

Final Report

**THE REFORM OF THE LAND LAWS
OF THE GAMBIA:**

REPORT AND DRAFT LEGISLATION

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TABLE OF CONTENTS

	<u>Page No.</u>
CHAPTER I	
INTRODUCTION	1
Terms of Reference	1
Scope of Project	2
Land Administration and Policy	4
Law of Property & Conveyancing Major Areas Considered	4
Registration of Instruments	5
Related Subjects Considered	5
Formulation of Principles	6
Simplification	6
Settling Doubts in Existing Laws	9
Removal and Repeal of Obsolete Rules	10
Easy Accessibility of the Law	10
CHAPTER II	
LAND ADMINISTRATION & POLICY	11
Preliminary	11
Direct Dealings/Delegation of Minister's Power	11
Constitutionality of Expropriation	13
Mobilization of Customary Owned Land	14

CHAPTER III

**LAW OF PROPERTY AND CONVEYANCING:
MAJOR AREAS CONSIDERED**

	...	...	...	...	...	...	...	16
1.	LEGAL ESTATES & INTERESTS	...	...	...	...	...	...	16
2.	TRUST OF LAND	...	...	...	...	...	...	18
3.	CO-OWNERSHIP	...	...	...	...	...	...	21
	Preliminary	...	...	...	...	...	...	21
	Presumption of Tenancy in Common	...	...	...	...	...	...	21
	Partition	...	...	...	...	...	...	22
	Sale of Land by Surviving Joint Tenant	...	...	...	...	...	...	22
	Tenancy of Entireties	...	...	...	...	...	...	22
	Bodies Corporate	...	...	...	...	...	...	23
	Simultaneous Deaths	...	...	...	...	...	...	23
4.	CONTRACTS FOR SALE, CONVEYANCING & COVENANTS							23
	Contracts	...	...	...	...	...	...	23
	Conveyance	...	...	...	...	...	...	25
	Covenants of Title	...	...	...	...	...	...	25
	Additional Covenants Implied	...	...	...	...	...	...	25
	Benefits and Burdens of Covenants	...	...	...	...	...	...	26
	Power to Discharge or Modify Restrictive Covenants	...	...	...	...	...	...	26
5.	MORTGAGES	...	...	...	...	...	...	27

	<u>Page No.</u>
6. POWER OF ATTORNEY	28
7. LESSOR AND LESSEE	29
Preliminary	29
Covenants and Conditions in Leases	30
8. PERPETUITIES	31
9. CAPACITY AND INCAPACITY	31
Infants	31
Married Women	32
Corporations	32
10. MISCELLANEOUS	33
Removal of Anachronism	33
Extension of the Rule in <i>Dearle v. Hall</i>	33
Consequential Provisions	33
Repealed Statutes	34
 CHAPTER IV	
REGISTRATION OF INSTRUMENTS	35
1. PRELIMINARY REMARKS	35
The Principle	35
Instrument Registration and Title Registration Distinguished	35
Registration of Charges	37

	<u>Page No.</u>
2. PROPOSAL FOR A LAND INSTRUMENT REGISTRATION ACT	38
Title	38
Registration a Condition for Admissibility of Instrument	38
Registration as Basis for Priority	38
Exclusion of Wills from Registration	39
Location of Land Registry in Department of Land Administration	39
Preservation of Registration Pursuant to Land Registration of Deeds Act	39
Specific Provisions: Definition of Instruments	40
Registration of Judgments	40
Procedure for Registration	41
Effect of Registration	41
Inspection of the Register the Chief Justice	41
 CHAPTER V	
RELATED SUBJECTS	43
1. CONDOMINIUM SCHEMES	43
2. WILLS, PROBATE AND ADMINISTRATION, ETC.	45
Scope	45
Wills	45
Probate and Administration	46

	<u>Page No.</u>
Distribution on Intestacy	47
Inheritance Family Maintenance Provisions	47
Conclusion	48

APPENDICES

APPENDIX A: **LAW OF PROPERTY AND CONVEYANCING ACT**

APPENDIX B: **LAND INSTRUMENT REGISTRATION**

APPENDIX C: **COMMENTS BY PROFESSOR JOHN BRUCE**

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CHAPTER I

INTRODUCTION

TERMS OF REFERENCE

I.1 We are asked to review the property laws of The Gambia in the light of a national commitment to modernise and improve the legal infrastructure of the country's financial sector. Our specific objectives are defined as being to:

- "(1) draft a law of property act (excluding mortgages), a conveyancing act, and a land charges act;
- (2) revise the land registration of deeds enactment and prepare all subsidiary legislation under the new act;
- (3) review the *Intestate Estates Act* with a view to advising on the need to enact an administration of estates law and advise, generally, on the need to revise any other law whether statutory (English Law) or the Common Law dealing with estates or interests in land which may be applicable to The Gambia by virtue of the *Law of England (Application) Act* of the Gambia."

Although we felt committed to keeping the work schedule and completing our assignment in the 73 days granted to us, it was obvious that the brevity of time was

going to be a serious constraint. After completing the base and field researches the consultants agreed on the following plan of action:

- (1) to formulate a preliminary report 'covering the field', and which would critically analyse real property law according to the subject matters set out below (para., I.5, I.6 and I.7), and guide in the drafting of appropriate legislation; and
- (2) to draft two bills, viz:
 - (i) a law of property and conveyancing act, and
 - (ii) an instrument registration act.

SCOPE OF PROJECT

I.2 The Gambia like all ex-colonial African and Pacific countries which received the English common law, achieved its independence in 1965 with a dual system of land tenure: received and customary. The former which applies to lands alienated from the traditional system is to a large extent based on pre-20th century common and statute laws, in particular the *Conveyancing Act*, 1881. (Those laws are hereinafter referred to as 'real property law'). The real property law with its many shortcomings from its feudal origin is applied without the benefit of the 1925 English land law reforms. The customary land tenure system which applies to over ninety percent of land, suffers from shortcomings ably stated in a number of studies done

in African and Pacific Island countries. These include imprecise boundaries and lack of documentary titles. It is a widely held view among the planners in The Gambia that the customary system and traditional attitudes are impeding the planning processes mapped out for the future, and with its emphasis on ownership at the expense of use, the system ties up much prime lands in the hands of people who have no plans for development.

I.3 The Gambia enacted legislation for the *conversion* of land from customary tenure into the alienated sector for public and private use. This is through the processes of state acquisition or/and state declarations and grants. The policy is to pursue conversion rather than mobilise such lands by reforming the traditional tenurial system. Though the scope of the consultancy does not extend to customary tenure, and the thrust is the revision and updating of the law of real property, alienated lands are created out of customary-held land. The process of land administration is therefore central to the alienated land holding structure. Some comments on the conversion policy and the machinery of land administration are therefore inevitable, particularly as they featured prominently in most of the discussions we have had with governmental officials. It is also necessary to ensure that the conveyancing processes are based on firm legal grounds which are not impeachable, and, therefore, avoid the experiences of other developing countries of challenges down the tract of the efficacy of titles now thought to be unimpeachable.

LAND ADMINISTRATION AND POLICY

I.4 In chapter II of this report we have drawn attention to those areas of land policy and legislation governing land administration that we recommend for reexamination from both the long and short term perspectives. Where our recommendation for change directly impinges on real property law a more elaborate discussion is offered in the appropriate sections of the report.

LAW OF PROPERTY & CONVEYANCING:

MAJOR AREAS CONSIDERED

I.5 Our analysis of real property law, Chapter III, proceeds according to the subject matters set out below. Our review of these subjects exclude from consideration social legislation e.g. rent restriction and taxation laws. In principle these pieces of legislation are outside the terms of reference.

1. Estates and Interests
2. Trust of Land
3. Co-ownership
4. Contracts for the Sale of Land, Conveyances and Covenants
5. Mortgages
6. Powers of Attorney
7. Landlord and Tenant
8. Perpetuities

9. Capacity and Incapacity
10. Miscellaneous

The draft for a Law of Property and Conveyancing Act which incorporates our recommendations forms Appendix A of this Report.

REGISTRATION OF INSTRUMENTS

- 1.6 Chapter IV discusses the importance of an instruments' registration system to unregistered conveyancing. Recommendations are made for a simple system providing for 'notice' and 'priority'.

The draft of appropriate legislation forms Appendix B of this Report. The need for a complementary titles registration system is discussed below (see para IV 1.2. post).

RELATED SUBJECTS CONSIDERED

- 1.7 The final chapter (Ch. V) examines:
- (1) limitations on the common law relating to the passage of benefits and burdens of covenants, with particular reference to condominium projects, and suggests legislation as a means of resolving the shortcomings in the law; and

- (2) the need for consolidating legislation on the laws governing wills and probate and administration of the deceased's estate, and related matters e.g recognition of foreign grants and deceased family's maintenance.

FORMULATION OF PRINCIPLES

I.8 In making our recommendations we have had regard to the following principles set out in the *Law Reform Commission Act* to guide law reform in The Gambia:

- (a) simplifying the laws;
- (b) removing doubts and anomalies where they exist;
- (c) repealing obsolete and anachronistic provisions; and
- (d) easy accessibility of the law.

SIMPLIFICATION

I.9 The applicable laws of real property are the English 19th century legislation. Subsequent to those legislation there were important land reforms in England in 1925 which aimed at simplifying the law. The thrust of the 1925 reforms was the assimilation of real property law with that governing personal property. It might therefore be argued that we should recommend for The Gambia a law modelled on the English 1925 statute laws. This solution has the additional advantage that there are now in existence texts, commentaries and practitioners' books on modern English

real property law which could be adopted in The Gambia. The fact is that after 69 years of application of the English property legislation, land law continues to be complex, particularly the form of the mortgage by demise and the strict settlement.

The Property Bill of Northern Ireland attempted a further simplification by *inter alia*:

- (a) reducing the number of legal estates and interests that could exist and increasing the number of interests which are over-reached on sale of the property (adopted from the English LPA);
- (b) replacing the *Settled Land Acts* by a simple mechanism of statutory trusts;
- (c) providing a statutory trust mechanism in cases of co-ownership;
- (d) making the wording of instruments correspond to the substance of the transaction; and
- (e) shortening conveyances by providing details in the legislation, subject to variation by agreement, like Table A in the Companies Act.

I.10 Very few developing countries have attempted to revise and update their real property law. The first was Nigeria where the Western Region used the 1925 English property reform legislation as a model and enacted the *Property and Conveyancing*

Law in 1959 (see Cap 100, *Laws of Western Nigeria*). Professor O.R. Marshall was critical of such wholesale borrowing without regard to local conditions (*Nigerian Law Journal*, Vol. 1 No. 2, 153). See also Omotola, *Thoughts on Nigerian Law of Real Property - Issues in Nigerian Law*, p. 152. The former, in his revision of the *Property Act* of Barbados (Cap 236), preferred to use as his model the draft Property Bill of Northern Ireland which was prepared by the Sheridan Committee and published under the title of *Survey of the Land Law of Northern Ireland*.

I.11 The Barbadian *Property Act*, 1979, removed further anachronisms and anomalies that survived the English 1925 reforms and adopted a number of changes purporting to "simplify the complex system of conveyancing". Its broad aim being a further assimilation of the property law to the law of personality, mainly by retaining only those interests which are easily and cheaply transferred, at the same time providing adequate legal machinery for such transfers.

I.12 The Law Reform Commission of The Gambia has on record a draft Conveyancing Act, 1989 which aims to update the law relating to conveyancing and to simplify conveyancing forms. The draft bill which includes a memorandum explaining its objectives has been circulated internally. A step has already been taken on the road of simplification by the passage of the *Mortgages Act*, 1992. This act limits the mortgage form to that of the charge.

I.13 The question was raised in the Northern Ireland report whether a more simplified system could not be achieved by an extension of the Northern Nigerian model of right of occupancy which was extended to Tanzania in 1923, and to the rest of Nigeria by the 1978 Land Use Decree. The right of occupancy is the title to the use and occupation of land for a fixed period and evidenced by a simple document, the certificate of occupancy. This issue is important in any discussion of simplifying real property law, but it is more relevant to the subject of the system of landholding, a policy matter. Whether the interest is the right of occupancy, government leasehold or freehold estate, the mechanism of transfer, settlements, co-ownership etc. would be defined with an eye on simplifying the rules of conveyancing.

SETTLING DOUBTS IN EXISTING LAWS

I.14 There are areas of uncertainty in the application of some laws, and case law has not clarified the issues. One such area is whether the mortgagee has a prior claim to compensation money when the mortgage property ceases to exist because of acts beyond his control. The East African case of *Manyara Estate Ltd. v. NDCA* [1970] EA 177 states the common law as being that he becomes an unsecured creditor (*per contra*, Fisher, *Law of Mortgages* P836). Like considerations arise as to the application of insurance money (*Rayner v. Preston* (1881) 18 Ch.D). There is much truth in the argument that on grounds of equity, he should have an entitlement to the compensation money. Another unresolved area is the scope of reception of such ancient rules of commorientes, perpetuities, the fee tail estate, etc.

REMOVAL AND REPEAL OF OBSOLETE RULES

I.15 The received common law has many traces of English feudalism and reflects the struggle between the landed gentry to dictate posthumously the ownership of land, and the courts to permit free alienability. English property law was therefore replete with anachronisms e.g. the rule in *Shelley's Case*, the entail estate and its barring, law of mortmain, etc. We recommend the removal of such anachronisms.

EASY ACCESSIBILITY OF THE LAW

I.16 The subject matter of our proposals consists in part of rules of common law and equity. It is also governed by numerous statutes. In our Bill we propose to consolidate all the statute law, using the 1925 *Law of Property Act* of the UK as a baseline, but incorporating reforms that appear to have promise from the experience of other Commonwealth countries. Apart from the Registration of Instruments and the law relating to Wills, Probate and Administration, we propose that statute law on the subject of real property and conveyancing should be, as far as possible, found in one place. These proposals would enable many received English statutes to be repealed *in toto*.

CHAPTER II
LAND ADMINISTRATION AND POLICY

PRELIMINARY

II.1 The *State Lands Act*, 1991 and related legislation implemented most of the recommendations of the "Task Force on Land Administration and Allocation in the Banjul and Kombo St. Mary Areas." The aim is to achieve a uniform and efficient system of land administration and land use development. In the light of our comments in para. I.3 of this Report, we offer a few comments on some aspects of the programme which suggest the need for a reconsideration of some of the options and statutory provisions. These comments are discussed under the following headings:

- (1) direct dealings/delegation of Minister's power;
- (2) constitutionality of expropriation provisions; and
- (3) mobilisation of customary-held land.

DIRECT DEALINGS/DELEGATION OF MINISTER'S POWER

II.2 There is implied in all state leases a covenant that the lessee will not, without first obtaining the consent of the Minister, subdivide, convey, assign or otherwise alienate the land by sale etc., (see s. 14 of the *Lands (Banjul and Kombo St. Mary) Act*, replaced by s. 17, *State Lands Act*). The non-observance of the covenant is a cause for forfeiture. Ministerial approval is not required for the sale of mortgage

security by the mortgagee where consent was obtained for the mortgage. The Act provides that the Minister should not consent to a transaction if (i) the rent in the lease has not been paid, or (ii) the improvement conditions have not been fulfilled. Beyond these circumstances, he exercises discretion. There are complaints of delays in securing the Minister's response. It is therefore argued that if the role of the government is to promote the efficient use of land and assist in the development of the country, there is need for fewer controls and more 'direct dealings'.

II.3 In the alternative the Minister could delegate this power to the Departmental Head and/or the appropriate Director under appropriate legislation. This would speed up the process. Short term interests (e.g. leases below three (3) years) and/or routine matters (e.g. mortgages, restrictive covenants and easements) may be readily exempted from the consent requirement. Where a transaction requires approval, regulations may also exempt statutory organisations from the need to obtain Ministerial approval, and/or they may effect a delegation of the Minister's power. The consultants' choice is to provide for a presumed consent if the applicant is not notified of a rejection of his application within two (2) months from the date of lodging the application. This solution simplifies the conveyancing process and creates certainty. It has the support of the professionals we interviewed.

Further, the provision requiring consent does not state who may apply for such consent. It should be made clear that either of the parties to the transaction can

apply for consent and avoid a situation whereby the grantor claims the sole right to apply for consent and yet refuses to make the application.

CONSTITUTIONALITY OF EXPROPRIATION

II.4 The consultants are not convinced of the constitutionality of the provisions in the *State Lands Act* which provide for the expropriation of the reversionary interest of customary owners on the granting by government of a (substituted) state lease (s. 7(1) & (2)). Less convincing is the constitutionality of provisions which expropriate the property rights of the 'deemed lessee', who defaulted in applying for his title deeds (s. 7(6)). What is clear is that there is ambivalence in opinions on the nature of customary title. On the one hand the view is expressed that customary law has no conception of ownership and these ancient rights are tantamount to licences or *usufructuary* rights. The alternative view is that customary tenure recognises ownership of land though it is communal and not individual. The individual may acquire derivative rights from the community. These rights of the customary owners are protected by the Constitution, see section 18 which sets out strict and uncompromising conditions for interference with them.

II.5 The consultants have no mandate to review these laws. We will however, recommend an urgent and careful ex-examination of the issues. The planning process has a long term goal and it is important that it proceeds not only on political and social stability, but also on a sound legal base. There has been much social

unrest in the post independence era in countries where the colonial government had expropriated land rights of the traditional owners by state land or waste and vacant declarations. Generations later the descendants of the original owners have challenged those declarations as expropriatory and threatened to disrupt effective developments. Attention is drawn to the recent decision of the Australian High Court in *Mabo v. Queensland* (1992) 66 ALJR 408, which rejected the fallacy acted on for over a hundred years (*Att. Gen. v. Brown* (1847) 2 SCR App. 30) that the indigenous peoples had no conception of ownership and their lands were *terra nullius*. The High Court held that this doctrine involved a 'discriminatory denigration' of the social system of the indigenous inhabitants. Section 18 of The Gambian Constitution provides an even firmer basis for challenge.

MOBILISATION OF CUSTOMARY OWNED LAND

II.6 The *State Lands Act* provides a machinery for *involuntary conversion* of traditional title into government leases of 99 years in Banjul and Kombo Saint Mary and, by gradual extension, the provinces. The machinery established by this Act rides rough -shoddily over traditional title and tenure. We have already commented on this. The *Lands (Provinces) Act* in contrast, protects the indigenous land rights and allows for voluntary and sporadic conversions for grants to indigene and non-indigene. Appropriation by the state is for a public purpose for a maximum term of 21 years and an obligation is on government to compensate the owners. This Act

provides a firmer basis for a conversion exercise and for the majority of Gambians (if they so desire) to benefit from the reforms, without expropriating their land rights.

II.7 The consultants are aware that these are short term measures and studies are being undertaken for reforming the customary tenure with the aim of modernisation. We have expressed the view to the Law Reform Commissioners that researches are being pursued elsewhere to find alternative models to the Kenya land reform model. New models will retain the fundamentals of the traditional African system. What is needed is a land mobilisation programme aimed at allowing the resource owners to participate in the development programme without destroying the fundamentals of the traditional land tenure system. In short, to facilitate the spontaneous adjustment of customary tenure to assist commercial agriculture and resettlement in response to emerging needs.

CHAPTER III
LAW OF PROPERTY AND CONVEYANCING:
MAJOR AREAS CONSIDERED

1. LEGAL ESTATES AND INTERESTS

III.1.1 It is thought that the present system of land holding under the *Conveyancing Act*, 1881 is complicated. There can exist in land, legal estates in fee simple, fee tail and for life, all with several variations. The 1925 English reforms attempted to simplify the system by providing for only two (2) legal estates and five (5) legal interests. All other estates and interests are equitable, i.e. they exist behind a trust and are overreached on a sale of the property. A purchaser is therefore not concerned with them.

III.1.2 We considered an option of converting all freehold estates into government leases for 99 years as was achieved in Tanzania in 1963, (Cap. 523) or into rights of occupancy for a similar period, which was done in Nigeria in 1978. The change has merit for apart from the difference of the concepts, most of the distinction between freehold and leasehold is of the past, and the only feudal incident of freehold that remains i.e. *escheat*, is replaced by *bona vacantia*. Taking into consideration existing policy to contain freehold grants and extend state and provinces' leases, we thought that there would be little advantage in a statutory conversion at this stage. The

possible disadvantage of conversion is that it may signal instability. This should be balanced against its advantage of annexing development conditions on the estate owner. However, the freehold estate was not presented to us as a problem in The Gambia, but as an estate not to be readily extended. Section 12 of the *State Lands Act* ensures this objective. We have therefore decided to be conservative in our recommendation on this issue and retain freehold which is now tantamount to ownership of land.

III.1.3 Two legal estates in land are being proposed *viz*, absolute ownership and the lease (cl 3). Whilst there is no objection to the life estate existing in equity, the fee tail and its variations, which are foreign to local conditions, should be abolished in The Gambia. If any exists or any future attempt is made to create this estate, the grantee(s) should take the whole interest of the grantor (cl 4).

The following interests would exist as legal interests in land:

- (i) an easement for years or absolute,
- (ii) mortgage by charge under the Mortgages Act, 1992; and
- (iii) a rent charge issuing out of or charged on land perpetually or for a term of years absolutely (cl 3(2)).

All other estates, interests and charges in or over land take effect as equitable interests (cl 3(3)).

III.1.4 As a corollary to reducing the number of legal estates we need to provide for the overreaching of as many equitable interests as possible on the conveyance of the legal estate. Overreaching will take place on a conveyance by:

- (i) trustees holding on a trust of land;
- (ii) a mortgagee or personal representative;
- (iii) or under an order of the court (cl.5(1)).

The purchaser will take free of equitable interests except those of a commercial, as opposed to a family settlement type. The former includes any equitable leases, easements etc. Where an equitable interest is overreached the rights holders are accorded substituted rights in the purchase money (cls. 5 & 9).

2. TRUST OF LAND

III.2.1 The Settled Lands Acts of the UK provide a machinery whereby land which stands limited for the time being to or in trust for:

- (i) any persons by way of succession;
- (ii) an infant

is settled land. The fundamental principle is that the person with an interest in possession is capable of exercising powers of dealing with the land. In exercising his powers he is deemed to be a trustee for all parties under the settlement and can transfer the land to a purchaser. The SLA provides an intricate machinery to ensure

that the purchaser takes a title free from the claims of the beneficiaries under the settlement.

III.2.2 An alternative to the strict settlement is the trust for sale which has the intention of giving the trustees the power to sell the land, but the SLA extended its provisions to the trust for sale. This immediately produced a contradiction between the intention of the settlor that the trustees should exercise plenary powers and the SLA, which vested those powers in the tenant for life. The 1925 English reforms preserved the dual system of settlements: strict settlements, being governed by the SLA and trust for sale by the *Law of Property Act*. In the former, the tenant for life exercises the powers of disposition. These powers are in the trustee where the trust for sale is adopted. A sale by either has an overreaching effect, i.e. the beneficiaries' interests are transferred from the land to the purchase money.

III.2.3 We have opted for neither because of their complexities. The notion of trust is not unknown in West Africa where jurists have for years drawn attention to the heads as trustees of lineage property. We are inclined to recommend only the 'trust of land' which would come into existence whenever land is:

- (i) held in trust for or by persons in succession; or
- (ii) given in trust for, or to an infant;
- (iii) subject to payment of any annuity or family arrangement for the life of any person or for any less period;

- (iv) given to two or more persons beneficiary as tenants in common;
- (v) held upon any express or implied trust for sale or trust (cl. 6).

In these cases the land will be held on a statutory trust i.e. the trustees shall hold it upon trust to receive the rents and profits and make disbursements and exercise plenary powers of management and of dealing with the property (cl. 8).

III.2.4 It might be argued that it is desirable for the law to recognise the trust for sale if it were the wishes of the settlor. A trust of land which gives the trustees a power of sale does not satisfy the direction in the trust for sale to sell with a discretion to postpone sale. We were influenced by the suggestion of Professor O.R. Marshall that the experience in Western Nigeria, where the trust for sale is the chosen system, is that people who bought property jointly or wish to keep it in the family, found it difficult to reconcile the trust for sale with their intention. He thought that the simpler and more effective model is the trust of land (*Nigerian Law Journal*, Vol. 1, No. 2 at p. 153).

III.2.5 In summary our recommendation is that where land is, *inter alia*, settled, or held on a tenancy in common or by an infant, the land should be held on a statutory trust and the legal estate should vest in the trustees who are responsible for its administration and disposition.

3. CO-OWNERSHIP

PRELIMINARY

III.3.1 In section III.2.3 we referred to the machinery dealing with the tenancy in common as an aspect of the trust of land. In this way we can avoid the cumbersome conveyancing rules of the received laws that are currently required to transfer land held on such tenancies. In any purported disposition it is often necessary to investigate the title of each tenant in common, and cases are known elsewhere, where estates have become so fractionalised, that each share became less in value than the costs of investigating the co-owner's title.

III.3.2 The institution of co-ownership is not unfamiliar in Africa. Family property has features of both the joint tenancy and tenancy in common. The solution for the tenancy in common is to vest the property in the grantees or the first four (4) of them as *joint tenants* on the statutory trust, and, like family property, proscribe a severance of title. In equity the co-owners will have individual shares. Severance of a joint tenancy could *inter alia* be realised in equity by the simple act of serving a notice to that effect on the joint owner (cl. 34(1)).

PRESUMPTION OF TENANCY IN COMMON

III.3.3 We adopted the proposal in the draft Conveyancing Act, 1989 and reversed the presumption of the joint tenancy found in English Law (cl. 31).

PARTITION

III.3.4 In view of our recommendation for a consolidating legislation it is necessary to replace the English Partition Acts with provisions for partition. The scheme adopted is that of giving power to the joint tenants in whom the land is vested beneficially or as trustees to effect a partition by conveying an appropriate portion of the property to the co-owner or co-owners in question. In the event of a dispute "any person interested" should be able to apply to the court for partition or sale of the property (cl.36).

SALE OF LAND BY SURVIVING JOINT TENANT

III.3.5 The difficulty experienced in England of the sole survivor disposing of land formerly held on a joint tenancy on the statutory trust was caused by the absence of statutory provisions giving him (the survivor), the right to deal with the property under the *Saunders v. Vautier* rule. The *Law of Property (Joint Tenants) Act, 1964* was passed to remedy that. We have therefore borrowed the technique and provided for the protection of a purchaser on sale of land by the surviving joint tenant. Only in rare cases would he (the purchaser) be prejudiced (cl. 35).

TENANCY OF ENTIRETIES

III.3.6 This tenancy was abolished by the *Married Women's Property Act*, but the old law continued to dictate the interpretation of grants to husband and wife. For the avoidance of doubt we have provided that a married woman is like a femme sole and

she is a separate legal person (cl.32) therefore, when interpreting a transfer of property to her and her husband, they should be treated as acquiring separate shares.

BODIES CORPORATE

III.3.7 In order to remove any barrier to a body corporate being a joint tenant with another body corporate or an individual, we provided expressly for that eventuality (cl. 33).

SIMULTANEOUS DEATHS

III.3.8 Finally, in the case of simultaneous deaths of beneficiary joint tenants, we propose to depart from English law that the younger is deemed to have survived and, instead, adopt the equitable rule, that the 'property was deemed to be held by them in equal shares'. Where they hold as trustees, survivorship of the youngest is presumed (cl. 37).

4. CONTRACTS FOR SALE, CONVEYANCING AND COVENANTS

CONTRACTS

III.4.1 We would adopt *in toto* the wise remarks stated in the Memorandum to the proposed Conveyancing Act, 1989, that for transactions relating to land such as buying, selling and leasing, a need exists to develop methods which are reliable, simple, cheap, etc. This includes discouraging fraudulent conveyances by imposing

a general requirement of writing. We have therefore consolidated the statute law on this subject and made a number of reforms on related matters.

III.4.2 The changes we propose are:

- (i) the reduction of the root of title from 30 to 20 years (cl. 43(1));
- (ii) the reversal of the rule that a lessee has no entitlement to call for the title of his lessor even though his interest is derived therefrom. This change reflects the views in the profession on leases of three (3) years or above and attempts to compromise between the need for security of title and the unnecessary trouble and expense of giving the right to call for title of a lessor. It is argued that the period of three years or above is often that of commercial leases and the emphasis should be on security in order to encourage commercial undertakings (cl. 43(5));
- (iii) reversal of the rule in *Patman v. Harland* that a lessee has constructive notice of the contents of a document which he has no legal right to call for (cl. 43(4));
- (iv) giving the purchaser the right to receive the insurance money under the vendor's policy, where the property is destroyed between the date of the contract and completion (cl. 47).

CONVEYANCE

III.4.3 We recommend the abolition of all archaic methods of conveying land (cl. 48).

Transfers must be normally in writing (cls. 39,40) though some exemptions are permitted (cl. 41). A grant of land must be by deed. A deed is a document that is (a) signed by the party to be bound, (b) attested by at least one witness and (c) expressed to be a deed, conveyance, assurance, charge etc. (cl. 50). A seal is still permitted and there is need for a seal when the party is a corporation (cl. 51).

III.4.4 In order to shorten the conveyance and ensure its simplicity, certain expressions in a deed are given a statutory meaning (cl. 54) and certain general words are implied (cls. 55, 56, 59 & 60).

COVENANTS OF TITLE

III.4.5 By section 7 of the Conveyancing Act, certain covenants for title are implied if the grantor conveys or is expressed to convey in a stated capacity. There is need for some changes and as a matter of convenience we propose that the covenants to be implied should be set out separately in a schedule to the Act (cl. 57, First Schedule).

ADDITIONAL COVENANTS IMPLIED

III.4.6 On the assignment of a term of years subject to a rent - there is implied a covenant on the part of the assignee - to observe and perform all covenants in the

lease, and indemnify the assignor against all claims on account of non-payment of rent or breach of covenant (cl. 58(1)(c)&(d); First Sch. paras 10, 11).

BENEFITS AND BURDENS OF COVENANTS

III.4.7 In order to assist the planning processes it is necessary to adopt the rules in the Conveyancing Act, with modifications, on the enforcement of benefits and burdens of covenants. These rules would enable successors to the covenantor and covenantee to enforce covenants that touch and concern the land, and persons to take the benefit of such covenants who are not parties to the deed (cls. 59, 60 & 61). Statutory changes are recommended for condominium schemes in order to address the limitations in the common law on the passage of burdens of positive covenants, and rights that can exist as easements (see ch. V.1, post).

POWER TO DISCHARGE OR MODIFY RESTRICTIVE COVENANTS

III.4.8 Provisions for the discharge or modification of restrictions imposed on land existed in England since 1925 (s. 84 Law of Property Act). It is necessary to empower the judge in Chambers or a Tribunal with such powers, for a restrictive covenant may become obsolete and could impede the legitimate development of land without corresponding benefits. We recommend that this power should exist whether the land affected is owned in fee simple or for a term of years (cl. 66).

5. MORTGAGES

III.5.1 The law of mortgages of land like landlord and tenant is traditionally an essential part of the law of real property. We, therefore, strongly recommend the incorporation of the new *Mortgages Act*, 1992 into the proposed Law of Property and Conveyancing Act. We acknowledge that the draftsmen of that act adopted principles consistent with those we have adopted, in particular that of simplifying the conveyancing form, and have opted for the 'charge' as the only form of mortgaging land. The incorporation of that enactment into the property law legislation would, by necessary consequential provisions (see para III.10.3, *post*), remove any confusion that may exist because of inconsistencies between the general mortgage provisions and specific unrepealed legislation such as the *Assets Management and Recovery Corporation Act*, 1992.

III.5.2 There is a need to incorporate the principle of *transmutation* of the mortgage security, if only for the removal of doubts (see para. I.8 above) in the following cases:

- (1) insurance money payable for loss or damage of the mortgage security by fire, hurricane, etc. (cl. 67(3));
- (2) compensation payable on compulsory acquisition of mortgage security (cls. 68 & 69); and

- (3) compensation for improvement accruing to the mortgagor on the premature termination of his interest in the mortgage security, whether by forfeiture, surrender or otherwise (cl. 71).

III.5.3 We also recommend under the general property law, a entitlement of the mortgagee, whose security is liable to be lost through the acts or default of the mortgagor, to:

- (i) a copy of any notice of forfeiture (cl. 87(2));
- (ii) claim relief against forfeiture of the mortgagor's interest in the mortgage security (cl. 88).

These recommendations are consequential upon the mortgage security becoming progressively government or other leasehold interests in land.

6. POWER OF ATTORNEY

III.6.1 The law governing power of attorney is contained in the Conveyancing Act. It is necessary to provide for the protection of the donee and persons with whom they deal in furtherance of the power, which might have been revoked without their knowledge (cl.72).

Any inconsistent act by the donor during the currency of the power of attorney would be void.

7. LESSOR AND LESSEE

PRELIMINARY

III.7.1 Public and private sector leases are the most important land transactions in The Gambia. To avoid doubts as to the intention of the parties it is a requirement that agreements should be evidenced by writing and a written instrument is required for their creation, assignment etc. (see section III.4.1 above). A deed is necessary to convey the legal estate to the lessee. However, the law permits oral leases of under three (3) years. If the purported lease is not in the requisite form and does not come within the framework of the oral lease it operates as a tenancy at will only. The doctrine of *Walsh v. Lonsdale* which is preserved would operate to validate some leases as equitable leases.

III.7.2 Further simplification of the law are:

- (i) the abolition of the doctrine of *interesse termini* (i.e. that the relationship of landlord and tenant does not arise until entry into possession by the tenant) (cl. 75(1));
- (ii) abolition of the need for attornment by the lessee where there are concurrent leases. A concurrent lease does not pass an estate during the continuance of the prior lease unless the prior

lessee attorns himself tenant of the reversioner. We take the view that attornment is unnecessary though the first lessee should be protected if he were to pay rent to his lessor without notice of the second lease (cl. 76(2)).

COVENANTS AND CONDITIONS IN LEASES

III.7.3 In setting out the implied covenant in leases we have followed as far as possible the State Lands Act ss. 16 and 17. We have already discussed the covenant against assignment without the landlord's consent. Breach of this covenant gives him a right of forfeiture (cl. 84). For the avoidance of doubt it is necessary to provide that:

- (i) subletting with the consent of the landlord is not to be deemed a general waiver of the benefit of the covenant (cl. 86(1));
- (ii) writing is only necessary in respect of a general waiver of breach of covenant and not to establish waiver of particular breaches which would be judged by the facts and circumstances of the case (cl. 86(2));
- (iii) in any case where a period is provided for the review/revision of rent, time is not of essence of the provision (cl. 44);
- (iv) in any case where a lessor enforces his right of forfeiture a corresponding right to apply for relief shall avail to the lessee or, and those claiming through him (cl. 88).

8. PERPETUITIES

III.8.1 We are of the opinion that those ancient common law rules which arose in order to prevent the landowner putting his land outside the reach of effective disposition are of no significance in The Gambia. Our scheme is for all future interests to be equitable and the legal estate thereto to vest in trustees with wide powers of dealing with the land. Moreover, the policy is to grant leases of 99 years and only in rare cases absolute ownership. The length of the leasehold estate would not encourage dispositions in perpetuity. The common law rules pertaining to it are all anachronisms, foreign to the local environment and their retention would detract from the principle of simplifying the law of real property. We therefore recommend the abolition of the rules against perpetuities and the other ancient rule related to perpetuities known as the rule in *Whitby v. Mitchell* (prohibiting the grant to an unborn child of an unborn person) (cl. 89(1)). Accumulation is permitted within reasonable bounds (cl. 90).

9. CAPACITY AND INCAPACITY

INFANTS

III.9.1 An infant's land would, without special machinery, be almost inalienable because of the 'paternal rule of law' that his disposition is voidable and capable of

being repudiated by him or his personal representative on his attaining majority, or within a reasonable time thereafter. This privilege of the infant was non-negotiable. By the *Settled Land Act* 1882 a settlement is imposed and the trustees could effect binding dispositions of the infant's land. Under the scheme we propose, all land transferred to an infant is to be held on a statutory trust and the trustees are to have the power of dealing with it. An infant is incapable of holding the legal estate in land either as beneficiary or trustee (cl. 92(1),(2)).

MARRIED WOMEN

III.9.2 It is proposed that, except for the special relationship with her husband, a married woman continues to be, in relation to the acquisition and disposition of property, in the same position as a man or unmarried woman. This is in substance the present law under the *Married Women's Property Act*, (Cap. 41.05, ss. 2, 6 & 16). We have also included provisions to safeguard her special position in respect of procedure in property litigation against her husband (cl. 94).

CORPORATIONS

III.9.3 Corporations suffered a number of unnecessary disabilities at common law. In view of the proposed repeal of the *Bodies Corporate (Joint Tenancy) Act*, 1899, we propose to legislate for the power of a body corporate to hold property on a joint tenancy in like manner as individuals can do (cl. 33). The law as applied to corporations sole needed updating. We have attempted this (cl. 96).

10. MISCELLANEOUS

REMOVAL OF ANACHRONISM

III.10.1 The following *rule* has no place in a modern system of real property law and we propose to abolish it as an anomaly of English legal history:

The rule in *Shelley's Case* (cl. 98).

EXTENSION OF THE RULE IN *DEARLE V. HALL*

III.10.2 Priority over dealings in land will be determined by the Instrument Registration Act if our recommendations in Chapter IV are implemented. In the case of equitable interests other than land, priority is in the order in which notice was given by the assignees to the trustees or other persons to be charged (*Dearle v. Hall*). Our recommendation here is to extend the rule in *Dearle v. Hall* to resolve priority over equitable interests in land (cl. 99).

CONSEQUENTIAL PROVISIONS

III.10.3 Inconsistencies may exist between an existing unrepealed statute and the proposed legislation. For example there are special requirements for corporations to convey land and the *Assets Management and Recovery Corporation Act*, vests in that corporation rights and powers greater than those

of the mortgagee under the new legislation. It is necessary to resolve the inconsistencies. Consequential provisions are herein proposed (cl. 100).

REPEALED STATUTES

III.10.4 In our proposals for a *Law of Property and Conveyancing Act*, we have attempted to be as comprehensive as possible in drafting the new legislation. These proposals enable the repeal of numerous old English statutes, hitherto of general application.

CHAPTER IV
REGISTRATION OF INSTRUMENTS

1. PRELIMINARY REMARKS

THE PRINCIPLE

IV.1.1 The general rule was that priority of interests created in land was governed by the order of creation. This rule is often expressed in the latin maxim *qui prior est portior est jure*. It was later modified by equity which laid emphasis on notice, thus postponing even the right of a legal owner where it is shown that he had notice of an earlier equitable interest in the land. It soon became clear, however, that none of the above approaches enhanced certainty of title and thus security of title could not be guaranteed. Recourse was had to the principle of registration for affixing notice and determining priority of such interests.

INSTRUMENT REGISTRATION AND TITLE REGISTRATION DISTINGUISHED

IV.1.2 We must distinguish registration of instrument from registration of title. Registration of instrument provides that where A transfers his interest in land to B, and subsequent to this he transfers the same interest to C, B's interest will acquire priority over C's only if B registers the instrument of transfer earlier in time. Priority here is determined according to the date of registration and not the date of creation of the interest. Registration of Instrument is associated with unregistered

conveyancing which is practised in The Gambia. Title registration on the other hand is the system based on registered conveyancing. It is title by registration and seeks *inter alia*, to make the register the mirror of the title of the owner. That is to say nearly every information about his title can be found in the register. To this extent it is said to guarantee the title of the owner. Instrument registration, in contrast, deals with priority and notice, but leaves unresolved the problem of title.

Title registration in Africa, the Pacific and Caribbean is usually preceded by processes of systematic adjudication and demarcation in order to determine the interest holders and their respective rights and boundaries. This topic is an aspect of the wider subject of land reform which is outside our terms of reference. We propose to make no recommendations thereon. It should be noted, however, that it is not necessary to have systematic adjudication and demarcation to convert a system of instruments registration to a system of title registration. It can be done piecemeal, as is done in the UK when transactions or successions take place and a new registration is made. Procedures exist in many countries for conversion from one to the other type of register. The matter would be easy in The Gambia, where most titles are leaseholds granted by government in relatively recent times, and without any transactions having taken place. The government should have good records of the origins of all these titles.

The system of instrument registration which exists in The Gambia is said not to have been functioning too badly. It is the system with which most jurisdictions in the U.S. have limped along for hundreds of years. That alone indicates that it is not a real barrier to land development, but it does impose higher transaction costs (largely legal fees) on those engaging in land transactions. One option would be to leave the instruments registration system in effect in urban and peri-urban Banjul, subject to gradual conversion to registered titles on the UK model, while applying a title registration approach to the new areas of leasehold creation. If this option were to be adopted there is an immediate need for a title registration enactment.

REGISTRATION OF CHARGES

IV.1.3 We are required to consider a Land Charges Act. We, however, found it unnecessary to prepare such legislation. It appears to us that a separate Charges Act in the Gambia will introduce complications and serve no useful purpose. After due consideration we came to the conclusion that instruments registration will better perform the functions of priority and notice.

The Law of Property and Conveyancing Act which we have proposed provides for all transactions in land, except leases for less than three years, to be effected by writing. These are registrable instruments. Any departure from this rule is recognisable only by equity which usually requires a prudent purchaser to discover

the right. For these reasons we refrain from providing a separate Land Charges Act so as to avoid duplication and confusion.

2. PROPOSAL FOR A LAND INSTRUMENT REGISTRATION ACT

TITLE

IV.2.1 We are proposing "Land Instrument Registration" as the title of the new Act on registration of instruments. We are of the view that both Caps. 126 and 57 which are titled: Land (Registration of Deeds) Act, are misleading since they encompass instruments other than deeds. The new Act proposed, defines instruments (such as wills) and expressly excludes certain instruments covered by the old statutes. We consider these not to require registration.

REGISTRATION A CONDITION FOR ADMISSIBILITY OF INSTRUMENT

IV.2.2 We note that none of the earlier statutes on registration in The Gambia made registration of an instrument a condition for it being used in evidence in the Law Courts and we have so provided.

REGISTRATION AS BASIS FOR PRIORITY

IV.2.3 We have provided that the only method of preserving priority is by registration. In so doing we departed from the limited cases of priority according to the date of creation. This change will enhance certainty.

EXCLUSION OF WILLS FROM REGISTRATION

IV.2.4 We have excluded wills from our definition of instruments. We are happy to learn from our discussions with the Registrar-General that in practice the statutory provisions requiring registration of wills are not complied with. Wills are deposited in the registry in sealed form at the discretion of the Testator and there is no issue of priority arising therefrom. We shall be recommending in our review of laws governing Wills, Probate and Administration of Estates, that wills should in fact be deposited in the registry of the Supreme Court (cf. Section 8 Land Registration of Deed Act Cap. 57).

LOCATION OF LAND REGISTRY IN DEPARTMENT OF LAND ADMINISTRATION

IV.2.5 We recommend that the Land Registry should be relocated in the Land Department of the Ministry responsible for Land matters. The registry should therefore move from its present location in the Ministry of Justice to the Ministry of Local Government and Land Administration.

PRESERVATION OF REGISTRATION PURSUANT TO LAND REGISTRATION OF DEEDS ACT

IV.2.6 We recommend that all instruments registered before the new Act should be made to preserve their priority and any matter which because they were not registrable should upon the coming into effect of this Act, become registrable.

SPECIFIC PROVISIONS: DEFINITION OF INSTRUMENTS

IV.2.7 We define instrument as a document affecting land in The Gambia. A will is excluded from this definition while a power of attorney is expressly included. The reason for this is as explained above that even if a will affects land, it is undesirable for it to be registered for the reason that it does not take effect until the death of the testator, and for the additional reason of public policy - a will is usually kept secret. On the other hand, a power of attorney neither transfers nor charges an interest in land. It however, usually authorises these acts to be done and therefore is a registrable instrument.

REGISTRATION OF JUDGMENTS

IV.2.8 The provision in the Land Registration of Deeds Act requiring Judgments affecting land to be registered within sixteen days failing which the judgments shall be void has been amended to require the registrar of the court by which judgment is given to transmit a certified true copy of the judgment to the Land Registry. We have also required that failure to transmit the judgments shall not affect the validity of the order.

PROCEDURE FOR REGISTRATION

IV.2.9. The Land (Registration of Deeds) Act provides for registrable instruments to be copied at full length in one of the record books. We consider this mode of registration to be cumbersome. Fortunately, it has not been followed in practice.

We provided in its place a simple procedure whereby the Registrar shall request that the instrument be submitted in original and duplicate form. The registrar shall mark the copy original that it is a true copy thereof. The new provision is fortunately in accord with existing practice as discovered during our interviews.

EFFECT OF REGISTRATION

IV.2.10 For the avoidance of doubt, we have expressly provided that registration under the new Act shall not cure any defect in any instrument or confer on such instrument any effect or validity which it would not otherwise have had.

INSPECTION OF THE REGISTER BY THE CHIEF JUSTICE

IV.2.11 Section 16 of Cap. 57 empowers the Minister to direct the Chief Justice to inspect the books etc. in the office of the Registrar as he thinks necessary at such period in the year. This provision does not state the consequences of

non-compliance or to what use his findings could be put. It has thus not been complied with. We, however, find the provision unnecessary and have thus rejected its retention in our draft and have provided instead, for the Chief Justice to make rules in matters where title to land in The Gambia or the validity of any instrument registered under the new Act, is in issue in Court.

CHAPTER V
RELATED SUBJECTS

1. CONDOMINIUM SCHEMES

V.1.1 Numerous schemes have sprung up in the cities of various third world countries to promote apartment ownership, particularly in those countries like the Gambia which promote urban tourism. These include the "tenant purchase scheme", "undivided share scheme" and "company dwelling". There are also a variety of time sharing devices. To establish workable schemes within the confines of the common law has taxed the ingenuity of the conveyancer and therefore given rise to multiplicity of arrangements. The intractable problem is that of reconciling the conflicting interests of the unit proprietors *inter se* and between themselves and the corporation which is invariably entrusted with the duty of managing the project. The conveyancer has had to overcome the limited approach of the common law to the passage of burdens of positive covenants, and its limitation on the negative covenant existing as easements. Only in April this year the House of Lords has restated the basic common law rule that the burden of positive covenants does not bind a successor in title. (*Rhone v. Stephens* [1994] 2 W.L.R. 429).

V.1.2 A number of devices are used to resolve some of the difficulties, chief among which are: (1) the chain of indemnity covenants, and (2) the doctrine of *Halsall v.*

Brizell [1957] Ch. 169. The former is of use only so long as the original covenantor is traceable and worth suing. The latter, under which a person who takes an advantage of a service must comply with the corresponding obligation, e.g. to contribute to the cost of providing that service, will only operate where there is reciprocity. If the servient owner does not wish to contribute, he can simply relinquish the advantage *Parkinson v. Reid* (1966) 56 DLR 315. Although the range of negative easements is too narrow and, for example, the right to shelter cannot exist as an easement *Phipps v. Pears* [1965] 1QB 76, such a covenant if of a negative nature may exist under the rule in *Tulk v. Moxhay*.

V.1.3 Some of the Caribbean countries (e.g. Barbados, Jamaica and the Bahamas) addressed the problems by passing Condominium Acts. Commenting on the Bahamian Act some 23 years ago, an English conveyancer concluded that in enacting that statute the legislature:

"[was] obviously ..sympathetic to the conveyancer."

We proposed no substantial changes above to the existing laws governing covenants. It might therefore be timely and prudent to provide specific legislation to standardise condominium schemes, if and when they become popular in The Gambia, and address the defects of the common law on the enforcement of covenants in such projects. The Caribbean enactments provide suitable precedents.

2. WILLS, PROBATE AND ADMINISTRATION, ETC.

SCOPE

V.2.1 It is proposed that the general laws relating to Wills (the *Wills Act* 1992), probate and administration of estates of deceased persons (*Intestate Estates Act*, Cap 14:02), distribution on intestacy (Cap 14:02), and recognition of foreign grants (*Probates (Resealing) Act*, Cap 14:01) should be consolidated and extended to include provisions on dependants' maintenance. The new enactment should be entitled the *Wills Probate and Administration, Act*. Some comments on these Parts of the composite statute are offered.

WILLS

V.2.2 The *Wills Act* of Gambia was passed in December, 1992 to provide for the making of wills and related matters. It allows a testator to dispose of his self-acquired properties by will. There are limitations on the power of disposition of a testator whose personal law is Mohammedan Law (s 30) and for the avoidance of doubt, customary land should be excluded from testamentary disposition. That Act has made substantial changes by removing many of the unsatisfactory features of the English Wills Act, 1837, which hitherto applied in the Gambia. Thus under the current enactment a married infant can now make a will (s. 5), and a married woman is no longer disqualified from taking a gift under a will simply because her husband

was an attesting witness, nor is he, in these circumstances, disqualified when the will is otherwise executed in accordance with the provisions of the Act. A gift to a surplus witness is therefore no longer invalid (s. 14).

The substantial compliance provision (s. 10) will operate to save "home made" wills in particular, although they might not satisfy all of the formal requirements. This provision guarantees equal access to the law for both the sophisticated and unsophisticated and the rich, who could afford to pay for legal service, and the poor who could not. We commend this philosophy.

V.2.3 We have submitted above (IV.2.4.) that no useful purpose is served by requiring wills to be registered under the proposed *Land Instruments Registration Act*, for wills are private and ambulatory. Instead, provisions should be made for the Registry of the Supreme Court to be designated as a depository for wills.

PROBATE AND ADMINISTRATION

V.2.4 The law of probate and administration is based on the *Land Transfer Act*, 1897 of the UK. There is need to update this law in the light of the 1925 *Administration of Estates Act* of the UK and the statutory trust concept introduced in our proposal for new property legislation.

DISTRIBUTION ON INTESTACY

V.2.5 Distribution on an intestacy depends on the personal laws of the deceased. The number of Christians and foreigners in The Gambia is very small and for now the provisions that on their death intestate the distribution of their real property should follow the same rule as the distribution of personal property (see s. 15 Cap. 14.02) is workable.

INHERITANCE FAMILY MAINTENANCE PROVISIONS

V.2.6 In order to reconcile the conflict between the common law ideal of ‘freedom of disposition’ of self-acquired property and the customary law principle of not ‘disinheriting the heir’, a jurisdiction should be vested in the judge in Chambers to make orders for the proper maintenance of the deceased’s family (i.e. his dependants). This jurisdiction should be exercised if the deceased failed to make adequate provisions, or the disposition on intestacy is inadequate, for the proper maintenance of his dependants.

In exercising his discretion whether to grant or refuse an application, and in fixing the amount to be granted (if any), the Court should have regard to, *inter alia*,

‘The character or conduct of the applicant to the deceased during his lifetime.’

These recommendations are consistent with customary practices which recognise the disinheritance of the heir 'for cause'. The inheritance family maintenance provisions should be of general application and capable of being invoked on a testacy or intestacy without regard to the applicable laws.

CONCLUSION

V.2.7 The law on wills, while very important with regard to land, is best handled in a statute which covers all types of property of the deceased, not just the real property. The same is true of rules of intestacy, or inheritance where there is no will. It is thus generally not included in statutes codifying the law on real property, but in a separate statute.

Generally, however, this is an area of deeply-felt values, and must not be approached as a legal drafting exercise, but on the basis of a careful public discussion of the pros and cons of different approaches and should be the subject of an independent study.

APPENDIX A
LAW OF PROPERTY AND CONVEYANCING ACT

ARRANGEMENT OF SECTIONS

PART I

Preliminary

Section	<u>Page No.</u>
1. Short Title	1
2. Interpretation	2

PART II

*General Principles as to Legal Estates
and Equitable Interests in Land*

3. Definition of legal estates and equitable interests	4
4. Definition of absolute ownership	4
5. Overreaching on conveyance of a legal estate	4

PART III

Trust of Land

6. Settlement upon statutory trust	5
7. Purported conveyance of legal estate to an infant	6
8. Definition of "the statutory trusts"	7
9. Overreaching effect of conveyance of trust land	7
10. Trustees for the purposes of this Act	8
11. Trustees of referential settlements	9

	<u>Page No.</u>
12. Limitation of the number of trustees	9
13. General powers of trustees upon statutory trusts	9
14. Conveyances to be for the best consideration	10
15. Consultation by trustees with beneficiaries	10
16. Purchaser not to be concerned with trusts of capital money etc.	10
17. Delegation of power of management by trustees	10
18. Notice to trustees respecting the exercise of power of sale	11
19. Mortgaged property where right of redemption is barred	11
20. Leasing powers	11
21. Leasing powers for special objects	12
22. Mortgage of trust land	12
23. Modes of investment or application	13
24. To whom capital monies payable	14
25. Trustees may reimburse themselves	14
26. Prohibition or limitation on exercise of powers void	14
27. Saving and exercise of other powers	15
28. Protection of purchasers	15
29. Payment of costs out of trust property	16
30. Termination of settlements and trusts	16

PART IV

Co-ownership

31.	Presumption of tenancy in common	16
32.	Husband and wife are separate persons	17
33.	Body corporate as joint tenant	17
34.	Severance of joint tenancy	17
35.	Protection of purchaser from surviving joint tenant	17
36.	Partition of land held by co-owners	18
37.	Simultaneous deaths	18
38.	Severance of party structures	19

PART V

Contracts, conveyance and covenants

39.	Contracts for sale etc. of land in writing	19
40.	Instruments required to be in writing	19
41.	Absence of writing not affecting validity	19
42.	Creation of relationship, lessor-lessee	20
43.	Statutory commencement of title	20
44.	Stipulations as to time not the essence of a contract	21
45.	Other statutory conditions of sale	21
46.	Supplemental instruments	23
47.	Application of insurance money on completion of sale etc.	23
48.	Lands lie in grant only	24

	<u>Page No.</u>
49. Conveyances to be by deed	24
50. Certain documents to be deeds even though not under seal	25
51. Conveyance by body corporate	26
52. Description of deeds	26
53. Execution of deeds by an individual	26
54. Construction of expressions used in deeds etc.	26
55. Conveyance of land to include all rights belonging to or enjoyed with the land	27
56. All estate clause implied	27
57. Covenants for title	28
58. Implied covenants in conveyances subject to rents	29
59. Benefit of covenants relating to land	32
60. Burden of covenants relating to land	32
61. Covenants binding land	32
62. Effect of covenant with two or more persons jointly	33
63. Covenants or agreements entered into by a person with himself and another	33
64. Covenants with two or more persons	33
65. Persons taking who are not parties to a deed	34
66. Power to discharge or modify certain restrictions affecting land	34

PART VI

Transmutation of mortgage security

67. Amount and application of insurance money	35
---	----

	<u>Page No.</u>
68. Preferential claim of mortgagee on compulsory acquisition	36
69. Particulars of mortgages	37
70. Mortgage moneys barred by statute of limitations	37
71. Preferential claim of mortgagee to compensation	38

PART VII

Powers of Attorney

72. Payment of attorney without notice of death etc.	38
73. Execution under power of attorney	39
74. Certified copies of powers	40

PART VIII

Lessor and Lessee

75. Doctrine of interesse termini abolished	40
76. Attornment by lessees	40
77. Lessor's implied covenants	41
78. Lessee's implied covenants	41
79. Meaning of "repair"	42
80. Running of lessee's covenants	42
81. Running of lessor's covenants	43
82. Lessee's fixtures	43
83. Insurance of demised premises	44
84. Forfeiture	45
85. Waiver of forfeiture	45

	<u>Page No.</u>
86. Waiver of covenants	46
87. Notice before forfeiture	46
88. Relief against forfeiture	47

PART IX

Perpetuities

89. Abrogation of the perpetuity rules	47
90. General restrictions on accumulation of income	48

PART X

Capacity and Incapacity

91. Presumption as to age	49
92. Inability of infant to hold legal estate, or to be appointed trustee	49
93. General position of married woman	49
94. Questions between husband and wife	49
95. Saving of special position of spouses, and extension of presumption of advancement	51
96. Provisions as to corporations	52
97. Dissolution of a corporation	52

PART XI

Miscellaneous

98. Abolition of the rule in Shelley's case	53
99. Extension of the rule in <i>Dearle v. Hall</i>	53

	<u>Page No.</u>
100. Consequential provision	53
101. Repeal and Savings	54
<hr/>	
FIRST SCHEDULE	55
<hr/>	
SECOND SCHEDULE	62
<hr/>	

LAW OF PROPERTY AND CONVEYANCING ACT

An Act to make provisions respecting property.

PART I

Preliminary

Short Title

1. This Act may be cited as the *Property and Conveyancing Act*.

Interpretation

2. (1) For the purposes of this Act

"assurance" means the vesting, otherwise than by will, of property or an interest therein in any person;

"bankruptcy" includes liquidation by arrangement; and, in relation to a corporation, means the winding-up thereof;

"capital money" means the proceeds of sale or mortgage of land held upon the statutory trusts, a fine levied in connection with a lease of such land, and the proceeds of sale or mortgage of any asset in which capital money has been invested;

"conveyance" includes any instrument, other than a will, consisting of or comprising a transfer, mortgage or other charge, lease, assent, vesting declaration, disclaimer, release or other assurance or property or of an interest therein; and "convey" has a corresponding meaning;

"covenant", when used as a noun in reference to a lease, includes a promise in a written lease which is not a deed; and "covenant", when used as a verb, has a corresponding meaning;

"demise", when used as a noun, means the grant of a term of years; and the verb "demise" and the adjective "demised" have corresponding meanings;

"disposition" includes a conveyance and also a devise, bequest or appointment of property by will; and "dispose of" has a corresponding meaning;

"encumbrance" includes a legal or equitable mortgage, a trust for securing money, a lien and a charge of a capital or annual sum on land;

"encumbrancer" has a meaning corresponding with that of "encumbrance", and includes every person entitled to the benefit of an encumbrance or entitled to require payment or discharge thereof;

"equitable interest" means estates, interests and charges in or over land which are not legal estates;

"fine" includes a premium or foregift and any payment, consideration or benefit in the nature of a fine, premium or foregift;

"income" includes rents and profits;

"instrument" does not include a statute, unless the statute creates a settlement;

"land" means the surface of the earth, the space above it and the things below it, and includes

- (a) houses and other structures whatsoever and parts of structures (whether the division is horizontal, vertical or made in any other way);
- (b) mines and minerals, whether or not held apart from the surface; and
- (c) land covered by water;

"lease" means an instrument, including a sublease, by which a term of years is created;

"legal estate" means any interest or charge which can subsist under section 3;

"lessee" means a person, including a sublessee, in whom a term of years is vested by a lease or a conveyance thereof;

"lessor" means a person, including a sublessor, entitled to the reversion expectant upon the determination of a term of years created by lease;

"mines and minerals" include any stratum or seam of minerals or substances in or under any land, and powers of working or getting the same;

"mining lease" means a lease for mining purposes, that is to say, the searching for, winning, working, getting, making merchantable, carrying away or disposing of mines and minerals, or purposes connected therewith; and includes a grant or licence in writing for mining purposes;

"notice" includes constructive notice;

"possession" includes a receipt of rents and profits, or the right to receive the same, if any;

"power of attorney" means a power conferred by an instrument in writing by a donor upon a donee to execute on behalf of the donor such instruments (including instruments capable of being made by deed only) relating wholly or in part to the acquisition or disposal of interest in land or to the execution of such other acts and things as are specified in particular or in general in the instrument creating such power.

"property" includes any thing in action and any interest in land, chattels or rights which are treated commercially as property;

"Public Trustee" means the Public Trustee established by the *Public Trustee Act*;

"purchaser" means a purchaser in good faith for valuable consideration, and includes a lessee, mortgagee or other person who, for valuable consideration, acquires an interest in property (except that in Part II, and elsewhere where so expressly provided, "purchaser" means only a person who acquires an interest in, or charge on, property for money's worth); and, where the context so requires, "purchaser" includes an intending purchaser; and "purchase" has a meaning corresponding with that of "purchaser";

"rent" includes a rent service or a rentcharge or other rent, toll, duty, royalty or annual or periodic payment in money or money's worth, reserved or issuing out of or charged upon land, but does not include mortgage interest;

"trust land" means land held upon the statutory trusts;

"valuable consideration" includes marriage, but does not include a nominal consideration in money.

PART II

GENERAL PRINCIPLES AS TO LEGAL ESTATES AND EQUITABLE INTERESTS IN LAND

Definition of legal estates and equitable interests

3. (1) The only estates in land which are capable of subsisting or of being conveyed or created at law are -

- (a) the absolute interest in possession; and
- (b) the term of years absolute.

(2) The only interests in or over land which are capable of subsisting or of being conveyed or created at law are -

- (a) an easement, right or privilege in or over land absolutely in possession or for a term of years absolute;
- (b) a mortgage by charge by deed; and
- (c) a rent charge in possession issuing out of or charged on land being either perpetual or for a term of years absolute.

(3) All other estates, interests and charges in or over land take effect as equitable interests.

Definition of absolute ownership

4. (1) For the purposes of this Act, a grantee will take absolute ownership where land is *inter alia* limited for any type of -

- (a) fee simple; or
- (b) fee tail.

Overreaching on conveyance of a legal estate

5. (1) Subject to subsection (2), a conveyance to a purchaser of a legal estate in land overreaches any equitable interest or power affecting that estate, whether or not he had notice thereof, if the conveyance is made -

- (a) under the powers conferred by this Act on the trustees upon the statutory trusts or under any additional powers conferred by the settlement, and the statutory requirements respecting payment of capital money arising under the settlement upon the statutory trusts are complied with; or
- (b) by a mortgagee or personal representative in the exercise of his paramount powers, and any capital money arising from the transaction is paid to the mortgagee or personal representative; or
- (c) under an order of the court and the equitable interest or power is bound by such order, and any capital money arising from the transaction is paid into, or in accordance with the order of, the court.

(2) The following equitable interests and powers are not overreached in accordance with or in the manner referred to in this section, but a purchaser of a legal estate takes subject thereto only if he has notice of -

- (a) any equitable interest protected by a deposit of documents relating to the legal estate affected;
- (b) the benefit of any covenant or agreement restrictive of the user of land;
- (c) any easement, liberty or privilege over or affecting land and being merely an equitable interest;
- (d) the benefit of any contract to convey or create a legal estate, including a contract conferring either expressly or by implication a valid option to purchase, a right of pre-emption or any other like right.

PART III

TRUST OF LAND

Settlement upon statutory trust

6. (1) Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, whether made or passed before or after this Act, under or by virtue of which any land is for the time being -

- (a) limited in trust for or to any persons by way of succession;

- (b) given in trust for or to an infant absolutely or for a term of years absolute;
- (c) limited to two or more persons beneficially as tenants in common;
- (d) held or limited to any implied or expressed trust for sale or trust; or
- (e) subject to the payment of an annuity, whether voluntarily or in consideration of marriage or by way of family arrangement for the life of any person or any less period, or subject to the payment of any capital, annual or periodical sums for the portions, advancement, maintenance or otherwise for the benefit of any person.

creates or is for the purposes of this Act a settlement upon the statutory trusts.

Conveyance of legal estate to an infant

7. (1) An instrument which, but for this Act, would have operated as a conveyance of a legal estate in land to an infant alone or to two or more persons jointly or as tenants in common, both or all of whom are infants for his or their own benefit, operates only as a declaration that such legal estate is vested in the person who made the conveyance upon trust to convey the same to trustees upon the statutory trusts for the benefit of the infant.

(2) A devise or bequest of a legal estate in land to an infant alone or to two or more persons jointly or as tenants in common, both or all of whom are infants for his or their benefit operates only as a declaration that such legal estate is vested in the personal representatives of the testator upon trust, subject and without prejudice to the rights and powers of such personal representatives for purposes of administration, to convey the same to trustees for the benefit of infant.

(3) A conveyance of legal estate in land to an infant jointly or as a tenant in common with one or more other persons of full age, operates to vest the legal estate in the other persons upon the statutory trusts for him and the infant or them and the infant as joint tenants or tenants in common, as the case may be.

(4) A conveyance of a legal estate to infant alone or two or more persons jointly, both or all of whom are infants operates as a declaration of trusts and is not effective to pass a legal estate.

(5) A conveyance of a legal estate to an infant jointly with one or more other persons of full age upon any trusts operates as if the infant had not been named therein, but without prejudice to any beneficial interest intended to be thereby provided for the infant.

(6) A purported grant or transfer of a legal mortgage to an infant operates as an agreement for valuable consideration to hold any beneficial interest in the mortgage debt upon trust for the infant.

(7) Where a legal mortgage is purported to be made to an infant and any other person of full age it operates as if the infant had not been named therein, but without prejudice to any beneficial interest in the mortgage debts intended to be thereby provided for the infant.

Definition of "the statutory trusts"

8. (1) For the purposes of this Act and of any assurance of land to trustees after the passing of this Act or of any document relating to land so assured, land which is or is to be held upon "the statutory trusts" shall be held upon trust to receive the net rents and profits thereof after payment of rates, taxes, cost of insurance, repairs and other outgoings, and the trustees shall hold such land together with such net rents and profits upon trust to give effect to the rights of the persons (including an encumbrancer whose encumbrance is not secured by a legal mortgage) interested in the land.

(2) Trustees holding land upon the statutory trusts may exercise with respect to the same the powers conferred by the succeeding provisions of this Part, and any moneys arising from, or property acquired as a result of, the exercise of such powers shall be held upon the same trusts as formerly affected the land the subject of the settlement.

Overreaching effect of conveyance of trust land

9. Subject to subsection 5(2), a purchaser from trustees upon the statutory trusts shall take the estate or interest which is the subject of the conveyance discharged from all limitations, powers and provisions of the settlement, and from all estates, interests and charges subsisting or to arise thereunder, but subject to and with the exception of

- (a) all legal estates and charges by way of legal mortgage which have been conveyed or created in respect of the full amount secured and owing thereunder, provided that such part of the full amount as represents capital has been actually raised at the date of the conveyance to the purchaser; and
- (b) all leases and all easements, liberties or privileges over or affecting trust land which were before the date of the conveyance granted or imposed by any person beneficially interested under the settlement or by the trustees thereof under any statutory or other power and which are at that date otherwise binding on the said person or the trustees.

Trustees for the purposes of this Act

10. (1) Any instrument creating or being for the purposes of this Act a settlement upon the statutory trusts, operates, subject to section 12, to vest the land in the persons specified in this section upon the statutory trusts -

- (a) the persons appointed by the instrument as trustees of the land; or, if there are no such persons, then,
- (b) the persons, if any, appointed by the instrument as trustees, whether or not of the settlement or for the purposes of any particular statute; or, if there are no such persons, then,
- (c) the person, if any, upon whom power of sale of the land or power of consent to or approval of the exercise of the power of sale is by the instrument conferred; or if there are no such persons, then,
- (d) the persons, if any, who are for the time being under the instrument trustees with power of, or upon trust for, sale of any other land comprised therein and subject to the same limitations as the land to be sold or otherwise dealt with, or with power of consent to or approval of the exercise of such power of sale; or, if there are no such persons, then,
- (e) the persons, if any, who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not; or if there are no such persons, then,
- (f) the persons, if any, appointed by deed to be the trustees of the settlement by all the persons who, at the date of such deed, were together able, by virtue of their beneficial interests or by the exercise of an equitable power, to dispose of the land in equity for the whole estate the subject of the settlement.

(2) Nothing in this Act operates to prevent the appointment as a trustee of the settlement of one or more of the persons of full age for the time being beneficially interested in the rents and profits of the land.

(3) Where a settlement is created by will or arises by virtue of an intestacy and, apart from this subsection, there would be no trustees, then the personal representatives of the deceased are, until other trustees are appointed, the trustees of the trust land, but where

there is a sole personal representative, not being a trust corporation, he shall appoint an additional trustee to act with him for the purposes of this Act, and the provisions of the Trustee Act, relating to the appointment of trustees and the vesting of trust property, apply accordingly.

(4) If there are no trustees in whom the land vests under or by virtue of this section, the instrument is ineffective to create or transfer a legal estate in the land until the court appoints trustees on the application of any person interested.

Trustees of referential settlements

11. Where a settlement upon the statutory trusts is made by reference (with or without variation) to the limitations, powers and provisions of any other settlement, the trustees for the time being of the settled property are, in the absence of an express appointment of trustees of the settlement made by reference, the trustees of the settlement made by reference, and the land the subject of the settlement made by reference shall vest in them accordingly.

Limitation of the number of trustees

12. (1) In the case of trusts of land held upon the statutory trusts made or coming into operation after the passage of this Act -

- (a) the number of trustees thereof shall not exceed four, and where more than four persons are named as such trustees, the first four named who are able and willing to act shall alone be the trustees and the legal estate the subject of the trust vests in such persons accordingly;
- (b) the number of the trustees shall not be increased beyond four.

(2) This section does not apply in the case of land vested in trustees for charitable, ecclesiastical or public purposes.

POWERS OF TRUSTEES

General powers of trustees upon statutory trusts

13. Trustees upon the statutory trusts may sell, exchange, lease, mortgage or otherwise convey, and partition the trust land or any part thereof or any interest therein or grant options to purchase the trust land or any part thereof with all the powers for these purposes of an absolute owner except in so far as such powers are restricted in this Part.

Conveyances to be for the best consideration

14. (1) Every conveyance of trust land shall be made for the best consideration that can reasonably be obtained.

(2) Nothing in subsection (1) operates to prevent the trustees from making a conveyance of the trust land for less than the best consideration or for no consideration provided that the conveyance is for public purposes and is also, by virtue of interests reserved to the beneficiaries or otherwise, in the interest of those beneficially entitled under the settlement.

Consultation by trustees with beneficiaries

15. The trustees upon the statutory trusts, unless a contrary intention appears in the instrument declaring the trust, shall, so far as practicable, consult the persons of full age for the time being beneficially interested in possession of the land or the rents and profits thereof, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of a dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser is protected whether or not the provisions of this section have been complied with.

Purchaser not to be concerned with trusts of capital money etc.

16. A purchaser of a legal estate from trustees upon the statutory trusts is not concerned with the trusts affecting the trust land, the capital money representing the same, or the proceeds of sale, whether or not the trusts are declared by an instrument forming part of the title of the trustees to the trust land.

Delegation of power of management by trustees

17. (1) The powers of and incidental to leasing and management conferred on trustees upon the statutory trust, whether by this Act or otherwise, may, until sale of the land and in their absolute discretion, be revocably delegated from time to time by writing signed by the trustees, to any person of full age (not being merely an annuitant) for the time being beneficially entitled in possession to the trust land or to be net rents and profits of the land during his life or for any less period; and in favour of a lessee such writing is, unless the contrary appears, sufficient evidence that the person named therein is a person to whom the powers may be delegated and the production of such writing is, unless the contrary appears, sufficient evidence that the delegation has not been revoked.

(2) Any power so delegated shall be exercised only in the names and on behalf of the trustees.

(3) The trustees are not, in relation to the exercise or purported exercise of the power, liable for the acts or defaults of the person to whom the power is delegated, but that person is, in relation to the exercise of the power by him, in the position and has the duties and liabilities of a trustee.

Notice to trustees respecting the exercise of power of sale

18. (1) If the trustees upon the statutory trusts receive a notice in writing from the person of full age (not being merely an annuitant) for the time being beneficially entitled in possession to the trust and indicating his desire that all or any part of the trust land should be sold, the trustees shall (unless the court orders to the contrary) accordingly, within a reasonable time of receipt of the notice, exercise the power of sale conferred on them by this Part.

(2) If the trustees upon the statutory trusts or upon trust for sale refuse to sell, or propose to exercise or refuse to exercise any of the powers conferred on them by this Part, or if any requisite consent cannot be obtained, any person interested, whether in the capacity of beneficiary, may apply to the court for a vesting or other order for giving effect to the proposed transaction or directing the trustees to refrain from exercising their powers or for an order directing such course of action to be taken by such persons with respect to the transaction as the court may think fit, and the court may make any such order, or refuse to make an order, (having regard in every case to the interests of all the beneficiaries), in its absolute discretion.

Mortgaged property where right of redemption is barred

19. Where trustees upon the statutory trusts are mortgagees of property which becomes, by virtue of the law relating to limitation or otherwise, discharged from the right of redemption, it shall be held by them upon the statutory trusts.

Leasing powers

20. (1) The trustees upon the statutory trusts may lease such land, or part thereof, or any easement, right or privilege of any kind over or in relation to the land, for any purpose whatever, whether involving waste or not, provided that every lease -

- (i) shall be by formal lease and be made to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease;
- (ii) shall reserve the best rent that can reasonably be obtained, regard being had to any fine or premium taken, and to any money laid out or to be laid out for the benefit of such land, and generally to the circumstances of the case;
- (iii) shall contain a covenant or agreement by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(2) A duplicate of every lease shall be executed by the lessee and delivered to the trustees, of which execution and delivery the execution of the lease by the trustees shall be sufficient evidence.

(3) A statement contained in a lease or in an endorsement thereon, signed by the trustees, respecting any matter of fact or of calculation under this Act in relation to the lease shall, in favour of the lessee and those claiming under him, be sufficient evidence of the matter stated.

(4) A fine received on the grant of a lease under any power conferred by this Act is capital money and shall be applied by the trustees accordingly.

Leasing powers for special objects

21. The leasing power of the trustees extends to the making of -

- (a) a lease for giving effect (in such manner and so far as the law permits) to an agreement or covenant for renewal, performance whereof could be enforced against the owner for the time being of the trust land; and
- (b) a lease for confirming a previous lease being void or voidable, but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted under this Act or otherwise.

Mortgage of trust land

22. (1) Any money raised under a mortgage by virtue of the power conferred by this Act which is for one or more of the following purposes -

- (a) raising the purchase money or any part thereof with which trust land is acquired or discharging an encumbrance on the trust land or part thereof;
- (b) providing money which is required to be raised (for the purpose of paying portions or otherwise) under the terms of the settlement;
- (c) paying for any repair of or improvement to the trust land or any buildings thereon, which repair or improvement is in the trustees' opinion likely to maintain or enhance the value of the said land or buildings;
- (d) equality of exchange;
- (e) where the trust land is held for a term of years or otherwise subject to any annual rent or charge, buying out such rent or charge and the superior interests or any of them;
- (f) payment of the costs of any transaction authorised by this section,

is capital money and shall be applied for the purpose for which it was raised.

(2) Where the money is raised for any other purpose, the money arising is to be treated as if it were capital money arising from a sale of the trust land.

Modes of investment or application

23. (1) Capital money or proceeds of sale arising out of the exercise by trustees of any power vested in them or out of the execution of a statutory trust shall, when received, and subject to any power to advance trust funds to any beneficiary entitled, be invested or otherwise applied wholly in one, or partly in one and partly in the other, of the following

- (a) in investment in the manner authorised by the law relating to the investment of trust funds, but subject to any enlargement or restriction of the trustees' powers of investment contained in the instrument creating the trust;
- (b) in the fulfilment of any of the purposes contained in subsection 22(1) for which trust land may be mortgaged.

(2) Capital money representing the proceeds of sale or other disposition of land held for successive interests or the securities in which an investment of any such capital money is made shall be held for and go to the same persons successively, in the same

manner and for the same estates and interests and on the same trusts as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

To whom capital monies payable

24. (1) Notwithstanding anything in this Act (except section 30) or in a trust instrument, capital money arising under this Act shall not, except where the trustee is a trust corporation, be paid to or by the direction of fewer persons than two as trustees for the time being of the land and a conveyance to a purchaser of the land takes effect under this Act only if the capital or other money arising is paid accordingly or into court.

- (2) The restrictions imposed by this section do not affect
- (a) the right of a personal representative in whom the trust land may be vested to convey or deal with the land for the purposes of administration;
 - (b) the right of a person of full age who has become absolutely entitled to the trust land, free from all limitations, powers and charges taking effect under the trust instrument, to require the land to be conveyed to him.

Trustees may reimburse themselves

25. The trustees of the trust property may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

Prohibition or limitation on exercise of powers void

26. If, in any settlement, will, assurance or other instrument a provision is inserted
- (a) purporting or attempting, by way of direction, declaration or otherwise, to forbid the trustees of land held upon the statutory trusts to exercise any power under this Part; or
 - (b) attempting or tending, or intending by the imposition of any condition (other than the obtaining of the consent to a disposition by any person interested under a settlement provided his beneficial interest is not affected in consequence of giving such consent) or by forfeiture, or in any other manner whatever, to prohibit or prevent them from exercising, or to induce them to

abstain from exercising any power under this Part, or whereby, if such power were exercised, the existing interest in the trust property of any beneficiary would be unduly prejudiced in consequence thereof.

that provision, as far as it purports, or is intended to have, or would or might have, the operation aforesaid, is void, and the trusts take effect as far as possible as if the void provision were omitted from the settlement, will, assurance or other instrument.

Saving and exercise of other powers

27. (1) Nothing in this Part derogates from, abridges or affects prejudicially any power (not being a power created by a provision in conflict with a provision of this Part) for the time being subsisting under a settlement, or by statute or otherwise, and the powers given by this Part are cumulative.

(2) Nothing in this Act precludes a settlor from conferring on the trustees of the land any powers additional to or larger than those conferred by this Act.

(3) In case of conflict between the provisions of a settlement and the provisions of this Part, relative to any matter in respect whereof the trustees exercise or contract or intend to exercise any power under this Part, the provisions of this Part prevail; and, notwithstanding anything in the settlement, any power (not being merely a power of revocation or appointment) relating to the trust land thereby conferred on the tenant for life or other persons exercisable for any purpose, whether or not provided for in this Part, is exercisable by the trustees as if it were an additional power conferred on the trustees.

(4) If a question arises or a doubt is entertained respecting any matter within this section, the trustees of the land or any other person interested under the settlement may apply to the court for its decision thereon, and the court may make such order respecting the matter as it determines.

Protection of purchasers

28. On a sale, exchange, lease, mortgage or other disposition, a purchaser dealing in good faith with the trustees of the land shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration or rent, as the case may require, that could reasonably be obtained.

Payment of costs out of trust property

29. Where the court directs that any costs, charges or expenses be paid out of property subject to the statutory trusts the same shall, subject and according to the directions of the court, be raised and paid -

- (a) out of any money forming part of the capital of the trust; or, failing that,
- (b) out of the proceeds of any disposition of securities representing such money; or failing that,
- (c) out of accumulations of income of trust land, money or securities; or, failing that,
- (d) by the proceeds of any disposition of the trust land authorised by this Part.

Termination of settlements and trusts

30. (1) If any person of full age becomes absolutely entitled to the trust land free from all limitations, powers, charges and annuities (whether or not charged on the land) taking effect under the settlement, the trustees of the land shall at his request convey the land to him, and if more persons than one become absolutely entitled as aforesaid, the land shall be conveyed to them as joint tenants.

(2) Where land is held by trustees upon the statutory trusts such trust is, so far as regards the safety and protection of any purchaser thereunder, deemed to be subsisting until the land has been conveyed to or under the direction of the person of full age absolutely entitled to the trust land or the proceeds of sale.

PART IV

CO-OWNERSHIP

Presumption of tenancy in common

31. A conveyance of an interest in land to two or more persons, except a conveyance in trust, shall create an interest in common in equity, unless it is expressed in such conveyance that the transferees shall take beneficially jointly or unless it manifestly appears from the tenor of the instrument that it was intended to create an interest in joint tenancy.

Husband and wife are separate persons

32. A husband and wife shall for all purposes of acquisition of any interest in property under a disposition be treated as two persons.

Body corporate as joint tenant

33. (1) A body corporate is capable of acquiring and holding any land or a property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual or two or more bodies corporate become entitled to any such property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint tenancy they are entitled to the property as joint tenants.

(2) Where a body corporate is joint tenant of any property, then on its dissolution the property devolves on the other joint tenant.

Severance of joint tenancy

34. (1) Where land is vested in joint tenants, any tenant not being a mere trustee or personal representative may sever the joint tenancy by giving to the other joint tenants notice in writing of such desire or by doing such other acts or things as are effectual to sever the tenancy.

(2) Notwithstanding anything contained in this Act, it is hereby declared that a notice in writing given under this section is a conveyance for the purposes of being recorded under the Land Instrument Registration Act.

Protection of purchaser from surviving joint tenant

35. (1) The survivor of two or more joint tenants is, in favour of a purchaser of the legal estate acting in good faith, able to deal with the legal estate free from any trust if he conveys as beneficial owner or the conveyance includes a statement that he is solely beneficially interested.

(2) Subsection (1) does not apply if, at any time before the date of the conveyance by the survivor -

(a) an instrument evidencing a severance has been recorded; or

- (b) a memorandum of the severance (that is to say in any case a note or memorandum signed by the joint tenants or one of them and recording that the joint tenancy was severed on a date therein specified) has been endorsed on or annexed to the conveyance by virtue of which the legal estate was vested in the joint tenants; or
- (c) an adjudication in bankruptcy made against any of the joint tenants, or a petition for such an order, has been registered under any law, being an adjudication of which the purchaser has notice by virtue of the registration, on the date of the conveyance by the survivor.

(3) This section applies with the necessary modifications in relation to a conveyance by the personal representatives of the survivor of joint tenants as they apply in relation to a conveyance by such survivor.

Partition of land held by co-owners

36. (1) Where the legal estate in land is vested in persons of full age they may partition the land among themselves in such parcels as they may agree, or in the absence of agreement any one of them may apply to the court for an order partitioning the land or sale in lieu thereof, as the court considers fit.

(2) The court may give effect to such an application by ordering the land to be sold or conveyed in severalty to each co-owner in such parcels as the court determines, whether or not subject to any charge by deed created for raising equality money.

(3) A subsequent purchaser shall not be concerned to see or inquire whether any such agreement as is mentioned in subsection (1) has been made.

(4) Where a co-owner makes an application for a partition of any land for the purpose of selling his share therein and the effect would be to adversely affect the use of that land, the court may order a sale of the land or the shares therein by public auction or make such other order as it considers fit.

(5) Any co-owner is entitled to purchase at an auction or by private treaty land or any share in land which is the subject of an application to the court for partition and is ordered by the court to be sold.

Simultaneous deaths

37. (1) Subject to subsection (2) where two or more joint owners have died in circumstances rendering it uncertain which of them survived the other or others, such deaths

shall for all purposes affecting the title to the property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

(2) Wherever they are beneficially entitled to the property as joint tenants they are deemed to have held the property upon a tenancy in common immediately before their deaths.

Severance of party structures

38. (1) Where, under a disposition or other arrangement, a wall or other structure is or is expressed to be made a party wall or structure, it is and remains severed as between the respective owners so that each owner is the absolute owner of half the structure, and the owner of each part has a right to support and of user over the rest of the structure, subject to the obligation to maintain and keep in repair his part of the structure for the benefit of the whole.

(2) Any person interested may, in case of dispute, apply to the court for an order declaring the rights and interests under this section of the persons interested in any such structure and the court may make such order as it considers fit.

PART V

CONTRACTS, CONVEYANCE AND COVENANTS

Contracts for sale etc. of land in writing

39. No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or some other person thereunder by him lawfully authorised.

Instruments required to be in writing

40. Subject to section 41 a transfer of an interest in land shall be in writing signed by the person making the transfer or by his agent duly authorised in writing.

Absence of writing not affecting validity

41. (1) Sections 39 and 40 shall not apply to any transfer or contract for the transfer of an interest in land which takes effect -

- (a) by operation of law;
- (b) by operation of the rules of equity relating to the creation or operation of resulting, implied or constructive trusts;
- (c) by will or upon an intestacy;
- (d) by prescription or limitation;
- (e) by a lease taking effect in possession for a term not exceeding three years, whether or not the lessee is given power to extend the term.

(2) Sections 39 and 40 shall be subject to the rules of equity including the rules relating to unconscionability, fraud, duress and part performance.

Creation of relationship, lessor-lessee

42. (1) The relationship of lessor and lessee shall subject to subsections (2) and (3), be created only by an instrument in writing executed by the lessor or his agent thereunto authorised in writing.

(2) An instrument in writing is not necessary for the creation of the relationship

- (a) for a fixed term for a period less than three years certain; or
- (b) from year to year or for any other periodic tenancy.

(3) Authorisation of the lessor's agent need not be in writing in any case where an instrument in writing is not necessary for the creation of the relationship of lessor and lessee.

Statutory commencement of title

43. (1) The period of commencement of title whether documentary or otherwise which a purchaser of land may require shall be twenty years.

(2) An intending assignee of a term of years may require the instrument creating the term, however old.

(3) The intending purchaser of a reversion may require the instrument under which the reversionary interest arises, however old.

(4) A purchaser shall not be deemed to be or ever to have been affected with notice of any matter of thing of which he might have had notice if he had investigated the title or made inquiries in regard to matters prior to the period of commencement of title ascertained in accordance with subsection (1), (2) or (3), unless he actually makes such investigation or inquiries.

(5) Under a contract to grant or assign a term of three years or more, whether derived or to be derived out of freehold or leasehold land, the intended lessee or assignee shall be entitled to call for the title to the freehold or leasehold as the case may be.

(6) Where a lease is made under a power contained in a will, enactment or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title down to an intended assignee, form part of the title, or evidence of the title, to the lease.

(7) This section applies to contracts for exchange in the same manner as to contracts for sale.

(8) This section applies only so far as a contrary intention is not expressed in the contract.

Stipulations as to time not the essence of a contract

44. Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules.

Other statutory conditions of sale

45. (1) A purchaser of any interest in land shall not -
- (a) require the production, or any abstract or copy, of any deed, will or other document dated or made before the time prescribed by section 43, or stipulated, for the commencement of the title, even though it creates a power subsequently exercised by an instrument abstracted in the abstract given to the purchaser; or
 - (b) require any information or make any requisition, objection or inquiry, with respect to any such deed, will or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title, is recited, agreed to be produced, or noticed;

and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, or any deed, will or other document, (1) forming part of that prior title, are correct and give all the material contents of the deed, will or other document so recited, and that every document so recited was duly executed by all necessary parties.

(2) Subsection (1) shall not deprive a purchaser of the right to require the production or an abstract or copy of -

- (a) any power of attorney under which any abstracted document is executed;
- (b) any document creating or disposing of an interest, power or obligation which is not shown to have ceased or expired, and subject to which any part of the property is disposed of by an abstracted document;
- (c) any document creating any limitation or trust by reference to which any part of the property is disposed of by an abstracted document.

(3) Where an interest in land sold is held by lease (other than a sublease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of the actual completion of the purchase.

(4) Where an interest in land sold is held by sublease, the purchaser shall assume, unless the contrary appears, that the sublease and every superior lease was duly granted; and, on production of the receipt for the last payment due for rent under the sublease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the sublease have been duly performed and observed up to the date of actual completion of the purchase and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

(5) Recitals, statements, and descriptions of fact, matters and parties contained in deeds, instruments or statutory declarations, twenty years old at the date of the contract, shall, except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions.

(6) The inability of a vendor to give a purchaser a covenant or other undertaking to produce and deliver copies of documents of title shall not be an objection to title if the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

(7) Such undertakings and covenants to produce and for safe custody of documents as the purchaser can and does require shall be given at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

(8) A vendor shall be entitled to retain documents of title where -

(a) he retains any part of the land to which the documents relate; or

(b) the document consists of a trust instrument or other instrument creating a trust which is still subsisting, or an instrument relating to the appointment or discharge of a trustee of a subsisting trust.

(9) This section applies to contracts for exchange in the same manner as to contracts for sale.

(10) This section applies subject to any contrary intention expressed in the contract.

(11) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing provisions similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the court.

Supplemental instruments

46. (1) Any instrument expressed to be supplement to a previous instrument shall be read and have effect as far as may be as if it contained a full recital of the previous instrument.

(2) This section shall not give any right to an abstract or production of any such previous instrument, and a purchaser may accept the same evidence that the previous instrument does not affect the title as if it had merely been mentioned in the supplement instrument.

Application of insurance money on completion of sale etc.

47. (1) Where, after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money is, on completion of the contract, held or receivable by the vendor on behalf of the purchaser, and shall be paid by the vendor to the purchaser on completion of the sale or exchange or so soon thereafter as the same is received by the vendor.

(2) For the purposes of this section, cover provided by such a policy maintained by the vendor extends until the date of completion, and money does not cease to become payable to the vendor merely because the risk has passed to the purchaser.

(3) This section has effect subject to -

- (a) any stipulation to the contrary contained in the contract or policy; and
- (b) the payment by the purchaser, at the time of completion or earlier if required by the vendor, of the proportionate part of the premium from the date of the contract.

(4) This section applies to a sale or exchange by an order of the court, as if -

- (a) for references to the "vendor" there were substituted references to the "person bound by the order";
- (b) for the reference to the completion of the contract there were substituted a reference to the payment of the purchase or equality money (if any) into court;
- (c) for the reference to the date of the contract there were substituted a reference to the time when the contract becomes binding.

Lands lie in grant only

48. (1) All lands and all interests therein lie in grant and are incapable of being conveyed by livery and seisin, feoffment or bargain and sale, and a conveyance of an interest in land may operate to pass the possession or right to possession thereof, without actual entry, but subject to all prior rights thereto.

(2) The use of the word "grant" is not necessary to convey land or to create any interest therein.

Conveyances to be by deed

49. (1) Subject to subsection (2), all conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

(2) This section does not apply to

- (a) assents by a personal representative;

- (b) disclaimers made in accordance with the Bankruptcy Act, or not required to be evidenced in writing;
- (c) surrenders not required to be effected by deed;
- (d) leases or tenancies or other assurances not required by law to be made in writing;
- (e) receipts not required by law to be by deed;
- (f) vesting orders of the court or other competent authority;
- (g) conveyances taking effect by operation of law.

(3) The transferee under a conveyance shall be entitled to have that conveyance delivered to him by the transferor as soon as practicable after execution of the conveyance by the transferor and all persons whose consent or concurrence is required.

Certain documents to be deeds even though not under seal

50. (1) Subject to subsection (4), every document satisfying the requirements of subsection (2) is a deed notwithstanding that it has not been sealed.

(2) The requirements referred to in subsection (1) are that the document be

- (a) signed by the party to be bound by it; and
- (b) attested by at least one witness in accordance with subsection (3); and
- (c) expressed to be a deed, conveyance, assurance, mortgage, charge, settlement, covenant, bond or specialty.

(3) No particular form of words is requisite for the attestation referred to in subsection (2) (b).

(4) Nothing in this section affects -

- (a) the need for a deed to be sealed if the party to be bound by the deed is a corporation; or
- (b) the requirement of delivery; or

- (c) the validity or operation of a deed otherwise executed in accordance with the law governing the execution of deeds before the passage of this Act.

Conveyance by body corporate

51. (1) Where a (body corporate) to which the Companies or other Act applies executes a conveyance, that conveyance shall be executed in accordance with the provisions of that Act.

(2) A conveyance shall be deemed, in favour of a purchaser, to have been duly executed by a corporation aggregate, other than a company referred to in subsection (2), if its seal is affixed thereto in the presence of and attested by its secretary or other permanent office or his deputy, and a member of the board of directors or other governing body of the corporation or otherwise in accordance with the terms of any instrument or enactment establishing or regulating that corporation.

Description of deeds

52. Any deed under seal, whether or not being an indenture, may be described (at the commencement thereof or otherwise) simply as a deed, or as a conveyance, assurance, mortgage, settlement, covenant, bond, specialty or otherwise, according to the nature of the transaction intended to be effected.

Execution of deeds by an individual

53. Where an individual executes a deed, he shall either sign or place his mark upon the same and sealing alone is not sufficient.

Construction of expressions used in deeds etc.

54. In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation unless the context otherwise requires

- (a) "month" means calendar month;
- (b) "person" includes a corporation;
- (c) the singular includes the plural and vice versa;

- (d) the masculine includes the feminine and vice versa;
- (e) "land" has the meaning assigned to it by subsection 2(1).

*Conveyance of land to include all rights belonging to or
enjoyed with the land*

55. (1) A conveyance of land includes, and operates to convey with the land, all buildings, erections, fixtures, commons, hedges, ditches, drains, fences, ways, waters, watercourses, liberties, privileges, easements, rights and benefits of any covenants appertaining or annexed to the land or any part thereof.

(2) A conveyance of land having houses or other buildings thereon includes, and operates to convey, with the land, houses or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and benefits of any covenants, appertaining or annexed to the land, houses or other buildings conveyed, or any of them, or any part thereof.

(3) This section applies only if and so as a contrary intention is not expressed in the conveyance and has effect subject to the term of the conveyance and to the provisions therein contained.

(4) This section shall not be construed as giving to any person a better title to any property right or thing in this section mentioned other than the title which the conveyance gives to him in respect of the land expressed to be conveyed or as conveying to him any property, right or thing in this section mentioned further or otherwise than as the same could have been conveyed to him by the conveying parties.

All estate clause implied

56. (1) Every conveyance is effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to or on the property conveyed or expressed or intended so to be, or which they have power to convey in, to or on the same.

(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance and has effect subject to the terms of the conveyance and to the provisions therein contained.

Covenants for title

Implied covenants by transferor

57. (1) In a conveyance there are, in the several cases mentioned in this section, implied covenants to the effect stated in this section and to the extent stated in paragraph 1 of the First Schedule, by the person or by each person who conveys as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say

- (a) in a conveyance for valuable consideration, other than a mortgage, covenants by a person who is expressed to convey "as beneficial owner" in the terms set out in paragraph 2 of the First Schedule;
- (b) in a conveyance by way of assignment or sublease of a term of years for valuable consideration, other than a mortgage, further covenants by a person who is expressed to convey "as beneficial owner" in the terms set out in paragraph 3 of the First Schedule;
- (c) in a mortgage covenants by a person who is expressed to mortgage "as beneficial owner" in the terms set out in paragraph 4 of the First Schedule;
- (d) in a mortgage of property subject to a rent or of a term of years, further covenants by a person who is expressed to mortgage "as beneficial owner" in the terms set out in paragraph 5 of the First Schedule;
- (e) in a conveyance by way of settlement, a covenant by a person who is expressed to convey "as settlor" in the terms set out in paragraph 6 of the First Schedule;
- (f) in any conveyance, a covenant by every person who is expressed to convey "as trustee", "as mortgagee", "as personal representative", or as a committee of a mental patient within the meaning of the Mental Health Act or under an order of the court, in the terms set out in paragraph 7 of the First Schedule.

(2) Where in a conveyance it is expressed that a person conveys, by direction of another person expressed to direct "as beneficial owner", then the person giving the direction, whether expressed to convey "as beneficial owner" or not, is to be treated as if he had been expressed to convey "as beneficial owner" the subject-matter so conveyed by his

direction; and the covenants on his part are implied as if he had been expressed to convey "as beneficial owner" the subject-matter so conveyed to his direction.

(3) Where in a conveyance, other than an assent, a person conveying is not expressed to convey "as beneficial owner", "as settlor", "as trustee", "as mortgagee", as "personal representative", or as a committee of a mental patient within the meaning of the Mental Health Act or under an order of the court or by direction of some person "as beneficial owner" no covenant on the part of the person conveying is implied in the conveyance.

(4) In this section -

- (a) a conveyance does not include a lease;
- (b) valuable consideration does not include marriage;
- (c) any reference to a person being expressed to "convey" does not mean that the word "convey" must be used.

(5) The benefit of a covenant implied as aforesaid is annexed and incident to, and goes with, the estate or interest of the implied covenantee, his mortgagee, or lessee, and is capable of being enforced by every person, including a mortgagee or lessee, in whom that estate or interest, any part thereof or any estate or interest derived therefrom is from time to time vested.

(6) A covenant implied as aforesaid may be varied or extended by a deed or an assent, and, as so varied or extended, operates in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were directed in this section to be implied.

(7) Where a conveyance is not required to be by deed, the word "covenant" in this Part includes an agreement in such a conveyance.

Implied covenants in conveyances subject to rents

58. (1) In addition to the covenants implied under section 57, there are, in the several cases mentioned in this section, implied covenants to the effect stated in this section, by and with such persons as are hereinafter mentioned, that is to say

- (a) in a conveyance for valuable consideration, other than mortgage, of the entirety of the land affected by rentcharge, covenants by the grantee or joint and several covenants by the grantees, if more than one, with the conveying parties and with each of them, if more than one, in the

terms set out in paragraph 8 of the First Schedule; and where a rentcharge has been apportioned in respect of any land, with the consent of the owner of the rentcharge, the covenants in this paragraph are implied in the conveyance of that land in like manner as if the apportioned rentcharge were the rentcharge referred to, and the document creating the rentcharge related solely to that land;

- (b) in a conveyance for valuable consideration, other than a mortgage, of part of land affected by a rentcharge, subject to a part of that rentcharge which has been or is by that conveyance apportioned (but in either case without the consent of the owner of the rentcharge) in respect of the land conveyed;
 - (i) covenants by the grantee of the land or joint and several covenants by the grantees, if more than one, with the conveying parties and with each of them, if more than one, in the terms set out in sub-paragraph (i) of paragraph 9 of the First Schedule,
 - (ii) covenants by a person who is expressed to convey as beneficial owner, or joint and several covenants by the persons who are expressed to so convey, if at the date of the conveyance any part of the land affected by such rentcharge is retained, with the grantees of the land and with each of them (if more than one) in the terms set out in sub-paragraph (ii) of paragraph 9 of the First Schedule;
- (c) in a conveyance for valuable consideration, other than a mortgage, of the entirety of the land comprised in a lease, for the residue of the term or interest created by the lease, covenants by the assignee or joint and several covenants by the assignees (if more than one) with the conveying parties and with each of them (if more than one) in the terms set out in paragraph 10 of the First Schedule; and where a rent has been apportioned in respect of any land, with the consent of the lessor, the covenants in this paragraph are implied in the conveyance of that land in like manner as if the apportioned rent were the original rent reserved, and the lease related solely to that land;
- (d) in a conveyance for valuable consideration, other than mortgage, of part of the land comprised in a lease, for the residue of the term or interest created by the lease, subject to a part of the rent which has been or is by the conveyance apportioned (but in either case without the consent of the lessor) in respect of the land conveyed

- (i) covenants by the assignee of land, or joint and several covenants by the assignees, if more than one with the conveying parties and with each of them, if more than one in the terms set out in sub-paragraph (i) of paragraph 11 of the First Schedule,
- (ii) covenants by a person who is expressed to convey as beneficial owner, or joint and several covenants by the persons who are expressed to so convey if at the date of the conveyance any part of the land comprised in the lease is retained, with the assignees of the land and with each of them (if more than one) in the terms set out in sub-paragraph (ii) of paragraph 11 of the First Schedule.

(2) Where in a conveyance for valuable consideration, other than a mortgage, part of the land affected by a rentcharge, or part of the land comprised in a lease is, without the consent of the owner of the rent or of the lessor, as the case may be, expressed to be conveyed,

- (i) subject to or charged with the entire rent, then, subsection (1)(b)(i) or (d)(i), as the case may require, has effect as if the entire rent were the apportioned rent; or
- (ii) discharged or exonerated from the entire rent, then, subsection (1)(b)(ii) or (d)(ii), as the case may require, has effect as if the entire rent were the balance of the rent, and the words "other than the covenant to pay the entire rent" had been omitted.

(3) In this section "conveyance" does not include a lease.

(4) Any covenant which would be implied under this section by reason of a person being expressed to convey as beneficial owner may, by express reference to this section, be implied with or without variation, in a conveyance, whether or not for valuable consideration, by a person who is expressed to convey as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as a committee of a mental patient within the meaning of the Mental health Act, or under an order of the court.

(5) The benefit of a covenant implied under this section is annexed and incident to, and goes with, the estate or the interest of the implied covenantee, and is enforceable by every person including a mortgagee or lessee in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(6) A covenant implied under this section may be varied or extended by deed, and as so varied or extended, shall, as far as may be, operate in like manner and with all the like

incidents, effect and consequences, as if such variations or extensions were directed in this section to be implied.

(7) In particular, any covenant implied under this section may be extended by providing that -

- (a) the land conveyed; or
- (b) the part of the land affected by the rentcharge which remains vested in the covenantor; or
- (c) the part of the land demised which remains vested in the covenantor,

shall, as the case may require, stand charged with the payment of all money which may become payable under the implied covenant.

Benefit of covenants relating to land

59. (1) A covenant relating to any land of the covenantee is deemed to be made with the covenantee and his successors in title and the persons deriving title under him, or them and has effect as if such successors and other persons were expressed.

(2) For the purposes of this section, and of sections 60 and 61, "successors in title" include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

Burden of covenants relating to land

60. (1) A covenant relating to any land of a covenantor, or land capable of being bound by him is, unless a contrary intention is expressed, deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and subject as aforesaid, has effect as if such successors and other persons were expressed.

(2) This section extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

Covenants binding land

61. (1) A covenant (whether express or implied under this or any other Act), a bond and an obligation or contract by deed, binds the real estate as well as the personal estate

of the person making the same unless a contrary intention is expressed in the covenant, bond obligation or contract.

(2) The benefit of a covenant relating to land may be made to run with the land, without the use of any technical expression, if the covenant is of such a nature that the benefit could have been made to run with the land.

(3) For the purposes of this section, the benefit of a covenant runs with the land when the benefit of it, whether at law or in equity, passes to the successors in title of the covenantee.

Effect of covenant with two or more persons jointly

62. (1) A covenant (whether express or implied under this or any other Act) and a contract, bond or obligation by deed, made with two or more persons jointly, to pay money, to make a conveyance, or to do any other act to them or for their benefit, implies an obligation to do the act to, or for the benefit of the survivors of them, and to, or for the benefit of, any other person on whom devolves the right to sue on the covenant, contract, bond or obligation.

(2) This section applies only if, and as far as, a contrary intention is not expressed in the covenant, contract, bond or obligation, and has effect subject to the provisions therein contained.

*Covenants or agreements entered into by a person
with himself and another*

63. A covenant (whether express or implied under this or any other Act) or an agreement entered into by a person with himself and another or others shall be construed and be capable of being enforced in like manner as if the covenant or agreement has been entered into with the other persons alone.

Covenants with two or more persons

64. (1) Subject to this Act, where, under a covenant (whether express or implied under this or any other Act) more persons than one are

(a) covenantors, the covenant binds the covenantor and any two or more of them jointly and each of them severally;

- (b) covenantees, the covenant shall be construed as being also made with each of them.

(2) This section applies only if and as far as a contrary intention is not expressed in the covenant, and to covenants implied by this Act or any other enactment.

Persons taking who are not parties to a deed

65. (1) Where a deed is expressed to confer, or by its express terms purports to confer, an immediate or other interest in property, or the benefit of any condition, right of entry, covenant or agreement over or respecting property, upon a third person, it shall be enforceable by the third person in his own name whether or not he is a party to the deed.

(2) Notwithstanding the generality of subsection 2(1), it is hereby declared that "property" in this section includes all other forms of property as well as land.

Power to discharge or modify certain restrictions affecting land

66. (1) A Judge in Chambers may from time to time, on the application, in the prescribed manner, of any person interested in any *land affected by any restriction* arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied

- (a) that because of changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete; or
- (b) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extend to justify the continued existence of such restriction; or, as the case may be, the continued existence thereof without modification; or
- (c) that the person of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction, is annexed, have agreed, either

expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

- (d) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

(2) No compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss.

(3) The Judge shall, before making any order under this section, direct such inquiries as he determines to be made and such notice as he determines, whether by way of advertisement or otherwise, to be given any persons who appear to be entitled to the benefit of the restriction sought to be discharged, modified, or dealt with.

(4) Any order made under this section shall be binding on all persons, whether ascertained or of full age or of capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction which is thereby discharged, modified, or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not.

PART VI

TRANSMUTATION OF MORTGAGE SECURITY

Amount and application of insurance money

67. (1) The amount of an insurance effected by a mortgagee under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is specified therein, the maximum amount due at any time under the mortgage.

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases -

- (a) where there is a declaration in the mortgage deed that no insurance is required; and
- (b) where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed.

(3) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance of mortgaged property against loss or damage by fire, hurricane, earthquake or otherwise effected under this Act, or any enactment replaced by this Act, or on an insurance for the maintenance of which the mortgagor is liable under the mortgage deed, be applied in or towards the discharge of the mortgage money.

Preferential claim of mortgagee on compulsory acquisition

68. (1) Where land acquired by compulsory process was at the date of acquisition subject to a mortgage the mortgagee may either -

- (a) claim the compensation; or
- (b) by notice to the Minister, waive his rights to compensation.

(2) If the mortgagee makes a claim for compensation he shall state in his claim -

- (a) the amount of principal due under the mortgage at the date of acquisition; and
- (b) the amount of interest costs and charges due under the mortgage at that date.

(3) The Minister may, by written notice served on a person who is or may be a mortgagee require him at his option -

- (a) to make a claim under this Act for compensation as mortgagee; or
- (b) to waive his rights to compensation.

(4) If the person referred to in Subsection (3) fails to make a claim for compensation in accordance with this Act within two months or such further period as the Minister in writing allows after the service of the notice under that subsection, he shall be deemed to have waived his rights to compensation as mortgagee.

(5) Where a mortgagee claims compensation under this section, the acquisition of the land has, to the extent to which the compensation payable to the mortgagee is sufficient to satisfy the mortgage debt and interest, costs and charges due to the mortgagee under the mortgage at the date of acquisition, the effect of extinguishing the liability of the mortgagor under the mortgage as from the date of acquisition.

(6) A mortgagee who waives his rights to compensation is debarred from claiming or recovering as mortgagee any compensation or other amount from the State.

(7) Waiver of his rights to compensation by a mortgagee or failure by a mortgagee to claim compensation does not affect his rights and remedies against the mortgagor or in respect of land included in the mortgage other than the land acquired.

Particulars of mortgages

69. (1) The Minister may by written notice served on the owner of land acquired by compulsory process under this Act require him to furnish the following particulars -

- (a) whether or not the land is subject to a mortgage; and
- (b) if the land is subject to a mortgage -
 - (i) the name and address of the mortgagee; and
 - (ii) the amount of principal due under the mortgage at the date of acquisition; and
 - (iii) the amount of interest, costs and charges due to the mortgagee under the mortgage at that date.

(2) If the owner of the land fails to furnish the particulars to the Minister within two months, or such further period as the Minister in writing allows after the service of notice under Subsection (1), the Minister may agree with any person claiming to be a mortgagee of the land as to the amount due under the mortgage, and the owner is debarred from disputing the correctness of any amount so agreed on.

Mortgage moneys barred by statute of limitations

70. For the purposes of this Division, moneys shall not be deemed to have been due to a mortgagee under a mortgage, or to have been secured by the mortgage, at the date of acquisition of land that was subject to the mortgage if the right of the mortgagee to recover the moneys was, at that date, barred by a statute relating to the limitation of actions unless the mortgagee had, at that date, a power of sale or other remedy exercisable in relation to the land.

Preferential claim of mortgage to compensation

71. Any compensation money payable to the mortgagor on the termination of his interest, whether prematurely or otherwise, in the mortgage security shall, if any mortgage repayment on the property remains outstanding, be applied in or toward the discharge of the mortgage money.

PART VII

POWERS OF ATTORNEY

Payment of attorney without notice of death etc.

72. (1) Any person making any payment or doing any act in accordance with or in pursuance of or in reliance on a power is not liable in respect of the payment or act by reason that before the payment or act the donor had died, become subject to disability, become bankrupt or revoked the power, if the fact of death, disability, bankruptcy or revocation was not at the time of the payment or act known to the person making or doing the same, and such act or payment is accordingly as effectual as if none of the said events had occurred.

- (2) (a) A statement in writing by a donee or any person dealing with him to the effect that he has not or had not at the date of any such payment or act received any notice or information of the revocation of the power, by death or otherwise, is, if made immediately before or within 3 months after any such payment or act as aforesaid or (as regards the transferee of any property transferred by the donee) immediately before or within the same time of any subsequent dealing with any property transferred, conclusive proof in favour of the person to whom the statement is made and his successors in title in the absence of any knowledge of such revocation by the maker of the statement at the time when the payment or act was made or done;
- (b) where the donee is a corporation aggregate, the officer appointed to act for the corporation in the execution of the power may make the statement in like manner as if that officer had been the donee;
- (c) a donee or other person making a statement under this subsection which is knowingly false in regard to any such matter is liable in like manner as if the statement had been contained in an affidavit.

(3) Where probate or letters of administration have been granted to any person as attorney for some other person, this section applies as if the payment made or acts done under the grant had been made or done under a power.

(4) Nothing in this section affects the rights of any person entitled to money or property paid or transferred by the donee, and the person so entitled has the same remedy against the person to whom the money is paid or the property transferred as he would have had against the donee, provided that the person entitled can show that the payee or transferee had actual notice that the power had never come into operation or of the revocation of the power before such payment was made or property transferred.

Execution under power of attorney

73. (1) The donee may, if he thinks fit, execute any instrument or do any act in and with his own name and signature and under his own seal, where sealing is required, by the authority of the donor; and every instrument so executed or act so done is as effectual in law as if it had been executed or done by the donee in the name and with the signature and seal, where sealing is required, of the donor.

(2) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, as an alternative to the procedure specified in subsection (1), he may as attorney execute the conveyance by signing the name of the corporation in the presence of at least one witness, and, in the case of a deed, by affixing his own seal, and such execution takes effect and is valid in like manner as if the corporation had executed the conveyance.

(3) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the deed or other instrument in the name of such other person; and where an instrument appears to be executed by an officer so appointed, then, in favour of a purchaser the instrument is deemed to have been executed by an officer duly authorised.

(4) This section applies to powers created by instruments and operates without prejudice to any statutory direction that an instrument is to be executed in the name of an estate owner.

Certified copies of powers

74. Where an instrument creating a power confers power to dispose of or deal with any interest in or charge upon land (not being registered land or a registered charge thereon) the instrument or a certified copy thereof or of such portions thereof as referred to or are necessary to the interpretation of such power, shall be recorded in the Registration Office and shall be admissible in evidence in any court without further proof of the execution thereof.

PART VIII

LESSOR AND LESSEE

Doctrine of interesse termini abolished

75. (1) The doctrine of *interesse termini* is abolished and all terms of years absolute take effect at law or in equity, according to the estate, interest or powers of the grantor, from the date fixed for the commencement of the term without actual entry.

(2) Nothing in this section affects prejudicially the right of any person to recover any rent or to enforce or take advantage of any covenants or conditions, or, operates to vary any statutory or other obligations imposed in respect of such terms or interests

Attornment by lessees

76. (1) Where land is subject to a lease, the conveyance of a reversion in the land expectant on the determination of the lease is valid without any attornment of the lessee.

(2) Nothing in subsection (1)

(a) affects the validity of any payment of rent by the lessee to the person making the conveyance or grant before notice of the conveyance or grant is given to him; or

(b) renders the lessee liable for any breach of covenant to pay rent, on account of his failure to pay rent to the person entitled under the conveyance or grant before such notice is given to the lessee.

(3) An attornment by the lessee in respect of any land to a person claiming to be entitled to the interest in the land of the lessor, if made without the consent of the lessor, is void.

- (4) Subsection (3) does not apply to an attornment
 - (a) made pursuant to a judgment of a court of competent jurisdiction; or
 - (b) to a mortgagee, by a lessee holding under a lease from the mortgagor, where the right of redemption is barred; or
 - (c) to any other person rightfully deriving title under the lessor.

Lessor's implied covenants

77. There shall, subject to any provisions to the contrary, be implied in every lease a covenant by the lessor with the lessee -

- (a) to give quiet enjoyment of the land forming the subject-matter of the lease without interruption by the lessor or any person claiming through him;
- (b) not to use or permit the use of adjoining or neighbouring land in the possession or control of the lessor that renders the leased land unfit for the purpose for which it is leased;
- (c) to keep in repair the roof, main walls and main drains, and where part only of the building is leased, the common passage and common installations;
- (d) in the case of a lease of a dwelling-house or part thereof, that the house or the part thereof is fit for human habitation at the commencement of the tenancy;
- (e) to repair the leased premises in the case of destruction by fire, earthquake, hurricane, flood or riot;
- (f) to pay the rates, taxes and other outgoings.

Lessee's implied covenants

78. There shall, subject to any provisions to the contrary, be implied in every lease a covenant by the lessee with the lessor

- (a) to pay the rent reserved by the lease;

- (b) in the case of a lease of agricultural land, to farm that land in accordance with the rules of good husbandry;
- (c) to keep the interior of the leased premises in good repair, reasonable wear and tear excepted;
- (d) when the lease is of furnished premises, to keep the furniture in as good condition as it was at the commencement of the lease, reasonable wear and tear only excepted, and to replace such articles as are lost, destroyed or so damaged as to be beyond repair with articles of equal value to those so lost, destroyed or damaged;
- (e) to permit the lessor or his agent to enter and inspect the premises;
- (f) not to transfer, charge, sublet or otherwise part with the possession of the leased premises or any part thereof without the written consent of the lessor.

Meaning of "repair"

79. (1) For the purposes of this Act, "repair" means the state of repair in which a prudent owner might reasonably be expected to keep his property, due allowance being made for the age, character and location of the premises at the commencement of the lease.

(2) Nothing in this section shall be construed as requiring a lessee to put a building in a better state of repair than that in which it was at the commencement of the lease.

Running of lessee's covenants

80. (1) The lessor for the time being may enforce against the lessee for the time being all covenants, conditions and agreements, in respect of rent or otherwise, contained or implied in every lease or tenancy agreement, to be observed or performed by the lessee.

(2) A lessor may enforce all the said covenants, conditions and agreements notwithstanding

- (a) a severance of the reversion expectant on the termination of the lease or tenancy agreement, in respect of the severed parts of the reversion;
- (b) that he has become entitled to the income of the whole or part of the land after the condition of re-entry or forfeiture has become enforceable, but this does not render enforceable any condition of re-

entry or other condition waived or released before the lessor became so entitled.

- (3) This section
- (a) takes effect without prejudice to any liability arising under contract;
 - (b) applies only if and as far as a contrary intention is not expressed or implied in the lease or tenancy agreement, and has effect subject to the terms of the lease or tenancy agreement and to the provisions therein contained notwithstanding
 - (i) any severance of the reversion expectant on the termination of the lease or tenancy agreement,
 - (ii) any acquisition by conveyance or otherwise of the right to receive or enforce any rent, covenant, condition or agreement.

Running of lessor's covenants

81. (1) The lessee for the time being may enforce against the lessor for the time being all covenants, conditions and agreements, contained or implied in every lease or tenancy agreement, to be observed or performed by the lessor as lessor.

(2) A lessee may enforce all the said covenants, conditions and agreements, notwithstanding a severance of the reversion expectant on the termination of the lease or tenancy agreement, in respect of the severed parts of the reversion.

(3) This section takes effect without prejudice to any liability arising under contract.

Lessee's fixtures

82. (1) Any chattel, engine, machinery, fencing or other fixture, or any building, erected on or affixed to the demised premises by the lessee at his sole expense, for any purpose of residence, trade, manufacture or agriculture, or for ornament or for the domestic convenience of the lessee in the occupation of the demised premises, but not so erected or affixed in accordance with any obligation or in violation of any agreement in that behalf, may be removed by the lessee at any time during the continuance of the lease.

(2) The right conferred by subsection (1) is not exercisable where removal of the building or other fixtures, as the case may be, would cause irreparable damage to the

demised premises, but so long as the said right is exercisable the fixture or building, as the case may be, remains the property of the lessee.

(3) Where, in the case of a periodic tenancy, the length of the period of notice to determine the tenancy is not enough reasonably to enable the lessee to remove the building or other fixture, as the case may be, before the determination of the tenancy, the lessee may exercise the right conferred by subsection (1) for such period of time as is reasonably necessary for the removal of the building or other fixture, as the case may be, after the said determination.

(4) Upon an application by the lessor, the court may, if it so determines, make an order vesting in the lessor the building or other fixture, as the case may be, provided reasonable compensation for the loss of the said building or other fixture is paid to the lessee.

(5) The lessor is entitled to reasonable compensation for any damage caused to the demised premises by removal of any building or other fixture under this section.

(6) This section applies if and so far as only a contrary intention is not expressed or contained in, and takes effect subject to, the terms of, the lease or tenancy agreement.

Insurance of demised premises

83. (1) (a) Where one party to the lease covenants to insure or repair the demised premises but instead the other party to the lease insures the demised premises, the latter shall be deemed to contract with respect to the said insurance on behalf of the former, to the extent of the former's interest in the demised premises.

(b) all money received on an insurance of the demised premises against loss or damage by fire or otherwise shall be held on behalf of the lessor and lessee for their benefit, in the proportion of their respective interest in the demised premises.

(2) Where the lease contains no covenant to repair or insure by the lessor or lessee, and only one party to the lease insures the demised premises, that party shall be deemed to contract with respect to the said insurance on behalf of the other party, to the extent of the other party's interest in the demised premises, and subsection (1) (a) applies to all money received on an insurance of such demised premises against loss or damage by fire or otherwise.

(3) This section applies if and so far only as a contrary intention is not expressed in, and takes effect subject to the terms of, the lease.

Forfeiture

84. (1) A lessor may, subject to section 87 and any provision to the contrary in the lease, forfeit the lease if the lessee
- (a) commits a breach of any agreement or condition on his part expressed or implied in the lease;
 - (b) is adjudicated bankrupt; or
 - (c) being a company, goes into liquidation.
- (2) The right of forfeiture may -
- (a) be exercised by peaceable entry upon the land and remaining in possession thereof; or
 - (b) be enforced by action before a court.

Waiver of forfeiture

85. (1) The right to forfeit shall be construed as having been waived where the lessor
- (a) accepts rent that has become due since the breach that gave rise to forfeiture;
 - (b) by some positive act, shows an intention to treat the lease as subsisting, and

is, or should by reasonable diligence have become, aware of the commission of the breach.

(2) The acceptance of rent after the lessor has commenced an action by virtue of subsection 84(2) shall not be construed as being a waiver of the right of forfeiture.

(3) The forfeiture of a lease terminates every sublease or other interest derived out of that lease.

(4) Notwithstanding subsection (3) -

(a) where the forfeiture is set aside by the court on grounds of fraud on the sublessee; or

(b) where the court grants relief against forfeiture under section 88,

every sublease or other interests relating to that lease shall be deemed to be subsisting.

Waiver of covenants

86. (1) Unless a contrary intention appears in accordance with subsection (2), where any actual waiver by a lessor or the persons deriving title under him of the benefit of any covenant, condition or agreement in any lease or tenancy agreement is proved to have taken place in any particular instance, such waiver does not extend to any instance, or to any breach of covenant or condition save that to which such waiver specifically related, nor does it operate as a general waiver of the benefit of any such covenant, condition or agreement.

(2) A general waiver of a covenant, condition or agreement in any lease is not effective unless executed in writing by the lessor or his agent thereunto authorised in writing.

Notice before forfeiture

87. (1) Notwithstanding anything to the contrary contained in a lease, a lessor is not entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease until

(a) the lessor has served on the lessee a notice

(i) specifying the breach complained of,

(ii) if the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period as is specified in the notice, and

(iii) in any case other than of non-payment of rent, requiring the lessee to make compensation in money for the breach; and

(b) the lessee has failed

(i) to remedy the breach within a reasonable time, if it is capable of being remedied, or

(ii) to make reasonable compensation in money.

(2) Copies of a notice of forfeiture shall be served on all persons who, to the knowledge of the lessor have a claim under section 88 in relation to the land, or such of them as can with reasonable diligence be ascertained and found.

Relief against forfeiture

88. (1) A lessee upon whom a notice has been served under section 87 or against whom the lessor enforces his right of forfeiture by action or re-entry may apply to the court for relief and the court may, having regard to

- (a) the proceedings;
- (b) the conduct of the parties; and
- (c) all the circumstances of the case,

grant relief on such terms as it thinks fit.

(2) The court may, on the application of any person claiming as sublessee or mortgagee any interest in the property comprised in the lease for which forfeiture is sought, make an order vesting the property so claimed in that sublessee or mortgagee for a period not exceeding the lease.

PART IX

PERPETUITIES

Abrogation of the perpetuity rules

89. (1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is abrogated.

(2) The rule of law relating to perpetuities does not apply and shall be deemed never to apply in The Gambia.

Accumulations

General restrictions on accumulation of income

90. (1) No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely --

- (a) the life of the grantor or settlor; or
- (b) a term of twenty-one years from the death of the grantor, settlor or testator; or
- (c) the duration of the minority or respective minorities of any person or persons living or *en ventre de sa mere* at the death of the grantor, settlor or testator; or
- (d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.

(2) This section does not extend to any provision-

- (i) for payment of the debts of any grantor, settlor, testator or other person;
- (ii) for raising portions for-
 - (a) any child, children or remoter issue of any grantor, settlor or testator; or
 - (b) any child, children or remoter issue of a person taking any interest under any settlement or other disposition directing the accumulations or to whom any interest is thereby limited;

(iii) respecting the accumulation of the produce of timber of wood;

and accordingly such provisions may be made as if no statutory restrictions on accumulation of income had been imposed.

PART X

CAPACITY AND INCAPACITY

Presumption as to age

91. The parties to any conveyance are, until the contrary is proved, presumed to be of the age of majority at the date thereof.

Inability of infant to hold legal estate, or to be appointed trustee

92. (1) A legal estate is not capable of being held by an infant.

(2) The appointment of infant to be trustee in relation to any settlement or trust is void, but without prejudice to the power to appoint a new trustee to fill the vacancy.

(3) An infant who is married has power to give valid receipts for all income (including statutory accumulations of income made during his infancy) to which the infant may be entitled in like manner as if he were of full age.

General position of married woman

93. A married woman is in the same position as a man or femme sole of like age with regard to the acquisition, holding, enjoyment and disposition of property and to dealings with or affecting property.

Questions between husband and wife

94. (1) In any question between husband and wife as to the title to or possession of property, either party may apply by summons to the Chief Justice in Chambers, or by motion in a summary way to the Supreme Court, and thereupon the Chief Justice or Court may direct such inquiry, hear such evidence, make such order, and award such costs as he or it may think fit -

Provided that any order made by the Chief Justice in Chambers shall be subject to appeal in the same manner as any order in Chambers upon a summons is now subject.

(2) The right of a wife to apply under this section includes the right to make such an application where it is claimed by the wife that her husband has had in his possession or under his control -

- (a) money to which, or to a share of which, she was beneficially entitled (whether by reason that it represented the proceeds of property to which, or to an interest in which, she was beneficially entitled, or for any other reason); or
- (b) property (other than money) to which, or to an interest in which, she was beneficially entitled,

and that either that money or other property has ceased to be in his possession or under his control or that she does not know whether it is still in his possession or under his control.

(3) Where, on an application made under this section, the Judge is satisfied

- (a) that the husband has had in his possession or under his control money or other property as mentioned in sub-section (2) (a) or (b);
- (b) that he has not made to the wife, in respect of that money or other property, such payment or disposition as would have been just and equitable in the circumstances,

the power to make orders under this section is extended in accordance with subsection (5).

(4) Where subsection (4) applies, the power to make orders under this section includes power to order the husband to pay to the wife

- (a) in a case falling within subsection (4) (a) such sum in respect of the money to which the application relates, or the wife's share thereof, as the case may be; or
- (b) in a case falling within subsection (4) (b), such sum in respect of the value of the property to which the application relates, or the wife's interest therein, as the case may be,

as the Judge considers appropriate.

(5) Where, on an application under this section, it appears to the Judge that there is any property which

- (a) represents the whole or part of the money or property in question; and
- (b) is property in respect of which an order could have been made under this section if an application had been made by the wife thereunder in a question as to the title to or possession of that property,

the Judge (either in substitution for or in addition to the making of an order in accordance with subsection (5)) may make any order under this section in respect of that property which he could have made on such an application as is mentioned in paragraph (b) of this subsection.

(6) Subsections (4) to (7) have effect in relation to a husband as they have effect in relation to a wife, as if any reference to the husband were a reference to the wife and any reference to the wife were a reference to the husband.

(7) For the avoidance of doubt, it is hereby declared that the power conferred by this section to make orders with respect to any property includes power to order a sale of the property and includes power to make orders with respect to the property of a husband or wife where their marriage has been dissolved after proceedings under this section have been commenced.

*Saving of special position of spouses, and extension
of presumption of advancement*

95. (1) Nothing in this Part affects -

- (a) any statute not expressly repealed by this Act;
- (b) any inherent jurisdiction of any court; or
- (c) any presumption of advancement (except as mentioned in subsection (2)) or other principle of equity.

(2) A presumption of advancement by a wife in favour of her husband shall arise in cases in which, and to the extent to which, had the roles of the parties been reversed, a presumption would have arisen of advancement by the husband in favour of his wife.

166

Provisions as to corporations

96. (1) Where, any property or any interest in property is or has been vested in a corporation sole that property or interest (unless and until otherwise disposed of by the corporation) passes to, devolves upon and vests in the successors from time to time of such corporation, and shall be deemed always to have so passed, devolved and vested, and any estate or interest of the corporator sole in the property of the corporation ceases on his death.

(2) Nothing in subsection (1) shall be construed to mean that the property of a corporation sole passes on the succession of a corporator so as to render that property liable to estate duty.

(3) Where there is or has been a vacancy in the office of a corporation sole or in the office of the head of a corporation aggregate (in any case in which the vacancy affects the status or powers of the corporation) at a time when, if there had been no vacancy, any interest in or charge on property would have been acquired by the corporation, then, notwithstanding the vacancy, the interest or charge -

(a) vests in the successor to such office on his appointment as a corporation sole, or in the corporation aggregate, as the case may be; and

(b) shall be deemed to have so vested,

but without prejudice to the right of the successor, or of the corporation aggregate after the appointment of its head officer, to disclaim that interest or charge.

(4) Where any contract or other transaction is or has been expressed or purported to be made with a corporation sole, or a corporation sole is or has been appointed trustee, at a time when there was vacancy in the office, then, on the vacancy being filled, the transaction or appointment was expressed or purported to be made or was capable of taking effect, and, on the appointment of a successor, is capable of being enforced, accepted, disclaimed or renounced by him to the same extent as that to which it would have been capable of being enforced, accepted, disclaimed or renounced had he been the corporator sole at the time the transaction or appointment was made.

Dissolution of a corporation

97. Where, by reason of the dissolution of a corporation a legal estate in any property has determined, the court may by order create a corresponding estate and vest the same in the person who would have been entitled to the estate which determined had it remained a subsisting estate.

PART XI

MISCELLANEOUS

Abolition of the rule in Shelley's case

98. (1) Where, by an instrument, an interest in any property is expressed to be given to the heir or to any particular heir or any class of the heirs or issue of any person in words which, under the rule of law known as the rule in *Shelley's case*, would have operated

(a) but for this section, to give to that person an interest in fee simple; or

(b) but for this section to give to that person an entailed interest,

those words operate as words of purchase and not of limitation and shall be construed and have effect accordingly.

Extension of the rule in Dearle v. Hall

99. (1) The law applicable to dealings with equitable things in action which regulates the priority of competing interests therein shall, as respects dealings with equitable interests in land, capital money and securities representing capital money, apply to and regulate the priority of competing interests therein (whether or not the money or securities are in court).

(2) In the case of a dealing with an equitable interest under the statutory trusts, capital money or securities representing capital money, the persons to be served with notice of the dealing are the trustees; and where the equitable interest is created by a derivative or subsidiary settlement on the statutory trusts, the persons to be served with notice are the trustees of the property comprised in the derivative or subsidiary settlement.

Consequential provision

100. Any unrepealed statutes conferring special facilities or prescribing special modes for disposing of, acquiring or charging land, or providing for the vesting (by conveyance or otherwise) of the land in trustees or any person, or the holder for the time being of an office or any corporation sole or aggregate or for rights in the interest holder over and above those granted in this legislation shall remain in full force.

Repeal statutes

101. The Acts mentioned in the second column of the Second Schedule are repealed to the extent specified in the third column thereof.

FIRST SCHEDULE

COVENANTS IMPLIED IN CONVEYANCES

Paragraph 1

Extent of the burden of covenants

In this Schedule, unless either the context requires otherwise or the contrary is expressed, the covenantor's liability in respect of any covenant set out herein extends to the acts or omissions only of persons within any of the following classes -

- (i) the covenantor and any person conveying by his direction
- (ii) any person through whom the covenantor derives title otherwise than by purchase for value;
- (iii) any person (including a mortgagee) who either holds or has held a derivative title from the covenantor for less than the estate or interest vested in the covenantor or who holds or has held such a derivative title from any predecessor in title of the covenantor who is also a person within class (ii);
- (iv) any person who holds or has held in trust for the covenantor;

provided that it is not a breach of a covenant contained in this Schedule where the conveyance by the covenantor was made expressly subject to the act, matter or thing which, but for this proviso, would or might have caused such a breach, or where such covenant has been expressly negated or varied by the covenantor.

Paragraph 2

Covenants implied in a conveyance for valuable consideration other than a mortgage by a person who is expressed to convey "as beneficial owner"

- (1) That the covenantor has the right to convey the estate or interest purported to be conveyed, save that the covenantor's liability is only in respect of any acts or omissions of himself or persons within class (ii) of paragraph 1;
- (2) That the person to whom the conveyance is made shall quietly enjoy the land conveyed without disturbance from any person within any class in paragraph 1;

- (3) That the estate or interest conveyed is free from all encumbrances, other estates, claims and demands;
- (4) That the covenantor will, at the cost of the person requiring the same, take such action as may be necessary for the better assuring of the estate or interest purported to be conveyed by him as may from time to time be reasonably required by the person to whom the conveyance is made and the persons deriving title under him.

Paragraph 3

*Further covenants implied in a conveyance of a term of years
for valuable consideration by a person who is expressed
to convey "as beneficial owner"*

- (1) That the lease the subject-matter of the conveyance is at the time thereof valid and effectual;
- (2) That the rent reserved by the said lease has up to the time of the conveyance been paid and the covenants and conditions expressly or impliedly contained in the lease have been performed and observed by the lessee;

provided that the covenantor's liability in respect of both of the foregoing covenants shall be restricted (a) to any acts or omissions of himself or persons within class (ii) of paragraph 1 and (b) as regards the said covenants and conditions, to breaches caused by such acts and omissions the consequences of which could not be discovered on reasonable inspection of the property conveyed.

Paragraph 4

*Covenants implied in a mortgage by a person who is expressed to
mortgage "as beneficial owner"*

That the covenantor covenants in the terms of the covenants set out in paragraph 2 with the variations following, that is to say -

- (a) liability in respect of any breach of any of the said covenants extends to the acts or omissions of any person whether or not such person is within the classes or persons set out in paragraph 1;
- (b) the covenant set out in paragraph 2(2) (for quiet enjoyment) is not implied against any mortgagor until the mortgagee has lawfully entered into possession of the property conveyed;

- (c) the covenant set out in paragraph 2(4) (for further assurance) shall be performed at the cost of the covenantor during the subsistence of the mortgage.

Paragraph 5

Further covenants implied in a mortgage of property held in fee simple subject to a rent or for a term of years by a person who is expressed to mortgage "as beneficial owner"

That, in addition to covenanting in the terms of the covenants set out or referred to in paragraph 4, the covenantor covenants

- (a) that the lease or grant the subject-matter of the conveyance is at the time thereof valid and effectual and that the rent thereby reserved has up to that time been paid and that the covenants and conditions expressed or implied in the lease have been performed and observed; and
- (b) that the covenantor will from time to time, so long as any money remains owing on the security of the property conveyed, pay the rent reserved by the lease and perform and observe the covenants and conditions therein and will indemnify the person to whom the conveyance is made in respect of any consequences of the breach of this covenant.

Paragraph 6

Covenant implied in a conveyance by way of settlement by a person who is expressed to convey "as settlor"

That the covenantor covenants in the terms of the covenant set-out in paragraph 2(4) (for further assurance) save that liability under this covenant shall not attach to persons other than the covenantor and the persons deriving title under him.

Paragraph 7

Covenant implied in any conveyance by every person who is expressed to convey "as trustee", "as mortgagee", "as personal representative", "as a committee of a mental patient" or under an order of court

That the covenantor has not, by virtue of any act or omission of his, caused the title to the estate or interest conveyed to be liable to be impeached through the existence of any encumbrance or rendered himself unable to convey the said estate or interest conveyed in the manner in which it is expressed to be conveyed.

Paragraph 8

Covenant implied in a conveyance for valuable consideration other than a mortgage, of the entirety of land affected by a rentcharge

That the grantees or the persons deriving title under them will at all times -

- (1) from the date of the conveyance or other date therein stated, duly pay the said rentcharge and observe and perform all the covenants, agreements and conditions contained in the deed or other document creating the rentcharge, and thenceforth on the part of the owner of the land to be observed and performed;
- (2) from the date aforesaid, keep indemnified the conveying parties and their respective estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the said rentcharge or any part thereof, or any breach of any of the said covenants, agreements and conditions.

Paragraph 9

Covenants implied in a conveyance for valuable consideration, other than a mortgage, of part of land affected by a rentcharge, subject to a part (not legally apportioned) of that rentcharge

Subparagraph [i]

That the grantees, or the persons deriving title under them, will at times -

- (a) from the date of the conveyance or other date therein stated, pay the apportioned rent and observe and perform all the covenants (other than the covenant to pay the entire rent) and conditions contained in the deed or other document creating the rentcharge, so far as the same relate to the land conveyed;
- (b) from the date aforesaid, keep indemnified the conveying parties and their respective estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the said apportioned rent, or any breach of the said covenants and conditions, so far as the same relate as aforesaid.

Subparagraph [ii]

That the conveying parties, or the persons deriving title under them, will at all times -

- (a) from the date of the conveyance or other date therein stated, pay the balance of the rentcharge (after deduction the apportioned rent aforesaid, and any other rent similarly apportioned in respect of land not retained), and observe and perform all the covenants, other than the covenant to pay the entire rent, and conditions contained in the deed or other document creating the rentcharge, so far as the same relate to the land not included in the conveyance and remaining vested in the covenantors;
- (b) from the date aforesaid, keep indemnified the grantees and their estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the aforesaid balance of the rentcharge, or any breach of any of the said covenants and conditions so far as they relate as aforesaid.

Paragraph 10

Covenants in a conveyance for valuable consideration, other than a mortgage, of the entirety of the land comprised in a lease for the residue of the term or interests created by the lease

That the assignees, or the persons deriving title under them, will at all times -

- (1) from the date of the conveyance or other date therein stated, duly pay all rent becoming due under the lease creating the term or interest for which the land is conveyed, and observe and perform all the covenants, agreements and conditions therein contained and thenceforth on the part of the lessees to be observed and performed;
- (2) from the date aforesaid, save harmless and keep indemnified the conveying parties and their estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the said rent or any breach of any of the said covenants, agreements and conditions.

Paragraph 11

Subparagraph [i]

Covenants implied in a conveyance for valuable consideration, other than a mortgage, of part of the land comprised in a lease, for the residue of the term or interest created by the lease, subject to a part (not legally apportioned) of that rent

That the assignees, or the person deriving title under them, will at all times -

- (a) from the date of the conveyance or the date therein stated, pay the apportioned rent and observe and perform all the covenants, other than the covenant to pay the entire rent, agreements and conditions contained in the lease creating the term or interest for which the land is conveyed, and thenceforth on the part of the lessees to be observed and performed, so far as the same relate to the land conveyed;
- (b) from the date aforesaid keep indemnified the conveying parties and their respective estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the said apportioned rent or any breach of any of the said covenants, agreements and conditions so far as the same relate as aforesaid.

Subparagraph [ii]

That the conveying parties, or the persons deriving title under them will at all times -

- (a) from the date of the conveyance, or other date therein stated, pay the balance of the rentcharge and other rents similarly apportioned and observe and perform all the covenants, other than the covenant pay the entire rent, and agreements to be observed and performed so far as the same relate to the land demised (other than the land comprised in the conveyance) and remaining vested in the covenantors;
- (b) from the date aforesaid, keep indemnified the assignees and their estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the aforesaid balance of the rent or any breach of any of the said covenants, agreements and conditions so far as they relate as aforesaid.

SECOND SCHEDULE

Parliaments of England and Great Britain

<i>Session and Chapter</i>	<i>Title or Short Title</i>	<i>Extent of Repeal</i>
27 Hen. 8C 10	Statute of Uses, 1534	The whole Act.
13 Eliz, C.5	Fraudulent Conveyances, 1571	The whole Act.
27 Eliz. C.4	Fraudulent Conveyances, 1585	The whole Act.

Parliament of the United Kingdom

<i>Session and Chapter</i>	<i>Title or Short Title</i>	<i>Extent of Repeal</i>
3 & 4 Will. 4, c. 74	Fines and Recoveries Act 1833	The whole Act.
8 & 9 Vict., c. 106	Real Property Act 1845	The whole Act.
8 & 9 Vict., c. 112	Satisfied Terms Act 1845	The whole Act.
12 & 13 Vict., c. 26	Leases Act 1849	The whole Act.
12 & 13 Vict., c. 105	Renewable Leasehold Conversion Act 1849	The whole Act.
13 & 14 Vict., c. 17	Leases Act 1849	The whole Act
22 & 23 Vict., c. 35	Law of Property Amendment Act 1859	The whole Act.
23 & 24 Vict., c. 38	Law of Property Amendment Act 1860	The whole Act.
31 & 32 Vict., c. 4	Sales of Reversions Act 1867	The whole Act.
31 & 32 Vict., c. 40	Partition Act 1868	The whole Act.
37 & 38 Vict., c. 78	Vendor and Purchaser Act 1874	The whole Act.
39 & 40 Vict., c. 17	Partition Act 1876	The whole Act.
40 & 41 Vict., c. 18	Settled Estates Act 1877	The whole Act.
40 & 41 Vict., c. 33	Contingent remainders Act 1877	The whole act.

112

Parliament of the United Kingdom

<i>Session and Chapter</i>	<i>Title or Short Title</i>	<i>Extent of Repeal</i>
44 & 45 Vict., c. 41	Conveyancing Act 1881	The whole Act.
45 & 46 Vict., c. 38	Settled Land Act 1882	The whole Act.
47 & 48 Vict., c. 18	Settled Land Act 1884	The whole Act.

APPENDIX B

LAND INSTRUMENT REGISTRATION

ARRANGEMENT OF SECTIONS

Section	Page
1. Citation	1
2. Definitions	1
3. Land registry	1
4. Appointment of registrar	1
5. Registers to be kept	2
6. Instruments, the registration of which is compulsory	2
7. Description and plan of land	2
8. Endorsement of consent in certain cases	3
9. Compliance with the requirement of this act or prior enactment	3
10. Registration of instrument on another instrument	3
11. Inadmissibility in evidence	3
12. Loss of priority	3
13. Registration to constitute actual notice	4
14. Method of registration	4
15. Filing of judgments	4
16. Registrar to file court judgment	5
17. Effect of filing	5

18.	Copies of privy council judgments	5
19.	Filing not to affect validity	5
20.	Rules of court	6
21.	Effect of registration	6
22.	Register to be deemed in legal custody	6
23.	Searches	6
24.	Copies of entry registers	6
25.	Penalty for false statement	6
26.	Penalty for falsifying register	7
27.	Power of Minister	7
28.	Repeal of Land (Registration of Deeds) Act. Cap 57	7

The Schedule

LAND INSTRUMENTS REGISTRATION

An Act to Consolidate and Amend the Law Relating to the Registration of Instruments Affecting Land in the Gambia

Citation

1. This Act may be cited as the Land Instruments Registration.

Definitions

2. "Instrument" means a document affecting land in the Gambia, whereby one party (hereinunder called the grantor) confers, transfers, limits, charges or extinguishes in favour of another party (hereinafter called the grantee) any right or title to, or interest in land in The Gambia, and includes a certificate of purchase and a power of attorney under which any instrument may be executed, but does not include a will;

"Local judgment" means a judgment or decision of the Supreme Court, a High Court or Magistrate's Court whereby the title to land in the Gambia is or shall be affected or whereby the validity of any instrument registered under this Act is affected;

"Office" means an office of land registry established under this Act;

"Privy Council judgment" means a judgment of the Judicial Committee of Her Majesty's Privy Council determining an appeal from a local judgment together with the Order of Her Majesty's Privy Council giving effect to such judgment.

Land registry

3. (1) There shall be a land registry with an office or offices in the Ministry responsible for land matters.
(2) The registry shall be the proper office for the registration of all instruments including powers of attorney affecting land in The Gambia.

Appointment of registrar

4. (1) The Public Service commission of the Gambia shall appoint a registrar, deputy registrar and assistant registrars as it may think fit for the purposes of this Act.

(2) A deputy registrar or an assistant registrar if so authorised may do anything which by this act is required or authorised to be done by the registrar.

Registers to be kept

5. (1) There shall be kept at each office such registers, books and files as may be prescribed and the registrar shall, subject to the provisions of this Act, register therein in the prescribed manner all instruments required to be registered and delivered to him for registration, and shall file all local judgments and Privy Council judgments required or permitted to be filed and delivered to him for filing.

(2) All registers kept in the offices of the land registry immediately before the commencement of this Act shall form part of the register under this Act.

Instruments, the registration of which is compulsory

6. (1) Subject to the provisions of this Act, every instrument executed before the commencement of this Act shall be registered.

(2) Subject to the provisions of this Act, every instrument executed before the commencement of this Act, and not already registered, shall be void so far as it affects any land in The Gambia unless the same is registered within six months from the commencement of this Act.

Provided that the registrar may extend such periods whenever he shall be satisfied that registration has been delayed without default or neglect on the part of the person acquiring the right or interest in the lands in question.

Description and plan of land

7. No instrument executed after the commencement of this Act other than a power of attorney, shall be registered unless it contains a proper and sufficient description, and, subject to the regulations, a plan, of the land affected by such instrument signed by a licensed surveyor and authenticated by the signature of the Director of surveys or a Government Surveyor authorised by him. The decision of the registrar as to the adequacy of the description and plan of any land in any instrument for the purpose of identification shall be final, subject to any order of the Supreme Court.

Endorsement of consent in certain cases

8. No instrument requiring the consent of any public officer to the validity thereof shall be registered unless such consent be endorsed thereon or the registrar is otherwise satisfied that such consent has been given.

Compliance with the requirement of this Act or prior enactment

9. No instrument executed before the commencement of this Act shall be registered if it does not comply with the requirements of this Act or the enactment in force at the date of execution thereof.

Registration of instrument on another instrument

10. No instrument endorsed on another instrument shall be registered unless the instrument on which it is endorsed is registered.

Inadmissibility in evidence

11. No instrument shall be pleaded or given in evidence in any court as affecting any land unless the same shall have been registered.

Loss of priority

12. Every instrument registered under this Act shall, so far as it affects any land, take effect, as against other instruments affecting the same land, from the date of its registration and every instrument registered before the commencement of this Act shall be deemed to have taken effect from the date provided by the law in force at the time of its registration.

Provided that every such instrument shall take effect from the date of its execution if registered within any periods limited for registration as follows, that is to say

- (a) if such instrument be executed in The Gambia, if registered within seven days from its date;
- (b) if executed elsewhere than in The Gambia, if registered within Thirty days from its date.

Registration to constitute actual notice

13. Registration of any instrument under this Act shall constitute actual notice of the existence of the instruments and contents, certificates, and any matter endorsed thereon to any person and for all purposes.

Method of registration

14. (1) Any person desiring that any instrument shall be registered shall deliver the same together with a true copy thereof and the prescribed fee to the registrar at the office.

(2) The registrar shall, immediately after such delivery, place upon the instrument and upon the copy thereof a certificate, as in form B in the Schedule.

(3) The registrar shall compare the copy of the instrument with the original and if he shall find such copy to be a true copy to comply with any regulations made under this Act and for the time being in force he shall certify the same by writing thereon the words "certified true copy" and appending his signature thereto.

(4) The registrar shall thereupon register the instrument by causing the copy so certified to be pasted or bound in one of the register books and by endorsing upon the original instrument a certificate as in Form C in the Schedule; and upon such registration the year, month, day and hour specified in the certificate endorsed on the instrument in pursuance of subsection (2) shall be taken to be the year, month, day and hour at which the instrument was registered.

(5) The original instrument shall thereafter, upon application, be returned to the person who shall have delivered it for registration.

Filing of judgments

15. (1) Within two calendar months from the date of every local judgment the registrar of the court by which such judgment has been pronounced shall transmit to the registrar, at such registry office as the Minister may from time to time direct, a certified true copy of the judgment together with a copy of any map or plan ordered to be filed in that court to which the judgment refers, a copy whereof has not already been transmitted under the provisions of this Act, and any other map or plan ordered by the court to be transmitted.

(2) No map or plan other than those specified in subsection (1) shall accompany or be attached to a copy of a judgment transmitted under the provisions of that subsection.

Registrar to file court judgment

16. On receipt of the certified true copy of any local judgment and map or plan specified in subsection (1) of section (15) the registrar shall file the same.

Effect of filing

17. The failure to transmit or file any local judgment and any error in transmitting or filing any local judgment shall not affect the validity or effect of such judgment.

Copies of Privy Council judgments

18. (1) Subject to the provisions of this section, copies of Privy Council judgments may be filed under this Act at such registry office as the Minister may from time to time direct.

(2) No copy of a Privy Council judgment shall be filed unless-

- (i) it is presented by the Registrar of the Court of Appeal or by one of the parties to the suit in respect of which it is made or his successor in title.
- (ii) At the time of presentation there is produced to the registrar the original Order in Council of which a copy is sought to be filed; provided that the provisions of this paragraph shall not apply if such copy is presented by the Registrar of the Court of Appeal.
- (iii) It determines an appeal in respect of a local judgment filed under this Act.

(3) In this section the expression "copy", in relation to that part of a Privy Council judgment contained in a judgment of the Judicial Committee, means a copy printed by Her Majesty's printer, and, in relation to that part of a Privy Council judgment contained in an Order in Council, means an office copy issued by the Registrar of the Privy Council.

Filing not to affect validity

19. The filing of any local judgment or Privy Council judgment shall not confer upon it any effect or validity which it would not otherwise have had.

Rules of court

20. The Chief Justice of The Gambia may make rules of court for giving effect to sections 19, 20 and 21 of this Act in the High Court or any magistrates' court of The Gambia and in particular for requiring and regulating the filing in court of maps and plans in matters wherein the title to land in The Gambia is in issue or the validity of any instrument registered under this Act is or may be in issue.

Effect of registration

21. Registration shall not cure any defect in any instrument or, subject to the provisions of this Act, confer upon it any effect or validity which it would not otherwise have had.

Register to be deemed in legal custody

22. All register books, registers and files of registered documents at the registry office shall be deemed to be in legal custody, and shall be receivable in evidence in any court and every register shall produce or cause to be produced any register book, register or file of registered documents in his office, on subpoena or order of any court without payment for so doing unless the court shall direct otherwise.

Searches

23. The registrar shall allow searches to be made at all reasonable times in any register book, register or file of registered or filed documents in his custody.

Copies of entry of registers

24. (1) The registrar shall upon request by any interested person and upon the payment of any prescribed fee by such person issue a certified copy of any entry in any such register book or register, or of any filed document.

(2) Every such certified copy shall be received in evidence, without any further or other proof in all civil cases.

Penalty for false statement

25. Any person who shall wilfully make or cause to be made for the purpose of being inserted in any register under this Act any false statement touching any of the particulars

herein required to be known and registered shall be liable to a fine of one hundred dalasis or to imprisonment for two years.

Penalty for falsifying register

26. Any person who shall wilfully destroy or alter or cause to be altered, any register books, register or filed document or any part thereof, or shall counterfeit or cause to be counterfeited any document or any certified copy thereof, or extract any false entry, or shall certify any writing to be a copy or extract of any such book, register or file, knowing the same to be false in any part thereof, or shall forge and counterfeit the seal of any registry office, shall be liable to imprisonment for seven years.

Power of Minister

27. (1) The Minister may, whenever he may think fit, remit or reduce the amount of any fee payable under this Act.

(2) The Minister may make regulations:-

- (i) for the governance and guidance of registrars and of all persons acting under him;
- (ii) prescribing the nature, size and shape of the paper or other substance to be used for copies of instruments delivered for registration and generally the manner in which such copies are to be prepared;
- (iii) excepting from the provisions of section (9) in so far as the said section relates to a plan, any class of instrument;
- (iv) adding to or altering any of the forms given in the First Schedule;

generally for the purposes of this Act.

Repeal of Land (Registration of Deeds) Act Cap 57

28. The Land Registration of Deeds Ordinance is hereby repealed. Provided that such repeal shall not affect any priority conferred upon any instrument by such enactment and that all directions given and all things lawfully done under the provisions of the said Ordinance shall, if not inconsistent with the provisions of this Act be deemed to have been given or done under this Act.

To: Checchi and Co.
From: John W. Bruce, Land Tenure Center
Re: Revision of the Real Property Law of the Gambia

Let me say at the outset that the report is technically excellent. Checchi provided distinguished consultants, and the report and draft law testify to it. It reflects a knowledge of property law in the Commonwealth that no American consultant could have provided. I cannot stress too much the legal confusion (and thus insecurity) which result when legal consultants trained in one system of law attempt to "reform" another on a short-term basis. I was very pleased to see that it has been avoided in this case.

My sense of what you need from me suggests that I should focus not so much on the minutiae of particular legal provisions but on how the drafts meet the purpose for which they were commissioned, that is, providing an adequate basis for commercial activities. The discussion thus proceeds largely by reference to the memorandum "Survey of the Land Laws of the Gambia with Particular Reference to Real Property Law", which is where the drafters explain their basic choices, rather than the drafts of the statutes themselves. (The "Survey" needs to be renamed. "The Reform of the Land Laws..." etc., would reflect more accurately reflect purpose of the exercise.)

Chapter I: Introduction

The Introduction considers the approach to law reform in this area. It conveys some notion of how outmoded the Gambia's law of real property had become, a common phenomena in former British colonies and protectorates. The authors strong familiarity with these reform processes is evident (at pp. 6-10), and this discussion will lend credibility to the report in the eyes of Gambian lawyers and policy-makers. It will help those who are not lawyers get the drift of the consultant's intentions.

The discussion seems a little inconclusive, however. If I understand them correctly, they are saying that their statutes embody all the basic elements of the watershed reform of real property law in the U.K. in 1925, as a baseline, and that they have also suggested some further reforms that appear to have promise from the experience of other Commonwealth countries since that time. This might usefully be stated more clearly.

The fundamental choices of the organization of the statutory material reflected here seem sound to me. For instance, the combination of the law of property and conveyancing into a single act is appropriate and helpful. As is usual in such an exercise, one ends up emphasizing items of disagreement. I hope that this will not obscure my sense that the consultants have done a very professional and effective job.

CHAPTER II. LAND ADMINISTRATION AND POLICY

I was pleased to see that the authors have included this more general discussion of land law and policy. It places their own statutory drafts within a broader policy context, which is very useful.

The authors discuss "direct dealing" in land at pp. 11-12. The term may be legally appropriate, but it might be made clearer to the lay reader at the outset that the issue is whether the reform should eliminate the current legal requirement that the government consent to transactions in leaseholds, such as an assignment or 'sale' of a leasehold. The authors note that s. 17 of the State Lands Act implies in all state leases a covenant that the lessee will not, without first obtaining consent of the Minister, subdivide, convey, assign, or otherwise alienate the land by sale, etc. (including mortgages). The non-observance of the covenant is a cause for forfeiture.

The authors conclude that "It would be unwise to completely abandon the power of the state to intervene in long term transactions which may prove detrimental to the interest of the nation, and therefore the radical solution of 'direct dealings' is rejected." They do however seek to limit the need for approval, arguing for no consent for short-term (less than 3 years) or routine matters (mortgages, restrictive covenants, and mortgages. Where consent needed, they exempt statutory organizations and suggest that delegation of the minister's power to subordinates will ease the process. They suggest that government should be allowed 2 months to notify applicant of objection, after which consent should be presumed.

My own inclination would have been to eliminate this consent requirement completely. It must act as a drag on the leasehold market, and if experience elsewhere in Africa is indicative, as an opportunity for the exercise of inappropriate influence and corruption. If the Gambians are not prepared to take such a step, the consultants' suggestions are all useful improvements, but could be expanded. There should be a clear statement of the public policy to be served by requiring a consent and a set of criteria for the exercise of the consent, criteria clear enough to guide intending participants in a transaction and clear enough to provide a basis for judicial review of a denial of consent.

Constitutionality of the appropriation of customary land rights under art. 18 of the Gambian constitution is discussed at pp. 13-14. The discussion of the "constitutionality of appropriation of the reversionary interest in customary land" refers to the fact that when government brings land which has been under customary law within the purview of the State Lands Act, even if the customary holder remains in possession under a lease from government, his or her property rights are reduced. They are reduced because the title at custom was perpetual, more like ownership in a western sense, while under a lease, when the term ends, no matter how long the term may be, the land reverts to the State.

The consultants appear to me to be clearly correct, both in law and policy, no matter how inconvenient this may be for the Gambian government in terms of the compensation requirements which it implies. AID, if it is committed to respect for property, should support the authors firmly on this point. The inconvenience created in the long term by pursuing the approach under the State Land Act will be much greater. The authors are correct in saying that "There has been much social unrest in the post-independence era in countries where the government has expropriated land rights of the traditional owners by state or waste and vacant declarations."

The provision in the State Lands Act under which the Minister of lands can simply designate an area for inclusion under the Act confers a basic public policy choice on an administrative officer, and should be rethought. In recent discussions in Gambia, Dr. Mark S. Freudenberger of the Land Tenure Center has suggested that such inclusion should be possible only after a public discussion and a referendum or some other more democratic process.

On mobilization of customarily owned land (pp. 14-15) the consultants express a preference for the earlier Lands (Provinces) Act in terms of the process of mobilization, and I am inclined to agree. On the other hand, the institutional arrangement embodied in that Act require reconsideration, relying too exclusively as they do on the power of the seifo or alkalo. There is evidence of their abusing their authority, for example to sell land in areas such as the Combos. It is worth considering whether that authority should not be returned to the lineages which traditionally own the land.

On a fundamental level, the consultants are attempting to point out a major misstep in recent Gambian land law. The Gambian government for many years adhered to sound land policies while many other African countries attempted some very harmful experimentation with more statist approaches. At the very end of the period, the government veered away from a tradition of respect for the evolving systems of private property which we call "customary land law".

The drafters obviously felt that they could address this only in a limited way, because much of the matter lies outside their terms of reference, but we should be grateful that they have so usefully pointed out the problem.

Chapter III. Major Areas Considered

1. Legal Estates and Interests

Given my overall disinclination towards leasehold systems, the decision (p. 17) to preserve freehold as a tenure option (rather than opting for leasehold as the only basic tenure) is one which I applaud. The consultants' write of leasehold's advantage of "annexing development conditions on the estate owner." In fact,

there is very little evidence of this. In the actual experience with such systems in Africa: 1) the conditions applied have often been overly specific or inappropriate, 2) government has lacked the ability to monitor compliance and enforcement has been sporadic, 3) the exercise of bureaucratic discretion with respect to such conditions has provide an occasion for both the taking of bribes and vendettas against political opponents. These problems have been more pronounced in some countries than others, but they have rarely been entirely absent in leasehold systems. Adequate public control over land use is entirely possible in a freehold system through zoning and other mechanisms, and does not require the state to retain the title to land. Again, the fundamental question of whether the Gambia should be proceeding with a leasehold system is raised, but the consultants were not asked to reexamine the fundamental policies behind the State Lands Act, as so they clearly considered this lay beyond their terms of reference.

The general pattern of legal and equitable estates which they recommend is sound.

2. Trust of Land

"Trusts" is a well-developed area of law in common law systems, but for historical reasons is unnecessarily complex. At pp. 18-21, the authors wisely reject the historic distinction between the "trust for sale" and the "strict settlement". In either case, the beneficiaries' interests are transferred from the land to the purchase money. The simpler "trust of land" approach they propose should meet the need admirably.

3. Co-ownership

The discussion at pp. 20-24 is sound. A number of changes are made, especially as regard presumption as to intention, which accord better with African circumstances than do the traditional English rules. The consolidation of the provisions of the English statutes and common law affecting co-ownership into the single consolidated statute is appropriate.

4. Contracts for Sale, Conveyancing and Covenants

There are painfully archaic areas of law affecting real property even today in the U.K., and this is one of them. The consultants' drastic simplifications will help a great deal, and are consistent with thoughtful reform proposals elsewhere in the Commonwealth.

5. Mortgages

The inclusion of this material in the single consolidated act is certainly appropriate, as are the specific recommendations of the consultants.

6-10. Power of Attorney, Lessor and Lessee, Perpetuities, Capacity and Incapacity, Miscellaneous

The proposed provisions are sound, and the broad repeals of old English statutes will clear out of good deal of legal underbrush.

Chapter IV. Registration of Instruments

1. Preliminary Remarks

Here the consultants explain why they have opted for a system of instruments registration, rather than a system of title registration, which is generally considered superior. They indicate that "Title registration in Africa, the Pacific and Caribbean is usually preceded by processes of systematic adjudication and demarcation in order to determine the interest holders and their respective rights and boundaries. This topic is an aspect of the wider subject of land reform and is outside our terms of reference" (p. 37).

It is not necessary to have systematic adjudication and demarcation to convert a system of deeds registration to a system of title registration. It can be done piecemeal, as is done in the Country of London, when transactions or successions take place and a new registration is made. Procedures exist in many countries for conversion from one to the other type of register. The matter would be easy in the Gambia, where most titles are leaseholds granted by government in relatively recent times, and without many transactions having taken place. The government should have good records of the origins of all these titles.

The system of instrument registration which exists in the Gambia is said not to have been functioning too badly. It is the system with which most jurisdictions in the U.S. have limped along for hundreds of years. That alone indicates that it is not a real bar to land development, but it does impose higher transaction costs (largely legal fees) on those engaging in land transactions. On the other hand, it is a shame to see an expanding registry system going off in less than optimum fashion. One option would be to leave the instruments registration system in effect in urban and peri-urban Banjul, subject to gradual conversion to registered titles on the London model, while applying a title registration approach to the new areas of leasehold creation.

The matter is closely tied to the issue of the market in leaseholds. These registration systems exist not just to facilitate proof of transactions, but as a part of the public infrastructure for the market in land rights. The development of the commercial sector requires a relatively free market in land rights, which in the Gambia's case means leasehold rights. A title registration system is generally accepted to be superior for both purposes, and I hope that the consultants could provide a more substantial explanation of their decision.

2. Proposal for a Land Instrument Registration Act

Once the basic issue of the type of system is decided, the consultants do an excellent job of reviewing the needed changes to establish a Land Instrument Registration Act.

I do have a question, however, as to whether these provisions would apply only to instrument effecting transactions in freehold and leasehold, or with respect to customary rights in land as well. It seems to me that the law could be read in the latter fashion.

Such transactions in customary rights are not uncommon, but those who engage in them often know little of registration formalities. The approach which I would favor would be to permit the registration of such contracts, but not to apply to them some of the requirements of this statute. For example, a customary transfer should not be refused admission as evidence in court because it has not been registered (p. 38). Nor should its priority be determined by priority of registration (p. 39) But simple recording in the registry for purposes of proof should be possible.

The exclusion of wills from the requirement of registration is appropriate, as is the movement of the Land Registry from the Ministry of Justice to the Ministry of lands (p.39).

Chapter V. Related Subjects

1. Condominium Schemes

I think it is unfortunate that the consultants have not provided provisions on condominium schemes as part of their consolidated statute. Such arrangements are not likely to "become popular in the Gambia" until there is a legal framework for them, and there seems to me no good reason for not incorporating provisions based on the Caribbean precedents now.

2. Wills, Probate and Administration, Etc.

The law on wills, while very important with regard to land, is best handled in a statute which covers all types of property of the deceased, not just the real property. The same is true of rules of intestacy, or inheritance where there is no will. It is thus generally not included in statutes codifying the law on real property, but in a separate statute. The consultants' recommendation is appropriate in this regard. Was it within their terms of reference? It is potentially a topic for a separate consultancy by itself.

Their suggestions are however helpful. They appreciate, as did the drafters of the 1992 Wills Act, the difficulty of overriding religious values and customary rules in this area. On the other

hand, the use of wills is to be encouraged, because the desire of the testator as to the disposal of his property is likely the only morally compelling argument for moving away from traditional inheritance patterns. The provision on substantial compliance (p. 46) is a very positive step which will help the use of wills grow in the Gambia. The consultants are also justifiably concerned about the issue of dependents' maintenance, and are correct in calling for revision of the laws in that respect.

Generally, however, this is an area of deeply-felt values, and must not be approached as a legal drafting exercise, but on the basis of a careful public discussion of the pros and cons of different approaches.

To turn to strictly commercial sector land issues: what of inheritance of the leaseholds from the State? Is there special provision in the State Lands Act? Or in the lease itself? It is on this area that attention should be focused by the consultants, and their report should at least explain the present legal position.

The provisions in this section are incomplete in the draft which I have, and so it is difficult to say much more.