under this section shall be given by the Official Trustee to the debtor and to each creditor who is mentioned in the debtor's statement of affairs or who, not being so mentioned, himself lodges a proof; and if the debtor knows or believes that the proof is false in any material particular it shall be his duty to inform the Official Trustee thereof as soon as is practicable.

(5) The Official Trustee shall examine every proof of debts lodged with him and if, after considering any representations made by the debtor or any other creditor, it appears to him that any item is improperly included or any value incorrectly stated or that the proof is otherwise incorrect, he shall give notice of the objection to the creditor, who may lodge an amended proof within the period specified in the notice or such extended period as the Official Trustee may allow.

(6) If it does not appear to the Official Trustee that a proof is incorrect he shall give notice to the creditor that he admits the proof subject to verification under section 65 of this Act.

(7) If the creditor fails to lodge an amended proof or a further amended proof, as the case may be, within the period allowed under subsection (5) of this section and the Official Trustee is still of opinion that the previous proof is incorrect he shall give notice to the creditor that he rejects the proof.

36. Meeting of creditors

(1) The Official Trustee shall call a first meeting of creditors for a date not later than thirty days weeks after the publication of a protection order, and shall give such notice of the meeting as may be practicable to

each creditor who is mentioned in the debtor's statement of affairs or who, not being so mentioned, has lodged a proof of debts.

(2) So far in advance as may be practicable, the Official Trustee shall give to every such creditor a copy of the debtor's statement of affairs and of any proposal for an arrangement with creditors lodged by him, together with any observations thereon that the Official Trustee may wish to make.

(3) The Official Trustee shall put to the meeting such questions as he considers appropriate;

Provided that if the debtor has proposed an arrangement with creditors, the meeting shall be asked to approve or reject the proposal.

(4) An arrangement with creditors shall not be taken to be approved unless it has secured at least three-quarters of the votes cast.

(5) The meeting shall be closed not later than six weeks after the publication of the protection order.

(6) Schedule IV to this Act shall apply in relation to the meeting.

JUDICIAL CONSIDERATION

37. Application for judicial consideration

(1) Within fourteen days after the closing of the first meeting of creditors, the Official Trustee shall make an application to the Court, in this Act referred to as an application for judicial consideration, to enable the Court to consider the debtor's affairs and give its decision as to the future course of the insolvency proceedings.

(2) On an application for judicial consideration the Court may make one or other of the following orders, namely,

(a) an insolvency order;

(b) an order confirming an arrangement with creditors;

(c) an order rescinding the protection order.

(3) On the making of any such order the protection order shall cease to have effect, so however that the debtor's assets shall remain vested in the Official Trustee except as otherwise provided by section 70 of this Act.

38. Appearance of parties

(1) At the hearing of an application for judicial consideration the debtor and any creditor who has lodged a proof of debts may appear and be heard either in person or by counsel, and the Official Trustee shall submit to the Court a report on the circumstances of the case.

(2) The Official Trustee's report shall include a statement of;

(a) the grounds on which the protection order was made;

(b) the assets of the debtor which have become vested in the Official Trustee;

(c) the liabilities of the debtor;

(d) the conduct of the debtor before and since the presentation of the petition; and

(e) any decisions taken at the first meeting of creditors, together with any other information which may assist the Court.

(3) The Official Trustee and any other person entitled to appear may, with the leave of the Court, adduce oral or written evidence and cross-examine any witness.

(4) It shall be the duty of the Official Trustee to give whatever assistance the Court may require to enable it to reach a conclusion.

39. Making of an insolvency order

(1) The Court shall make an insolvency order in every case in which it does not, under sections 40 and 41, confirm an arrangement with creditors or rescind the protection order.

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(2) Where an insolvency order is made with respect to an individual the Official Trustee shall proceed to realise and distribute the debtor's assets in accordance with Part III of this Act, and while the order has effect;

- (a) the debtor shall be subject to the duties and disabilities specified in sections 45 to 49 of this Act;
- (b) no civil proceedings by or against the debtor shall be instituted or continued without the leave of the Court.

40. Confirmation of arrangement with creditors

(1) Where an arrangement with creditors was approved by the first meeting of creditors and it does not appear that grounds for bankruptcy exist or that it is likely that they exist, the Court shall make an order confirming the arrangement if,

- (a) its terms are fair and reasonable;
- (b) it provides for an order of priority of payments corresponding to that laid down by section 74 of this Act; and
- (c) it provides for payments in full of any fees and outgoings due to the Official Trustee in respect of the insolvency proceedings.

(2) If the conditions specified in paragraphs (a) to (c) of the preceding subsection are not satisfied the Court may adjourn the hearing of the application for judicial consideration and direct the first meeting of creditors to be reopened with a view to the submission by the debtor of proposals for a modified arrangement.

(3) On confirmation by the Court an arrangement with creditors shall, in respect of every provable debt owed by the debtor, become binding on the debtor and on each creditor who was entitled to lodge a proof, whether or not that creditor voted in favour of the arrangement.

(4) It shall be the duty of the Official Trustee to supervise the carrying into effect of an arrangement with creditors confirmed by the Court; and the Court may, on the application of the Official Trustee or any person

interested, from time to time give such directions as may be expedient for carrying it into effect.

(5) If it appears to the Court, on the application of the Official Trustee or any person interested,

(a) that default has been made in carrying into effect an arrangement with creditors confirmed by the Court; or

(b) that for any reason it is impracticable or would be unjust to proceed with the arrangement; or

(c) that confirmation of the arrangement was procured by fraud,

the Court may annul the arrangement but without prejudice to anything previously done thereunder.

(6) Where an arrangement is annulled the Court may make a protection order against the debtor, and this Act shall thereafter apply as if the protection order had been then made on a creditor's petition by the Official Trustee.

41. Power of court to rescind protection order

(1) The Court shall rescind the protection order if it appears,

(a) that having regard to any new evidence and to the circumstances generally, the order should not have been made; or

(b) that owing to payments made on behalf of the debtor or other change of circumstances, payment in full has been achieved.

(2) If the Official Trustee informs the Court that the assets vested in him in respect of the debtor are likely to be sufficient to provide for payment in full, the Court may adjourn the hearing of the application for judicial consideration and authorise the Official Trustee to realise and distribute the assets in the same manner as if an insolvency order had been made.

(3) Where the hearing has been adjourned under subsection (2) the Official Trustee shall apply to the Court for the hearing to be resumed,

(a) when payment in full has been achieved; or

(b) if at any time it appears to him that the assets are after all insufficient to provide for payment in full,

and where it is satisfied that payment in full has been achieved the Court shall rescind the protection order.

BANKRUPTCY

42. Examination and conduct

(1) If, at any time when an insolvency order is made, or on an application made by the Official Trustee at any subsequent time before the debtor's discharge from the insolvency order, it appears to the Court that grounds for bankruptcy exist or that it is likely that they exist, the Court shall direct the debtor to undergo an examination as to his conduct and affairs at a public sitting of the Court.

(2) The debtor shall be examined on oath or on affirmation and shall answer all questions put to him by the Court or allowed by the Court to be put to him by or on behalf of the Official Trustee or any creditor who has lodged a proof of debts.

(3) A transcript of the examination shall be made and read to or by the debtor and signed by him; and the signed transcript may be used as evidence in any subsequent civil or criminal proceedings affecting the debtor, whether instituted under this Act or not.

43. Grounds of bankruptcy

(1) Where a public examination has been held under the preceding section, the Court shall make an order adjudging the debtor a bankrupt if one or more of the following have been established, namely;

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- (a) that for a consecutive period of twelve months within the three years preceding the making of the protection order, the debtor continued to carry on his trade or business in the knowledge that he was insolvent;
 - (b) that the debtor contributed to his insolvency by rash speculations or culpable neglect of his business affairs, or by gambling or unjustifiable extravagance;
 - (c) that a provable debt was contracted by the debtor with the intention that it should not be met or without a reasonable expectation of being able to meet it;
 - (d) that the debtor has failed to account satisfactorily for assets of his which have disappeared since the date of the making of the protection order or during the year previous to that date;
 - (e) that the debtor has persistently and without adequate excuse failed to carry out his duties in the insolvency proceedings;
 - (f) that the debtor is a former bankrupt;
 - (g) that within the preceding three years the debtor has been convicted of an offence involving dishonesty in relation to property and has been sentenced to imprisonment for three months or more,
 - (h) that within the preceding three years the debtor has been convicted of an offence relating to business.
- (2) The order shall specify a date for the discharge of the bankrupt, being a date at least two years after the making of the order.
- (3) Where the Court has directed the debtor to undergo a public examination under the preceding section but the examination cannot be held because the debtor has absconded, or is medically unfit to appear, or for any other reason, the Court may proceed under this section as if the examination had been held.

44. Additional disabilities and responsibilities of bankrupt

(1) In addition to the duties and disabilities imposed on a bankrupt by virtue of an insolvency order having been made against him, he shall be subject to the provisions of this section.

(2) A bankrupt shall not,

- (a) carry on, or take part in the management or direction of, any trade or business;
- (b) operate an account with a bank, building society or similar institution;
- (c) obtain credit exceeding five thousand dalasis; or
- (d) enter into any hire-purchase agreement;

except with consent in writing of the Official Trustee and in accordance with such directions as may from time to time be given to him by the Official Trustee.

(3) A bankrupt shall,

- (a) keep a record of his income, expenditure and other financial dealings in a form approved by the Official Trustee; and
- (b) lodge with the Official Trustee at intervals of not more than four months an income and expenditure account in a form so approved.

(4) In this section "hire-purchase agreement" means an agreement by which a person agrees to bail goods to a bailee on terms such that the property in the goods may or will pass to the bailee after payment of two or more installments.

GENERAL DUTIES AND DISABILITIES OF DEBTOR**45. Duties of debtor**

(1) In addition to the specific duties imposed on him by or under this Act, it shall be the general duty of the debtor, at all times during the period between the making of a protection order and the termination of the insolvency proceedings, to comply as promptly and fully as is practicable with any direction given by the Official Trustee in connection with the exercise of his functions as to the debtor's affairs.

(2) During the said period it shall be the duty of the debtor,

- (a) to attend every meeting of creditors called by the Official Trustee and give such information to the meeting as may be required by the chairman;
- (b) as soon as is practicable to give notice to the Official Trustee of any change in his name or address;
- (c) not to destroy, alter, conceal or dispose of any account-book or other record of his financial affairs.

46. Duty of debtor to give notice of after-acquired property

(1) It shall be the duty of the debtor, whenever he becomes entitled to any after-acquired property; to give notice thereof to the Official Trustee.

(2) In this Act, "after-acquired property" means movable and immovable property, including income, which becomes, or but for this Act would become, vested in the debtor during the period between the making of the protection order and the discharge of the debtor or earlier termination of the insolvency proceedings.

47. Duty of debtor to disclose his bankrupt status

Where a bankrupt or other debtor who has not been discharged intends, whether by himself or jointly with another person, to obtain credit

exceeding five thousand dalasis from any person, it shall be the debtor's duty to disclose to that person, before seeking to obtain credit, that he is a bankrupt or is undischarged from an insolvency order, as the case may be.

48. Power of court to issue warrants of arrest of debtor

(1) If, while insolvency proceedings are in progress against a debtor, it appears to the Court that the proceedings are or may be impeded by reason that the debtor,

- (a) has absconded, or is likely to do so;
- (b) has removed, concealed, destroyed or damaged any property, or is likely to do so; or
- (c) is likely to fail to attend as required before the Court, the Official Trustee or any meeting of creditors,

then without prejudice to its powers in relation to contempt of court, the Court may issue a warrant for the arrest of the debtor, or the seizure of the property in question, or for both arrest and seizure.

(2) Where a warrant of arrest is issued under this section the provisions of the criminal law relating to arrest shall apply in the same manner as they apply to arrest for a criminal offence; and a debtor arrested under such warrant may, for the purposes of the insolvency proceedings, be conveyed in custody to any hearing by the Court or the Official Trustee, or to any meeting of creditors.

(3) Property seized under this section shall be dealt with as the Court may direct, so however that property which does not belong to the debtor and is not likely to be subject to the powers of the Official Trustee under Chapter III of Part II of this Act shall be returned to its owner as soon as is practicable.

49. Intercepting postal article of debtor

(1) If, during the period between the making of a protection order and the termination of the insolvency proceedings, it appears to the Court that the proceedings may be impeded unless the Official Trustee is enabled to

inspect the debtor's incoming correspondence, the Court may make an order directed to the Minister responsible for Communications requiring him to cause any postal article in course of transmission by post to the debtor during such period, not exceeding six months, as may be specified in the order to be readdressed to the Official Trustee.

(2) After taking such copies and retaining such articles as he considers expedient for the purposes of the proceedings, the Official Trustee shall transmit the remaining articles to the debtor as soon as is practicable.

DISCHARGE

50. Time of discharge from insolvency order

(1) The date of discharge from an insolvency order of a debtor who is not a bankrupt shall be the earliest of the following dates, namely,

- (a) the date two years after the insolvency order was made;
- (b) the date on which payment in full is achieved;
- (c) the date specified in a proposal for additional payment approved by the Court under section 51 of this Act.

(2) The date of discharge from an insolvency order and from bankruptcy of a debtor who is a bankrupt shall be the date fixed under section 53 of this Act at the time when the debtor was adjudged bankrupt, or if that date has been altered by the Court under section 51 of this Act, shall be the date as so altered.

(3) The date which will be the date of discharge unless an event occurs to alter it is in this Act referred to as the appointed discharge date.

51. Meeting of creditors prior to discharge date

(1) Where before the appointed discharge date of a bankrupt or other debtor,

- (a) a person other than the debtor gives notice to the Official Trustee that he proposes to pay to the Official Trustee a sum specified in the notice for distribution to the creditors if the debtor's discharge is fixed for an earlier date specified therein, in this section referred to as the specified date; and
- (b) it appears to the Official Trustee that the proposal is made in good faith and could be carried out,

the Official Trustee shall call a meeting of creditors, to which the Schedule to this Act shall apply, and shall report to the meeting his views on the proposal and also, if the debtor is a bankrupt, his views on the debtor's conduct since he was adjudged a bankrupt together with an account of any new facts which have since come to light as to his conduct and affairs before he was so adjudged.

(2) After hearing the Official Trustee's report and any observations made by or on behalf of the debtor, the meeting shall vote on the proposal.

(3) If the meeting approves the proposal the Official Trustee shall apply to the Court for its decision thereon and shall submit to the Court a report dealing with the matters required to be dealt with in his report to the meeting and including the decision of the meeting.

(4) If the Court is satisfied that it would be proper to discharge the debtor on the specified date it shall make an order,

- (a) fixing that date as the appointed discharge date; and
 - (b) requiring the person making the proposal to pay the sum specified therein to the Official Trustee within such period as is specified in the order.
- (5) The specified date,
- (a) shall not be less than two months after the date on which notice of the proposal is given to the Official Trustee, and
 - (b) in the case of a bankrupt shall not be less than two years after the date on which he was adjudged bankrupt,

and the Official Trustee shall carry out the requirements of this section in sufficient time to enable the Court to give its decision before the specified date.

(6) A sum paid under this section shall be taken to be paid by way of gift to the debtor unless the proposal states that it is to be paid by way of loan.

52. Alteration of discharge date

(1) Where, before the appointed discharge date of a bankrupt, it appears to the Official Trustee that the date should be altered to an earlier or later date by reason of,

- (a) the conduct of the bankrupt since he was adjudged a bankrupt; or
- (b) new facts which have come to light as to his conduct or affairs before he was so adjudged,

the Official Trustee shall call a meeting of creditors, to which Schedule IV to this Act shall apply, and shall report to the meeting his view as to the appropriate new discharge date and as to the debtor's conduct since he was adjudged a bankrupt, together with an account of any such new facts as aforesaid.

(2) After hearing the Official Trustee's report and any observations made by or on behalf of the debtor, the meeting shall vote on whether the discharge date should be altered and if so what the new date should be.

(3) If after the meeting the Official Trustee remains of the opinion that the discharge date should be altered he shall apply to the Court for its decision, and if he does so shall submit to the Court a report dealing with the matters required to be dealt with in his report to the meeting and including the decision of the meeting.

(4) If the Court is satisfied that the date should be altered it shall make an order fixing as the appointed discharge date whichever new date it considers appropriate.

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(5) The same meeting of creditors may, if the Official Trustee thinks fit, consider a proposal made under the preceding section and matters brought before it under this section, and if the Court thinks fit, the Court may deal in the same proceedings with applications under the preceding section and under this section.

53. Certificate of discharge

On the appointed discharge date of a bankrupt or other debtor, the debtor shall be deemed to be discharged, and as soon as may be thereafter the Official Trustee shall issue to the debtor a certificate of discharge.

54. Effect of discharge of a bankrupt

- (1) The discharge of a bankrupt or other debtor shall,
 - (a) release him from all provable debts whether or not included in any proof of debts;
 - (b) relieve him for the future from any duties and liabilities under sections 44, 46 and 47 of this Act.
- (2) The discharge of a bankrupt or other debtor shall not,
 - (a) release any person who at the date when the insolvency order was made was a partner or co-trustee of the debtor, or was jointly bound with him under a contract or otherwise, or was a surety or in the nature of a surety for him; or
 - (b) bring the insolvency proceedings to an end.

TERMINATION OF PROCEEDINGS**55. When insolvency proceedings come to an end**

(1) Where an insolvency order is not made, insolvency proceedings shall come to an end on the happening of any of the following events, namely,

- (a) the withdrawal or dismissal of the petition by which the proceedings were initiated;
- (b) the confirmation of an arrangement with creditors under section 40 of this Act;
- (c) the rescission of the protection order under section 41 of this Act.

(2) Where an insolvency order is made the insolvency proceedings shall come to an end on the making by the Court of an order under the following section.

56. Application for termination of insolvency proceedings

(1) Where a bankrupt or other debtor has been discharged and,

- (a) the Official Trustee has completed the distribution of the debtor's assets under Part III, Chapter III of this Act; and
- (b) the Official Trustee's final accounts in the insolvency have been drawn up, and have been passed by the Auditor-General,

the Official Trustee shall apply to the Court for an order terminating the insolvency proceedings.

(2) The Official Trustee shall give notice of the application, together with a summary of the final accounts, to the debtor and to every creditor with an admitted proof.

(3) The Court shall grant the application if satisfied that it is duly made.

CHAPTER III**ADMINISTRATION OF DEBTOR'S PROPERTY****ASSETS PASSING TO OFFICIAL TRUSTEE****57. Vesting of debtor's property in Official Trustee**

(1) On and by virtue of the making of a protection order there shall vest in the Official Trustee to the same extent and, subject to subsection (3) of this section, with the same incidents, all movable and immovable property vested in the debtor immediately before the order was made.

(2) All property in the possession of the debtor at any time within six months before the protection order was made shall be presumed to be vested in the debtor unless the contrary is shown.

(3) Property which has become vested in the Official Trustee under this section shall not be subject to attachment, distress or other proceedings for the enforcement of an obligation against the debtor, whether founded on a judgment or not:

Provided that this subsection shall not apply to proceedings for the enforcement of a security.

58. Effect of vesting of debtor's property in Official Trustee

(1) The Official Trustee shall bring about the vesting in him, to the same extent and, subject to subsection (3) of this section, with the same incidents, of all after-acquired property of the debtor except property exempted by subsection (2) or property which would not be of value to the creditors.

(2) The following after-acquired property shall be exempted namely,

- (a) property necessary for the reasonable current maintenance of the debtor, his spouse and children;
- (b) money paid or payable to the debtor, as compensation for his diminished earning capacity, by way of damages for personal injury or other lump sum;
- (c) money paid or payable to the debtor by way of loan;
- (d) movable property bought by the debtor and not paid for in full;
- (e) property in which any property mentioned in paragraph (b), (c) or (d) of this subsection has been directly or indirectly invested, or which otherwise represents the same.

(3) Property which has become vested in the Official Trustee under this section shall not be subject to attachment, distress or other proceedings for the enforcement of an obligation against the debtor, whether founded on a judgment or not:

Provided that this subsection shall not apply to proceedings for the enforcement of a security.

(4) If the debtor has, with respect to after-acquired property which is not exempted, entered into any transaction whereby the whole or any part of the value of the property is lost to the creditors, the Official Trustee may apply to the Court for an order setting aside the transaction and requiring the property or its value, or such part thereof as was lost to the creditors, as the case may be, to be transferred to the Official Trustee.

(5) The Official Trustee may give notice to any employer, banker or other person who but for this section would be under an obligation to transfer after-acquired property which is not exempted to, or to the order of, the debtor to transfer the property instead to the Official Trustee, whose receipt shall be a sufficient discharge.

(6) A person who fails to comply with a notice under the preceding subsection shall pay to the Official Trustee such sum as may be necessary to make good any loss to the creditors arising from the failure.

59. Transfer of accrued benefits to creditor

(1) Where, at any time between the making of an insolvency order and the debtor's discharge, it appears to the Official Trustee that, during the six months ending with the making of the protection order and at a time when he was insolvent, the debtor made any payment or other transfer of property, or created any mortgage or other charge, or suffered any judgment or incurred any other obligation, with the dominant intent that any of his creditors should benefit at the expense of others, the Official Trustee shall give notice to the creditor so preferred requiring him, within the period specified in the notice, to restore to the Official Trustee, whether by payment of money, transfer of property or surrender of rights, the benefit which has accrued to the creditor by reason of his being preferred.

(2) Where an insolvency order is made against a debtor every person who, during the relevant period, received a payment of money, or other transfer of property, in respect of a debt owed to him by the debtor shall, on receipt of a notice given in that behalf by the Official Trustee, restore the property or its value to the Official Trustee:

Provided that this subsection shall not apply to a payment or other transfer of property,

- (a) made by the debtor to his banker, in so far as it has been subsequently disbursed by the banker in meeting cheques drawn by the debtor;
- (b) made in respect of a debt incurred during the relevant period;
- (c) made in respect of a secured debt; or
- (d) made on the enforcement against a third party of a guarantee or indemnity, or of a mortgage, charge or lien on that party's property.

(3) Where an insolvency order is made against a debtor, all property in the possession of the sheriff at the time of the making of the protection order, being property of which possession was taken under an execution issued by a creditor of the debtor or the proceeds of such property, shall, after deduction of the sheriff's and bailiff's charges in the execution, be transferred to the Official Trustee.

(4) Where a person has complied with a notice given under subsection (1) or (2) of this section, he may, within one month after the notice was given, lodge a proof of debts, or require the Official Trustee to amend his proof, as the case may be, so as to enable the debt in respect of which the notice was given to rank for dividend at the value which is appropriate in view of his compliance.

(5) In this section "relevant period" means the period beginning twenty-one days before the presentation of the petition on which the protection order was made, or, if the protection order was made on two or more petitions, before the presentation of the first petition, and ending with the making of the protection order.

60. Notice to recipient of property or obligation

(1) Where, at any time between the making of an insolvency order and the debtor's discharge, it appears to the Official Trustee that the debtor made any disposition of his property otherwise than for full value or in settlement of a due debt, or incurred any obligation otherwise than for full value,

- (a) during the two years ending with the making of the protection order, or
- (b) more than two years but less than ten years before the making of the protection order and at a time when he was insolvent,

the Official Trustee shall give notice to the person to whom the disposition was made or for whose benefit the obligation was incurred requiring him, within the period specified in the notice, to restore to the Official Trustee, whether by payment of money, transfer of property or surrender of rights, the excess of the benefit which thereby accrued to him above the value of any consideration provided.

(2) Excess benefit restored under this section shall be treated as a provable debt in respect of which a proof may be lodged at any time within one month after it was restored.

(3) This section shall not apply to any disposition made in consideration of marriage unless the Court is of the opinion that the disposition was made for the purpose of defeating creditors.

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61. Notice to lender for repayment of money

Where, at any time between the making of an insolvency order and the debtor's discharge, it appears to the Official Trustee that, during the ten years ending with the making of the protection order, any sum was paid or allowed by the debtor in respect of a loan in circumstances such that the Court would have ordered the lender to make a repayment to the debtor, the Official Trustee may give notice to the lender requiring him, within the period specified in the notice, to make a like repayment to the Official Trustee.

62. Debtor's official account

(1) The Official Trustee shall open an account, in this Act referred to as the debtor's official account, within the Insolvent Estates Fund for each debtor in respect of whom a protection order is made.

(2) There shall be credited to the debtor's official account,

- (a) all moneys received by the Official Trustee in respect of the debtor by virtue of the preceding provisions of this Part of this Act;
- (b) payments made to the Official Trustee in respect of the debtor either under an order for early discharge made under section 31 of this Act or otherwise for the purpose of increasing the assets available for dividend;
- (c) repayments in respect of excess dividends made under subsection 2 of section 74 of this Act.

(3) If on the application of the debtor or any creditor it appears to the Court before the termination of the insolvency proceedings that assets have been lost to the estate by reason of any default by the Official Trustee, the Court may order that the debtor's official account be credited with such sum as may appear to the Court to be just and that an equivalent sum be debited to the Fees Account.

GENERAL FUNCTIONS OF OFFICIAL TRUSTEE**63. Functions of the Official Trustee**

(1) On the making of a protection order it shall be the duty of the Official Trustee,

- (a) to take possession of all property which has passed to him under section 57 of this Act;
- (b) to take such steps as may be expedient to procure, in relation to stocks and shares and other property transferable in the books of any body corporate or other person which have passed to him under the said section 57, the transfer of the property into his name;
- (c) to make such arrangements as may be expedient to secure the carrying on of any trade or business the continuance of which would be likely to benefit the creditors;
- (d) to secure the payment to him or other discharge of all debts and other obligations the right to which has passed to him under the said section 57;
- (e) to take such other steps as may be expedient to ensure the protection of the debtor's assets for the benefit of the creditors.

(2) Until an insolvency order is made the Official Trustee shall not dispose or encumber any property, otherwise than in the course of a trade or business, without the consent of the debtor or the authority of the Court.

(3) No restriction on the transferability of such property as is mentioned in paragraph (b) of subsection (1) of this section shall be operative in the case of a transfer to the Official Trustee.

(4) If the Official Trustee suspects that property has been concealed he may offer a reward to any person, not being the debtor himself, who shall produce the property or give information leading to its discovery, but the reward shall not exceed one-twentieth of the value of the property recovered by the action of that person.

64. Duty of Official Trustee to realize assets not held as cash

On the making of an insolvency order it shall be the duty of the Official Trustee to realise as soon as practicable all assets not held as cash by such means and for such return as will produce for distribution to the creditors sums representing the full value of the assets:

Provided that this section shall not be taken to require the realisation of any asset which cannot be readily or advantageously disposed of.

65. Verifying correctness of admitted proof and realization of security

(1) On the making of an insolvency order it shall be the duty of the Official Trustee to take such steps as are practicable to verify the correctness of every admitted proof.

(2) If, where an insolvency order is made, creditor's obligations such as are mentioned in paragraph (b) of subsection (3) of section 35 of this Act are included in the creditor's admitted proof,

(a) where the total value of the obligations as shown in the proof is less than the total value of debts owed to the creditor as so shown, the obligations shall be deemed to be canceled at the making of the insolvency order and the values of the said debts shall be *pro rata* reduced;

(b) in any other case the obligations shall be deemed to be *pro rata* reduced at the making of the insolvency order by the total value of the said debts, and the proof shall be deemed to be expunged.

(3) The Official Trustee may give notice to a creditor holding a security that, if the security is not realised within the period specified in the notice, which shall not be less than six months, it will be treated as surrendered.

(4) Subject to the provisions of this Part of this Act, a debt shall rank for dividend at any time if, but only if, it is at that time included in an admitted proof; and the value of the debt shall be taken to be the value shown at that time in the proof.

66. Change in value of debt or security

(1) If the value of a debt or security included in an admitted proof has charged otherwise than in respect of interest accruing after the protection order was made, the proof shall be subject to amendment for the purpose of altering the value shown therein to give effect to the change.

(2) If a debt or security is incorrectly included in an admitted proof, or the value of a debt or security at the date of the making of the protection order is incorrectly stated, the proof shall be subject to amendment for the purpose of rectifying the incorrectness.

(3) If a creditor desires to withdraw his claim to the whole or a part of a debt included in an admitted proof the proof shall be subject to amendment for the purpose of deleting the debt or reducing its value accordingly, as the case may be.

(4) Where an admitted proof is subject to amendment under this section,

(a) the Official Trustee may, except in the case of an amendment under the preceding subsection, give notice to the creditor specifying the proposed amendment and inviting him to consent to it within the period specified in the notice; or

(b) the creditor may, if the Official Trustee has not given him notice as aforesaid, give notice to the Official Trustee specifying the proposed amendment and, except in the case of an amendment under the preceding subsection, inviting him to consent to it within the period specified in the notice.

(5) Where notice of a proposed amendment is given under the preceding subsection the Official Trustee shall amend the proof accordingly if,

(a) the party to whom the notice is given consents to the amendment;

(b) consent is not given but, on an appeal by the creditor or an application by the Official Trustee, the Court orders the amendment to be made; or

- (c) the amendment is proposed by the creditor under subsection (3) of this section.

67. Classification of debts

(1) On the making of an insolvency order it shall be the duty of the Official Trustee, in relation to each debt which ranks for dividend, to ascertain into which of the following classes the whole or any part of the debt falls:

Class A - A debt or part of a debt which answers either of the following descriptions, that is to say,

- (a) remuneration not exceeding five thousand dalasis owed to an employee of the debtor, not being a near relative, in respect of employment during the whole or any part of the four months preceding the making of the protection order;
- (b) rates, taxes or similar payments owed to the Government or a local authority which have become due and payable within the year preceding the making of the protection order.

Class B - A debt or part of a debt which does not fall into any other class.

Class C - A debt or part of a debt which does not fall within class D and is, or was at any time within the year preceding the making of the protection order, owed to a near relative of the debtor.

Class D - A debt or part of a debt which answers either of the following descriptions, that is to say -

- (a) excess benefit restored to the Official Trustee under section 60 of this Act;
- (b) excess interest, that is any portion of a debt which, whether it is stated to do so or not, represents interest at a rate in excess of seven *per centum per annum*.

(2) For the purposes of this section the following shall be taken to be near relatives of the debtor, that is to say,

- (a) his spouse, parents and issue;
- (b) his brothers, sisters, uncles, aunts, nephews and nieces, whether of the whole or the half blood.

68. Duty of Official Trustee to consult and report to creditors

(1) Subject to the provisions of this Act, it shall be the duty of the Official Trustee,

- (a) to report to the creditors, at intervals not greater than six months, on the progress of the insolvency proceedings;
- (b) to consult the creditors on any matter arising in the proceedings which substantially affects their interests; and
- (c) to give effect, so far as may be practicable, to any views expressed by the creditors in relation to the realisation and distribution of assets.

(2) For the purpose of complying with subsection (1), the Official Trustee may call a meeting of creditors at any time, and shall call such a meeting if required to do so by a notice in writing signed by creditors whose votes exceed one-fifth of the total number of votes which could be cast at the meeting.

(3) Schedule IV to this Act shall apply in relation to every meeting of creditors called under this section.

69. Powers of Official Trustee to order attendance of any person in court

(1) If the Official Trustee is of opinion that it is necessary, in order to enable him to carry out his functions under this Part of this Act in relation to a debtor, for the debtor, any creditor or any other person to be brought before and examined by the Court he may order him to attend for that purpose before the Court.

(2) In proceedings under this section the Court may

- (a) examine on oath or otherwise any person brought before it,

(b) order the delivery up by any such person of assets to which the Official Trustee is entitled under this Act, and

(c) make such order as it thinks just.

ASSETS PASSING FROM OFFICIAL TRUSTEE

70. Transfer of property to person entitled thereto

(1) As soon as is practicable after an arrangement with creditors is confirmed under section 40 of this Act, the Official Trustee, unless he is to act as trustee under the arrangement, shall cause all property which has become vested in him under section 57 or 58 of this Act in respect of the debtor to be transferred to the person entitled thereto under the arrangement.

(2) As soon as practicable after a protection order is rescinded under section 41 of this Act, the Official Trustee shall cause all property which has become vested in him under section 57 or 58 of this Act in respect of the debtor to be transferred back to the debtor.

(3) Notwithstanding subsections (1) and (2) of this section, the Official Trustee shall be entitled to retain assets sufficient to reimburse him for fees and outgoings due to him from the debtor in respect of the insolvency proceedings.

(4) This section shall not apply to any property which has already passed from the Official Trustee under the provisions of this Part of this Act, so however that it shall apply to the proceeds of property which has been realised as it applies to property which has been retained in its original form.

71. Disclaimer of property and its effect

(1) Within one year after any property has become vested in him under section 57 of this Act, the Official Trustee, if he is of opinion that

the property will not be of benefit to the creditors, may by notice published in the Gazette disclaim the property;

Provided that if any person interested in property so vested in the Official Trustee has by application in writing required the Official Trustee to elect whether he disclaims the property or not, this subsection shall not apply if the Official Trustee fails to disclaim within one month after the making of the application, or such longer period as the Court may allow.

(2) The Court may on the application of any person interested, give such relief and make such other provision as it thinks just in consequence of disclaimer under this section.

(3) Subject to any order made by the Court, the effect of disclaimer shall be as follows, that it to say,

- (a) if the property consists of rights under a lease, share, contract or other interest, the interest shall be void to the extent that it affects the Official Trustee or the debtor;
- (b) if the property consists of the absolute ownership of land or chattels that ownership shall revert to the debtor.

72. Power of Official Trustee to satisfy own fees from debtor's official account

(1) The Official Trustee shall be entitled to withdraw from the property of the debtor which has become vested in the Official Trustee sums sufficient to satisfy fees of the prescribed amount charged in respect of the costs of the administration.

(2) When any fees become due to the Official Trustee in respect of a debtor, the Official Trustee shall cause them to be paid by transferring the necessary sum from the debtor's official account to the Fees Account.

(3) When any rent, rates, charges or other outgoings fall to be met by the Official Trustee in respect of the debtor, the Official Trustee shall cause them to be paid out of the debtor's official account.

73. Restoration of debtor's property

As soon as is practicable after the debtor's property has vested in the Official Trustee under section 57 of this Act he shall restore to the debtor such of the following as the debtor may select, not being of a total value exceeding five thousand dalasis, namely,

- (a) property used personally by the debtor for the purposes of his employment;
- (b) furniture, clothing and other household effects used by the debtor or any of his dependents.

74. Rules as to declaration and distribution of dividends

(1) Subject to sections 72 and 73, the Official Trustee shall from time to time, and as early as is practicable declare and distribute dividends to creditors in accordance with the following rules, that is to say,

- (a) provision shall be made for the payment in full of all class A debts before any dividend is declared in respect of class B debts, and so on throughout the classes;
- (b) all debts within one class shall rank *pari passu*;
- (c) payments shall be made only in respect of debts which rank for dividend and shall not exceed the values thereof;
- (d) where a security held by a creditor has not yet been realised or surrendered, the value of the debt against which the security is held shall be treated as reduced by the value of the security;
- (e) interest shall not be allowed in respect of any period after the making of the protection order.

(2) Where a dividend has been paid under this section in respect of a debt which is subsequently struck out or reduced in value by an amendment of the admitted proof, the creditor shall repay to the Official Trustee the difference between the amount of the dividend and the amount which, in the light of the amendment, should have been paid.

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(3) Where a dividend has been paid under this section in respect of a debt which is subsequently increased in value by an amendment of the admitted proof, the Official Trustee shall, so far as may be practicable without disturbing dividends already declared, pay to the creditor the difference between the amount of the dividend and the amount which, in the light of the amendment, should have been paid.

(4) Where a creditor has omitted to lodge a proof of debts during the period allowed by this Act, or has omitted a provable debt from his proof, he may at any time during the insolvency proceedings apply to the Court for relief, and if the Court is of opinion that the omission was excusable it shall make an order requiring the Official Trustee, so far as may be practicable without disturbing dividends already declared, to pay to the creditor such sums as would have been payable to him under this section if the omission had not occurred.

(5) If at the end of the period of one year following the declaration of a dividend stated by the Official Trustee to be the final dividend, any payments under that or any previous dividend remain outstanding because the creditors in question cannot be found, the Official Trustee shall cancel the payments and, unless payment in full has been achieved, shall declare a further dividend in favour of the remainder of the creditors.

(6) In the case of a final dividend, or a further dividend declared under the preceding subsection, no payment of less than five dalasis shall be required to be made.

(7) Payments under this section shall be in money drawn from the debtor's official account:

Provided that property which has not been converted into money may be transferred to a creditor in lieu of the equivalent amount of money if the creditor consents.

75. Treatment of balance after payments and transfers of property

(1) Where, after provision has been made for all payments and transfers of property required to be made under sections 72, 73, and 74, any balance remains in the debtor's official account, the Official Trustee shall pay that balance to the debtor.

(2) Where, after such provision has been made, the Official Trustee retains property which has not been converted into money, he shall transfer that property to the debtor.

(3) If the debtor cannot be found, the Court may direct any such balance to be transferred to the Fees Account, and may give directions for the disposal of any such property.

76. Restrictions on payments in relation to a debtor

(1) No person shall be entitled to any payment in respect of anything done by the Official Trustee in relation to a debtor except out of any balance in the debtor's official account or out of assets otherwise vested in the Official Trustee in respect of the debtor under this Part of this Act:

Provided that if in any proceedings costs are given against the Official Trustee they shall be met out of the Fees Account.

(2) During the continuance of insolvency proceedings, no person shall be required, under a contract entered into with the debtor before the protection order was made, to supply goods, render services or otherwise perform an obligation unless he has received an assurance in writing from the Official Trustee that the debtor's estate is sufficient to enable the goods or services to be paid for, or the performance of the obligation otherwise recompensed, in accordance with the terms of the contract.

(3) Notwithstanding subsection (1) of this section, if an assurance given under the subsection (2) proves incorrect the person to whom the assurance was given shall be entitled to be reimbursed out of the Fees Account.

CHAPTER IV**ARRANGEMENTS WITH CREDITORS APART FROM
INSOLVENCY PROCEEDINGS****77. Application of this Part to arrangements with creditors**

This Part of this Act shall apply to any arrangement with creditors made by an insolvent debtor, not being a body corporate, whether in writing or orally,

- (a) if the arrangement is made at a time when insolvency proceedings are not in progress against the debtor; and
- (b) if the debts subject to the arrangement amount to at least five thousand dalasis and constitute the whole, or substantially the whole, of the debtor's indebtedness at the time when the arrangement is made.

78. The Arrangements Register

(1) The Official Trustee shall make and keep a register, to be known as the Arrangements Register, in which shall be recorded the prescribed particulars of instruments lodged with the Official Trustee under the following section.

(2) If the Official Trustee is satisfied that an arrangement recorded in the Arrangements Register has been fully carried out, or has otherwise ceased to have effect, he shall record the fact in the Register.

(3) The Arrangement Register and copies of instruments recorded therein shall at all reasonable times be open for public inspection on payment of such fee, if any, as may be prescribed.

(4) The Official Trustee shall, on application being made by any person in the prescribed form, and on payment of the prescribed fee, provide copies of any entry in the Arrangement Register or any instrument recorded therein.

79. When an arrangement becomes voidable

(1) An arrangement to which this Part of this Act applies shall be voidable unless, within fourteen days after the arrangement has become binding on the debtor, two copies of the instrument embodying the arrangement, or, where the arrangement was oral, of an instrument recording the details of the arrangement, have been lodged with the Official Trustee for entry in the Arrangements Register.

(2) If, on an application by the Official Trustee or any person interested, it appears to the Court that an arrangement is voidable by virtue of the preceding subsection, the Court shall declare the arrangement to have been void from the beginning, or from such later date as may appear just, unless it considers that the failure to register was neither wilful nor negligent.

(3) An arrangement which is voidable by virtue of subsection (1) of this section shall not on that ground be avoided otherwise than by the Court under the preceding subsection.

(4) Where an arrangement is declared void under this section the Court may make a protection order against the debtor and this Act shall thereafter apply as if the protection order had been then made on a creditor's petition by the Official Trustee.

80. Power of court to set aside an arrangement

(1) If, on the application of any person interested, it appears to the Court, as respects an arrangement to which this Part of this Act applies, not being an arrangement subject to avoidance under the preceding section,

- (a) that default has been made in carrying the arrangement into effect;
- (b) that for any reason it is impracticable or would be unjust to proceed with the arrangement; or
- (c) that the agreement of creditors to the arrangement was procured by fraud,

the Court may set aside the arrangement but without prejudice to anything previously done thereunder.

(2) Where an arrangement is set aside under this section the Court may make a protection order against the debtor and this Act shall thereafter apply as if the protection order had been then made on a creditor's petition by the Official Trustee.

81. Non-application of Section 29(1) to an arrangement registered under this Part

Where an arrangement has been duly registered under this Part of this Act neither the arrangement itself nor any act done for the purpose of entering into the arrangement shall be treated as falling within paragraph (a) of subsection (1) of section 29 of this Act for the purpose of founding a petition for a protection order against the debtor.

CHAPTER V

MODIFICATIONS IN SPECIAL CASES

82. Capacity of debtors

(1) Subject to the provisions of this section, this Act shall apply in relation to debtors who are not of full age and capacity in the same manner as it applies in relation to debtors who are of full age and capacity.

(2) Where a debtor is an infant or of unsound mind the Court may, on the application of the Official Trustee or any person interested, appoint a person to act as the debtor's guardian in insolvency proceedings.

(3) In the case of a debtor who is of unsound mind this Act shall apply in relation to property vested in any person as committee of the debtor or otherwise on his behalf as it applies in relation to property vested in the debtor.

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83. Joint debtors

(1) Where insolvency proceedings are instituted in respect of two or more debtors jointly, debts not owed jointly by all the debtors shall be disregarded for the purpose of section 29 or 30 of this Act.

(2) Where a protection order is made in respect of two or more debtors jointly,

(a) any petition pending against any of the debtors individually shall lapse;

(b) subject to the provisions of this section, the insolvency proceedings shall extend to debts owed by the debtors separately as well as their joint debts, and assets of the debtors shall vest in the Official Trustee whether or not they are referable to the joint debts;

(c) in addition to the joint official account opened under section 62 of this Act, a separate official account shall be opened in respect of each debtor, in which shall be entered items referable to his separate estate and his separate debt.

(3) Where an insolvency order is made in respect of two or more debtors jointly,

(a) the joint estate shall be applicable in the first instance in payment of the joint debts, and if there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the interest of each debtor in the joint estate;

(b) the separate estate of each debtor shall be applicable in the first instance in payment of his separate debts and if there is a surplus of any separate estate it shall be dealt with, so far as may be necessary for satisfying the joint debts, as part of the joint estate.

84. Duty of Official Trustee in respect of debtor who is a trustee

(1) Where a debtor in respect of whom an insolvency order is made is, whether by himself or jointly with any other person or persons, a trustee

of any property, and the debtor's interest in the property as trustee has become vested in the Official Trustee under this Act, then,

- (a) if the debtor had any beneficial interest in the property, the Official Trustee shall continue to act as trustee in place of the debts; until the beneficial interest has been realised;
- (b) subject to the preceding paragraph, the Official Trustee shall as soon as is practicable take steps to secure the appointment of another trustee in his place or, if there are two or more remaining trustees, to retire from the trust.

(2) Nothing in this Act shall affect the beneficial interest of any person other than the debtor in trust property.

(3) In this section "trustee" includes a personal representative or other person holding property on a fiduciary basis, and "trust property" shall be construed accordingly.

85. Application for a participation order

(1) Where an insolvency order has been made but the insolvency proceedings have not yet come to an end, any one or more creditors of the debtor may, on payment of the prescribed fee, apply to the Official Trustee for the making by him of an order, to be known as a participation order, enabling creditors to participate in the insolvency proceedings in respect of new debts:

Provided that an application shall not be made unless,

- (a) the debtor's indebtedness to the applicant or, as the case may be, the applicants collectively, comprises new debts in liquidated sums payable immediately and amounting to at least one thousand dalasis; and
- (b) debts to that amount remain unpaid fourteen days after the service on the debtor of a written demand for payment.

(2) Sections 31, 32, 33, 35 and 36 of this Act shall apply as nearly as may be in relation to an application under this section, subject to the following modifications, namely,

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- (a) references to a petition shall be read as references to the application;
 - (b) references to a protection order shall be read as references to a participation order;
 - (c) sections 33 and 35 shall not apply to debts which are not new debts, and the period within which a proof of debts may be lodged shall be limited to three months from the making of the participation order;
 - (d) in section 36 the following shall be omitted, namely, the reference to an arrangement with creditors in subsection 2, the proviso to subsection 3 and subsection 5.
- (3) Part III of this Act shall apply as nearly as may be in relation to a participation order, subject to the following modifications, namely,
- (a) references to a protection order or an insolvency order shall be read as references to the participation order;
 - (b) the Official Trustee shall open a sub-account within the debtor's official account, in this section referred to as a participation account, to which shall be credited the proceeds of all after-acquired property which becomes vested in the Official Trustee after the making of the participation order and before any such subsequent order is made, together with any other moneys which become vested in the Official Trustee by virtue of the participation order;
 - (c) subject to section 72 of this Act, the participation account shall be used only for the payment of dividends in respect of debts ranking for dividend by virtue of the participation order, and dividends in respect of such debts shall be paid only out of the participation accounts;
 - (d) if there is a surplus on the participation account and a deficiency on the debtor's main account, or a surplus on the main account and a deficiency on the participation account the surplus shall be transferred to the credit of the main account or the participation account, as the case may be;

- (e) where more than one participation order has been made a surplus shall be dealt with on the principle that the main account is to be credited in preference to a participation account and an earlier participation account is to be credited in preference to a later participation account;

(4) Where a participation order is made,

- (a) if the debtor is a bankrupt and his appointed discharge date is less than two years ahead, then, subject to sections 51 and 52 of this Act, it shall be postponed to the date two years after the participation order is made;
- (b) if the debtor is not a bankrupt and has not been discharged from the insolvency order, then, subject to sections 43 and 51 of this Act, his appointed discharge date shall be postponed to the date two years after the participation order is made;
- (c) if the debtor has been discharged from the insolvency order and where applicable, from bankruptcy, his discharge shall be treated as revoked, and,
 - (i) subject to sections 43, 51 and 52 of this Act, his appointed discharge date shall be the date two years after the participation order is made;
 - (ii) the debtor shall surrender his certificate of discharge to the Official Trustee;
 - (iii) the debtor shall not be treated as having contravened section 44, 46 or 47 of this Act by reason of any act done by him between discharge and the revocation thereof.

(5) In this section "new debt" means a debt incurred by the debtor since the making of the protection order or, if the participation order is a second or subsequent participation order, means a debt incurred by the debtor since the making of the participation order.

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CHAPTER VI**ADMINISTRATION OF ESTATES OF DECEASED INSOLVENTS****86. Application for an administration order for estate of deceased**

(1) Where the estate of a deceased is insufficient to pay his debts the representative or any creditor of the deceased may, on payment of the prescribed fee, apply to the Official Trustee for the making by him of an order, to be known as an administration order, for the administration of the estate under this Part of this Act.

(2) Where an application under this section is made by a creditor, the applicant shall at the same time serve a copy of the application on the representative of the deceased.

(3) After seven days have elapsed following the making of the application, the Official Trustee shall consider the application and evidence in support thereof, together, in the case of a creditor's application, with any representations made by the representative of the deceased, and,

(a) if he considers that the application was duly made he shall make an administration order thereon, or

(b) if he considers that the application was not duly made he shall give notice to the applicant and, in the case of a creditor's application, to the representative of the deceased that the application is dismissed.

(4) References in this Part of this Act to the representative of a deceased debtor shall be construed as references to his personal representative if he has any or, if he has not and was subject to customary law, as references to his successor under customary law.

(5) Where there is no representative of the deceased, provisions of this Part requiring anything to be done by or in relation to the representative shall not apply.

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87. Vesting of deceased's estate in Official Trustee

(1) On and by virtue of the making of an administration order there shall vest in the Official Trustee to the same extent and, subject to the following subsections, with the same incidents, all movable and immovable property which, immediately before the order was made, was vested for the purposes of the administration of the deceased's estate in his representative or, by virtue of [*the prevailing statute on administration of estates*] in the Chief Justice; and the representative shall have no right of retainer in respect of debts owed to him.

(2) Property which has become vested in the Official Trustee under this section shall not be subject to attachment, distress or other proceedings for the enforcement of an obligation against the debtor's estate, whether founded on a judgment or not:

Provided that this subsection shall not apply to proceedings for the enforcement of a security.

(3) The administration order shall not affect the validity of any realisation or distribution of assets made by the representative, or any other set of administration done by him, before he received notice of the making of the administration order.

(4) Within seven days after the making of an administration order, or such longer period as the Official Trustee may allow, the representative of the deceased shall lodge with the Official Trustee a copy of any will left by the deceased, whether or not it has been admitted to probate, and a statement containing,

- (a) particulars of the assets of the deceased;
- (b) a list of creditors, showing the amounts and due dates of debts and particulars of securities held;
- (c) a description of any steps already taken by the representative by way of realising and distributing the assets;
- (d) a description of any funeral, testamentary or administration expenses incurred.

88. Classification of a proof of debt

(1) At any time during the period of three months following the making of an administration order any creditor of the deceased may lodge with the Official Trustee a statement, to be known as a proof of debts, in accordance with subsection (2).

(2) A proof of debts shall be in two parts, the first part containing brief particulars of,

- (a) the amount outstanding of every debt owed to the creditor by the deceased's estate;
- (b) the amount outstanding of any debt owed by the creditor to the deceased's estate;
- (c) the nature and value of any securities held by the creditor, or held on behalf of the deceased's estate, in respect of the said debts,

and the second part containing details of the transactions from which the said debts arose.

(3) A copy of the first part of every proof lodged under this section shall be given by the Official Trustee to the representative of the deceased and to each creditor who is mentioned in the statement lodged by the representative or who, not being so mentioned, himself lodges a proof; and if the representative knows or believes that the proof is false in any material particular it shall be his duty to inform the Official Trustee thereof as soon as is practicable.

(4) The Official Trustee shall examine every proof of debts lodged by a creditor and if, after considering any representations made by the representative or any creditor, it appears to him that any item is improperly included or any value incorrectly stated or that the proof is otherwise incorrect he shall give notice of the objection to the creditor, who may lodge an amended proof within the period specified in the notice or such extended period as the Official Trustee may allow.

(5) If it does not appear to the Official Trustee that a proof is incorrect he shall give notice to the creditor that he admits the proof subject to verification under section 65 of this Act.

(6) If the creditor fails to lodge an amended proof or a further amend proof, as the case may be, within the period allowed under subsection (4) of this section and the Official Trustee is still of opinion that the previous proof is incorrect he shall give notice to the creditor that he rejects the proof.

89. Meeting of creditors after publication of administration order

(1) The Official Trustee shall call a first meeting of creditors for a date not less than six or more than eight weeks after the publication of an administration order, and shall give such notice of the meeting as may be practicable to each creditor who is mentioned in the representative's statement or who, not being so mentioned, has lodged a proof of debts.

(2) So far in advance as may be practicable, the Official Trustee shall give to every such creditor a copy of the representative's statement, together with any observations thereon that the Official Trustee may wish to make.

(3) Schedule IV of this Act shall apply in relation to the meeting.

90. Duty of deceased's representative to comply with Official Trustee's direction

(1) In addition to the specific duties imposed on him by or under this Act, it shall be the general duty of the representative of the deceased, at all times during the period between the making of an administration order and the termination of the administration, to comply as promptly and fully as is practicable with any direction given by the Official Trustee in connection with the exercise of his functions as to the deceased's estate.

(2) During the period it shall be the duty of the representative,

(a) to attend every meeting of creditors called by the Official Trustee and give such information to the meeting as may be required by the chairman;

- (b) as soon as is practicable to give notice to the Official Trustee of any change in his name or address;
- (c) not to destroy, alter, conceal or dispose of any account-book or other record of the deceased's financial affairs.

91. Application of Chapter III Part III of this Act

(1) Where an administration order has effect Chapter III Part III of this Act shall apply as nearly as may be for the purposes of the administration, subject to the modifications set out in this section.

(2) The following provisions shall be omitted, namely,

- (a) sections 57 and 58 (which deal with vesting of property);
- (b) subsection (2) of section 63 (which restricts the disposition of property by the Official Trustee);
- (c) section 70 (which relates to divesting of assets where an insolvency order is not made);
- (d) section 73 (which provides for the return of personal effects to a debtor); and
- (e) section 75 (which requires surplus assets to be returned to the debtor).

(3) Except where the context otherwise requires, the following adaptations shall be made, that is to say,

- (a) references to the debtor shall be read as references to the representative of the deceased;
- (b) references to section 57 of this Act shall be read as references to section 87;
- (c) references to a protection order or an insolvency order shall be read as references to an administration order;

(d) references to the debtor's discharge shall be read as references to the termination of the administration.

(4) The Official Trustee shall cause all funeral, testamentary and administration expenses incurred by the representative to be met out of the deceased's official account in priority to all other payments:

Provided that funeral expenses in excess of five thousand dalasis shall rank as a class D debt.

(5) Where, after provision has been made for all payments and transfers of property required to be made by virtue of the preceding provisions of this section, any balance remains in the deceased's official account, the Official Trustee shall pay the balance,

- (a) to the representative of the deceased, who shall deal with it as property of the deceased's estate; or
- (b) if there is no representative, to the Curator, who shall deal with it as unrepresented estate.

92. Application to terminate administration of estate

(1) Where an estate has been administered under this Part of this Act, and

- (a) the Official Trustee has duly completed the distribution of the assets of the deceased; and
- (b) the Official Trustee's accounts in the administration have been drawn up, and have been passed by the Auditor-General,

the Official Trustee shall apply to the Court for an order terminating the administration.

(2) The Official Trustee shall give notice of the application, together with a summary of the accounts in the prescribed form, to the representative and to every creditor with an admitted proof.

(3) The Court shall grant the application if satisfied that it is duly made.

93. Where debtor pre-deceases insolvency proceedings

(1) This section shall apply where a debtor in respect of whom insolvency proceedings have been instituted dies before the proceedings have come to an end.

(2) The proceedings shall lapse if the death occurs either before a protection order has been made or while a protection order has effect, and in the latter case property vested in the Official Trustee by virtue of the protection order shall devolve in accordance with [*the prevailing enactment on the administration of estates*]

(3) If the death occurs after an insolvency order has been made the proceedings shall continue, except so far as they concern the debtor personally, as if a participation order has been made immediately before the death, and,

- (a) no administration order shall be made in respect of the deceased;
- (b) the deceased's representative shall be subject to the provisions of subsection 4 of section 87 of this Act, and of section 90 thereof, as if references in those provisions to the making of an administration order were references to the death;
- (c) in relation to the disposal of surplus assets, subsection 5 of section 91 of this Act shall apply in place of section 75;
- (d) in relation to the termination of the proceedings, section 92 of this Act shall apply in place of section 56;
- (e) in relation to funeral, testamentary and administration expenses incurred by the deceased's representative, subsection 4 of section 91 shall apply.

PART IV**INSOLVENCY PRACTITIONERS AND THEIR
QUALIFICATION****RESTRICTIONS ON UNQUALIFIED PERSONS ACTING AS
LIQUIDATOR, TRUSTEE IN BANKRUPTCY, ETC.****94. Insolvency practitioner**

(1) A person acts as an insolvency practitioner in relation to a company by acting -

(a) as its liquidator, provisional liquidator, administrator or receiver,
or

(b) as supervisor of a voluntary arrangement approved by it under Part II.

(2) A person acts as an insolvency practitioner in relation to an individual by acting -

(a) as his trustee in bankruptcy or interim receiver of his property or as permanent or interim trustee in the sequestration of his estate; or

(b) as trustee under a deed which is a deed of arrangement made for the benefit of his creditors; or

(c) as supervisor of a voluntary arrangement proposed by him and approved under Part III; or

(d) in the case of a deceased individual to the administration of whose estate this section applies by virtue of an order under section 91 (application of provisions of this Act to insolvent estates of deceased persons), as administrator of that estate.

95. Penalty for acting as insolvency practitioner when not qualified

(1) A person who acts as an insolvency practitioner in relation to a company or an individual at a time when he is not qualified to do so is liable to imprisonment of _____ months or a fine of dalasi _____, or to both.

(2) This section shall not apply to the official receiver.

96. Qualifications of an insolvency practitioner

(1) A person who is not an individual is not qualified to act as an insolvency practitioner.

(2) A person is not qualified to act as an insolvency practitioner at any time unless at that time -

(a) he is authorised so to act by virtue of membership of a professional body recognised under section 97 below, being permitted so to act by or under the rules of that body; or

(b) he holds an authorisation granted by a competent authority under section 99.

(3) A person is not qualified to act as an insolvency practitioner in relation to another person at any time unless -

(a) there is in force at that time security for the proper performance of his functions; and

(b) that security meets the prescribed requirements with respect to his so acting in relation to that other person.

(4) A person is not qualified to act as an insolvency practitioner at any time if at that time -

(a) he has been adjudged bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged;

- (b) he is subject to a disqualification order made under the Companies Act; or
- (c) he is a patient within the meaning of the Mental Health Act.

97. Powers of Minister to declare and recognise professional body

(1) The Minister may by executive instrument declare a body which appears to him to fall within subsection (2) to be a recognised professional body for the purposes of this section.

(2) A body may be recognised if it regulates the practice of a profession and maintains and enforces rules for securing that such of its members as are permitted by or under the rules to act as insolvency practitioners -

- (a) are fit and proper persons so to act; and
- (b) meet acceptable requirements as to education and practical training and experience.

Provided that the bodies representing the legal profession and the members of Chartered Accountancy bodies recognised for the purpose by the Gambia Association of Accountants shall be recognised professional bodies for the purposes of this section.

(3) References to members of a recognised professional body are to persons who, whether members of that body or not, are subject to its rules in the practice of the profession in question.

(4) An order made under subsection (1) in relation to a professional body may be revoked by a further order if it appears to the Minister that the body no longer falls within subsection (2).

(5) An order of the Minister under this section has effect from such date as is specified in the order; and any such order revoking a previous order may make provision whereby members of the body in question continue to be treated as authorised to act as insolvency practitioners for a specified period after the revocation takes effect.

98. Application to act as insolvency practitioner

(1) An application may be made by a member of a recognised professional body under section 97 to a competent authority for authorisation to act as an insolvency practitioner.

(2) The competent authorities for this purpose shall be -

- (a) in relation to a case of any description specified in directions given by the Minister the body or person so specified in relation to such case; and
- (b) in relation to a case not falling within paragraph (a), the Minister.

(3) The application -

- (a) shall be made in such manner as the competent authority may direct;
- (b) shall contain or be accompanied by such information as that authority may reasonably require for the purpose of determining the application; and
- (c) shall be accompanied by the prescribed fee;

and the authority may direct that notice of the making of the application shall be published in such manner as may be specified in the direction.

(4) At any time after receiving the application and before determining it the authority may require the applicant to furnish additional information.

(5) Directions and requirements given or imposed under subsection (3) or (4) may differ as between different applications.

(6) Any information to be furnished to the competent authority under this section shall, if it so requires, be in such form or verified in such manner as it may specify.

(7) An application may be withdrawn before it is granted or refused.

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(8) Any sums received under this section by both the Minister and the competent authority may be paid into the fee account.

99. Power to grant, refuse, or withdraw applicant's authorisation

(1) The competent authority may, on an application duly made in accordance with section 98 and after being furnished with all such information as it may require under that section, grant or refuse the application.

(2) The authority shall grant the application if it appears to it from the information furnished by the applicant and having regard to such other information, if any, as it may have -

(a) that the applicant is a fit and proper person to act as an insolvency practitioner; and

(b) that the applicant meets the prescribed requirements with respect to education and practical training and experience.

(3) An authorisation granted under this section, if not previously withdrawn, continues in force for such period not exceeding the prescribed maximum as may be specified in the authorisation.

(4) An authorisation so granted may be withdrawn by the competent authority if it appears to it -

(a) that the holder of the authorisation is no longer a fit and proper person to act as an insolvency practitioner, or

(b) without prejudice to paragraph (a), that the holder

(i) has failed to comply with any provision of this Part, or

(ii) in purported compliance with any such provision, has furnished the competent authority with false, inaccurate or misleading information.

(5) An authorisation granted under this section may be withdrawn by the competent authority at the request or with the consent of the holder of the authorisation.

100. Effect of granting, refusing, or withdrawing an application or authorisation

(1) Where a competent authority grants an authorisation under section 99, it shall give written notice of that fact to the applicant, specifying the date on which the authorisation takes effect, and shall cause such facts with respect to the grant to be published in the *Gazette*.

(2) Where the authority proposes to refuse an application, or to withdraw an authorisation under section 99, it shall give the applicant or holder of the authorisation written notice of its intention to do so, setting out particulars of the grounds on which it proposes to act.

(3) In the case of a proposed withdrawal the notice shall state the date on which it is proposed that the withdrawal should take effect.

(4) A notice under subsection (2) shall give particulars of the rights exercisable under sections 101 and 102 by a person on whom the notice is served.

101. Limitation period for written representations

(1) A person on whom notice is served under section 100 may within 14 days after the date of service make written representations to the competent authority.

(2) The competent authority shall have regard to any representations so made in determining whether to refuse the application or withdraw the authorisation, as the case may be.

102. Application and reference to court

(1) Where a person is served with a notice under section 100, he may-

(a) at any time within 28 days after the date of service of the notice; or

(b) at any time after the making by him of representations under section 101 and before the end of the period of 28 days after the date of the service on him of a notice by the competent

authority that the authority does not propose to alter its decision in consequence of the representations,

apply to the Court for relief.

(2) Where a requirement is made under subsection (4), of section 98 then, unless the competent authority -

(a) has decided or decides to grant the application or, as the case may be, not to withdraw the authorisation; and

(b) within 7 days after the date of the making of the requirement, gives written notice of that decision to the person by whom the requirement was made,

it shall refer the case to the Court.

103. Competent authority to apply court decision

(1) On a reference under section 102 the Court shall -

(a) investigate the case, and

(b) make a report to the competent authority stating what would in their opinion be the appropriate decision in the matter and the reasons for that opinion,

and it shall be the duty of the competent authority to apply the decision accordingly.

(2) The competent authority may, if he thinks fit, publish the report of the Court.

PART V**SUPPLEMENTAL PROVISIONS****104. Acts of misdemeanor**

(1) A person who does any act in contravention of a duty imposed on him as a debtor or as the representative of a deceased debtor by or under this Act is guilty of a misdemeanor.

(2) This section is without prejudice to the power of the Court to issue a warrant in relation to a debtor under section 48 of this Act, or to punish any person for contempt of court or for an offence under the criminal law.

105. Register, notice or certificate to be *prima facie* evidence

A register kept, notice published or certificate given under this Act shall be *prima facie* evidence of the matters stated therein.

106. (1) The Minister may, by legislative instrument, make Rules, other than rules of Court, providing for any matter which under this Act is to be provided for by rules or which otherwise relates to procedure under this Act.

(2) If it appears to the said Minister that any of the monetary limits specified in sections 29, 30, 77 and 85 of this Act should be altered he may, by legislative instrument, make such amendments in this Act as are necessary for effecting the alteration.

107. Commencement

(1) This Act shall come into operation on such date as the Minister may, by legislative instrument, appoint.

(2) A provision of this Act shall apply in relation to matters arising before the matters arising thereafter:

Provided that,

- (a) no act done or suffered before the commencement of Part II of this Act shall be taken into account in considering whether grounds for bankruptcy exist under paragraph (a) or (h) of subsection (1) of section 43 of this Act;
- (b) Part III of this Act shall not apply to an arrangement with creditors made before the commencement of that Part.

REPEAL

108. The Insolvency Act, 1967 is hereby repealed.

SCHEDULE I**POWERS EXERCISABLE IN A WINDING UP WITH SANCTION**

1. Power to pay any class of creditors in full.

2. Power to make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or whereby the company may be rendered liable.

3. Power to compromise, on such terms as may be agreed -
 - (a) all calls and liabilities to calls, all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and
 - (b) all questions in any way relating to or affecting the assets or the winding up of the company

and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it.

SCHEDULE II**POWERS EXERCISABLE WITHOUT SANCTION IN
VOLUNTARY WINDING UP, WITH SANCTION IN
WINDING UP BY THE COURT**

1. Power to bring or defend any action or other legal proceeding in the name and on behalf of the company.

2. Power to carry on the business of the company so far as may be necessary for its beneficial winding up.

SCHEDULE III**POWERS EXERCISABLE WITHOUT SANCTION IN
ANY WINDNG UP**

1. Power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.

2. Power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company's seal.

3. Power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors.

4. Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with respect to the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business.

5. Power to raise on the security of the assets of the company any money requisite.

6. Power to take out in his official name letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot conveniently be done in the name of the company.

In all such cases the money due is deemed, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, to be due to the liquidator himself.

7. Power to appoint an agent to do any business which the liquidator is unable to do himself.

8. Power to do all such other things as may be necessary for winding up the company's affairs and distributing its assets.

SCHEDULE IV**MEETING OF CREDITORS**

1. A meeting of creditors shall not be competent to act for any purpose unless at least three creditors with admitted proofs, or all such creditors if there are less than three, are present either in person or by representatives holding proxies.

2. If there is no quorum within half an hour after the time appointed for a meeting of creditors the Official Trustee shall adjourn the meeting to such date as he may determine not less than seven or more than fourteen days thereafter; and if there is still no quorum within half an hour after the time appointed for the adjourned meeting, the meeting shall be taken to be cancelled.

3. The cancellation of a meeting under the preceding paragraph shall not prevent the Court from considering and determining the matter as if the meeting had been held and closed on the day on which it was cancelled:

Provided that this paragraph shall not authorise the Court to confirm an arrangement with creditors which has not been approved by the first meeting of creditors.

4. A meeting of creditors shall be presided over by the Official Trustee.

5. At a meeting of creditors each creditor with an admitted proof shall be entitled to be heard either in person or by a representative holding a proxy.

6. (1) Except where this Act otherwise provides questions at a meeting of creditors shall be decided by a simple majority of votes cast.

(2) Each creditor with an admitted proof shall be entitled to one vote for each complete dalasi of the net amount of debt as shown in his proof at the time when the meeting opened.

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(3) For voting purposes the net amount of a debt shall be calculated by deducting the following amounts, if any, from

- (a) the total value of securities held by the creditor;
- (b) the total value of obligations outstanding to the debtor's favour against the creditor;
- (c) the amount of every dividend to which the creditor has become entitled.

SCHEDULE V

**TO ADOPT FORMULA AS PER FEES REGULATIONS IN CAP 14:02:
INTESTATE ESTATES (CURATOR'S FEES) REGULATIONS.**

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ANNEX D.2

**EXPLANATORY NOTE ON
THE DRAFT INSOLVENCY ACT**

**EXPLANATORY NOTE ON
THE DRAFT INSOLVENCY ACT, 1992**

A. THE EXISTING REGULATORY REGIME

The Report entitled *Assessment of the Legal and Regulatory Environment Affecting the Gambian Financial Sector* (R. McCarney for A.I.D The Gambia, 1990) highlights some active shortcomings in the legal regime for the enforcement of debt repayments. The report recommends the enactment of a bankruptcy law which "would clearly delineate creditors priorities in the event of bankruptcy" (p. 8. para.9).

It also recommends the development of "a meaningful framework to assist in the analysis of the role the legal system can play in supporting and facilitating the modernisation, expansion and deepening of the financial sector in the Gambia" (p. 9, para. 1). One other concern raised is the absence of a machinery to provide supporting measures to minimize lender and borrower risk (p. 10, para. 6 ii).

Bankruptcy is governed at present by two legal regimes. Company insolvency is regulated under the Companies Act, whereas personal insolvency is governed by the Insolvency Act, 1967. The Companies Act regulates the affairs of trading companies and associates. The Insolvency Act, 1967 is designed "to regulate the law relating to insolvent debtors and for matters connected therewith and incidental thereto."

The latter's philosophy is to exact imprisonment for acts of insolvency! (See sections 5 & 8). Besides, indebtedness in the paltry sum of "one hundred and fifty pounds" is a condition for personal insolvency. An elaborate court process is then set out in the Act with a view to satisfying these conditions of insolvency.

We cannot but observe that the philosophy of the Act is completely out of step with modern ideas, that the conditions for insolvency are unrealistic and the machinery for vindicating the same is not cost-effective.

The Companies Act, on the other hand, has no specific provision dealing with insolvency as such except through the indirect means of a winding up action.

In any case, no sound reason exists for maintaining two separate regimes of insolvency. The existing legal regime has no machinery for the proper investigation of indebtedness with a view, for example, to discovering concealed assets. There is also no machinery in place to distinguish the dishonest borrower from the honest but reckless one. Nor is there any provision in the law whereby the honest trader who runs into financial distress can purge his fault and make a fresh start.

B. THE FINDINGS OF THE FIELD RESEARCH

The field research showed clearly that there was, indeed, a lack of strong infrastructural legal support base for creditors and the absence of a fair scheme for the protection of honest debtors. That situation thus spoke to a powerful case for the reform of the wholly inadequate laws of debtor and creditor, designed to protect the interest of both debtor and creditor. In our view, an enhanced insolvency legislation could help to strengthen the harnessing of credit as an engine of economic and financial growth.

We found that the title "bankruptcy" was regarded by many as pejorative. Indeed, we suspect that the use of the title "Insolvency" in the 1967 Act in preference to "Bankruptcy" may well have led to the view that there was "no bankruptcy law in the Gambia." (See para. 85 of the *Assessment of the Legal and Regulatory Environment Affecting the Gambian Financial Sector, supra.*)

We also found that the rules on liquidations incorporated in the Companies Law, 1950 of The Gambia were based on pre - 1948 English Companies Law, rules which at the minimum need updating and necessary revision. We recommend that such a review be undertaken as a matter of urgency consequential upon our present mandate.

We also identified a clear need for long-term financing which at present is denied because of the absence of a properly functioning regulatory framework.

C. THE INSOLVENCY ACT

(i) The Philosophy Behind The Proposed Legislation

The basic philosophy behind the proposed new law has been one of simplicity and workability.

We have sought therefore to re-direct the new law towards the new and urgent demands of market-oriented development. To create a modern and viable financial sector, the presence of an adequate legal machinery is a *sine qua non* for the determination and settlement of debts. And the availability of that is ultimately dependent upon the existence of legal arrangements which speak to safeguarding the interests of both creditors and debtors.

Accordingly, we have attempted to craft a relatively simple and easy-to-understand statute designed to remove legal impediments. And we have sought to establish supporting institutions which would help to minimize lender/borrower risks and thus build up investor confidence.

At present Gambian law speaks to both "Bankruptcy" and "Insolvency". As we have already mentioned, bankruptcy carries a pejorative connotation, whereas not all bankruptcies are the result of dishonesty. Some bankruptcies are due merely to recklessness or an unwise investment. We prefer that the new law should reflect these ideas. Accordingly we suggest that the title of the law should be "Insolvency" rather than "Bankruptcy".

(ii) The Aims of the New Law

The following are some of the aims reflected in the new Insolvency Act:

- (a) the provision of rules for the public administration of insolvency;
- (b) the consolidation and amendment of enactments relating to the insolvency of individuals;
- (c) the provision of rules for the protection of companies and individuals from insolvency;
- (d) the licensing of insolvency practitioners -

(iii) The Provisions of the Act

Part II of the Act deals with administration orders with respect to insolvent companies.

Section 3(1) explains the circumstances in which an administration order may be made by the court, while Section 3(2) explains the effect of such an administration order.

The purposes for which an administration order may be made are set out in Section 3(3).

Section 4 explains how an application may be made to the court. Section 5 deals with the prohibitions that may apply during the currency of an administration order.

Section 7 provides for notice to the world about the existence of an administration order.

Sections 8 - 14 deal with the appointment, powers, resignation and vacation of office of an administrator.

Sections 15 - 16 expand on the power of the administrator in the investigation of the company's affairs.

Sections 17 - 19 then deal with the administrator's proposals.

Part III deals with the insolvency of individuals.

Chapter I creates the institution of Official Trustee, an Insolvent Estates Fund (Fees Account) and an Insolvency Register.

Chapter II deals with insolvency proceedings with respect to individuals, which proceedings shall be initiated by the presentation of a petition to the Official Trustee.

Section 29 raises the level of indebtedness of individuals to a minimum of five thousand dalasis and specifies the circumstances under which such indebtedness may attract a petition.

Protection Orders and the consequences thereof are dealt with in sections 31 - 36.

Sections 42 - 44 deal with the public examination of a bankrupt whereas sections 45 - 49 deal with the general duties and disabilities of a debtor.

Discharge from insolvency and the termination of insolvency proceedings are covered by sections 50 - 56.

Chapter III deals with the administration of the debtor's property.

Sections 57 - 62 deal with assets passing to the Official Trustee, while sections 63 - 69 cover the general functions of the Official Trustee.

Rules have also been provided in Chapter IV to deal with arrangements with creditors apart from insolvency proceedings.

Special provisions have also been made for the administration of estates of deceased insolvents, in Chapter VI.

Part IV sets out rules governing the licensing of insolvency practitioners in The Gambia.

The Insolvency Act, 1967, is repealed in section 108.

The Act also carries four schedules providing for the powers of administrators and the rules governing creditors' meetings.