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**MONOGRAPH  
ON  
THE MORTGAGES ACT, 1992**

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# MONOGRAPH ON THE MORTGAGES ACT, 1992

## A. INTRODUCTION

### 1. The Development of the Mortgages Act, 1992.

The Mortgages Act, 1992 was promoted by the Attorney General's Chambers and the Ministry of Justice with the support of United States Agency for International Development (USAID), which sponsored and executed through its Office in The Gambia a consultancy to review the existing law on the subject and to make recommendations. The review was part of the cooperation arrangement between the Ministry of Justice and USAID to improve and modernise the laws to support and strengthen the financial sector of The Gambia.

The consultants as a result, undertook the required review, and drafted the legislation they thought necessary for enactment to meet the situation. The review, in the case of mortgages, disclosed a situation where the determination of the law applicable was not a matter without difficulty, and where the law which was generally applied was, in any case, out of date.

The question which may be asked is, what is the purpose of a law of mortgages? To answer this, it is important to understand the nature of securities, of which mortgages form a part, and from there to define what a mortgage is. As is well known, the basis and tradition of law in The Gambia, including the laws on securities, is English law. Fisher and Lightwood, the

leading modern English law text on the Law of Mortgages (10th ed., 1988) gives, at page 3, this simple and clear explanation of the nature and kinds of security in English law:

"A creditor may be willing to rely solely on his debtor's personal credit for the fulfillment of the latter's contractual obligations. It is likely, however, that he will want something more than a mere contractual remedy against a debtor who defaults. This he obtains by taking security. Security is of two kinds, personal and real.

Personal security, or suretyship, consists of the contract of guarantee, whereby the guarantor promises to answer for the obligation of the debtor should the latter default. The effect of personal security is to give the creditor a secondary contractual action against the guarantor should the principal debtor default. The disadvantages of personal security, from the creditor's point of view, are that the efficacy of a guarantee depends on the completeness in the form of the document itself and on the original and continued solvency of the guarantor.

Real security gives the creditor rights over property which has been appropriated to meet the debt or other obligation. Its attraction for the creditor is that, if the debtor should become insolvent, the creditor may exercise his rights over the security in priority to the claims of the general creditors."

A mortgage is a form of real security.

In a developing economy like The Gambia, where lending and the protection of the rights of both lenders and borrowers are of increasing importance, it is essential that the law should adequately regulate the question of securities which lenders require as a condition for granting loans, and which borrowers require to protect them against unscrupulous lenders who may otherwise take advantage of the securities they obtain from borrowers to the disadvantage of the latter. Reliance on English statutes, some of which, as will be presently demonstrated, were difficult to identify or obtain, and which had developed through such modern amendments as were by law inapplicable to The Gambia, put a constraint on the proper regulation of the mortgage as a security. That in turn, retarded the harnessing of credit for economic growth in the country. Consequently, the requirements of The Gambia as a developing country and, in particular, its credit market had far outgrown the necessary legal rules governing credit and

securities. The financial sector in the country had, therefore, to be liberated from the constraints imposed by the legal rules, if development was not to be stifled in that sector.

This is the disability which the legislators sought to remove by the enactment of the Mortgages Act, 1992. The legislators, no doubt, expected that the Act would help to change the restrictive climate which had descended upon The Gambia's credit system and encourage the development of a new lending policy; they also must have expected, through this reform, to harness the substantial pools of under-utilized capital in The Gambia seeking profitable domestic investment outlets.

The Act purports to simplify the law of mortgages by bringing together the principles which should apply in The Gambia derived from the common law and the relevant legislation and disposing of the English statute which currently applies. It defines the mortgage transaction, specifies the rights and obligations of the parties, and states the consequences of entry into the mortgage relationship.

## **2. The Scope of this Monograph.**

Now that the Mortgages Act has been enacted, this monograph also sponsored by USAID in The Gambia, is presented in explanation of the objects and reasons of the Act and its contents. It is hoped that the monograph states the provisions of the Act in a narrative form which closely reproduces the provisions of the Act, and is simple enough for a wider public than lawyers, students of the law, or bankers and accountants, desiring knowledge of the laws of

The Gambia, to understand. But in the absence of legal textbooks on the various aspects of the laws of The Gambia, it is necessary that the monograph should go into some detail as to the nature, scope and contents of the Act so as to make it useful for those with a specialised interest in the subject to derive benefit from it. Accordingly, the monograph has been prepared with a view to presenting a fair representation of the Act to serious enquirers, providing a guide to its relevant sections. However, these sections are not necessarily dealt with here in the same order of sequence as in the Act.

## **B. HISTORICAL BACKGROUND**

Until the enactment of the Mortgages Act, 1992 The Gambia had no indigenous statute regulating mortgages. The English law on mortgages as at 1881 applied to The Gambia by virtue of section 119 of the Constitution of the Republic of The Gambia (Act No.1 of 1970) which continued existing laws, and section 2 of the Law of England (Application) Act [Cap.5], which rendered applicable to The Gambia "the common law, the doctrines of equity, the statutes of general application in force in England on the first day of November, 1888". These provisions ensured that the laws on mortgages enacted in the United Kingdom, including the English Conveyancing and Law of Property Act of 1881 applied in The Gambia. What other English enactments on the subject were also applicable to The Gambia as a result of the application provisions of the Constitution and Cap. 5 was a matter of some doubt and complexity.

Further, section 3 of Cap.5 also continued in force "All Acts of Parliament of the United Kingdom declared to extend or apply to The Gambia, which had effect as part of the law of The Gambia immediately before the eighteenth day February 1965." Simple as this sounds, it is not always easy to say which statutes in general, and if so whether any them on mortgages, were so declared by the British Parliament to extend or to apply to The Gambia. Even in England, the old statutes are not readily available to the ordinary legal practitioner. In The Gambia, an added complication is introduced by the fact that recent editions of English law books contain expositions involving amendments to the enacted law which make no reference to the provisions of old legislation which the current law set out to amend. This has always made it difficult, if not dangerous, to use current versions of English statutes or current editions of English law books to ascertain the true state of the law in The Gambia. This situation affects not only the law on mortgages but also affects all cases where The Gambia has to rely on English legislation as the law in force governing situations in The Gambia. And it provides additional justification for a monograph of this kind on a statute enacted specifically for The Gambia.

The need for The Gambia to enact its own laws to govern matters within its jurisdiction has been apparent for some time. The advantages of so doing, of which the following can be counted, are immense: first, the law will be fashioned with Gambian needs primarily in mind; secondly, there will be greater certainty on the law which governs a particular situation; thirdly, the laws will be more readily available to its users; fourthly, the opportunity will thereby be provided for development of the laws to meet changing conditions in The Gambia.

Mortgages, by virtue of the support that they give through lending to economic development constitute one of the subjects which needed urgent attention. The fact that The Gambia did not itself control the principal statutes applicable meant that if it enacted amendments to the United Kingdom Act, they were likely to produce a patchwork of local and foreign statutes, some readily available locally, others not; a course which would most likely have led to some confusion. A new Mortgages Act, complete in coverage was, therefore, required.

From existing precedents, it is clear that the legal practitioners of The Gambia managed to fashion and develop documents on mortgages which suited their clients's needs. But in doing so, the need for caution in the uncertain conditions of the law already described made it necessary for them to include in a mortgage document all covenants, rights, obligations and other material they could possibly think of as potentially relevant, however remote, with the result that the document produced was unnecessarily complicated and of considerable prolixity, at the cost of the client.

Under the old law, a mortgage, technically, involved a conveyance of the property by the mortgagor to the mortgagee. That gave the mortgagee the legal mortgage over the property. The mortgagee took possession of the title deeds. All mortgages of the property not involving a conveyance of a legal estate in the property became equitable mortgages, and took precedence after the legal mortgage.

From this base developed the doctrine of the mortgagor's **equity of redemption**, which was his right to redeem the mortgaged property when the obligation he undertook had been discharged. The equity of redemption entitled the mortgagor to deal with his property in any way consistent with the rights of the mortgagee and in particular, to redeem the mortgaged property at any time despite agreement to the contrary and though the time for repayment stated in the mortgage had passed. A **clog** or fetter on the equity of redemption was void, and no agreement between mortgagor and mortgagee could make a mortgage irredeemable. As the saying went, "once a mortgage, always a mortgage". This has continued to be a feature of a mortgage. But the right to redeem was, under the old law, lost by a sale or release of the equity of redemption by the mortgagor to the mortgagee, or by sale by the mortgagee under his power of sale, or by sale by process of the court.

In The Gambia, both legal and equitable mortgages were known under the old law. But the generally acknowledged view was that equitable mortgages were difficult to enforce because foreclosure proceedings in respect of them had to pass through the court which had very crowded lists of cases. Enforcement of an equitable mortgage through foreclosure, therefore, became a very cumbersome undertaking. There was also a risk which sometimes arose in connection with the nature of property ownership in The Gambia.

The problem confronting the legislature when the Mortgages Act, 1992 was enacted, was to devise a statute which addressed the problems which the old system had disclosed.

## C. THE 1992 ACT AND ITS PROVISIONS

### 1. Nature of a Mortgage.

Section 3 of the Act states the nature of a mortgage and emphasises its character as a security transaction, creating encumbrances rather than a new ownership interest.

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

The elements of a mortgage disclosed by this provision are:

Mortgage is a contract. The parties to the contract are the mortgagor, i.e. the person who under the contract offers the property as security, and the mortgagee, i.e. the person to whom under the contract the property is offered as security. The definition of mortgagor and mortgagee in the Act, however, extends the meaning to include, in the case of the mortgagor, any person from time to time deriving title through the original mortgagor or entitled to redeem a mortgage according to his interest in the property, and, in the case of the mortgagee, any person from time to time deriving title through the original mortgagee.

Object of contract is to charge property. The meaning of a charge is the appropriation of property for the discharge of a debt or other obligation, without giving the creditor either a general or special property in, or possession of, the subject of the security. There is, then, said to be a charge on the property for the payment of the specified amount under the contract. The

fact that the property is charged means that the Act does not require it to be conveyed by the mortgagor to the mortgagee, as was the case under the old law, in order to create a legal mortgage. Although the definition of a mortgage covers legal and equitable interests in the property, i.e. the possibility of giving in mortgage not only a legal interest but an equitable interest as well, the consequence of limiting mortgages to charges means that there is no need for the distinction between the mortgage which conveys the property as the legal mortgage and other mortgages which involve no conveyance, which, therefore, only qualify as equitable mortgages.

Property must be immovable. This requirement, thus, distinguishes the law now adopted in The Gambia from the law applied in some other jurisdictions where a mortgage of either immovable and movable property is possible. Assume that the person seeking the loan has only movable property which he can give as security, can he not do so by way of a mortgage? The answer is that he cannot. He would have to use some other form of security, like the pledge or pawn which is effected by giving possession of the chattel to the creditor to be kept by him until the debt is discharged, or use the device of a lien which may by contract give possession or a charge over moveable or immovable property until certain demands are satisfied. This Act, however, does not seek to regulate those transactions.

The Act goes on further to say that a mortgage of immovable property can only be effected in accordance with its provisions. Thus, it provides in section 4 that:

"4. A mortgage of immovable property shall only be capable of being effected in accordance with the provisions of this Act, and every transaction which is in substance

a mortgage of immovable property, whether expressed as a mortgage, charge, pledge of title documents, outright conveyance, trust for sale on condition, lease, hire purchase, conditional sale, sale with right of repurchase or in any other manner, shall be deemed to be a mortgage of immovable property and shall be governed by this Act."

Section 4, therefore, applies the Act to all non-possessory security transactions involving immovable property. The essence of a mortgage under the Act is that specific property is identified as security for the promised performance of an obligation, the mortgagor retaining the right of ownership subject to the security interest. The Act applies regardless of the form chosen to express the mortgage. It is for the court to determine in each case where there is a dispute as to the nature of the transaction whether it is, in substance, a mortgage. This section is designed to prevent attempts to take what is in substance a mortgage outside the ambit of the Act.

Subject to a contrary intention appearing expressly or by necessary implication from the agreement between the parties, every mortgage is effective to create a charge upon all interests and rights which the mortgagor has in the property mortgaged, or which he enjoys as an incident of his interest in the mortgaged property (see section 6).

Mortgage charges the property appropriated or identified as the security to be proceeded against in the case of default. For the occasional case of a mortgage made to secure an obligation other than the repayment of a debt, e.g. to secure the construction of a building, the building contractor/mortgagor charges some property owned by him as security which the owner/mortgagee can proceed against upon default in constructing the building as agreed. Section 3(3) applies the statute to any alienable interest which could be created in immovable

property. In case of default, the mortgagee has the power under the mortgage to realise his loan and any interest on it by going against the property given as security. Section 17 of the Act gives the remedies available to the mortgagee.

The order in which several mortgagees of the property are satisfied from the property mortgaged depends on the rule on priorities which is stated in section 21 as depending on actual or constructive notice of prior charges.

Security for repayment of debt and any accrued interest on the debt, or it may be in unusual cases, as explained above, for the performance of some other obligation for which the security is given. Further, section 7 provides that:

"Unless a contrary intention appears expressly, a mortgage shall be security only for the performance promised in any past or future contract."

If the parties wish that the security should cover the performance of any act promised in an identified past or future contract, the parties have to provide for it expressly in their agreement. Thus, if the mortgage does not expressly provide for future advances or for past debts, the mortgage will not secure performance of those obligations. An intention cannot be implied under the section.

Security a collateral agreement. Apart from the security given by the mortgagee against default, there would be an underlying agreement between the parties, generally, for the repayment of a debt, but sometimes for the performance of some other obligation. In a loan mortgage, the mortgagee is not confined to obtaining repayment of the loan amount by

realising the security. He may choose to proceed entirely against the mortgagor himself on the agreement for repayment of the debt, or after he has found that the security is insufficient. The law, therefore, makes the mortgagor personally liable for the performance of the act or acts secured by the mortgage. The principal advantage here for the mortgagee is that in the event that a mortgaged property yields insufficient funds to meet the obligation of the mortgagor, the mortgagee may recover the difference from the mortgagor personally. A surety or guarantor who does not wish to be personally liable for the performance of the act or acts secured by the mortgage should make express provision excluding his personal liability.

The point on the personal obligation of the mortgagor is dealt with by section 8 of the Act, which provides that:

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

This means that whoever is the mortgagor, whether an ordinary person or group or a company, that mortgagor continues to be liable on the loan contract for its repayment, so that in case of default, he may be called upon to repay the debt and interest in full whether by the realisation of the security he has provided or by an action against himself, or by the latter course being taken to supply a deficiency realised on taking the former. In other words, a dual basis of liability is provided, namely, liability against the mortgaged property in combination with the personal liability of the mortgagor. This is because the collateral contract of mortgage is additional to the underlying debt contract. The loan contract made by the debtor is not substituted by the mortgage which he provides as security. The loan contract is not merged

into or superseded by the mortgage agreement. Just as the mortgagee is not permitted to take over the mortgagor's property, which may be higher in value than the loan, in satisfaction of a lesser loan, so a mortgagee should not be asked to forfeit the rest of his loan repayment if upon a sale of the property the proceeds fail to satisfy the mortgage.

It will be noticed, however, that the section begins with the expression, "unless a contrary intention appears expressly or by necessary implication". That makes it possible for the parties to alter the consequences attached by the section to the mortgage transaction by express agreement between themselves or by such an agreement as would necessarily imply that the personal liability of the mortgagor, in a mortgage agreement, is excluded.

## **2. Requirements for Validity**

Mortgage must be evidenced by writing. As a precaution against fabrication or imprecision in the terms of a mortgage arrangement, the Act requires as a general rule that all mortgages must be evidenced by writing signed by the mortgagor or by his agent authorised in writing to sign on his behalf. If there is no such written evidence, the mortgage will not be enforceable (see section 5(1)). The enforcement provisions are to be found in sections 17 to 24 of the Act. Exceptions to the requirement that the mortgage must be in writing are made where the agreement is exempted from the necessity of writing by the operation of the rules of equity, including the rules relating to fraud, duress, hardship, unconscionability and part performance, or where it is exempted by any enactment, in the case of a customary law transaction.

Mortgage must be registered. As the Act is intended to help in the development of public and investor confidence, compulsory registration of all mortgages, transfers in such mortgages and their discharges, has been introduced (see section 5(3)). It should thus be easy, because of the notice which registration is deemed to give, to determine by means of a simple search the status of any property which is offered as a mortgage security, and also to determine the order of priorities of charges affecting the property. The Act requires that the writing evidencing a mortgage must be registered in accordance with the Land (Registration of Deeds) Act [Cap 57:01]. Power is given to a registrar called upon to register such mortgage instruments, in addition to any power given to him by Cap 57:01, to refuse to register any writing evidencing a mortgage unless the writing:

- "(a) states the name and address of each mortgagor and each mortgagee;
- (b) states the nature of the mortgagor's interest in the property which is mortgaged and the extent to which that interest is subject to the mortgage;
- (c) identifies the mortgaged property by reference to its location and boundaries (which may be by reference to an official plan) or to a previously registered writing describing the same property;
- (d) where the mortgage secures the payment of money, states the date on which payment is due and states the principal sum lent or to be lent or if the sum to be lent is indeterminate the writing so states, and if further advances are to be made and secured by the mortgage the writing so states." (see section 5(3))

Further, section 5(4) provides that, every writing evidencing the transfer or encumbrance of a mortgage or any interest in a mortgage, or, a discharge of a mortgage in accordance with section 24 (which provides for writing), must also be registered in accordance with the Land (Registration of Deeds) Act.

### **3. Effect of Mortgage to Several Persons**

Section 9 provides that, unless a contrary intention appears expressly or by necessary implication, a mortgage made to two or more mortgagees is, as against the mortgagor or any person deriving interest through the mortgagor, and without prejudice to the rights of the mortgagees, deemed to be made to the mortgagees as joint tenants with a right of survivorship. The same applies if a mortgage is transferred to two or more transferees, or the mortgage secures performance to two or more obligees; the transferees or obligees are deemed to be joint tenants with a right to survivorship. As joint tenants rather than tenants in common, on the death of one of them the mortgagor will be able to deal exclusively with the survivor. This provision is merely one of convenience for conveyancing since it has no application in determining rights among the parties deemed to be the joint tenants.

### **4. Implied Covenants.**

A number of covenants are implied by section 10 in the mortgage agreement. These covenants are similar to those implied in the conveyance of interests in land, with the addition of covenants to deal with the special need to protect the mortgagee's security interest in the mortgaged property. The covenants are implied by the section "unless a contrary intention appears expressly or by necessary implication." The parties are, therefore, at liberty to exclude the implied covenants and, to substitute their own covenants, if they so wish, or to modify the covenants as stated to suit themselves. In the state of uncertainty under the previous law, when mortgage documents were drafted to cover all contingencies, these covenants were expressly recited in the actual mortgage document if they were to apply. Now, the position is reversed:

the law implies them unless a contrary intention appears. The implication of the covenants is convenient in the drafting of mortgage documents, so that each document does not have to set them out at length. The implied covenants are made on behalf of the mortgagor and are set out in detail in Part I of the First Schedule to the Act.

Additional covenants are implied in cases where the mortgaged property is a leasehold, and will be dealt with presently. The covenants implied in all cases are:

- (a) the right to mortgage; namely, that the mortgagor alone, or with the consent or concurrence of all other persons whose consent or concurrence is required, has full power to mortgage the property expressed to be mortgaged by him in the manner in which it is expressed to be mortgaged;
- (b) the right to quiet enjoyment: that [if] either or both the mortgagee and persons deriving title through the mortgagee lawfully enter into possession of the mortgaged property, the mortgagor and every person concurring in the mortgage by his direction and every person deriving title through the mortgagor will not interfere with, interrupt or disturb the lawful possession of such person in possession. The exception made to this covenant is of a person having an interest to which the mortgage is expressly made subject; he may interfere with the right to quiet enjoyment;
- (c) freedom of the mortgaged property from encumbrances: that the mortgaged property is free and discharged from, or is otherwise sufficiently indemnified by the mortgagor against, all interests, encumbrances, claims and demands whatsoever, other than those to which the mortgage is expressly made subject;
- (d) execution of further assurances on request: that the mortgagor and every person concurring in the mortgage by his direction, and every person deriving title through any of them, and every other person having or rightfully claiming any interest in the mortgaged property (other than an interest to which the mortgage is expressly made subject) will, on the request of the mortgagee or any person deriving title through the latter, execute and do all such lawful assurances and things for further or more perfectly assuring the title to the security interest as the mortgagee or person deriving title through him may reasonably request. The expenses in respect of this covenant is to be borne by the mortgagor during the life of the mortgage and thereafter by the person making the request;

- (e) protection, maintenance and repair of the property: that the mortgagor and every person deriving an interest through him (other than a person with an interest to which the mortgage is expressly made subject), will at all times during the lifetime of the mortgage preserve, protect, repair and maintain the mortgaged property so as not to diminish its value below what is reasonably required as security for the performance of any act secured by the mortgage but which has yet to be performed.

Where the mortgaged property includes a leasehold, further covenants relating to the validity and past and future observance of the lease as set out in Part II of the First Schedule are implied. These additional covenants are:

- (a) validity of the lease: that the lease is at the date of the mortgage a good, valid and effectual lease of the mortgaged property and is in full force, unforfeited and unsurrendered, and has not become void or voidable;
- (b) proper performance in past of the obligations under the lease by the mortgagor: that all rents reserved by, and all the covenants, conditions and agreements contained in, the lease and to be paid, observed or performed by the mortgagor and persons deriving title through him have been paid, observed and performed up to the time of the mortgage;
- (c) proper performance in future of the obligations under the lease by mortgagor or successors in title during lifetime of the mortgage: that the mortgagor, or the person deriving title through him, will at all times during the continuance in force of the mortgage pay, observe and perform or cause to be paid, observed and performed, all rents reserved by the lease and all covenants, conditions and agreements contained in the lease, which he or they are bound to pay, observe and perform.

Section 11, sets out an implied term derived from the English Law of Property Act, 1925 (ch.20). The section implies covenants to or by joint parties. In a mortgage or transfer of a mortgage, where two or more persons are expressed to mortgage or transfer or to join as covenantors, any implied covenant on their part is deemed to be a joint or several covenant by them. In other words, any one of them individually, or some or all of them, can at any time

be proceeded against for the performance of the covenant. On the other hand, where there are two or more mortgagees or transferees, an implied covenant with them is deemed to be a covenant with them jointly. They can proceed against the covenantor for the performance of the covenant, but only jointly or together. If, on the other hand, the performance secured by the mortgage is secured to the mortgagees or transferees in shares or in distinct sums, then the implied covenant is deemed to be a covenant with each in respect of the share or distinct sum secured to him. All this is subject to the fact that a contrary intention expressly stated or gathered by necessary implication will override the provisions as implied by the Act.

#### **5. Right to Title Documents.**

A term is implied by section 12 to carry out the usual practice whereby title documents to the mortgaged property are transferred to the prior mortgagee and handed down to succeeding mortgagees as prior mortgages are discharged. According to that provision, unless a contrary intention appears expressly or by necessary implication, a prior mortgagee is entitled, as against the mortgagor, to possession of all of the mortgagor's title documents which relate exclusively to the mortgaged property. And where during the life of the mortgage the mortgagor becomes entitled to possess any title document relating exclusively to the mortgaged property he is obliged to deliver that document to the current prior mortgagee.

A mortgagee having possession of a mortgagor's title documents is under a duty to keep them whole, uncanceled and undefaced and is liable in an action for damages for any wilful or negligent failure to do so. The mortgagee who has taken the title documents must deliver them

to the mortgagee standing in priority immediately after him, upon timely performance of the act or acts secured by the mortgage or upon redemption. If there is no such later mortgagee then the delivery is to mortgagor or person succeeding in title through the mortgagor.

The section also implies a term giving access to the mortgagor to his title documents in the possession of the mortgagee. The entitlement of the mortgagor is to inspect and make copies or extracts from any such document subject to the right being exercised at any reasonable time, on his request and at his own expense, in person or through an agent (section 12(3)).

#### **6. Insurance.**

Both the mortgagor and the mortgagee are recognised by section 13 as having an insurable interest in the mortgaged property. The mortgage document will usually state who has the obligation to insure, normally the mortgagor. And unless a contrary intention appears, where the mortgagor has covenanted to insure all or any part of the mortgaged property and fails to do so as required by the terms of the mortgage, the mortgagee is entitled, after giving notice in writing to the mortgagor, to insure and keep insured the mortgaged property against loss or damage by theft, fire, earthquake or other natural disaster. The premiums paid by the mortgagee for any such insurance are secured with the same priority as the mortgage. Where the mortgage secures payment of money, the premium must be added to the principal sum with interest at the same rate as on the principal sum. Where the mortgagor has covenanted to insure all or any part of the mortgaged property and the insurance has been effected by the

mortgagor, or on behalf of the mortgagor by the mortgagee, all money received on such insurance has to be applied in making good the loss or damage in respect of which the money is received. However, the mortgagor may elect to apply all or part of such money toward the performance of the act or acts secured by the mortgage.

#### **7. Transfer of Mortgage by Mortgagor.**

By transfer, section 14, which is the relevant section dealing with the matter, includes a sale, lease, encumbrance or other disposition (see section 14(5)). Section 14(1) preserves the mortgagor's right to transfer his interest in the mortgaged property at any time. Subject to a contrary intention appearing, a mortgagor may transfer all or any part of his interest in the mortgaged property at any time without the concurrence of the mortgagee. If the mortgagee has protected his interest by registration, as required to do by section 5(2), the transferee from the mortgagor will always take his interest subject to the mortgage. Accordingly, the mortgagee is not prejudiced and there is no reason to restrict the mortgagor's powers of alienation.

But a novation is required to relieve the mortgagor of his personal liability on mortgage covenants (section 14(2)). The transfer of all or any part of his interest in the mortgaged property does not relieve the mortgagor of his personal liability on any covenant in the mortgage. If he wants to free himself of this liability on a transfer of his interest in the mortgaged property, he has to come to an agreement with the mortgagee and the transferee which relieves him of the personal liability and puts it on the transferee. But section 14(3)

protects the mortgagor/transferor, without such novation, from possible loss by implying a covenant on the part of the transferee, unless a contrary intention appears from the mortgage, to indemnify the mortgagor should the mortgagor be compelled after a transfer to perform on his personal covenants with the mortgagee. This is necessary since a mortgagor would otherwise even after he has conveyed away his entire interest in the mortgaged property, be subject on his personal covenants to liability without prospect of recovery of the loss. As pointed out earlier, only a novation, substituting the transferee for the mortgagor with the agreement of the mortgagee, can relieve a mortgagor of his liability on his personal covenants.

Section 14 (4) implies a covenant, unless a contrary intention appears, binding the mortgagor and all persons deriving an interest through him to notify the mortgagee of transactions involving the transfer, whether in whole or in part, of the mortgaged property. The reason is that although a mortgagee who registers his mortgage is protected against all dispositions by the mortgagor subsequent to the mortgage, he may be called upon to determine who is the next most senior encumbrancer, e.g., for the purposes of handing over the title deeds to the property (see section 12(2)), or he may wish to make further advances not included in the original mortgage and therefore require information of subsequent transactions (see section 21 on priorities), or he may wish to be kept informed of the occupation of the property so that he may select the most appropriate remedy open to him. The proviso to the subsection, however, provides that, notwithstanding any provision to the contrary, failure to give the required notice will not invalidate the transfer.

## **8. Transfer of Mortgage by Mortgagee.**

As section 14 deals with the entitlement of the mortgagor to transfer his interest in the mortgage, so section 15 deals with the entitlement of the mortgagee also to transfer. Here again, the word transfer is given the same wide meaning as in section 14(5) (see section 15(3)). Section 15(1) permits the mortgagee to transfer all or any part of his interest in the mortgage at any time without the concurrence of the mortgagor. Of course, if the mortgagor is not notified of the transfer he will be protected in continuing to direct performance to the original mortgagee. A qualification to the subsection recognises the essential nature of the mortgage as a security transaction and therefore prohibits the transfer of the mortgage without the simultaneous transfer of the obligation secured by the mortgage. Thus, it makes any transfer void and of no effect if it purports to make any disposition of the mortgagee's interest in the mortgaged property without making the same disposition of the right to performance of the act or acts secured by the mortgage.

Section 15 (2) provides that transfers of a mortgagee's interest in a mortgage will be an absolute discharge transferring all the mortgagee's interest including his rights and powers, such as the right to demand, sue for, recover and give receipts for performance of the act or acts secured by the mortgage, including performance then due or becoming due thereafter; and the benefit of all securities for performance including collateral securities, and the benefit of and right to sue on all covenants with the mortgagee and the right to exercise all powers of the mortgagee. Under this subsection, therefore, the transferee will be in exactly the same position as the mortgagee from whom he took his interest.

## 9. **Illegal, Void and Voidable Transactions.**

Section 16 distinguishes between two types of unenforceable agreements. Section 16(1) deals with mortgages based on performance of an act which is illegal or derives from a contract which is illegal. The mortgage will to the extent of illegality, not be enforceable, but the court may order the return of title documents or the removal of any clog on the title to the mortgaged property. Thus, the mortgagor is not put on terms as a condition for retrieving his title documents or for removing any clog or hindrance to the recovery of the title of the mortgaged property. The court may order the return of documents or the removal of any clog unconditionally.

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

## **10. Remedies of Mortgagee on Default.**

The law should, by its certainty and accessibility, give confidence to mortgagees and thereby encourage them to lend upon the mortgage security, but it is also important that mortgagors should not be unfairly treated under the law. The Act, therefore, seeks to give the mortgagor the protection of court supervision for dealings with the mortgaged property by third parties, except in the case of peaceful entry by the mortgagee into possession. It insists that in other cases, enforcement of the mortgage, where a mortgagor defaults, should be under the supervision of the court.

Where a mortgagor defaults, the remedies provided by the Act are either to sue the mortgagor or obligor or both on any personal covenant to perform (see section 17(a)); this is consistent with section 8 which retains the personal liability of the mortgagor. Alternatively, the mortgagee could realise the security in the mortgage in all or any of the ways provided in the Act. As section 17(b) goes on further to state that no other way would be allowed, notwithstanding any provision to the contrary in the mortgage, the mortgagee is restricted to remedies provided in the Act irrespective of any provision in the mortgage itself.

Other remedies which the Act provides against the mortgagor or an obligor for default are to appoint a receiver (see section 18); to enter into possession of the property (see section 19); and a judicial sale under section 20.

The old law gave the right to the mortgagee to foreclose on the mortgage. This was the process by which a mortgagee could make effectual his ownership of immovable property mortgaged. The right arose as soon as the day fixed for redemption was past. On bringing an action for foreclosure a further day was appointed for payment, and if the money was not paid, the property was adjudged to belong to the mortgagee absolutely for the whole interest of the mortgagor. Any subsequent legal mortgage was extinguished. The effect was to bar the mortgagor's equity of redemption. Foreclosure as a remedy, other than by judicial sale, has been abolished by the Act (see section 20(10)).

Appointment of Receiver on Default. This remedy will usually be invoked where the mortgagee finds that the mortgagor is in default in his instalment payments under the mortgage, or fears that the mortgagor will default, yet the mortgagee does not wish to exercise his power of sale. Under the old law, a mortgage could provide for the appointment of a receiver without the intervention of the court. But section 18(6) of the Act prohibits the appointment of a receiver except by court order. The reason is that the receiver appointed by the mortgagee becomes the agent of the mortgagor yet the mortgagor has no choice in his selection and will be bound by his acts whether honest or not. Thus, section 18(1) provides that upon failure of performance of an act or acts secured by the mortgage the mortgagee may apply to the court for the appointment of a receiver, and unless the court is satisfied that no grounds exist for appointment of a receiver the court will appoint a receiver.

The receiver appointed by the court may be given wide powers as to the administration of the mortgaged property: he may, under section 18(2), be empowered by the court to take possession of the property; to collect by demand, action in the name of the mortgagor or mortgagee, or otherwise all income including arrears accruing from the mortgaged property; to give valid receipts for all income collected; and to do any other act necessary or proper to manage the property including the making of repairs and improvements. Any such repair or improvement must be approved by the court before it can bind the mortgagor, mortgagee or property itself. The receiver is, however, subject to the obligation to account, under section 18(3), at any time ordered by the court.

He is entitled to retain out of money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a fee or commission at such rate as the court in its discretion determines. This right is held in priority to all other claims on such money (see section 18(4)). He must, unless otherwise directed by the court, apply all income received by him from the property in the order listed in accordance with section 18(5), namely, in:

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

(e) or towards the discharge of any principal money due under the mortgage.

He must pay the residue, if any, to the person who, but for the possession of the receiver, would have been entitled to receive the income or who is otherwise entitled to the mortgaged property.

Mortgagee in Possession. Section 19 gives the mortgagee a right to possession only after default, and subject to conditions. Upon the failure to meet a due obligation, the mortgagee is entitled, as against the mortgagor and any person deriving an interest in the property through him, whose interest is subsequent to that of the mortgagee, to possession of the mortgaged property. But in the case of default in the payment of principal or interest secured by the mortgage, the mortgagee's right to possession may be exercised only after thirty days' notice in writing to the mortgagor or such longer period as the mortgage may provide (see section 19(1)) A mortgagee entitled to possession may-

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

A mortgagee in possession is liable to account to the mortgagor for any income, whether in cash or kind, derived from the mortgaged property which he receives from the time of his taking possession. He is also liable to account for any income which he might have received, but did not on account of his wilful default. He is obliged to pay to the mortgagor any amount over and above the amounts due on the mortgage (see section 19(3)). He is, when accounting, liable for:

- (a) any failure to be diligent in realising any sum due to the mortgagee from the mortgaged property;
- (b) his own occupation rent, if he occupies all or part of the property, at a fair market value;
- (c) any unreasonable injury to or neglect of the property caused by his wilful or negligent act or omission. (see section 19(4))

He is for this purpose, not entitled to any compensation for personally managing the mortgaged property. But if he appoints an agent to manage the property, the agent is entitled to compensation which has to be approved by the court. He is, however, allowed the cost of any reasonable repairs or improvements he has made to protect the value of the mortgaged property or to maintain or increase the income from it. If any of these costs exceed the income from the mortgaged property the excess is secured with the same priority as the mortgage. Where the mortgage secures the payment of money, this excess will be added to the principal sum with interest at the same rate as on the principal sum (section 19(5)).

The mortgagee in possession has power from the date of his possession to collect by action or otherwise any income from the mortgaged property, including arrears to which he would have been entitled had he owned the property since the date of the mortgage (section 19(6)). Unless he otherwise agrees, he is not bound by any lease, profit or license entered into by the mortgagor subsequent to the mortgage unless the tenant, profit holder or licensee took his interest as a purchaser for value without notice of the mortgage (section 19(7)).

He is entitled to transfer, as provided in section 15, all or any part of his interest in the mortgaged property, including his right to possession. And he may lease the mortgaged property, but the lease will be subject to the mortgagor's right to redeem. Thus, on a lease from the mortgagee in possession the lessee will usually wish to obtain the agreement of the mortgagor as well.

Judicial Sale. Provision is made in section 20 for the realisation of the mortgage security and foreclosure by judicial sale. As pointed out earlier, all other methods of foreclosure are excluded (see section 20(10)). A mortgagee has the right, upon failure of performance of an act or acts secured by the mortgage, to apply to the court for an order for judicial sale of the mortgaged property. If the court is satisfied of the existence of grounds for the application it will grant an order for judicial sale of all or part of the mortgaged property, upon such conditions as it deems just and equitable. In considering what conditions, if any, to attach to the order the court has to have regard to what opportunity the mortgagee has afforded to the mortgagor or obligor or both to remedy the failure or to effect performance. It is, therefore, possible that before an order for judicial sale takes effect the court may give the mortgagor an opportunity to make good the default.

The judicial sale must be by public auction unless the mortgagor and all encumbrancers subsequent to the mortgagee requesting the sale and of whom he has notice at the time of the sale agree to a private sale and the terms of the sale are approved by the court. A sale ordered by the court cannot take place until thirty days have expired after the date of the order. Prior

to the sale the mortgagee requesting it must give notice of it to the mortgagor and every encumbrancer of whom he has notice. The time for which notice must be given has to be approved by the court. Failure to give such notice renders the mortgagee personally liable for any resulting loss, but does not otherwise affect the validity of the sale.

Neither the mortgagor nor any encumbrancer, including the mortgagee who requested the sale and any mortgagee prior or subsequent to him, is precluded from purchasing the property. But a purchase by a mortgagee who requested the sale or his nominee is ineffective until approved by the court.

The court ordering the judicial sale has the power to make any order for conveyance, or vesting order, which is proper for giving effect to the sale, and the court may authorise the registrar or other officer of the court to execute on behalf of the mortgagor and the mortgagee who requested the sale, a conveyance granting the interests of the mortgagor and the mortgagee in the mortgaged property to the purchaser at the sale. The purchaser takes title to the mortgaged property free of that mortgage. He also takes title free of all interests to which the mortgage of the mortgagee who requested the judicial sale has priority. But the purchaser's title is subject to all interests which have priority to the mortgage of the mortgagee who requested the sale. The purchaser is entitled to all title documents relating exclusively to the mortgaged property other than those title documents held by any person with an interest which has priority to the mortgage of the mortgagee who requested the sale.

The proceeds from the sale have to be dealt with as the court directs. The direction will be either that they be deposited in court for distribution as ordered by the court or must be held in trust for distribution by the mortgagee who requested the sale. The order of priority for such distribution is:

- (a) in payment of all expenses properly incurred as incidental to the judicial sale or any prior attempted judicial sale;
- (b) in payment of all sums secured by the mortgage or with the same priority as the mortgage;
- (c) in payment in the order of priority of any encumbrances subsequent to that of the mortgagee who requested the sale; and
- (d) the residue to the mortgagor or his successors in interest.

A mortgagee holding in trust for distribution proceeds from a judicial sale, who is in doubt as to the proper distribution of all or part of those proceeds, may apply to the court for direction. And he may, if the court so orders, deposit the proceeds in court.

The title of a purchase at a judicial sale ordered under the Act cannot be impeached on the ground that the order for the sale was improperly or irregularly made. A judicial sale terminates the mortgage and all encumbrances subsequent to the mortgage.

Judicial Sale in Lieu of Redemption. The question of redemption of a mortgage is dealt with in section 22 and will be discussed in due course. It is sufficient here to mention that there are times when the person entitled to redeem mortgaged property may wish rather to have the property sold under the supervision of the court. Such a situation could occur where a

mortgagor wishes to liquidate his debt through the sale of the property rather than redeem it, but the mortgagee who has obtained the appointment of a receiver or has himself taken possession refuses to seek a judicial sale. Section 23 provides the mortgagor with the opportunity to apply to the court to have the property sold. By the section, any person entitled to redeem mortgaged property may have an order for judicial sale instead of an order for redemption in an action brought by him either for redemption alone, or for judicial sale alone or for judicial sale or redemption in the alternative. Therefore, his application could be for judicial sale simpliciter or in the alternative a request for redemption. But even on an application for redemption alone, he could ask the court to have the property disposed of by judicial sale. In a judicial sale ordered at the instance of a person entitled to redeem mortgaged property, the provisions of section 20 (dealing with judicial sale at the request of a mortgagee) will, mutatis mutandis apply.

#### **11. Priorities.**

The owner of a property may enter into several mortgage agreements with a number of mortgagees. The question then arises as to the order in which the securities of the mortgagees could be discharged. The rules on priorities deal with this problem. Section 21 sets out these rules. It will be recalled that section 5(1)(b) and (c) provides exceptions to the requirement that mortgages must be evidenced by writing. In the case of such mortgages which need not be in writing, the requirement in section 5(2) that the writing evidencing a mortgage must be registered, cannot apply. The rules on priorities in section 21 provide that with the exception of different provisions in this Act (and this presumably would include such mortgages as are

referred to in section 5(1)(b) and (c)) or any other enactment or by express agreement among encumbrancers, priorities among encumbrancers shall be given according to the order of time of registration, with the first encumbrance in time of registration having priority over those following. The order may be, however, affected by the operation of the rules of equity including the rules of fraud, estoppel for gross negligence or otherwise, purchasers for valuable consideration without notice of prior interests and the priority of legal over equitable interests where the equities are equal. Presumably, the order according to registration will also be affected by the intervention of mortgages which under section 5(1)(b) and (c) need not be registered and by any other exception provided by enactment.

The rules allow the **tacking** by a mortgagee of a latter encumbrance to a former. This is a process by which a mortgagee is allowed to add on a further advance he makes to a mortgagor to an earlier mortgage so that the latter advance gains the same priority as the earlier. The following is a simple illustration of tacking:

1. A mortgages his property to X to secure a loan;
2. A mortgages the same property to Y to secure another loan;
3. A mortgages the same property to X to secure a further loan from X.

Here X can add on, or tack, his loan in (3) above to the loan in (1) and both loans will have priority over Y's loan in (2). The rule was developed from the application of the rule that a mortgagee who had the legal estate should prevail over other mortgagees of whose securities he had no notice when he made his advance. As stated in Fisher and Lightwood on the Law of Mortgage at page 484:

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

The application of the doctrine as described could lead to hardship. In this Act, therefore, the rule of tacking is modified, being restricted to situations where the intervening encumbrancer agrees to the tacking of the further transaction to the prior one or where the mortgage makes express provision for the extension of the security to further advances. Thus, in determining priority among mortgages, tacking will be permitted in two situations which would alter the rule as to first in time of registration having priority over others. These, according to section 21(3) are:

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

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

entitled to do so, solely on the property mortgaged by the mortgage which he seeks to redeem, without performing any act secured by any separate mortgage made by him or by any person through whom he claims (section 21(4)).

Section 21(5) provides that in determining the incidence of obligations secured by mortgage the rules of equity relating to contribution, exoneration and marshalling shall apply. The rule relating to **contribution** is based on the principle that properties of different owners included in the same security may have to contribute, each its share, to the common burden. Thus, if a fund is equally liable with another to pay a debt, that first fund should not escape merely because the creditor has been paid out of the other fund alone. A claim for **exoneration**, i.e. one property being entitled to exoneration by the other, exists where, though a single property is mortgaged, the debt is primarily the debt of a person other than the owner of the property. The doctrine of **marshalling** is based on the principle that a creditor who has the means of satisfying his debt out of several funds must not, by the exercise of his right, prejudice another whose security consists of only one of those funds. Thus, if the owner of two properties, X and Y, mortgages both to A, and then mortgages one of them, Y to B, B may require the securities to be marshalled. i.e., that A's mortgage be thrown upon property X so far as it will suffice, and property Y, or so much of it as is not required for A's mortgage, be left to satisfy B's mortgage.

## **12. Redemption of the Mortgage.**

Unless the mortgaged property is disposed of by a judicial sale, the right of redemption of a mortgage by the mortgagor always exists. Redemption consists of freeing the mortgaged property from the security burden which it has come to carry under the mortgage, so that the mortgagor, or other person entitled to redeem, can enjoy his rights over the property without that burden. The pre-conditions for redemption are that the performance required under the underlying contract which the mortgage secures should be rendered and compensation paid for any delay in timely performance. Section 22 which deals with the matter specifies the methods by which a mortgage may be redeemed, providing that any person entitled to redeem mortgaged property may do so by -

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

No rules are laid down for determining compensation as this may vary from case to case. In the majority of cases, compensation simply takes the form of payment of interest. The section does not require any notice of intention to redeem. A tender of performance and compensation sufficient to redeem the mortgaged property does, if refused by the mortgagee, have the effect of relieving the person offering to redeem from any obligation to pay compensation for any further delay in performance of the acts secured by the mortgage (see section 22(2)). Redemption may, but need not, be by court action (section 22(3)).

A mortgage is redeemed upon acceptance, or upon a sufficient tender, of performance and compensation under section 22 or upon an order for redemption made by the court (see section 24(1)).

### **13. Written Discharge.**

The person who redeems the mortgage is, under section 24, entitled to demand that the mortgagee should issue a written discharge. A written discharge issued to a subsequent encumbrancer, co-owner, or to any person other than the mortgagor or successor to his entire interest in the mortgaged property, operates as a transfer of the mortgagee's interest in the mortgage. In a written discharge given under this section the same covenants are implied as if the person who executes the discharge had been expressed to transfer as mortgagee subject to any interest prior to the mortgage. The written discharge must be registered in accordance with the Land (Registration of Deeds) Act under section 5(4).

### **14. Miscellaneous.**

Model Precedents. The Act provides model precedents of mortgage agreements which will be considered sufficient under the new law. As section 25(1) states:

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

The reason for this provision is to give examples of forms which are consistent with the requirements of the Act, and to free draftsmen of mortgages from the bondage of the old precedents developed to cover every conceivable point which it was thought necessary to cover

in order to feel secure in the state of uncertainty of the old law. As has been noticed, several terms in a mortgage are implied by the Act unless the parties wish to express a contrary intention. If the terms implied by the Act are sufficient and acceptable to the parties, there will be no further need to make specific provision in the mortgage document to cover those points. These precedents should, therefore, help lawyers draft shorter, and hopefully cheaper mortgage documents for their clients. It is in that light that the Act encourages the use of the simple forms contained in the Second Schedule. But the model precedents do not bind makers of a mortgage to use them. If the parties' wish is for a different document, it is up to them to make that document, provided that it complies with the requirements of the law otherwise stated in the Act. Nor do the model precedents require that the parties or their advisers should, if they choose to use them, follow everything stated in them to the letter. As noticed from the provisions on implied covenants, for example, the law takes a certain view of matters unless a contrary intention appears expressly or by necessary implication. In drawing up a mortgage document, it would be for the draftsmen to determine with their clients whether some contrary intention would better express their wish and therefore ought to be adopted. If that is the case, it would be for them to draft the necessary clauses to cover the intention required.

The Second Schedule gives convenient precedents, expressed in clear simple language, for the commonest forms of mortgage document. They are to be found in the Appendix to this monograph. Other situations may demand other formulated documents. Those are left for the parties and their legal advisers to devise.

Existing Mortgages. Existing mortgages before the commencement of the Act are saved under section 26(2). Each remains valid and operative under its terms and conditions and in accordance with the law applicable before the commencement of the Act. However, even existing mortgages have to conform now to the methods of enforcement by way of appointing a receiver and judicial sale as provided in the Act. They have, therefore, been made by the Act subject to such modifications as to enforcement by way of appointment of a receiver or judicial sale as are necessary to bring such mortgage into conformity with the Act's provisions. Thus with regard to the question of enforcement in the manner specified the provisions in the mortgages are replaced by the provisions in the Act.

Repeal of English Act of 1881. The Conveyancing and Property Law Act 1881 in so far as it related to mortgages ceased to apply in The Gambia.

**APPENDIX**

**SECOND SCHEDULE**

**MODEL PRECEDENTS (Section 25)**

**FORM I - FORM OF MORTGAGE FOR FREEHOLD PROPERTY**

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

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

The parties hereby agree as follows:

1. By a conveyance made the 1st day of August, 1976 between ..... of ..... and the mortgagor (registered number ..... ) the property known as ..... (hereinafter referred to as "the property") was conveyed to the mortgagor for ever.

2. In consideration of the sum of ..... dalasi (D.....) [here state the amount in words and figures] now paid by the mortgagee to the mortgagor (the receipt of which the mortgagor hereby acknowledges) [or if the full amount of the consideration has not been received, here substitute for the acknowledgement of the receipt of the full amount acknowledgment of any amount received and the terms arranged for the transfer of further amounts], the mortgagor covenants with the mortgagee to pay [here state the terms of repayment of the principal and interest].

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

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

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

signed by .....

The Mortgagor in the presence of:

signed by .....

The Mortgagee in the presence of:

FORM II - FORM OF MORTGAGE FOR LEASEHOLD PROPERTY

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

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

The parties hereby agree as follows:

1. By a lease agreement made the 1st day of August, 1976 between ..... of ..... and the mortgagor (registered number ..... ) the property known as ..... (hereinafter referred to as "the property") was leased to the mortgagor for a term of ..... years on terms and conditions described in that lease.
2. In consideration of the sum of ..... dalasi (D.....) [here state the amount in words and figures] now paid by the mortgagee to the mortgagor (the receipt of which the mortgagor hereby acknowledges) [or if the full amount has not been received, here substitute for the acknowledgement of the full amount acknowledgment of any amount received and the terms]

arranged for the transfer of further amounts], the mortgagor covenants with the mortgagee to pay [here state the terms of repayment of the principal and interest].

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

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

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

signed by .....

The Mortgagor in the presence of:

signed by .....

The Mortgagee in the presence of:

FORM III - FORM OF TRANSFER OF MORTGAGE

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

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

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

signed by.....

The Transferor in the presence of:

signed by .....

The Transferee in the presence of:

FORM IV - FORM OF DISCHARGE OF MORTGAGE

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

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

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

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

signed by .....

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