

MEMORANDUM PREFACED TO BILL TO AMEND THE PROPERTY LAW CONSOLIDATION ACT.

THE object of this Bill is to simplify conveyances, mortgages, settlements, and other instruments, by implying therein certain clauses which, in practice, are found to be uniformly inserted therein at length.

This Bill has been framed on the lines of the English "Conveyancing and Law of Property Act, 1881"; but many complicated provisions, deemed inapplicable to the simpler system of conveyancing in vogue in this colony, have been omitted, as have also those already directed to be applied by "The Property Law Consolidation Act, 1883," passed by the New Zealand Legislature.

This latter Act, which mainly consists of a consolidation of the conveyancing ordinance of 1842, is proposed to be amended in several particulars. One instance is as regards the covenants for title directed to be implied in conveyances by section 47 of that Act. These covenants are, for the most part, *absolute* in form, and it is, and for very many years past has been, the almost universal practice to insert a clause in conveyances restricting these covenants to the acts of the vendor, his ancestors or testators, if any, and persons claiming under him or them. Moreover, Mr. Justice Richmond held, in "*Cameron v. Tutchén*," N.Z. L.R., S.C., Vol. i., p. 392, that under an open contract for sale the vendor was entitled to insert this qualifying clause. The effect of section 2 of the Bill is to assimilate the practice to that which has always been in vogue in England.

The part of section 47 of the Property Law Consolidation Act providing that the covenant for quiet enjoyment shall not arise until default made in payment of the principal sum has been amended by making the same also arise on non-payment of interest or breach of covenant. The concluding words of such section of the principal Act restricted the mortgagee's right to enter into possession until default made in payment of the principal sum.

At common law a legal mortgagee is entitled to enter immediately upon execution of the mortgage, by virtue of his estate, notwithstanding that the covenant for quiet enjoyment may not arise until default; he enters, however, on his own title, and is not covered by the covenant (*vide* "Davidson's Precedents," Vol. "Mortgages," 4th ed., page iii.; "Fisher on Mortgages, 4th ed., p. 402; and cases cited). The insertion of a proviso for quiet enjoyment by the mortgagor until default (amounting to a re-demise) has for a long time been discontinued in English practice (*vide* "Davidson," *supra*). It seems open to question whether a New Zealand mortgagee can accept an attornment from his mortgagor in occupation of the mortgaged property before default made, inasmuch as the acceptance of a tenant must savour of entry into possession.

Clause 3 of the Bill implies certain covenants for title applicable exclusively to leaseholds. The purchaser's covenant to indemnify the vendor against the rent and covenants during the residue of the term is left, as in the English Act, to be inserted by the parties.

Clause 9 provides for the maintenance of infants out of the income of their shares. It will be observed that section 11 of "The Trustees Act 1883 Amendment Act, 1891," empowers the trustee, in certain small cases, to apply

part of the capital for that purpose, whilst clause 12 of that Act deals with advancement in life out of capital.

In framing matter affecting any provision of "The Property Law Consolidation Act, 1883," care has been taken to dovetail the language used with the expressions in that Act. Where the Bill directs a new clause to be applied in any instrument (as distinguished from vesting a power in an individual) the clauses have been taken, with any necessary modifications, from "Davidson's Concise Precedents." In those parts of the Bill which clothe trustees or others with certain authorities (as distinguished from inserting a clause), the language of the English "Conveyancing and Law of Property Act, 1881," has been followed as faithfully as possible, with necessary variations owing to the English interpretation clauses in various parts of the Act not having been used (an inconvenient step to take in an Amendment Bill), and with omissions of matter too complex or precise to need legislation in this colony.

Mr. Bell.

PROPERTY LAW CONSOLIDATION ACT AMENDMENT.

ANALYSIS.

Title.	
1. Short Title.	mortgagees. Trustees to be responsible for safe keeping of documents.
2. Amendment of section 47. Covenants for title restricted and extended.	7. General words implied.
3. Further covenants for title relative to leaseholds.	8. Joint-account clause.
4. Amendment of section 51. Power of sale in mortgage. Purchaser's protection clause.	9. Maintenance of infants.
5. Power for mortgagee to repair and insure on mortgagor's default.	10. Details of trustees' power of sale.
6. Implied obligation to produce title - deeds. Qualification in the case of trustees and	11. Powers may be exercised by surviving trustees.
	12. Implied covenants deemed entered into with grantee.
	13. Amendment of section 49. Covenant to pay mortgage debt.

A BILL INTITULED

AN ACT to further amend "The Property Law Consolidation Act, Title. 1883."

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows :—

1. The Short Title of this Act is "The Property Law Consolidation Act Amendment Act, 1894." Short Title.

2. Section forty-seven of "The Property Law Consolidation Act, 1893" (hereinafter called "the principal Act"), is hereby amended as follows :— Amendment of section 47.

The covenants for right to assure freedom from encumbrances and quiet enjoyment, set out in subsections one and two of section forty-seven of the principal Act, shall, in every conveyance of land by way of sale, marriage-settlement, or lease hereafter made, and in every other conveyance for valuable consideration hereafter made (otherwise than by way of mortgage), be restricted to, and taken as against, the acts, deeds, and defaults of the conveying party referred to in the said section, and of all persons through whom such conveying party derives title otherwise than by purchase for value, and also of all persons claiming or to claim through, under, or in trust for such conveying party, or through or under any persons through whom he derives title as aforesaid; and the covenant for further assurance set out in subsection three of the said section shall, in every such conveyance as last aforesaid, extend to the same acts, deeds, and defaults. Covenants for title restricted and extended.

In the case of conveyances of land by way of mortgage hereafter made, the said covenant for further assurance shall extend to the acts, deeds, and defaults of such conveying party as aforesaid, and of all other persons, if any, having or claiming any estate or interest in the premises expressed to be conveyed; and the costs of better assurance required under such covenant shall, during the continuance of the mortgage security, be borne by the conveying party, his heirs, executors, or administrators. 5

After the words "default in payment of the principal moneys secured by the mortgage," in the fourth line from the end of section forty-seven of the principal Act, there shall be added the words (applicable to mortgages hereafter made only) "at the time primarily fixed for the repayment thereof, or in any payment of interest thereon, or on breach of any covenant by the mortgagor contained or implied in the mortgage." 10 15

Further covenants
for title relative to
leaseholds.

3. In every conveyance of a term of years in land by way of sale, mortgage, or marriage-settlement, and in every other conveyance of a term of years in land for valuable consideration, there shall be implied (excepting as against trustees or mortgages) the following covenants by each conveying party, severally, for himself, his heirs, executors, and administrators, to the extent of the interest departed with by him, and restricted (save in the case of mortgagors) to the acts, deeds, and defaults of such conveying party, and of all persons through whom he derives title otherwise than by purchase for value, and all persons claiming through, under, or in trust for him, them, or any of them, that is to say,— 20 25

That the rent reserved by, and the covenants by the lessee and conditions contained and implied in, the lease under which such land is held, have been paid, performed, and observed up to the date of such conveyance. 30

And also (but to be implied in conveyances of terms of years in land by way of mortgage only, and not restricted to such acts, deeds, and defaults as aforesaid),—

That the conveying party, his executors, administrators, or assigns, will, so long as any principal money or interest shall remain on the security of the mortgage, pay, perform, and observe the rents, covenants by the lessee, and conditions reserved, contained, and implied in the lease under which the land is held; and will at all times keep the mortgagee, his heirs, executors, administrators, and assigns, indemnified against all actions, suits, expenses, and claims on account of the non-payment of the said rent, or the breach of the said covenants and conditions, or any of them. 35 40

Amendment of
section 51.

4. Section fifty-one of the principal Act is hereby amended as follows: After the word "conditions," at the end of the sixth line of the second paragraph of subsection one of the said section, the following words are added—namely, "as to title or evidence of title, time or mode of payment of purchase-money, or otherwise." 45

Power of sale in
mortgage.
Purchaser's
protection clause.

The following words are added to subsection three of the said section—namely, "or be concerned to inquire as to any other event having happened upon which the said power of sale is by the terms of the mortgage made exercisable, or otherwise as to the propriety or regularity of the sale; and, notwithstanding any impropriety or irregu- 50

larity whatsoever in the sale, the same shall, as regards purchasers, be deemed to be within the foregoing power, and be valid and effectual accordingly; and the remedy of any person damnified by any such impropriety or irregularity shall be confined to an action for damages
5 against the person or persons exercising the power."

5. In every mortgage or charge hereafter made, whether of real or personal property, in which any mortgagor or person creating the charge shall covenant to keep any buildings, fixtures, or chattels repaired or insured against loss or damage by fire, with or without an
10 additional covenant to deliver or produce the policy or policies of insurance and receipts for the premiums, there shall also be implied a covenant by such mortgagor or other person with the person with whom he shall have expressly covenanted as aforesaid, as follows:—

Power for mortgagee to repair and insure on mortgagor's default.

That, if default shall be made in keeping such buildings, fixtures,
15 or chattels so repaired or insured (as the case may be), or in delivering or producing any policy or receipt for premium (if the express covenant shall extend to such delivery or production), in terms of such express covenant as aforesaid, it shall be lawful for the person with whom such express covenant shall be made, his executors, adminis-
20 trators, or assigns, to effect any repairs to such buildings, fixtures, or chattels, or (as the case may be) to insure and keep insured against loss or damage by fire, in his or their own name or names, all or any of such buildings, fixtures, or chattels, in any sum or sums not exceeding the sum or value in or to which such mortgagor or other
25 person shall have expressly covenanted to insure the same; and that the mortgagor or person creating the charge, his executors, administrators, or assigns, will, on demand, repay to such covenantee, his executors, administrators, or assigns, all moneys expended for that purpose by him or them, with interest thereon at the highest rate
30 payable on the principal sum secured by the mortgage or charge, from the time of the same respectively having been expended; and that until such repayment the same shall be a charge upon all the property comprised in such mortgage or charge.

6. Where a person retains possession of documents and gives to
35 another an acknowledgment in writing of the right of that other to production of these documents and to delivery of copies thereof or gives to such other person an undertaking in writing for the safe custody of such documents, there shall by virtue of such acknowledgment or undertaking be implied in the instrument containing
40 the same a covenant by the person giving the same, for himself, his heirs, executors, administrators, and assigns, with the person to whom such acknowledgments or undertaking is given, his executors, administrators, and assigns, as follows:—

Implied obligation to produce title-deeds.

(1.) In the case of each acknowledgment being given,—

45 That the person giving such acknowledgment, his heirs, executors, administrators, or assigns, will (unless prevented by fire or other inevitable accident), upon every reasonable request in writing of the person to whom the same is given, his executors, administrators, or assigns, or
50 any person lawfully or equitably claiming through him or them any estate or interest in the property affected by the documents referred to, at the expense of the person or

persons requiring the same, produce in New Zealand, but not elsewhere, to him or them, or to such person or persons as he or they shall appoint, or in any Court or judicature or elsewhere, as occasion shall require, all or any of the documents the right to production of which is acknowledged, for the support or manifestation of the estate or title of the person to whom such acknowledgment is given, his executors, administrators, and assigns, and every or any other person claiming as aforesaid in and to the property affected by such documents or any part thereof; and will permit the same documents to be inspected, examined, or given in evidence, and, upon such request and at such expense as aforesaid, make and deliver to the person or persons requiring the same, or to such person or persons as he or they shall appoint, such true copies or extracts, attested or unattested, of or from such documents as he or they may require :

Qualification in the case of trustees and mortgagees.

Provided always that, in the case of trustees or mortgagees giving such acknowledgment as aforesaid, the covenant to be applied as aforesaid shall be binding upon each of them, and his heirs, executors, and administrators, so far as relates to his and their acts alone, and so long as he or they shall have the actual custody of the documents referred to ; but such covenant shall bind such documents, so far as practicable, into whosoever hands the same may come, but shall not bind such trustee or mortgagee, his heirs, executors, or administrators, or cause him or them to incur any liability in relation to such documents, further or otherwise.

(2.) In the case of such undertaking being given,—

Trustees to be responsible for safe keeping of documents.

That the person giving such undertaking, his heirs, executors, administrators, or assigns, will (unless prevented by fire or other inevitable accident) keep the documents, the safe custody whereof is undertaken, safe, whole, uncancelled, and undefaced.

General words implied.

7. In every conveyance of land hereafter made, whether by way of sale, mortgage, marriage-settlement, lease, gift, or otherwise howsoever, there shall be implied the following clause, which shall be deemed to be inserted in the operative part thereof immediately after every description of, or reference to, any land and hereditaments expressed to be thereby conveyed, namely :—

Together with all buildings, fixtures, rights, easements, advantages, and appurtenances whatsoever appertaining to the land and hereditaments hereinbefore expressed to be hereby conveyed, or with the same held or enjoyed, or reputed as part thereof or appurtenant thereto ; and all the estate and interest of each conveying party in the said premises (save that the last fourteen words shall not be deemed implied in any lease).

Joint-account clause.

8. (1.) Where in a mortgage or obligation for payment of money, or transfer of a mortgage or of such an obligation hereinafter made, money advanced or owing is expressed to be advanced by or owing to more persons than one, out of money, or as money, belonging

to them on a joint account, such money shall be deemed to be and remain money belonging to those persons on a joint account as between them and the mortgagor or obligor; and the receipt in writing of the survivor or last survivor of them, or of the personal representatives of the last survivor, or of their, his, or any of their assigns, shall be a complete discharge for the same, notwithstanding any notice to the payer of the severance of the joint account.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of such mortgage, or obligation, or transfer, and to the provisions therein contained.

9. (1.) Where any property is held by any trustee or trustees in trust for an infant, either for life or for any greater interest, and whether absolutely, or contingently upon his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustee or trustees may, at his or their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund available to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

Maintenance of infants.

(2.) The trustee or trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time on securities on which he or they are, by the settlement, if any, or by law authorised to invest trust moneys, and shall hold those accumulations for the benefit of the person or persons who shall ultimately become entitled to the property from which the same arise; but so that the trustee or trustees may at any time, if he or they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(4.) This section applies whether the instrument comes into operation before or after the commencement of this Act.

10. Where a trust for or power of sale of property created by an instrument hereafter coming into operation is vested in a trustee or trustees, he or they, or the trustee or trustees of such instrument for the time being, may, if and so far as a contrary intention is not expressed in and subject to the terms of such instrument and to the provisions therein contained, sell, or concur with any other person in selling, all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to any such conditions respecting title or evidence of title, time or mode of payment of purchase-money, or other matter, as the said trustee or trustees think fit; with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to resell without being answerable for any loss, and to execute and do all such conveyances and things for completing the sale as he or they shall deem proper.

Details of trustees power of sale.

Powers may be exercised by surviving trustees.

11. Where in the case of executorships or trusts hereafter constituted, or created by instruments hereafter coming into operation, a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised 5 or performed by the survivor or survivors of them, or other the legal personal representative or representatives or trustee or trustees for the time being.

Implied covenants deemed entered into with grantee.

12. Every covenant relating to land directed by the said Act or by this Act to be implied in any deed shall be deemed to be entered 10 into with the person, if one, to whom the land affected by the covenant is conveyed by way of sale, mortgage, marriage-settlement, lease, or otherwise, as the case may be; or with the persons jointly, if more than one, to whom such land is so conveyed as joint tenants, or with each of the persons, if more than one, to whom such land is so con- 15 veyed as tenants in common (to the extent of the undivided share conveyed to him); and also, in each of the cases hereinbefore mentioned, with his, their, or each of their executors, administrators, and assigns, as the case may be.

Amendment of section 49. Covenant to pay mortgage debt.

13. Section forty-nine of the said Act is hereby amended by the 20 omission in the third line of the words "and assigns," and the insertion in the second line of the word "and" between "executors" and "administrators."