

**Reprint**  
**as at 20 June 2011**

**Property Law Act 1952**

Public Act 1952 No 51  
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Property Law Act 1952: repealed, on 1 January 2008, by section 366(c) of the  
Property Law Act 2007 (2007 No 91).

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**Note**

Changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in this eprint.

A general outline of these changes is set out in the notes at the end of this eprint, together with other explanatory material about this eprint.

**This Act is administered in the Ministry of Justice**

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## **An Act to consolidate and amend certain enactments relating to property**

### **1 Short Title and commencement**

This Act may be cited as the Property Law Act 1952, and shall come into force on the 1st day of January 1953.

### **2 Interpretation**

In this Act, unless the context otherwise requires,—

**Bankruptcy** includes administration under Part 6 of the Insolvency Act 2006, and any other Act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and **bankrupt** has a corresponding meaning

**Conveyance** includes any deed of assignment, appointment, lease, settlement, or other assurance by deed of any property; and **convey** has a corresponding meaning

**Court** means the High Court

Court, Registrar: The words “High Court” were substituted for the words “Supreme Court” as from 1 April 1980, pursuant to section 12 Judicature Amendment Act 1979 (1979 No 124).

**Deed**, in relation to land under the Land Transfer Act 1952, includes an instrument having the effect of a deed under that Act

**Encumbrance** includes a mortgage in fee or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and **encumbrancer** has a corresponding meaning, and includes every person entitled to the benefit of an encumbrance, or entitled to require payment or discharge thereof

**Executors** and **administrators** of a deceased person mean respectively the persons to whom the right to administer the estate of the deceased has been granted by the proper Court, whether for general, special, or limited purposes; and **executors** includes executors by right of representation

**Income**, when used with reference to land, includes rents and profits

**Instrument** includes deed, will, Proclamation taking land, and Act of Parliament

**Land** includes all estates and interests, whether freehold or chattel, in real property

**Land under the Land Transfer Act 1952**, or any equivalent expression, means estates or interests registered under that Act

**Mortgage** includes a charge on any property for securing money or money's worth; and **mortgage money** means money or money's worth secured by a mortgage

**Mortgage**, **mortgagee**, and **mortgagor**, in relation to land under the Land Transfer Act 1952, have the same meaning as in that Act

**Mortgagee** includes any person from time to time deriving title under the original mortgagee; and **mortgagee in possession** means a mortgagee who in right of the mortgage has entered into and is in possession of the mortgaged property

**Mortgagor** includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property

**Possession**, when used with reference to land, includes the receipt of income therefrom

**Property** includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest

**Purchaser** includes a lessee or mortgagee, or other person who for valuable consideration takes or deals for any property; and **purchase** has a corresponding meaning; but **sale** means only a sale properly so called

**Registered** or **duly registered** means registered in the manner provided by the Land Transfer Act 1952 where the land

affected is under that Act, and otherwise means registered in the manner provided by the Deeds Registration Act 1908; and **registration** has a corresponding meaning

**Registrar** means the Registrar of the High Court, and includes a Deputy Registrar where there is no Registrar or in any case where the Deputy may lawfully act for and on behalf of the Registrar

Court, Registrar: The words “High Court” were substituted for the words “Supreme Court” as from 1 April 1980, pursuant to section 12 Judicature Amendment Act 1979 (1979 No 124).

**Rent** includes yearly or other rent, toll, duty, royalty, or other reservation by the acre, the ton, or otherwise; and **fine** includes premium or foregift, and any payment, consideration, or benefit in the nature of a fine, premium, or foregift

**Will** includes codicil.

Compare: 1908 No 152 s 2

Section 2 **bankruptcy**: amended, on 3 December 2007, by section 445 of the Insolvency Act 2006 (2006 No 55).

Bankruptcy: the reference to Part 17 of the Insolvency Act 1967 (1967 No 54) was substituted, as from 1 January 1971, for a reference to Part 4 of the Administration Act 1952 by section 171(1) Insolvency Act 1967 (1967 No 54).

### **3 Application to Land Transfer land**

- (1) This Act shall be read and construed so as not to conflict with the provisions of the Land Transfer Act 1952 as regards land under that Act.
- (2) Except as otherwise expressly provided, all the provisions of this Act shall, as far as they are applicable, apply to land and instruments under the Land Transfer Act 1952, as well as to other land and instruments.
- (3) The provisions of this Act which are specified in Schedule 1 to this Act do not apply to land or instruments under the Land Transfer Act 1952.

Compare: 1908 No 152 s 1(4)

## **Part 1**

### **Deeds and other instruments**

#### **4 Formalities of deed**

- (1) Every deed, whether or not affecting property, shall be signed by the party to be bound thereby, and shall also be attested by at least one witness, and, if the deed is executed in New Zealand, the witness shall add to his signature his place of abode and calling or description, but no particular form of words shall be requisite for the attestation.
- (2) Except where the party to be bound by a deed is a corporation, sealing is not necessary.
- (3) Formal delivery and indenting are not necessary in any case.
- (4) Every deed executed as required by this section shall be binding on the party purported to be bound thereby.
- (5) Every deed, including a deed of appointment, executed before the commencement of this Act which is attested in the manner required or authorised by any enactment providing for the execution and attestation of deeds in force at the time of execution, or at any time subsequent thereto, shall be deemed to be and to have been as valid and effectual as if it had been attested as required by this section.

Compare: 1908 No 152 s 26

#### **5 Deed by corporation**

- (1) Any deed that may be lawfully made by a corporation (whether executed before or after the commencement of this Act)—
  - (a) To which the common or official seal of the corporation is affixed; or
  - (b) Which is executed in the name of the corporation by any person who has been appointed its attorney, and on which is endorsed or to which is attached a certificate by that person to the effect that he is the attorney of the corporation acting under a power of attorney specified by him, and that he has executed the deed under the powers thereby conferred, and that he has not at the time of giving the certificate received any notice of the revocation of the power of attorney by the dissolution of the corporation or otherwise,—

shall be deemed to have been duly executed by the corporation, and shall bind the corporation; and all persons dealing in good faith without notice of any irregularity shall be entitled to presume the regular and proper execution of the deed, and to act accordingly.

- (2) Every person commits an offence and is liable on summary conviction to a fine not exceeding \$100 who wilfully or negligently signs any certificate for the purposes of this section if the certificate is false in a material respect.
- (3) Nothing in subsection (1)(a) of this section applies to a deed made by a company within the meaning of the Companies Act 1955.
- (4) Nothing in subsection (1)(a) of this section applies to a deed made by a society registered under the Building Societies Act 1965.
- (5) Nothing in subsection (1)(a) of this section applies to a company within the meaning of the Companies Act 1993.

Compare: 1908 No 152 s 27

Subsection (1)(b) was amended, as from 9 December 1976, by section 2(1) Property Law Amendment Act 1976 (1976 No 114) by substituting the words “and on which is endorsed or to which is attached a certificate by that person to the effect” for the words “and has at the time of execution made a statutory declaration”.

Subsection (1)(b) was further amended, as from 9 December 1976, by section 2(2) Property Law Amendment Act 1976 (1976 No 114) by substituting the words and “giving the certificate” for the words “making the declaration”.

Subsection (2) was inserted, as from 9 December 1976, by section 2(3) Property Law Amendment Act 1976 (1976 No 114).

Subsection (3) was inserted by section 3(1) Companies Amendment Act 1985 (1985 No 80).

Subsection (4) was inserted, as from 1 September 1987, by section 43(1) Building Societies Amendment Act 1987 (1987 No 175).

Subsection (5) was inserted, as from 1 July 1994, by section 2 Property Law Amendment Act 1993 (1993 No 123).

## **6 Receipt for consideration money**

An acknowledgment of the receipt of the consideration contained in the body of a deed shall be as valid and effectual in all respects as if the same had also been endorsed thereon.

Compare: 1908 No 152 s 28

**7 Person not named may take benefit**

*[Repealed]*

Section 7 was repealed, as from 1 April 1982, by section 13 Contracts (Privity) Act 1982 (1982 No 132).

**8 Construction of supplemental or annexed deed**

A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of endorsement on the previous deed, or contained a full recital thereof.

Compare: 1908 No 152 s 45

**9 Exercise of powers**

Where a power of appointment by deed or writing, otherwise than by will, is exercised by deed executed in the manner required by this Act, the deed shall be deemed to be a valid exercise of the power, notwithstanding that by the instrument creating the power some additional or other form of execution is required.

Compare: 1908 No 152 s 33

**10 Partitions, exchanges, etc**

No partition, exchange, lease, assignment, or surrender (otherwise than by operation of law) of any land shall be valid at law unless the same is made by deed, except a lease for a term not exceeding a tenancy of one year, which lease may be made either by writing or by parol.

Compare: 1908 No 152 s 34

**11 Appointments**

No appointment to be made by deed or writing (otherwise than by will) in exercise of a power shall be valid unless the same is executed as a deed is hereby required to be executed.

Compare: 1908 No 152 s 35

**12 Disclaimers**

No disclaimer of any land shall be valid unless the same is made by deed or by matter of record.

Compare: 1908 No 152 s 36

**13 Construction of word month**

(1) In all deeds, contracts, wills, orders, and other instruments executed or made on or after the 5th day of December 1944 (being the date of the passing of the Law Reform Act 1944), unless the context otherwise requires, the word **month** shall be deemed to mean a calendar month.

(2) This section shall bind the Crown.

Compare: 1944 No 18 s 4; 1950 No 54 s 5(2)

**Part 2****General rules affecting property****14 Uses not necessary**

Every limitation which at any time heretofore might have been made by way of shifting, springing, or executory use may be made by direct conveyance without the intervention of uses.

Compare: 1908 No 152 s 41

**15 Certain forms of assurance abolished**

The legal estate in any land shall not pass by a covenant to stand seised, or by any contract for the sale and purchase of land, or by livery of seisin.

Compare: 1908 No 152 s 42

**16 Estates tail abolished**

(1) In any instrument coming into operation after the commencement of this Act, a limitation which, if this section had not been passed, would have created an estate tail (legal or equitable) in any land in favour of any person shall be deemed to create an estate in fee simple (legal or equitable, as the case may be) in that land in favour of that person to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail.

- (2) Where at the commencement of this Act any person is entitled to an estate tail (legal or equitable), whether in possession, reversion, or remainder, in any land, that person, save as hereinafter mentioned, shall be deemed to be entitled to an estate in fee simple (legal or equitable, as the case may be) in that land, to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail.
- (3) In subsection (2) of this section the expression **estate tail** includes that estate in fee into which an estate tail is converted where the issue in tail is barred, but the persons claiming estates by way of remainder are not barred; also an estate in fee voidable or determinable by the entry of the issue in tail; but does not include the estate of a tenant in tail after possibility of issue extinct.
- (4) Every District Land Registrar is hereby authorised to make all such entries in the register book as may be necessary to give effect to this section.

Compare: 1908 No 152 s 114

#### **17 Estates by wrong abolished**

No conveyance shall create any estate by wrong, or work a forfeiture.

Compare: 1908 No 152 s 43

#### **18 Freehold *in futuro* may be created**

An estate of freehold to take effect at a future time may be created by any deed by which a present estate of freehold may be created.

Compare: 1908 No 152 s 4

#### **19 Estate in chattel real may be created by deed**

Any estate or interest that can be created by will in any chattel real may also be created by deed.

Compare: 1908 No 152 s 5

#### **20 When contingent remainders capable of taking effect**

- (1) A contingent remainder shall be capable of taking effect notwithstanding the destruction or determination by any means of

the particular estate immediately preceding, and notwithstanding that it may have been created expectant on the termination of a term of years.

- (2) A contingent remainder or a contingent interest lying between 2 estates vested in the same person shall prevent the merger of those 2 estates.

Compare: 1908 No 152 s 6

## **21 Rights of entry, etc**

Every right of entry, contingent remainder, and every contingent or executory or future estate, right, or interest in property, may be conveyed by deed:

Provided that no person shall be empowered by this Act to dispose of any expectancy he may have as next of kin, or under the Administration Act 1969.

Compare: 1908 No 152 s 37

The reference to the Administration Act in the proviso was substituted, as from 1 January 1971, for a reference to the Administration Act 1952 by section 84(1) Administration Act 1969 (1969 No 52).

## **22 Certain expressions to be words of purchase; rule in Shelley's case abolished**

- (1) Where by any instrument an interest in any property is expressed to be given to the heir or heirs or to any particular heir or any class of the heirs or issue of any person in words which but for this section or section 16 of this Act would under the rule of law known as the rule in Shelley's case have operated to give to that person an interest in fee simple or an entailed interest, those words shall operate as words of purchase and not of limitation and shall be construed and have effect accordingly.
- (2) Whereas section 7 of the Property Law Act 1908 made provision in the words following—namely, “Where a deed or will contains a limitation to any person for life, followed mediately or immediately by a limitation to the heirs or the heirs of the body of such person, the latter limitation shall not be deemed to coalesce with the former, but shall take effect as a contingent remainder”:

Now, therefore, to prevent doubt being made as to the effect of the said section, it is hereby declared that the said section in its

true meaning and effect extended at all times until the repeal thereof to establish the law as expressed in subsection (1) of this section and to abolish every rule or exception which that expression of the law extends to abrogate or abolish.

Compare: 1908 No 152 s 7

### **23 Restriction on executory limitations**

- (1) Where there is a person entitled to land for an estate in fee, or for a term of years absolute, or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect if and as soon as there is living any issue that has attained the age of 20 years, of the class on default or failure whereof the limitation over was to take effect.
- (2) This section applies only where the executory limitation is contained in an instrument coming into operation on or after the 1st day of January 1906 (being the date of the commencement of the Property Law Act 1905).

Compare: 1908 No 152 s 14

Subsection (1) was amended, as from 1 January 1971, by section 6 Age of Majority Act 1970 (1970 No 137) by substituting the expression “20” for the expression “21”.

24

Section 24 was repealed, as from 11 November 1964, by section 19(2) Perpetuities Act 1964 (1964 No 47).

25

Section 25 was repealed, as from 11 November 1964, by section 9(6) Perpetuities Act 1964 (1964 No 47).

### **26 Possibility upon a possibility**

- (1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is abolished, but without prejudice to any other rule relating to perpetuities.

- (2) Whereas section 8 of the Property Law Act 1908 made provision in the words following—namely, “No estate shall be void on account of its being made to depend on a possibility upon a possibility”:

Now, therefore, to prevent doubt being made as to the effect of the said section, it is hereby declared that the said section in its true meaning and effect extended at all times until the repeal thereof to establish the law as expressed in subsection (1) of this section and to abolish the rule thereby expressed to be abolished.

Compare: 1908 No 152 s 8

27

Section 27 was repealed, as from 25 September 1958, by section 5 Simultaneous Deaths Act 1958 (1958 No 37).

**28 Vendor’s lien taken away**

No vendor of any land shall have any equitable lien thereon by reason of the non-payment of the purchase money or any part of the purchase money for the same.

Compare: 1908 No 152 s 9

**29 Equitable waste**

An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer that right expressly appears by the instrument creating that estate.

Compare: 1908 No 152 s 10

**30 No merger by operation of law**

There shall not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

Compare: 1908 No 152 s 11

**31 Release of part of land charged not to be extinguishment of rent**

The release from a rent of any part of the land out of which it is payable shall not be a discharge of the residue of the land from the rent:

Provided that, where the owner of the part released is not the owner of the residue of the land charged with the rent, the owner of the residue shall be entitled to the same contribution from the owner of the part released as he would have been entitled to if no release had been made.

Compare: 1908 No 152 s 12

**32 Corporations may hold as joint tenants**

- (1) A body corporate shall be capable of acquiring and holding any property in joint tenancy in the same manner as if it were an individual, and where a body corporate and an individual or 2 or more bodies corporate become entitled to any property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint tenancy they shall be entitled to the property as joint tenants:

Provided that the acquisition and holding of property by a body corporate in joint tenancy shall be subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.

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

Compare: 1908 No 152 s 20

33

Section 33 was repealed, as from 18 October 1983, by section 2(1) Property Law Amendment Act 1983 (1983 No 29).

**33A Restrictions on ground of colour, race, etc, to be void**

- (1) Any provision in or in connection with any disposition of property (whether oral or in writing) made after the commencement of this section shall be void to the extent that its effect would be to prohibit or restrict the transfer, assignment, letting, sub-

letting, charging, or parting with the possession of the property or any part thereof, by any party to the disposition or his successor in title, to any person by reason only of the colour, race, or ethnic or national origins of that person or of any member of his family.

- (2) For the purposes of this section, the term **disposition** means—
  - (a) A sale, lease or letting, sublease or subletting, or licence; or
  - (b) A mortgage; or
  - (c) An agreement for any such disposition as aforesaid.
- (3) This section shall bind the Crown.

Section 33A was inserted, as from 10 September 1965, by section 2 Property Law Amendment Act 1965 (1965 No 16).

### **33B Restrictions requiring sterility**

- (1) Any provision in or in connection with any disposition of property (whether oral or in writing) made after the commencement of this section shall be void to the extent that its effect would be to require any party to the disposition, or any of his successors in title, or the spouse of any such party or successor, to be or to undertake to become sterile.
- (2) For the purposes of this section, the term **disposition** has the same meaning as it has in section 33A of this Act.
- (3) This section shall bind the Crown.

Section 33B was inserted, as from 16 December 1977, by section 2 Property Law Amendment Act 1977 (1977 No 119).

### **34 Disclaimer of powers**

- (1) A person to whom is given any power, whether coupled with an interest or not, may by deed release or contract not to exercise the power.
- (2) Any such person as aforesaid may by deed disclaim any such power, and after disclaimer shall not be capable of exercising or joining in the exercise of the power.
- (3) On any such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

- (4) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

Compare: 1908 No 152 s 25

**35 Intermediate income of contingent or executory gifts**

- (1) A contingent or future specific or residuary devise or bequest of property, and a specific or residuary devise or bequest of property upon trust for a person whose interest is contingent or executory, shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator except so far as the income or any part thereof may be otherwise expressly disposed of.
- (2) Where under an instrument other than a will property stands limited to a person for a contingent or future interest, or stands limited to trustees upon trust for a person whose interest is contingent or executory, that interest shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the time when the instrument comes into operation, except so far as the income or any part thereof may be otherwise expressly disposed of.
- (3) This section applies only to wills and instruments coming into operation after the commencement of this Act.

**36 Receipts for income by married infants**

- (1) A married infant shall have power to give valid receipts for all income (including statutory accumulations of income made during the minority) to which the infant may be entitled in like manner as if the infant were of full age.
- (2) This section applies only to receipts given after the commencement of this Act.

**37 Heirs and other words interpreted**

- (1) Where under the terms of any instrument coming into operation after the commencement of this Act any property vests in—
- (a) The heir or heirs of any person; or
  - (b) The next of kin of any person; or

- (c) The next of kin of any person to be determined in accordance with the Administration Act 1969,—  
the property shall vest in the persons who on the death of the person intestate would be beneficially entitled to his real and personal estate under the said last-mentioned Act, and in the same shares.
- (1A) If the instrument was executed before 1 February 2002, subsection (1) applies as if section 8 of the Administration Amendment Act 2001 had not been enacted.
- (2) This section applies only if and so far as a contrary or other intention is not expressed in the instrument, and shall have effect subject to the terms of the instrument and to the provisions therein contained.

The reference to the Administration Act in subsection (1) was substituted, as from 1 January 1971, for a reference to the Administration Act 1952 by section 84(1) Administration Act 1969 (1969 No 52).

Subsection (1A) was inserted, as from 1 February 2002, by section 12(1) Administration Amendment Act 2001 (2001 No 6).

### **38 Heirs of the body and other words interpreted**

- (1) Where under the terms of any instrument coming into operation after the commencement of this Act any property vests in—
- (a) The heir or heirs of the body of any person; or
  - (b) The heir or heirs male of any person, or the heir or heirs male of the body of any person; or
  - (c) The heir or heirs female of any person, or the heir or heirs female of the body of any person,—
- the property shall vest as follows—
- In case (a) in the issue of that person as tenants in common *per stirpes*; and
- In case (b) in the sons and issue of sons of that person as tenants in common *per stirpes*; and
- In case (c) in the daughters and the issue of daughters of that person as tenants in common *per stirpes*.
- (2) This section applies only if and so far as a contrary or other intention is not expressed in the instrument, and shall have effect subject to the terms of the instrument and to the provisions therein contained.

39

Section 39 was repealed, as from 27 October 1955, by section 13(3) Wills Amendment Act 1955 (1955 No 94).

**40 Appointments valid notwithstanding objects excluded**

- (1) An appointment in exercise of any power to appoint any property amongst several objects shall be valid and effectual notwithstanding that any one or more of the objects do not by the appointment or in default of appointment take a share or shares of the property.
- (2) Nothing in this section shall prejudice or affect any provision in any instrument creating any power which declares the amount of the share or shares from which no object of the power shall be excluded, or some one or more object or objects shall not be excluded.

Compare: 1908 No 152 s 30

**40A Property agreements between persons cohabiting as husband and wife**

No agreement between a man and a woman who are cohabiting as husband and wife although not legally married to each other, and no agreement made in contemplation of such cohabitation, with respect to the status, ownership, or division of any property owned by them or either of them at the date of the agreement or that may be acquired by them or either of them thereafter, shall be void or illegal as being contrary to public policy or founded upon an illegal consideration; and every such agreement, if otherwise valid, may be enforced according to its tenor.

Section 40A was inserted, as from 6 November 1986, by section 2 Property Law Amendment Act 1986 (1986 No 106).

41

Section 41 was repealed, as from 11 November 1964, by section 21(3)(a) Perpetuities Act 1964 (1964 No 47).

42

Section 42 was repealed, as from 11 November 1964, by section 21(3)(a) Perpetuities Act 1964 (1964 No 47).

### **Part 3**

#### **Assurances of real and personal property**

**43 Fee to pass without words of limitation**

Where land is conveyed to any person without words of limitation, the conveyance shall be construed to pass the fee simple or other whole estate or interest that the party conveying had power to dispose of.

Compare: 1908 No 152 s 3

**44 Form of conveyance**

A deed according to the form in Schedule 2 to this Act, or to the effect thereof, shall be effectual to pass any land and the possession thereof.

Compare: 1908 No 152 s 38

**45 Conveyance to vest ownership**

Where any land is conveyed directly and immediately to any person, the whole legal and equitable ownership of the land shall vest in that person.

Compare: 1908 No 152 s 39

**46 Conveyance subject to trust**

Where any land is so conveyed to any person in trust for any other person, the whole legal ownership of that land shall vest in the person to whom the same is so directly and immediately conveyed, subject, however, to a trust for the benefit of the other person.

Compare: 1908 No 152 s 40

**47 What a conveyance of land is deemed to include**

- (1) A conveyance of land shall be deemed to include, and shall operate to convey with the land, all rights, easements, and appurtenances belonging to the land or therewith usually held or enjoyed.
- (2) This section applies only in so far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms and provisions of the conveyance.

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

Compare: 1908 No 152 s 55

- 48 Declaration by tenants in common to become joint tenants**  
Any 2 or more persons in whom any property is beneficially vested as tenants in common may by deed declare that they will be joint tenants thereof, and thereupon the property shall vest in them as joint tenants.

Compare: 1908 No 152 s 18

**49 Person may convey property to himself**

A person may convey or mortgage property for any estate or interest to himself or to himself jointly with another or others.

Compare: 1908 No 152 s 19

Section 49 was amended, as from 13 December 1968, by section 2 Property Law Amendment Act 1968 (1968 No 101) by inserting the words “or mortgage”.

**49A Certain instruments to be in writing**

- (1) No legal interest in land may be created or disposed of except by writing signed by the person creating or conveying the same or by his agent lawfully authorised in writing in that behalf, or by will, or by operation of law.
- (2) A declaration of trust respecting any land or any interest in land shall be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.
- (3) A disposition of an equitable interest or trust subsisting at the time of the disposition shall be in writing signed by the person disposing of the same or by his agent lawfully authorised in writing in that behalf, or by will.
- (4) This section does not affect the creation or operation of resulting, implied, or constructive trusts.
- (5) Nothing in this section shall—
- (a) Invalidate dispositions by will; or

- (aa) Affect the creation of any lease—
    - (i) Of land subject to the Land Transfer Act 1952, for a term of less than 3 years; or
    - (ii) Of any other land, for a term not exceeding one year; or
  - (b) Affect any interest validly created before the commencement of this section; or
  - (c) Affect the right to acquire an interest in land by virtue of taking possession; or
  - (d) Affect the operation of the law relating to part performance.
- (6) This section is in substitution for sections 1 to 3 and 7 to 9 of the Statute of Frauds 1677 of the Parliament of England, and those sections shall cease to be in force in New Zealand, except in respect of the creation or conveyance of any interest in land, or a declaration of trust, or a disposition of an equitable interest or trust, before the commencement of this section.

Section 49A was inserted, as from 13 January 1981, by section 2 Property Law Amendment Act 1980 (1980 No 131).

Subsection (1) was amended, as from 11 December 1982, by section 2(1) Property Law Amendment Act 1982 (1982 No 49) by inserting the word “legal”.

Subsection (5)(aa) was inserted, as from 11 December 1982, by section 2(2) Property Law Amendment Act 1982 (1982 No 49).

Subsection (6) was amended by section 2(3) Property Law Amendment Act 1982 (1982 No 49) by inserting the expression “1 to 3 and”.

## Part 4

### Powers and conditions of sale and protection of purchasers and creditors

#### 50 Restrictions on and relief against rescission

Section 118 of this Act applies to any right or option to purchase any land where the purchaser is in possession of that land, as if any right of rescission or determination exercisable by a vendor were a right of re-entry or forfeiture exercisable by a lessor.

Compare: 1908 No 152 s 18

**51 Auction sales**

The provisions of section 59 of the Sale of Goods Act 1908 shall, with all necessary modifications, apply to sales by auction of every kind of property.

Compare: 1908 No 152 s 59

**52 Application of stated conditions of sale**

In the completion of any contract made at any time before or after the commencement of this Act for the sale of any property, and subject to any stipulation to the contrary in the contract,—

- (a) Thirty years shall be substituted for 60 years as the period of commencement of title which a purchaser may require; nevertheless, earlier title than 30 years may be required in cases similar to those in which earlier title than 60 years might immediately before the commencement of this Act have been required; and
- (b) The obligations and rights of vendor and purchaser shall be regulated by the following rules:
  - (i) Recitals, statements, and descriptions of facts, matters, and parties contained in instruments or statutory declarations 20 years old at the date of the contract shall, unless and except so far as they are proved to be inaccurate, be taken to be sufficient evidence of the truth of those facts, matters, and descriptions:
  - (ii) The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title where the purchaser on the completion of the contract has an equitable right to the production of the documents:
  - (iii) Such covenants for production as the purchaser can and does require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself and any necessary parties other than the purchaser:

- (iv) Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain those documents:
- (v) Where the land sold is held by lease (including underlease), the purchaser shall, on production of the receipt for the last payment due for rent under the lease before the actual completion of the purchase, assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion, and also, if the land is held by underlease, that all rent due under and all the covenants and provisions of every superior lease have been duly paid, performed, and observed up to that date:

Provided that this rule applies only to titles and purchasers on sales properly so called.

Compare: 1908 No 152 s 60

53

Section 53 was repealed, as from 1 January 1957, by section 89(1) Trustee Act 1956 (1956 No 61).

#### **54 Contracts where certificate of title is limited**

- (1) In the completion of any contract for the sale of any property, and subject to any stipulation to the contrary in the contract, where the land sold is comprised in a limited certificate of title under Part 12 of the Land Transfer Act 1952 issued before the making of the contract, the vendor shall at his own expense do such acts, prove such matters, and comply with such requisitions by the District Land Registrar as shall be necessary to cause the certificate to cease to be limited as to title, and the vendor shall pay the statutory fee payable on the issue of the first such limited certificate.
- (2) Nothing herein shall alter the law between vendor and purchaser relating to survey and plan of survey of the land.

**55 Rights of purchaser as to execution**

On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence or in that of his solicitor, as such, but shall be entitled to have at his own cost the execution of the conveyance attested by some person appointed by him who may, if he thinks fit, be his solicitor.

Compare: 1908 No 152 s 15

**56 Payment of consideration money to solicitor**

- (1) Where a solicitor produces an instrument having in the body thereof or endorsed thereupon a receipt for consideration money or other consideration, the instrument being executed or the endorsed receipt being signed by the person entitled to give a receipt for that consideration, the instrument shall be sufficient authority to the person liable to pay or give the consideration for his paying or giving the same to the solicitor, and it shall not be necessary for the solicitor to produce any separate or other direction or authority in that behalf from the person who executed or signed the instrument or receipt.
- (2) This section applies where the instrument is executed or the receipt signed by trustees.

Compare: 1908 No 152 s 29

**57 Validity of conveyances by executors, etc**

- (1) Where any person claims any property bona fide and for valuable consideration under any conveyance made by an executor or administrator, whether made to him or to any person through whom he derives title, that conveyance shall, so far as concerns the person so claiming, or any person claiming under him, be and be deemed to have always been valid and effectual.
- (2) On any sale by an executor or administrator the vendor's receipt in writing shall be a sufficient discharge to the purchaser for the purchase money thereby expressed to have been received, and neither the purchaser nor any person claiming under him shall be concerned to see to the application of the purchase money, or to inquire whether the sale was irregular or improper.

Compare: 1908 No 152 s 104

**58 Restriction on constructive notice**

- (1) A purchaser of land shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—
  - (a) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or
  - (b) It has in the transaction as to which a question of notice arises come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.
- (2) This section shall not exempt a purchaser from any liability under, or from any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and that liability or obligation may be enforced in the same manner and to the same extent as if this section had not been passed.
- (3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been passed.
- (4) This section shall not affect the provisions of section 39 of the Deeds Registration Act 1908.

Compare: 1908 No 152 s 115

**59 Orders of Court conclusive**

- (1) An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.
- (2) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court and purporting to be in pursuance of the Administration Act 1969 notwithstanding any exceptions in either of those Acts.

Compare: 1908 No 152 s 117

Subsection (2) was amended, as from 1 January 1957, by section 89(2) Trustee Act 1956 (1956 No 61) by omitting the words “the Settled Land Act 1908 or”.

The reference to the Administration Act in subsection (2) was substituted, as from 1 January 1971, for a reference to the Administration Act 1952 by section 84(1) Administration Act 1969 (1969 No 52).

**60 Alienation with intent to defraud creditors**

- (1) Save as provided by this section, every alienation of property with intent to defraud creditors shall be voidable at the instance of the person thereby prejudiced.
- (2) This section does not affect the law of bankruptcy for the time being in force.
- (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defraud creditors.

Compare: 1908 No 152 s 123

**61 Voluntary alienation of land with intent to defraud purchaser**

- (1) Every instrument (other than a will) which operates, or on registration would operate, as a voluntary alienation of land shall, if made with intent to defraud a subsequent purchaser, be voidable at the instance of that subsequent purchaser.
- (2) For the purposes of this section no such instrument shall, if registered before a subsequent purchase, be deemed to have been made with intent to defraud by reason only of that purchase, or that the instrument was not made for valuable consideration.

**62 Purchase in good faith of reversion not to be set aside for undervalue only**

No purchase of any reversionary interest in real or personal estate made in good faith and without fraud or unfair dealing shall hereafter be opened or set aside merely on the ground of undervalue.

Compare: 1908 No 152 s 31

**62A Rule in *Bain v Fothergill* abolished**

The rule of law known as the rule in *Bain v Fothergill* (limiting the damages recoverable in respect of a breach of a contract for the sale and purchase of land where the breach arises out of the vendor's inability to provide good title to the land) is hereby abolished.

Section 62A was inserted, as from 30 March 1995, by section 2(1) Property Law Amendment Act 1995 (1995 No 15).

## Part 5 Covenants and powers

**63 Benefit of covenants relating to land**

- (1) A covenant, whether express or implied under this or any other Act, relating to any land of the covenantee shall, unless a contrary intention is expressed, be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if those successors and other persons were expressed.
- (2) For the purposes of this section in connection with covenants restrictive of the user of land, the expression **successors in title** shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

Compare: 1908 No 152 s 47

**64 Burden of covenants relating to land**

- (1) A covenant, whether express or implied under this or any other Act, relating to any land of a covenantor or capable of being bound by him by covenant shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself and his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if those successors and other persons were expressed.
- (2) This section extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.
- (3) For the purposes of this section in connection with covenants restrictive of the user of land the expression **successors in title**

shall be deemed to include the owners and occupiers for the time being of the land.

**64A Covenants to run with land**

- (1) Subject to subsection (6) of this section, this section applies to every covenant, whether express or implied under this or any other Act, and whether positive or restrictive in effect, where—
  - (a) The covenant relates to any land of the covenantor and is intended to benefit the owner for the time being of the covenantee's land; and
  - (b) There is no privity of estate between the covenantor and the covenantee.
- (2) Notwithstanding any rule of law or equity to the contrary, but subject to subsections (3) to (5) of this section, every covenant to which this section applies shall, unless the contrary is expressed—
  - (a) Be binding in equity on—
    - (i) Every person who acquires a fee simple estate in the land (whether from the covenantor or any of the covenantor's successors in title, and whether for valuable consideration or not, and whether by operation of law or otherwise); and
    - (ii) Every other person who is for the time being the occupier of the land within the meaning of section 126 of this Act; and
  - (b) Cease to be binding on any such person when that person ceases to hold a fee simple estate in the land, or ceases to be the occupier of the land, as the case may require, but without prejudice to that person's liability for any breach of the covenant arising before that person ceases to hold that estate or to occupy the land.
- (3) The administrator of the estate of any person who, at the date of that person's death was bound by a covenant to which this section applies shall, if the covenant is positive in effect, be bound by the covenant only to the extent of the assets of the estate in the administrator's hands and available for the meeting of any obligation under the covenant.

- (4) The rights under a covenant to which this section applies shall rank in relation to all other unregistered interests affecting the same land as if it were an equitable and not a legal interest, but subject to the effect of notification under the Land Transfer Act 1952 pursuant to section 126A of this Act.
- (5) Nothing in this section shall limit or affect—
  - (a) The duty to observe the terms of any restrictive covenant affecting any land owned by any person holding any interest in the land (other than the occupier within the meaning of section 126 of this Act); or
  - (b) The law relating to restrictive covenants in gross.
- (6) Nothing in this section shall apply to any covenant entered into, or implied in respect of any particular land or any particular owners or occupiers of any land, before the 1st day of January 1987.

Section 64A was inserted, as from 6 November 1986, by section 3 Property Law Amendment Act 1986 (1968 No 106).

## **65 Effect of covenant with 2 or more jointly**

- (1) A covenant, whether express or implied under this or any other Act, and a contract by deed, and a bond or obligation by deed, made with 2 or more jointly, to pay money, or to make a conveyance, or to do any other act to them or for their benefit, shall be deemed to include, and shall by virtue of this Act imply, an obligation to do the act to or for the benefit of the survivor or survivors of them, and to or for the benefit of any other person on whom devolves the right to sue on the covenant, contract, bond, or obligation.
- (2) This section applies only to a covenant, contract, bond, or obligation made expressly or by implication on or after the 1st day of January 1906 and then only in so far as a contrary intention is not expressed in the deed containing the covenant or contract, or in the bond or obligation, and shall have effect subject to the provisions thereof.

Compare: 1908 No 152 s 48

**66 Covenants and agreements made by a person with himself and others**

- (1) A covenant, whether express or implied under this or any other Act, or an agreement made by a person with himself and another or others, shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been made with the other or others.
- (2) This section applies to covenants or agreements made or implied before or after the commencement of this Act.

**66A Covenants and agreements made by a person with himself**

- (1) A covenant (whether express or implied under this or any other Act), or an agreement, made by a person with himself as an incident of or with respect to or for the purposes of any conveyance or mortgage of property under section 49 of this Act, shall be capable of being enforced in like manner as if the covenant or agreement had been made by that person with another person.
- (2) This section shall apply to all covenants and agreements, whether made before or after the commencement of this section:

Provided that nothing in this section shall affect the rights of the parties under any judgment given in any Court before the commencement of this section, or under any judgment given on appeal from any such judgment, whether the appeal is commenced before or after the commencement of this section.

Section 66A was inserted, as from 13 December 1968, by section 3 Property Law Amendment Act 1968 (1968 No 101).

**67 Covenants to be joint and several**

Where under a covenant, whether express or implied under this or any other Act, more persons than one are covenantors, the covenant shall, unless a contrary intention is expressed, be deemed to bind the covenantors and any 2 or greater number of them jointly and each of them severally.

Compare: 1908 No 152 s 66

**68 Implied covenants may be negatived**

A covenant or power implied under this or any other Act shall have the same force and effect, and may be enforced in the same manner, as if it had been set out at length in the deed wherein it is implied:

Provided that any such covenant or power may be negatived, varied, or extended in the deed, or by a memorandum in writing endorsed thereon and executed as a deed is required to be executed by the parties to the deed intended to be bound thereby.

Compare: 1908 No 152 s 49

**69 Benefit of covenant for title**

The benefit of a covenant for title implied under this or any other Act shall be annexed and incident to and shall go with the estate and interest of the implied covenantee, and may be enforced by any person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

Compare: 1908 No 152 s 51

**70 Construction of covenants**

In the construction of a covenant or proviso, or other provision, in a deed, whether express or implied under this or any other Act, unless a contrary intention is expressed, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

Compare: 1908 No 152 s 52

**71 Power to re-enter not implied**

Neither the word **grant** nor the word **exchange** shall have the effect of creating any warranty or right of re-entry.

Compare: 1908 No 152 s 53

**Part 6**  
**Covenants implied in conveyances**  
**generally**

**72 Covenants implied in conveyance by way of sale, etc**

- (1) In every conveyance by way of sale, mortgage, marriage settlement, or lease, and in every other conveyance for valuable consideration, there shall be implied (except as provided by section 75 of this Act) the following covenants by the person or each of the persons who conveys, so far as regards the estate or interest expressed to be conveyed by him, with the person to whom the conveyance is made, or with the persons jointly to whom the conveyance is made as joint tenants, or with each of the persons to whom the conveyance is made as tenants in common, that is to say,—
- (a) A covenant for right to convey, meaning thereby a covenant that the conveying party has good right and full power to convey and assure the estate or interest purported to be conveyed, and that free and clear from all encumbrances other than such as are mentioned in the conveyance:
  - (b) A covenant for quiet enjoyment, meaning thereby a covenant that the party to whom the estate or interest is purported to be conveyed, and all persons claiming under him, shall quietly enjoy the same without any disturbance by any person:
  - (c) A covenant for further assurance, meaning thereby a covenant that the conveying party, his executors or administrators, and all other persons having or claiming any interest in the subject-matter of the conveyance, will, at the cost of the person requiring the same, do and execute all such acts and conveyances for the better assuring of the estate or interest purported to be thereby conveyed as may from time to time be reasonably required by the party to whom the same is conveyed or any person claiming under him:
  - (d) A covenant for production of title deeds, meaning thereby a covenant that the conveying party, his executors, administrators, or assigns, at the request and cost of the grantee, his executors, administrators, or as-

signs, will, unless prevented by fire or other inevitable accident, produce to him or them, or as he or they may direct, within New Zealand all registered deeds and instruments or evidences of title in the possession of the conveying party, and relating to the land conveyed as well as to other land; and also that the conveying party, his executors, administrators, and assigns, will, unless prevented as aforesaid, keep the said deeds and instruments or evidences of title in the meantime safe, whole, and uncanceled. This covenant shall run with the land, so as to bind only the person for the time being entitled to the possession of the deeds, instruments, or evidences of title.

- (2) The covenants for right to convey, for quiet enjoyment, and for further assurance shall, except in the case of a mortgage, be restricted to the acts, deeds and defaults of the conveying party, and of all persons through whom he derives title otherwise than by purchase for value, and of all persons claiming or to claim through, under, or in trust for him, or through or under any persons through whom he derives title as aforesaid.
- (3) The costs of any further assurance or production of title deeds required by a mortgagee under the implied covenants in that behalf shall during the continuance of the mortgage be borne by the mortgagor.
- (4) The covenant for quiet enjoyment shall not be implied against any mortgagor until default in payment of the principal money secured by the mortgage at the time fixed for the repayment thereof, or in payment of interest thereon, or until breach of any covenant by the mortgagor contained or implied in the mortgage; and until such default or breach as aforesaid it shall not be lawful for a mortgagee to enter into possession of the mortgaged land.

Compare: 1908 No 152 s 56

### **73 Covenants implied in conveyance subject to encumbrance**

- (1) In every conveyance by way of sale subject to an encumbrance there shall be implied a covenant by the person to whom the property is conveyed with the person making the conveyance to pay the money or perform the obligations secured by the

encumbrance, and to perform and observe the covenants and provisions of the encumbrance, and to keep harmless and indemnified the person making the conveyance in respect of all such money, obligations, covenants, and provisions.

- (2) This section applies only in so far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the provisions thereof.

Compare: 1908 No 152 s 57

#### **74 Covenants implied in conveyance of term of years**

In every conveyance of a term of years in land by way of sale or marriage settlement, and in every other conveyance of a term of years in land for valuable consideration, not being by way of mortgage, there shall be implied (except as provided by section 75 of this Act) the following covenants by each conveying party severally, for himself, his executors and administrators, to the extent of the interest parted with by him, but restricted to the acts, deeds, and defaults of that conveying party, and of all persons through whom he derives title otherwise than by purchase for value, and of all persons claiming through, under, or in trust for him, them, or any of them, that is to say,—

- That the rent reserved by the lease under which the land is held, and the covenants and conditions expressed or implied in the lease and to be performed and observed by the lessee, have been respectively paid, performed, and observed up to the date of the conveyance.

Compare: 1908 No 152 s 58

#### **75 Covenants implied in conveyance by trustees, etc**

- (1) Where any person conveys as trustee or mortgagee, or as executor or administrator of a deceased person, or as manager of a mentally disordered person, or as Public Trust, when appointed or acting as manager of a mentally disordered person's estate, or as manager of any property under Part 7 of the Public Trust Act 2001, or where any person conveys under an order of the Court, or in a fiduciary capacity, the covenants set out in paragraphs (a), (b), and (c) of subsection (1) of section 72 and in section 74 of this Act shall not be implied, but there shall be implied the following covenant on the part of the person con-

veying, which covenant shall be deemed to extend to his own acts only, namely:

- That he has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing whereby or by means whereof the subject-matter of the conveyance or any part thereof is or may be impeached, charged, affected, or encumbered in title, estate, or otherwise, or whereby or by means whereof he is in any wise hindered from conveying the subject-matter of the conveyance or any part thereof in the manner in which it is expressed to be conveyed.
- (2) The covenant implied by this section shall be deemed to be implied in every memorandum of discharge endorsed on or annexed to a mortgage in the same manner as if the memorandum were a deed of conveyance by the mortgagee.
- (3) Every conveyance of property by Public Trust, except when acting as agent or attorney, shall, in the absence of evidence to the contrary, be deemed to have been made by it in a fiduciary capacity within the meaning of this section.

Compare: 1908 No 152 s 61

Subsection (1) was amended, as from 18 October 1957, by section 2(1) Property Law Amendment Act 1957 (1957 No 39) by inserting the words “or as manager of any property under Part 5 of the Public Trust Office Act 1957”.

The words “the manager of a mentally disordered person” and “manager of a mentally disordered person’s” in subsection (1) were substituted, as from 1 April 1970, for the words “the committee of a mentally defective person” pursuant to section 129(4) and (7) Mental Health Act 1969 (1969 No 16).

Subsection (1) was amended, as from 1 March 2002, by section 170(1) Public Trust Act 2001 (2001 No 100) by substituting the words “Public Trust” for the words “the Public Trustee”. It was further amended by substituting the words “Part 7 of the Public Trust Act 2001” for the words “Part 5 of the Public Trust Office Act 1957”. See clause 2 Public Trust Act Commencement Order 2002 (SR 2002/11).

Subsection (3) was inserted, as from 18 October 1957, by section 2(2) Property Law Amendment Act 1957 (1957 No 39).

Subsection (3) was amended, as from 1 March 2002, by section 170(1) Public Trust Act 2001 (2001 No 100) by substituting the words “Public Trust” for the words “the Public Trustee”. It was further amended by substituting the word “it” for the word “him”. See clause 2 Public Trust Act Commencement Order 2002 (SR 2002/11).

## **Part 7** **Mortgages**

### *General provisions*

#### **76 Form of mortgage**

- (1) Mortgages of land may be made in the form in Schedule 3 to this Act, or by an ordinary conveyance by way of mortgage.
- (2) Every mortgage in the said form shall be deemed to be a conveyance of land by way of mortgage, and may be registered accordingly.

Compare: 1908 No 152 s 62

#### **77 No equitable mortgage by deposit of deeds**

No land shall be charged or affected, by way of equitable mortgage or otherwise, by reason only of any deposit of title deeds relating thereto, whether or not the deposit is accompanied by a written memorandum of the intent with which the deposit has been made.

Compare: 1908 No 152 s 63

#### **78 Covenants, etc, implied in all mortgages**

In every mortgage of land made after the commencement of this Act there shall be implied the covenants by the mortgagor and the powers and conditions set forth in Schedule 4 to this Act, except in so far as the same are varied or negatived in the mortgage or by deed, and except also that clauses 11, 12, and 13 of the said Schedule 4 shall be implied only in mortgages subject to a prior mortgage or mortgages, and that clauses 14, 15, and 16 of the said Schedule 4 shall be implied only in mortgages of a term of years in land.

Compare: 1908 No 152 ss 64, 65

#### **79 Endorsements on mortgages**

- (1) In the case of every mortgage (whether made before or after the commencement of this Act)—
  - (a) The mortgage debt may be discharged; and
  - (b) The interest of the mortgagee may be assigned; and

- (c) The amount secured by the mortgage may be increased or reduced; and
- (d) The rate of interest may be increased or reduced; and
- (e) The term or currency of the mortgage may be shortened, extended, or renewed; and
- (f) The covenants, conditions, and powers contained or implied in the mortgage may be varied, negated, or added to,—

by a memorandum endorsed on or annexed to the mortgage, and executed as a deed is required to be executed.

- (2) Any such memorandum for the purposes of paragraphs (a) and (b) of the last preceding subsection may be in such one of the forms in Schedule 5 to this Act as is applicable, or to the effect thereof, and shall operate as a deed, and may be registered.
- (3) A memorandum for the purposes of paragraphs (c), (d), (e), and (f) of subsection (1) of this section shall be in the corresponding form prescribed by section 102 of the Land Transfer Act 1952, and all the provisions of the last-mentioned section shall apply to the said paragraphs as if set out at length herein.
- (4) Every such memorandum of discharge shall vacate the mortgage debt, and, subject in the case of mortgages under the Land Transfer Act 1952 to the provisions of that Act, shall operate as a deed of reconveyance of the estate and interest of the mortgagee of and in the mortgaged property to the person for the time being entitled to the equity of redemption:  
Provided that nothing herein shall prevent a mortgagee from executing a deed of reconveyance of the mortgaged property if he thinks fit and the mortgagor requires it.
- (5) Every such memorandum of assignment shall operate as a deed of assignment of the mortgage debt, and as a deed of conveyance of the estate and interest of the mortgagee of and in the mortgaged property, and shall vest the debt and estate and interest in the assignee together with all the rights, powers, and remedies of the mortgagee expressed or implied in the mortgage.

Compare: 1908 No 152 s 67

**80 Effect of advance on joint account, etc**

- (1) Where, in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, 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, or where a mortgage, or such an obligation, or such a transfer, is made to more persons than one jointly and not in shares, the mortgage money or other money or money's worth for the time being due to those persons on the mortgage or obligation shall, as between them and the mortgagor or obligor, be deemed to be and remain money or money's worth belonging to them on a joint account; and the receipt in writing of the survivors or last survivor of them, or of the executors or administrators of the last survivor, or their or his assigns, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.
- (2) The said survivors or survivor, or the executors or administrators of the last survivor, or their or his assigns, may exercise all powers conferred by the mortgage or obligation as fully and effectually as the mortgagees, if living, could have done, subject, as to the lands under the Land Transfer Act 1952, to compliance with the provisions of that Act.
- (3) This section applies only in so far as a contrary intention is not expressed in the mortgage, obligation, or transfer, and shall have effect subject to the terms and provisions thereof.

Compare: 1908 No 152 s 76

**80A Security for further advances**

- (1) Where a mortgage purports to secure a principal sum the amount of which is specified therein (whether or not the mortgage also purports to secure further advances), the mortgagee shall have the right to advance from time to time to the mortgagor the whole or any part of the principal sum the amount of which is so specified so as to rank in priority to any subsequent mortgage, notwithstanding that the advance is made after the execution or registration of the subsequent mortgage, and whether or not the mortgagee has actual or

constructive notice of the subsequent mortgage at the time of making the advance:

Provided that any part of the principal sum which has been repaid to the mortgagee and readvanced to the mortgagor shall be deemed for the purposes of this section not to form part of the principal sum specified in the mortgage:

Provided also that nothing in this section shall derogate from the provisions of subsection (4) of section 102 of the Land Transfer Act 1952.

- (2) Where a mortgage granted after the commencement of this subsection purports to secure advances to be made from time to time, whether upon current account or otherwise, it shall be lawful to specify in the mortgage a maximum amount up to which the sum for the time being owing under the mortgage shall rank in priority to any subsequent mortgage; and, where a maximum amount is so specified, the mortgage shall take effect accordingly notwithstanding anything in any rule of law to the contrary, and notwithstanding that the sum for the time being owing under the mortgage may include money that has been repaid to the mortgagee and readvanced to or otherwise applied for the benefit of the mortgagor. Where a maximum amount is so specified, that amount may from time to time be varied, but no increase of that amount shall be binding on the mortgagee under any subsequent mortgage existing at the time of such variation unless consented to by him.
- (3) Where a mortgage granted after the commencement of this subsection secures the payment to the mortgagee of any money which he may be required to pay under any guarantee given by him to answer for an obligation entered into by the mortgagor with a third party, and the nature and extent of that obligation and the circumstances under which the mortgagee may be liable to honour his guarantee are set out in the mortgage, all money which the mortgagee may subsequently be required to pay pursuant to that obligation shall, together with interest thereon, rank in priority to any subsequent mortgage:  
Provided that nothing in this subsection shall destroy or adversely affect in any way the priority or protection which is conferred by virtue of registration under the provisions of any

Act on a subsequent mortgage in relation to a prior mortgage then unregistered.

- (4) Nothing in this section applies to a security interest to which the Personal Property Securities Act 1999 applies.

Section 80A was inserted, as from 15 October 1959, by section 2 Property Law Amendment Act 1959 (1959 No 31).

Subsection (2) was inserted, as from 19 September 1975, by section 2 Property Law Amendment Act 1975 (1975 No 36).

Subsection (2) was amended, as from 1 June 1982, by section 48(3) Credit Contracts Act 1981 (1981 No 27) by omitting the words “section 8 of the Moneylenders Amendment Act 1933 or”.

Subsection (3) was inserted, as from 19 September 1975, by section 2 Property Law Amendment Act 1975 (1975 No 36).

Subsection (4) was inserted, as from 1 May 2002, by section 191(1) Personal Property Securities Act 1999 (1999 No 126). *See* also Part 12 of that Act for transitional provisions.

### **80B Right of mortgagor to bring proceedings against mortgagee**

- (1) The rule of law whereby the mortgagor is barred from instituting any proceedings in relation to the mortgage against the mortgagee unless he has first offered to redeem the mortgaged land is hereby abolished.
- (2) Notwithstanding any provision to the contrary in the instrument of mortgage, the mortgagor may institute any proceedings against the mortgagee notwithstanding that he has not first offered to redeem the mortgaged land.

Section 80B was inserted, as from 13 November 1982, by section 3 Property Law Amendment Act 1982 (1982 No 49).

### *Redemption*

#### **81 Equity of redemption**

- (1) A mortgagor is entitled to redeem the mortgaged land at any time before the same has been actually sold by the mortgagee under his power of sale, on payment of all money due and owing under the mortgage at the time of payment.
- (2) A mortgagor is entitled to redeem the mortgaged land although the time for redemption appointed in the mortgage deed has not arrived; but in that case he shall pay to the mortgagee, in addition to any other money then due and owing under the

mortgage, interest on the principal sum secured thereby for the unexpired portion of the term of the mortgage.

- (3) A mortgagor seeking to redeem after the expiry of the term of the mortgage, or of any further term for which it has been renewed or extended, shall give to the mortgagee 3 clear months' notice in writing of his intention to redeem, or shall pay to the mortgagee 3 months' interest in lieu thereof:

Provided that this subsection shall not apply in any case where the mortgagee has entered into possession of the mortgaged land or any part thereof, or has taken any steps to realise his security.

- (4) For the purposes of this section the expression **money due and owing under a mortgage** includes all expenses reasonably incurred by the mortgagee—
- (a) For the protection and preservation of the mortgaged land, or otherwise in accordance with the provisions of the mortgage; and
- (b) With a view to the realisation of his security,—
- and in either case includes interest on the sums so expended at the rate expressed in the mortgage deed.
- (5) This section extends to mortgages comprising both land and chattels.
- (6) Nothing in this section shall affect the operation of section 16 of the Limitation Act 1950.

Compare: 1908 No 152 s 70; 1939 No 7 s 8; 1950 No 65 s 35

## **82 Mortgagor may require mortgagee to assign instead of reconveying**

- (1) Where a mortgagor is entitled to redeem he shall by virtue of this Act have power to require the mortgagee, instead of discharging, and on the terms on which he would be bound to discharge, to transfer the mortgage to any third person as the mortgagor directs; and the mortgagee shall by virtue of this Act be bound to transfer accordingly.
- (2) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary; but does not apply where the mortgagee is or has been in possession.

Compare: 1908 No 152 s 71; 1939 No 7 s 8

**83 Encumbrancer to have the like right**

The like right to require a mortgagee to assign the mortgage debt to a third person shall belong to and may be enforced by each encumbrancer or by the mortgagor, notwithstanding any intermediate encumbrance; but a requisition of an encumbrancer shall prevail over a requisition of the mortgagor, and, as between encumbrancers, a requisition of a prior encumbrancer shall prevail over a requisition of a subsequent encumbrancer.

Compare: 1908 No 152 s 72; 1939 No 7 s 8

**84 Power for mortgagor to inspect title deeds**

A mortgagor, so long as his right to redeem subsists, shall, notwithstanding any stipulation to the contrary, be entitled from time to time at reasonable times, on his request and at his own costs, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged land in the custody or power of the mortgagee.

Compare: 1908 No 152 s 73; 1939 No 7 s 8

**85 Restriction on consolidation**

A mortgagor seeking to redeem any one mortgage shall, by virtue of this Act, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage that he seeks to redeem.

Compare: 1908 No 152 s 74; 1939 No 7 s 8

**86 Sale of mortgaged property in action for redemption**

- (1) A person entitled to redeem any mortgaged property may have a judgment or order for sale, instead of redemption, in an action brought by him either for redemption alone or for sale alone, or for sale or redemption in the alternative.
- (2) In any action, whether for redemption or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and

notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.

- (3) Where an action for sale is brought by a person interested in the right of redemption, the Court may, on the application of any defendant, direct the plaintiff to give security for costs, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.
- (4) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of encumbrancers.

Compare: 1908 No 152 s 83

### **87 Repayment when mortgagee cannot be found, etc**

- (1) Where any person entitled to receive or having received payment of any money secured by mortgage is out of the jurisdiction, cannot be found, or is unknown or is dead, or it is uncertain who is entitled, the Court, upon the application of the person entitled to redeem the mortgaged premises, may order the amount of the debt to be ascertained in such manner as the Court thinks fit, and direct the amount so ascertained to be paid into Court or, as the case may be, may by order declare that all money secured by the mortgage has been paid in full.
- (2) A certificate by the Registrar that such payment as aforesaid was directed and has been made or a sealed copy of the order of the Court declaring that all money secured by the mortgage has been paid in full shall, in favour of a purchaser of the land, upon registration, operate as a discharge of the land from the mortgage debt and as a deed of reconveyance in the same manner as a memorandum of discharge operates under subsection (4) of section 79 of this Act:

Provided that as between the mortgagor and the person so entitled to receive payment as aforesaid any amount which is eventually shown by the person entitled to the mortgage debt

to have been in fact due or payable over and above the amount so paid shall continue to be a debt due under the mortgage of the nature of a liability under a deed.

- (3) The Court shall order the amount so paid into Court to be paid to the person entitled, upon the application of that person, and on proof that the deed or instrument of mortgage, and all the title deeds which were delivered by the mortgagor to the mortgagee on executing the same, or in connection therewith, have been delivered up to the person by whom the amount was so paid into Court, or his executors, administrators, or assigns, or have been otherwise satisfactorily accounted for.
- (4) In the case of a mortgage under the Land Transfer Act 1952, upon production to the District Land Registrar of the certificate of the Registrar of the High Court as hereinbefore mentioned or of a sealed copy of the order of the Court declaring that all money secured by the mortgage has been paid in full—
  - (a) He shall on payment of the prescribed fee make an entry in the register book discharging the mortgage, stating the day and hour on which the entry is made:
  - (b) The entry shall be a discharge of the land from the mortgage:  
Provided that as between the mortgagor and the person so entitled to receive payment as aforesaid, any amount which is eventually shown by the person entitled to the mortgage debt to have been in fact due and payable over and above the amount so paid shall continue to be a debt due under the mortgage of the nature of a liability under a deed:
  - (c) The District Land Registrar shall endorse on the relevant certificate of title or other document of title, and also on the memorandum of mortgage, whenever those instruments are brought to him for the purpose, particulars of the entry.
- (5) In any case in which subsection (1) of this section applies, the person entitled to redeem the mortgaged premises, instead of applying to the Court, may tender to Public Trust the amount of the mortgage debt, or, as the case may be, proof that all money secured by the mortgage has been paid in full, and Public Trust, on proof to its satisfaction that the amount ten-

dered is the whole amount due under the mortgage, may receive the amount in trust for the mortgagee or other person entitled thereto, and in any such case or on proof to its satisfaction that all money secured by the mortgage has been paid in full, Public Trust shall sign a memorandum of discharge of the mortgage debt in the form numbered (1) in Schedule 5 to this Act, and every such memorandum of discharge shall operate as if it had been signed by the mortgagee himself:

Provided that as between the mortgagor and the person entitled to receive payment any amount which is eventually shown by the person entitled to the mortgage debt to have been in fact due or payable over and above the amount (if any) so paid shall continue to be a debt due under the mortgage of the nature of a liability under a deed.

- (6) Every such memorandum of discharge when registered shall, for the protection of any person dealing with the mortgagor in good faith and for value, be conclusive proof of the happening of all conditions necessary to entitle Public Trust to receive the mortgage debt (if any) and to sign the memorandum.
- (7) The production of Public Trust's receipt for the mortgage debt, or, as the case may be, the production of its certificate that all money secured by the mortgage has been paid in full, shall be sufficient authority to the person in possession of the instruments of title to the mortgaged property to deliver them to the mortgagor.
- (8) The Court may order any person in possession of the instruments of title to the mortgaged property to deliver them to the mortgagor on production of Public Trust's receipt for the mortgage debt, or, as the case may be, on production of its certificate that all money secured by the mortgage has been paid in full, and on payment of all proper charges (if any).
- (9) In any case where Public Trust discharges a mortgage under the powers conferred on it by this section, it shall incur no liability in respect of any loss incurred in respect of its so doing so long as it acts reasonably and in good faith. The onus of proving that Public Trust has not acted reasonably and in good faith shall be upon any person alleging it.

Compare: 1908 No 152 s 75

The words “High Court” in subsection (4) were substituted for the words “Supreme Court”, as from 1 April 1980, pursuant to section 12 Judicature Amendment Act 1979 (1979 No 124).

Subsection (5) was amended, as from 1 March 2002, by section 170(1) Public Trust Act 2001 (2001 No 100) by substituting the words “Public Trust” for the words “the Public Trustee”. It was further amended by substituting the word “its” for the word “his” wherever it occurs. *See* clause 2 Public Trust Act Commencement Order 2002 (SR 2002/11).

Subsection (6) was amended, as from 1 March 2002, by section 170(1) Public Trust Act 2001 (2001 No 100) by substituting the words “Public Trust” for the words “the Public Trustee”. *See* clause 2 Public Trust Act Commencement Order 2002 (SR 2002/11).

Subsection (7) was amended, as from 1 March 2002, by section 170(1) Public Trust Act 2001 (2001 No 100) by substituting the words “Public Trust’s” for the words “the Public Trustee’s”. It was further amended by substituting the word “its” for the word “his” wherever it occurs. *See* clause 2 Public Trust Act Commencement Order 2002 (SR 2002/11).

Subsection (8) was amended, as from 1 March 2002, by section 170(1) Public Trust Act 2001 (2001 No 100) by substituting the words “Public Trust’s” for the words “the Public Trustee’s”. It was further amended by substituting the word “its” for the word “his” wherever it occurs. *See* clause 2 Public Trust Act Commencement Order 2002 (SR 2002/11).

Subsection (9) was inserted, as from 18 October 1957, by section 3(1) Property Law Amendment Act 1957 (1957 No 39).

Subsection (9) was amended, as from 1 March 2002, by section 170(1) Public Trust Act 2001 (2001 No 100) by substituting the words “Public Trust” for the words “the Public Trustee”. It was further amended by substituting in each case the word “it” for the words “him” and “he” wherever they occur. *See* clause 2 Public Trust Act Commencement Order 2002 (SR 2002/11).

### *Rights of mortgagor in possession*

#### **88 Suit for possession of land by mortgagor**

A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice has been given by the mortgagee of his intention to take possession or to enter into the receipt of the rents and profits thereof, may sue for possession, or for the recovery of the rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

Compare: 1908 No 152 s 77

*Powers and rights of mortgagee and restrictions  
thereon*

**89 Foreclosure prohibited**

A mortgagee shall not in any case be entitled to foreclose the equity of redemption in any land.

Compare: 1908 No 152 s 69

**90 Mortgagee accepting interest not to call up without notice**

Where the mortgagor has made default in payment of the principal sum at the expiry of the term of the mortgage, or of any period for which it has been renewed or extended, and the mortgagee has accepted interest on the said sum for any period (not being less than 3 months) after default has been so made, then, so long as the mortgagor performs and observes all covenants expressed or implied in the mortgage, other than the covenant for payment of the principal sum, the mortgagee shall not call up and compel payment of the said sum without giving to the mortgagor 3 clear months' notice of his intention so to do.

Compare: 1908 No 152 s 68

**91 Powers of mortgagee in possession**

- (1) A mortgagee in possession of any land shall as against every subsequent encumbrancer and as against the mortgagor have power from time to time to grant a lease of the whole or any part of the mortgaged land for any term not exceeding 7 years.
- (2) No lease under this section shall be binding upon a prior encumbrancer except so far as he has consented thereto in that behalf.
- (3) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.
- (4) Every such lease shall be made to take effect in possession not later than 6 months after its date.
- (5) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

- (6) Every such lease shall contain a covenant by the lessee for the payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding one month.
- (7) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.
- (8) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage, and has effect subject to the terms of the mortgage and the provisions therein contained.
- (9) The mortgagor and the mortgagee may, by agreement in writing, whether or not contained in the mortgage, reserve to or confer on the mortgagee any further or other powers of leasing or having reference to leasing, and any further or other powers so reserved or conferred shall be exercisable as far as may be as if they were conferred by this section, and with all the like incidents, effects, and consequences:  
Provided that the powers so reserved or conferred shall not prejudicially affect the rights of any mortgagee interested under any other mortgage subsisting at the date of the agreement unless the mortgagee joins in or adopts the agreement.
- (10) Nothing in this section shall be construed to enable a mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the encumbrancers, if this section had not been passed:  
Provided that in the case of a mortgage of leasehold land a lease granted under this section shall reserve a reversion of not less than one day.
- (11) While a mortgagee is in possession of any land subject to the Land Transfer Act 1952, he shall be entitled to sue upon the covenants of every lease affecting the said land or any part thereof, and to exercise all other rights, powers, and remedies of the lessor under the said lease in all respects as though the reversion of the said land were for the time being vested at law in the mortgagee, whether the said lease shall have been granted by the mortgagee or by the mortgagor or any other person.

- (12) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.
- (13) No District Land Registrar or other person shall be concerned to inquire whether or not the occasion has arisen authorising a mortgagee to grant a lease of any land in accordance with this section; and no action shall lie under section 172 of the Land Transfer Act 1952 in respect of any loss, damage, or deprivation occasioned by the improper exercise by the mortgagee of any powers conferred by this section.
- (14) A mortgagee in possession of any land shall be entitled to accept a surrender of any lease thereof granted by him under this section.
- (15) For the purposes of this section a first mortgagee of any land shall be deemed to be in possession of the land if he is entitled to enter into possession thereof or to bring an action for possession thereof.

Compare: 1932 No 27 s 2

## **92 Restriction on exercise by mortgagee of his rights**

- (1) Subject to the provisions of this section, no power to sell land or to enter into possession of land conferred by any mortgage shall become or be deemed to have become exercisable, and no money secured by any mortgage of land shall become or be deemed to have become payable, by reason of any default (whether made before or after the commencement of this Act) in the payment of any money so secured or in the performance or observance of any other covenant expressed or implied in the mortgage unless and until the mortgagee serves on the owner for the time being of the land subject to the mortgage a notice that complies with the requirements of this section, and (in any case where the default complained of is capable of remedy) the owner fails to remedy the default before the date specified in the notice.
- (1A) Every notice shall be in the form prescribed by regulations made under this Act; but no notice shall be void by reason of any variation from the prescribed form unless the notice does not adequately inform the mortgagor of—

- (a) The nature and extent of the default complained of; and
- (b) The date (being a date that complies with the provisions of subsection (2) of this section) by which he is required to remedy the default (if it is capable of remedy); and
- (c) The rights that the mortgagee will be entitled to exercise if the default is not remedied within the specified period,—

and the variation materially prejudices the interests of the mortgagor.

- (1AA) For the purposes of subsection (1) and subsection (6) of this section, the entering into of a contract to sell or the granting of an option to purchase land shall not be regarded as the exercise of a power of sale if the contract or option is conditional (either solely or together with other conditions) on the failure by the owner to remedy a default specified in a notice under subsection (1) of this section served either before or after the contract is entered into or the option is granted, as the case may be.
- (2) The date to be specified in the notice as aforesaid shall not be earlier than 4 weeks from the service of the notice nor earlier than the date on which the power would have become exercisable or the money would have become payable if this section had not been passed. A notice under this section may be served before the last-mentioned date.
- (3) In any case to which the provisions of this section and of section 90 of this Act apply, the 3 clear months' notice of intention to call up and compel payment of the principal sum required by the said section 90 and the notice required by this section may be combined in one document. Where those notices are so combined, the notice required by the said section 90 shall be deemed to have been given to the mortgagor at the time when the document containing the combined notices has been served on him in accordance with section 152 of this Act.
- (4) Where any land that is subject to the mortgage is also subject to any subsequent mortgage, and the mortgagee has actual notice of the name and address of the subsequent mortgagee, he shall forthwith after serving the notice on the owner serve a copy of the notice on the subsequent mortgagee. Failure to comply with the provisions of this subsection shall not of itself prevent

any of the powers referred to in subsection (1) of this section from becoming or being deemed to have become exercisable, or prevent any money secured by a mortgage from becoming or being deemed to have become payable.

- (4A) Where, in the case of land subject to the Land Transfer Act 1952, a caveat in Form N in Schedule 2 to that Act has been lodged (otherwise than by the District Land Registrar) subsequent to the registration of the mortgage, the provisions of subsection (4) of this section shall apply as if the caveat were a subsequent mortgage.
- (5) Where the notice relates to a power to enter into possession of any land the Court may in its discretion, upon the application of the mortgagee made *ex parte* or otherwise as the Court thinks fit, grant leave to the mortgagee to exercise the power at any time before the date specified in the notice, but not earlier than the date on which the power would have become exercisable if this section had not been passed. Leave may be granted under this subsection either unconditionally or upon or subject to such conditions as the Court thinks fit.
- (6) If at any time the mortgagee exercises the power of sale conferred by any mortgage of land and the amount realised is less than the amount owing under the covenant to repay expressed or implied in the mortgage, no action to recover the amount of the deficiency or any part thereof shall be commenced by the mortgagee against any person (not being the owner of the land subject to the mortgage at the time of the exercise of the power of sale) unless the mortgagee, at least one month before the exercise of the power of sale, serves on that person notice of his intention to exercise the power of sale and to commence action against that person to recover the amount of the deficiency in the event of the amount realised being less than the amount owing under the covenant to repay.
- (7) This section shall have effect notwithstanding any stipulation to the contrary.
- (8) Nothing in this section shall be construed to affect any sale or entry into possession made before the 8th day of September 1939 (being the date of the passing of the Property Law Amendment Act 1939), or any proceedings commenced be-

fore that date for the recovery of any money secured by a mortgage.

- (9) Notwithstanding anything to the contrary in the foregoing provisions of this section, if before the date mentioned in the last preceding subsection any mortgagee for the time being entitled by reason of any default of the mortgagor to exercise the power of sale conferred by his mortgage has made an application to a Registrar of the High Court to conduct the sale of the whole or any part of the land that is subject to the mortgage, the sale may be proceeded with and completed as if neither the Property Law Amendment Act 1939 nor this Act had been passed: Provided that in any such case the sale shall not be proceeded with if, before the time fixed for the sale, the mortgagor remedies the default complained of by the mortgagee in his application to the Registrar and pays to the mortgagee the expenses already incurred by him in connection with the intended sale and any money expended by him on or about the land subsequently to the time when he made his application to the Registrar; and for the purposes of this provision the Registrar, on the application of the mortgagor, may, if he thinks fit, postpone the sale for any period not exceeding one month.
- (10) For the purposes of this section the term **owner**, in relation to any land subject to a mortgage, means the original mortgagor, or if it appears from any register kept under the Land Transfer Act 1952, or from any instrument or instruments registered under the Deeds Registration Act 1908, that his estate or interest has been transferred or conveyed, whether by operation of law or otherwise, means the person appearing from the register or instrument or instruments to be entitled to that estate or interest.

Compare: 1939 No 6 s 3; 1950 No 27 ss 4, 5

Subsection (1) was amended, as from 11 December 1952, by section 4(1) Property Law Amendment Act 1982 (1982 No 49) by substituting the words “that complies with the requirements of this section, and (in any case where the default complained of is capable of remedy) the owner fails to remedy the default before the date specified in the notice” for the words “specifying the default complained of and a date on which the power will become exercisable or the money will become payable, as the case may be, and requiring the owner to remedy the default, and the owner fails to remedy the default before the date so specified”.

Subsection (1A) was inserted, as from 1 April 1983, by section 4(2) Property Law Amendment Act 1982 (1982 No 49).

A second subsection (1A) was inserted, as from 26 October 1993, by section 3 Property Law Amendment Act 1993 (1993 No 123). It would appear that this resulted from an error in numbering the subsections rather than from an intention by the legislature to repeal the existing subsection (1A).

The second subsection (1A) was substituted by subsection (1AA), as from 1 July 1994, by section 2(1) Property Law Amendment Act 1994 (1994 No 13).

Subsection (2) was amended, as from 11 December 1982, by section 4(3) Property Law Amendment Act 1982 (1982 No 49) by substituting the expression “4 weeks” for the expression “1 month”.

Subsection (4A) was inserted, as from 11 December 1982, by section 4(4) Property Law Amendment Act 1982 (1982 No 49).

The words “High Court” in subsection (9) were substituted for the words “Supreme Court”, as from 1 April 1980, pursuant to section 12 Judicature Amendment Act 1979 (1979 No 124).

### **93 Power to authorise land and minerals to be dealt with separately by mortgagee**

Where a mortgagee’s power of sale in regard to land has become exercisable but does not extend to the purposes mentioned in this section, the Court may, on his application, authorise him and the persons deriving title under him to dispose—

- (a) Of the land, with an exception or reservation of all or any mines and minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of minerals; or
- (b) Of all or any mines and minerals, with or without the said rights or powers, separately from the land,—

and thenceforth the powers so conferred shall have effect as if they were contained in the mortgage.

Compare: 1939 No 6 s 4

### **94 Power of sale in mortgage includes certain powers incident thereto**

Subject to the provisions of section 96 of this Act, every power of sale expressed or implied in a mortgage of land shall include the following powers as incident thereto, namely:

- (a) A power to impose or reserve or make binding, as far as the law permits, by covenant, condition, or otherwise,

on the unsold part of the mortgaged land or any part thereof, or on the purchaser and any land sold, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing:

- (b) A power to sell the mortgaged land, or any part thereof, or all or any mines and minerals apart from the surface,—
  - (i) With or without a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the land remaining subject to the mortgage or any part thereof, or to any land sold; and
  - (ii) With or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged land, and with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or connected with mining purposes in relation to the land remaining unsold, or any part thereof, or to any land sold; and
  - (iii) With or without covenants by the purchaser to expend money on the land sold.

Compare: 1939 No 6 s 5

**95 Mortgagee in possession may cut and sell certain trees**

Subject to the provisions of section 96 of this Act, a mortgagee in possession of any land as mortgagee shall have power to cut and sell timber and other trees on the land ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale to be completed within any time not exceeding 12 months from the making of the contract.

Compare: 1939 No 6 s 6

**96 Application of last 2 sections**

- (1) Subject to the provisions of this section, the last 2 preceding sections shall apply only to mortgages of land executed on or after the 8th day of September 1939 (being the date of the passing of the Property Law Amendment Act 1939).
- (2) The said sections apply only if and as far as a contrary intention is not expressed in the mortgage, and shall have effect subject to the terms of the mortgage and to the provisions therein contained.

Compare: 1939 No 6 s 7

**97 Mortgaged property may be sold or leased together at one price or rent**

- (1) In the exercise by the mortgagee of a power of sale or lease contained or implied in any mortgage—
  - (a) The mortgaged premises, or any part thereof, may be sold or leased, together with any other land or property of whatsoever nature or tenure which is the subject of the mortgage or of any collateral security from the mortgagor to the mortgagee, by one sale or lease at one price or rent; and in such case—
  - (b) The mortgagee shall fairly and equitably apportion all costs, expenses, purchase money, and rents between the properties sold or leased.
- (2) A failure by the mortgagee to make any such apportionment shall not affect the purchaser or lessee, nor the title to the property in his hands.
- (3) This section applies to all mortgages, whether made before or after the commencement of this Act.

**98 Mortgagee's receipts, discharges, etc**

- (1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage or arising thereunder, and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage or to see to the application of the money or securities so paid or transferred.

- (2) Money received by a mortgagee under his mortgage, or from the proceeds of securities comprised in his mortgage, shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act, but with this variation: that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money instead of those incident to sale.

*Sale by mortgagee through registrar of High Court*

**99 Sale of mortgaged land by Registrar**

- (1) Any present or future mortgagee of land may, at any time after he has become entitled to exercise the power of sale contained or implied in his mortgage, apply in writing to the Registrar who is acting within the land registration district in which the land intended to be sold is situate, or, if that land is situate in more districts than one, then to the Registrar acting in any one of those districts, to conduct the sale of the whole or any part of the land comprised in the mortgage, and in his application shall state the price (in this section and sections 100 and 101 of this Act termed the redemption price) at which the mortgagor may redeem the land to be sold.
- (1A) The applicant shall advise the Registrar in writing of the name and address (or, where they are unknown to the applicant, the last known place of residence or business) of the mortgagor, and, if the land in respect of which the application is made is subject to a prior or subsequent mortgage and the applicant has actual notice of the name and address of any person who is entitled as mortgagee under that mortgage, of the name and address of that person.
- (2) As soon as practicable after receiving an application under this section the Registrar shall—
- (a) Fix a convenient time (being not more than 3 months and not less than one month from the date of the application) and a convenient place for the conduct of the sale; and

- (b) Give written notice to any person (including the mortgagor) whose name and address has been supplied to him by the applicant under subsection (1A) of this section of the time and place at which the sale is to be conducted, and of the redemption price of the land to be sold; and
- (c) Give such notice of the sale by advertisement in a newspaper circulating in the neighbourhood as he considers sufficient; and
- (d) Approve of proper conditions of sale, employ an auctioneer, and do all other things necessary for the proper conduct of the sale.

Subsection (1) was amended, as from 11 December 1982, by section 5(1) Property Law Amendment Act 1982 (1982 No 49) by inserting the words “the price (in this section and sections 100 and 101 of this Act termed the redemption price) at which the mortgagor may redeem the land to be sold”.

Subsection (1A) was inserted, as from 19 September 1975, by section 3(1) Property Law Amendment Act 1975 (1975 No 36).

Subsection (1A) was amended, as from 11 December 1982, by section 5(2) Property Law Amendment Act 1982 (1982 No 49) by inserting the words “(or, where they are unknown to the applicant, the last known place of residence or business)”

Subsection (2) was substituted, as from 19 September 1975, by section 3(2) Property Law Amendment Act 1975 (1975 No 36).

Subsection (2)(b) was amended, as from 11 December 1982, by section 5(3) Property Law Amendment Act 1982 (1982 No 49) by substituting the words “redemption price of” for the words “value at which the applicant has estimated”.

## **100 Mortgagor may redeem at mortgagee’s valuation**

At any time before the sale the mortgagor may pay to the mortgagee either the redemption price of the land, or the amount due and owing under the mortgage, together with the expenses already incurred by the mortgagee in connection with the intended sale, and any money expended by him on or about the land subsequently to the time when he fixed the redemption price in his application for sale; and on such payment the mortgagee shall do the acts required by clause (10) of Schedule 4 to this Act:

Provided that where the sum so paid is less than the amount owing under the mortgage, the balance may be recovered from

the mortgagor under the covenant to repay expressed or implied in the mortgage.

Compare: 1908 No 152 s 79

Section 100 was amended, as from 11 December 1982, by section 5(4)(a) and (b) Property Law Amendment Act 1982 (1982 No 49) by substituting the words “redemption price of the land” for the words “value of the land, as estimated by the mortgagee”

Section 100 was amended, as from 11 December 1982, by section 5(4)(b) Property Law Amendment Act 1982 (1982 No 49) by substituting the words “fixed the redemption price in his application for sale” for the words “estimated the value thereof as aforesaid”.

### **101 Mortgagee may become purchaser**

- (1) The mortgagee may be a bidder at any such sale conducted as aforesaid, and become the purchaser of the land or any part thereof.
- (2) In the event of the mortgagee being declared the purchaser, the Registrar shall, on demand by the mortgagee, execute a deed of conveyance of the land purchased, or, where the land is under the Land Transfer Act 1952, a memorandum of transfer, expressed to be made between the Registrar (describing him by his official description only) and the mortgagee, with or without the addition of any other parties, and containing a recital that the sale has been made under this section.
- (3) In the said deed or memorandum the consideration to be stated shall be not less than the redemption price of the land.
- (4) Upon the execution of the said deed or memorandum by the Registrar, and subject, as to land under the Land Transfer Act 1952, to compliance with the provisions of that Act as to registration, the land shall vest in the mortgagee in the same manner as if it had been conveyed by the mortgagee to a purchaser at a sale made in exercise of the power of sale expressed or implied in the mortgage, and the mortgagee shall have the same estate and interest in the land as if he had purchased at such a sale, and no rule of law or equity had existed preventing him from purchasing and taking a conveyance.
- (5) A conveyance or transfer in pursuance of any such sale may be made by the Registrar to any person whom the mortgagee in writing may appoint, instead of to the mortgagee, and shall

have the same force and effect in favour of the person to whom it is made as it would have had if made to the mortgagee.

- (6) Every such memorandum of transfer may be registered under the Land Transfer Act 1952, and thereupon the estate or interest of the mortgagor therein expressed to be transferred shall vest in the transferee freed and discharged from the liability on account of the mortgage under which the power of sale has been exercised, or any estate or interest except an estate or interest which has priority over the mortgage or which by reason of the consent of the mortgagee is binding on him; and the District Land Registrar may make in the register book any entry necessary to show that every such liability, estate, or interest has been so determined.
- (7) Where any sale made under section 80 of the Property Law Act 1908 has not been completed by the execution of a proper conveyance, the conveyance may be made in the same manner and with the same effect as if that section had continued in force, and for the purpose only of completing the sale that section shall continue in force accordingly.

Compare: 1908 No 152 s 80

Subsection (3) was amended, as from 11 December 1982, by section 5(5) Property Law Amendment Act 1982 (1982 No 49) by substituting the words “redemption price of the land” for the words “value of the land as estimated by the mortgagee as aforesaid”.

## **102 Protection of bona fide purchaser**

Any conveyance or memorandum of transfer executed by the Registrar upon a sale shall, in favour of any person (other than a mortgagee purchasing under section 101 of this Act or the corresponding section of the Property Law Act 1905 or the Property Law Act 1908, or any person appointed by him) claiming by, through, or under that conveyance or memorandum of transfer (including a person claiming under a conveyance or memorandum of transfer to the mortgagee) in good faith and for valuable consideration, be conclusive proof that all the provisions of this Act, or, as the case may be, of the Property Law Act 1905 or the Property Law Act 1908 relating to the sale have been complied with, and that all things

have happened and all times have elapsed to authorise the conveyance or memorandum of transfer to be made.

Compare: 1908 No 152 s 81

**102A Payment of surplus money after sale when mortgagor cannot be found**

- (1) Notwithstanding anything in section 78 of this Act, or in Schedule 4 to this Act, or in any other provision of that Act or any other Act, or in any mortgage or other instrument, the provisions of this section shall apply to every sale of mortgaged property by the mortgagee of the property in exercise of his power of sale if any surplus money arising from the sale of the property cannot be paid to the mortgagor by reason of his not being found after reasonable inquiry by the mortgagee as to his whereabouts.
- (2) After any sale to which this section applies, the mortgagee may, on filing in the Court nearest to which he resides an affidavit giving to the best of his knowledge and belief particulars of the mortgagor, the mortgaged property, and the sale, and on serving a copy of the affidavit on the Secretary to the Treasury, pay the surplus money to the Crown by remitting it to the Secretary to the Treasury.
- (3) All money paid to the Crown under this section shall be credited by the Secretary to the Treasury to a Trust Bank Account established under section 67 of the Public Finance Act 1989; and sections 78 and 79 of the Trustee Act 1956 shall apply to all such money in every way as if the money were held by the Crown under section 77 of the Trustee Act 1956.
- (4) The receipt of the Secretary to the Treasury shall be a sufficient discharge to the mortgagee for any money paid to the Crown under this section.
- (5) If any mortgagee has obtained or is seeking a discharge in respect of any money under this section, the Secretary to the Treasury may at any time require the mortgagee to give such information in his possession or control as he may require in relation to the persons beneficially entitled to the money, including information as to the steps taken to trace those persons; and if any person refuses or wilfully neglects to give any such information that is in his possession or control when so

required, or wilfully gives any false information in answer to any such requisition, he commits an offence and shall be liable on summary conviction to a fine not exceeding \$200.

Section 102A was inserted, as from 8 December 1971, by section 3(1) Property Law Amendment Act 1971 (1971 No 121).

Subsection (3) was amended, as from 14 August 1986, by section 11 Public Finance Amendment Act 1986 (1986 No 67) by substituting the words “section 42 of the Public Finance Act 1977” for the words “section 38 of the Public Revenues Act 1953 (as substituted by section 3 of the Public Revenues Amendment Act 1963)”.

Subsection (3) was further amended, as from 1 July 1989, by section 86(1) Public Finance Act 1989 (1989 No 44) by substituting the words “section 67 of the Public Finance Act 1989” for the words “the Trust Account established under section 42 of the Public Finance Act 1977”.

### 103 Fees payable on applications

- (1) In respect of every application under section 99 of this Act there shall be paid to the Registrar by the mortgagee, in addition to the reasonable expenses of and incidental to the sale,—
- (a) The prescribed fee which shall accompany the application; and
  - (b) Where the land is sold, a further fee of 1/4 percent of the amount of the purchase money, but in no case shall the last-mentioned fee be less than the minimum or more than the maximum prescribed.
- (2) In any case where the land sold is sold subject to a mortgage, the money secured by the mortgage shall be deemed to be **purchase money** within the meaning of this section.

Compare: 1908 No 152 s 82; 1926 No 46 s 14

Subsection (1)(a) (previously amended by section 7 Decimal Currency Act 1964) was further amended, as from 23 November 1967, by section 2(1)(a) Property Law Amendment Act 1967 (1967 No 111) by substituting the words “ten dollars” for the words “two dollars”.

Subsection (1)(a) was further amended, as from 11 December 1982, by section 6(1) Property Law Amendment Act 1982 (1982 No 49) by substituting the words “the prescribed fee” for the words “a fee of \$10”.

Subsection (1)(b) (previously amended by section 7 Decimal Currency Act 1964) was further amended by section 2(1) Property Law Amendment Act 1967 (1967 No 111) by substituting the words “ten dollars or more than one hundred dollars” for the words “two dollars or more than forty dollars”.

Subsection (1)(b) was further amended, as from 11 December 1982, by section 6(1) Property Law Amendment Act 1982 (1982 No 49) by substituting the words “the minimum or more than the maximum prescribed”.

*Exercise of power of sale*

Sections 103A and 103B and the preceding heading were inserted, as from 1 July 1994, by section 4 Property Law Amendment Act 1993 (1993 No 123).

**103A Duty of mortgagee exercising power of sale**

A mortgagee who exercises a power of sale of land or other mortgaged property, including exercise of a power of sale through the Registrar of the High Court under section 99 of this Act, owes a duty to the mortgagor to take reasonable care to obtain the best price reasonably obtainable as at the time of sale.

Sections 103A and 103B and the preceding heading were inserted, as from 1 July 1994, by section 4 Property Law Amendment Act 1993 (1993 No 123).

**103B No defence or indemnity**

Notwithstanding any enactment or rule of law or anything contained in the deed or instrument by or under which the power of sale is conferred,—

- (a) It is not a defence to proceedings against a mortgagee for a breach of the duty imposed by section 103A of this Act that the mortgagee was acting as the mortgagor's agent or under a power of attorney from the mortgagor:
- (b) A mortgagee is not entitled to compensation or indemnity from the mortgaged property or the mortgagor in respect of any liability incurred by the mortgagee arising from a breach of the duty imposed by section 103A of this Act.

Sections 103A and 103B and the preceding heading were inserted, as from 1 July 1994, by section 4 Property Law Amendment Act 1993 (1993 No 123).

*Liability to mortgagee of purchaser of land  
subject to mortgage*

**104 Purchaser personally liable to mortgagee**

- (1) Where a person acquires any land by conveyance or transfer subject to any mortgage, the person acquiring the land shall, unless a contrary intention appears in the mortgage, and irrespective of whether he has signed the conveyance or transfer, become personally liable to the mortgagee for the payment of all principal money and interest secured by the mortgage, and

shall also become personally liable to the mortgagee for the fulfilment and observance of any other covenant or agreement contained or implied in the mortgage as if he were an original mortgagor of the land and had covenanted with the mortgagee for such payment as aforesaid and for the fulfilment and observance of such covenants and agreements as aforesaid, and the mortgagee shall have remedy directly against that person accordingly, but nothing herein shall extinguish the liability of any original mortgagor under the mortgage or the liability of any intermediate transferee of the land acquired by him subject to the mortgage aforesaid.

- (2) Nothing in this section shall render an executor or administrator or trustee personally liable in respect of the estate of a deceased person or in respect of the property subject to a trust, as the case may be, except to the extent of the property under his control as such executor or administrator or trustee.
- (3) Notwithstanding anything to the contrary in any mortgage, it shall not be obligatory on any mortgagor or any person acquiring land as aforesaid to procure or execute any covenant or contract by that person for the payment of principal, interest, or other money secured by or the observance or performance of the covenants, conditions, or agreements contained or implied in the mortgage, and no covenant, contract, or condition by a mortgagor or by any such person acquiring the land as aforesaid (whether expressed in a mortgage or in any instrument collateral to the mortgage) to procure the execution of or to execute any such covenant, condition, or agreement shall have any effect whatever.
- (4) This section applies to all mortgages where land subject to the mortgage is acquired as aforesaid after the commencement of this Act.
- (5) For the purposes of this section the term **conveyance** does not include a lease, or a conveyance by way of security only.

Subsection (2) was substituted, as from 18 October 1957, by section 4 Property Law Amendment Act 1957 (1957 No 39).

Subsection (5) was inserted, as from 1 January 1953, by section 2 Property Law Amendment Act 1953 (1953 No 4).

### *Regulations*

Section 104AA and the preceding heading were inserted, as from 11 December 1982, by section 7 Property Law Amendment Act 1982 (1982 No 49) and numbered section 104A. The section was renumbered “104AA”, as from 17 December 1982, by section 2(2) Property Law Amendment Act (No 2) 1982 (1982 No 173).

#### **104AA Regulations**

The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

- (a) Prescribing the form of notice required by section 92 of this Act to be given by the mortgagee before the mortgagee exercises his rights on default:
- (b) Prescribing the application fee payable under paragraph (a) of section 103(1) of this Act, and the minimum and maximum fees payable under paragraph (b) of that provision:
- (c) Prescribing the form and manner of advertising of sales to be conducted by Registrars under section 99 of this Act:
- (d) Prescribing conditions of sale to apply in respect of sales under that section, and providing for the variation of any such conditions by the Registrar, whether on the application of the mortgagee or of his own motion:
- (e) Providing for such other matters as are contemplated by or necessary for giving full effect to this Part of this Act and for its due administration.

This section and the preceding heading were inserted, as from 11 December 1982, by section 7 Property Law Amendment Act 1982 (1982 No 49) and numbered section 104A. The section was renumbered “104AA”, as from 17 December 1982, by section 2(2) Property Law Amendment Act (No 2) 1982 (1982 No 173).

### **Part 7A**

#### **Special provisions applying to mortgagees in possession of or receiving income from mortgaged property**

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

**104BB Application**

- (1) This Part of this Act applies—
  - (a) To a person who becomes a mortgagee in possession, whether personally or by an agent, of mortgaged property after the coming into force of this Part of this Act:
  - (b) A mortgagee who, whether personally or by an agent, first receives income from mortgaged property after the coming into force of this Part of this Act:
  - (c) Subject to subsections (3) to (6) of this section,—
    - (i) To a person who is a mortgagee in possession, whether personally or by an agent, of mortgaged property and who became a mortgagee in possession of the property before the coming into force of this Part of this Act:
    - (ii) To a mortgagee receiving, whether personally or by an agent, income from mortgaged property and who received income from the property before the coming into force of this Part of this Act.
- (2) For the purposes of subsection (1) of this section, a person is not to be regarded as a mortgagee in possession of mortgaged property or a mortgagee who received income from mortgaged property, as the case may be, by reason only of the fact that the person, whether personally or by an agent, has received income from the mortgaged property other than as the result of the exercise of a right to receive the income on a default under the mortgage.
- (3) Nothing in section 104DD or section 104II of this Act applies to a mortgagee referred to in subsection (1)(c) of this section.
- (4) Nothing in paragraph (a) of subsection (1) of section 104JJ of this Act requires a mortgagee referred to in subsection (1)(c) of this section to prepare a report in relation to a period of 6 months referred to in that paragraph that ends before the coming into force of this Part of this Act.
- (5) Nothing in paragraph (b) of subsection (1) of section 104JJ of this Act requires a mortgagee referred to in subsection (1)(c) of this section who has ceased to be in possession of mortgaged property or to be in receipt of income from mortgaged property before the coming into force of this Part of this Act to prepare a report under that paragraph.

- (6) Nothing in section 104OO of this Act requires a mortgagee who has ceased to be in possession of mortgaged property or to be in receipt of income from mortgaged property, as the case may be, before the coming into force of this Part of this Act to give a notice under that section.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

### 104CC Interpretation

- (1) In this Part of this Act,—

**Director**, in relation to—

- (a) A company within the meaning of section 2 of the Companies Act 1955 or a company within the meaning of section 2 of the Companies Act 1993, as the case may be, includes—
- (i) Any person occupying the position of director of the company by whatever name called; and
  - (ii) A person in accordance with whose directions or instructions a person referred to in subparagraph (i) of this paragraph may be required or is accustomed to act; and
  - (iii) A person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act:
- (b) An overseas company, includes an agent, officer, or employee responsible in New Zealand for the business of the overseas company:
- (c) Any other body corporate, means a person having functions similar to those of a director of a company.

- (2) In sections 104DD, 104LL and 104OO of this Act,—

**Registrar**, in relation to—

- (a) A company, has the same meaning as in section 2 of the Companies Act 1955 or section 2 of the Companies Act 1993, as the case may be:
- (b) A society registered under the Industrial and Provident Societies Act 1908, means the Registrar of Industrial and Provident Societies:

- (c) A society registered under the Incorporated Societies Act 1908, means the Registrar of Incorporated Societies:
- (d) A friendly society or a credit union registered under the Friendly Societies and Credit Unions Act 1982, means the Registrar of Friendly Societies and Credit Unions:
- (e) Any other body corporate registered under any enactment, means any person discharging the powers, functions, and duties of a registrar under that enactment.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

**104DD Notice of entry into possession of, or receipt of income from, mortgaged property**

- (1) A mortgagee to whom this Part of this Act applies must—
  - (a) Forthwith after entering, whether personally or by an agent, into possession of mortgaged property; or
  - (b) Forthwith after receiving, whether personally or by an agent, income from mortgaged property—  
give written notice of the fact to the mortgagor and also give public notice of the fact.
- (2) A notice given under subsection (1) of this section must include—
  - (a) The mortgagee's full name:
  - (b) The date on which the mortgagee entered into possession of the mortgaged property or first received income from the mortgaged property, as the case may be:
  - (c) The address of the registered office of the mortgagee, if the mortgagee is a body corporate, or the address of the residence of the mortgagee if the mortgagee is an individual, or an address specified by the mortgagee as an address to which communications relating to the mortgaged property may be sent:
  - (d) A brief description of the mortgaged property.
- (3) If the mortgagor is a body corporate, the mortgagee must send a copy of the public notice to the Registrar within 7 days after the date on which the mortgagee enters into possession of the mortgaged property or first receives income from the mortgaged property, as the case may be.

- (4) If a mortgagee fails to comply with this section, the mortgagee and, if the mortgagee is a body corporate, every director of the mortgagee, commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

#### **104EE Public notice**

- (1) Where, pursuant to section 104DD(1) of this Act, public notice must be given in relation to mortgaged property in any case where the mortgagor is not an overseas company, that notice must be given by publishing it—
- (a) In at least 1 issue of the *Gazette*; and
  - (b) In at least 1 issue of a newspaper circulating in the following areas in New Zealand:
    - (i) The area in which the mortgaged property is situated; and
    - (ii) The area in which is situated—
      - (A) The mortgagor's place of business; or
      - (B) If the mortgagor has more than 1 place of business, the mortgagor's principal place of business; or
      - (C) If the mortgagor has no place of business or neither the mortgagor's place of business nor principal place of business is known, the mortgagor's registered office, in the case of a body corporate, or the residence of the mortgagor, in the case of an individual.
- (2) Where, pursuant to section 104DD(1) of this Act, public notice must be given in relation to mortgaged property in any case where the mortgagor is an overseas company, that notice must be given by publishing it—
- (a) In at least 1 issue of the *Gazette*; and
  - (b) In at least 1 issue of a newspaper circulating in the following areas in New Zealand:
    - (i) The area in which the mortgaged property is situated; and
    - (ii) The area in which is situated—

- (A) The mortgagor's place of business; or
- (B) If the mortgagor has more than 1 place of business, the principal place of business of the mortgagor.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

#### **104FF Mortgagor to make information available to mortgagee**

- (1) A mortgagor, and, in the case of a mortgagor that is a body corporate, every director of the mortgagor must—
  - (a) Make available to a mortgagee to whom this Part of this Act applies all books, documents, and information relating to the mortgaged property in the possession or under the control of the mortgagor:
  - (b) If required to do so by the mortgagee, verify by statutory declaration that the books, documents, and information are complete and correct:
  - (c) Give the mortgagee such assistance as the mortgagee may reasonably require:
  - (d) If the mortgagor is a body corporate that has a common seal, make the common seal available for use by the mortgagee.
- (2) On the application of a mortgagee to whom this Part of this Act applies, the Court may make an order requiring the mortgagor or, if the mortgagor is a body corporate, any director of the mortgagor to comply with subsection (1) of this section.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

#### **104GG Accounting records**

- (1) A mortgagee to whom this Part of this Act applies must at all times keep accounting records that correctly record and explain the receipts, expenditure, and other transactions relating to the mortgaged property.
- (2) The accounting records must be retained for not less than 6 years after the mortgagee has ceased to be in possession of the mortgaged property or has ceased to receive the income from it, as the case may be.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

**104HH Duty in relation to money**

- (1) A mortgagee must keep money relating to the mortgaged property separate from other money held by or under the control of the mortgagee.
- (2) Nothing in subsection (1) of this section prevents a mortgagee from applying money relating to mortgaged property towards repayment of amounts owing under the mortgage.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

**104II First report by mortgagee**

- (1) Not later than 2 months after entering into possession of mortgaged property or first receiving income from mortgaged property, as the case may be, a mortgagee to whom this Part of this Act applies must prepare a report in relation to the property, including—
  - (a) Particulars of the mortgaged property:
  - (b) Particulars of the debts and liabilities to be satisfied from the mortgaged property:
  - (c) The names and addresses of the creditors with an interest in the mortgaged property:
  - (d) Particulars of any other mortgage or encumbrance over the mortgaged property held by any creditor (including the date on which it was created):
  - (e) Particulars of any default by the mortgagor in making relevant information available:
  - (f) Such other information as may be prescribed.
- (2) The report must also include details of—
  - (a) The events leading up to and giving rise to the right of the mortgagee to enter into possession of the mortgaged property or to receive the income from it, as the case may be, so far as the mortgagee is aware of them:
  - (b) Any proposal to dispose of the mortgaged property:
  - (c) Any amounts likely to be available for payment to other creditors of the mortgagor.

- (3) A mortgagee may omit from the report details of any proposals for disposal of the mortgaged property if the mortgagee considers that their inclusion would materially prejudice the exercise of the mortgagee's rights or powers.
- (4) If a mortgagee fails to comply with this section, the mortgagee, and, if the mortgagee is a body corporate, every director of the mortgagee, commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

#### **104JJ Further reports by mortgagee**

- (1) Not later than 2 months after—
  - (a) The end of each period of 6 months after a mortgagee to whom this Part of this Act applies entered into possession of mortgaged property or first received income from mortgaged property, as the case may be; and
  - (b) The date on which a person who was a mortgagee to whom this Part of this Act applied ceased to be in possession of the mortgaged property or the income from it, as the case may be,—the mortgagee or person, as the case may be, must prepare a further report summarising the state of affairs with respect to the mortgaged property, including all amounts received and paid during the period to which the report relates.
- (2) The report must also include details of—
  - (a) Property disposed of since the date of any previous report and any proposals for disposal of mortgaged property; and
  - (b) Any amounts likely to be available for payment to other creditors of the mortgagor.
- (3) A mortgagee may omit from the report required to be prepared in accordance with subsection (1)(a) of this section details of any proposals for disposal of the mortgaged property if the mortgagee considers that their inclusion would materially prejudice the exercise of the mortgagee's rights or powers.
- (4) Where a person fails to comply with this section, that person and, if that person is a body corporate, every director of the

body corporate, commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

#### **104KK Extension of time for preparing reports**

A period of time within which a person must prepare a report referred to in section 104II or section 104JJ of this Act may, on the application of that person, be extended by the Registrar.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

#### **104LL Persons entitled to receive reports**

- (1) A copy of every report prepared under section 104II and section 104JJ of this Act must be sent by the person required to prepare it to the mortgagor.
- (2) The copy of the report must be sent to the mortgagor—
  - (a) At the address of the mortgagor's place of business; or
  - (b) If the mortgagor has more than 1 place of business, at the address of the mortgagor's principal place of business; or
  - (c) If the mortgagor has no place of business or neither the mortgagor's place of business nor principal place of business is known, at the address of the mortgagor's registered office, in the case of a body corporate, or the last known residence of the mortgagor, in the case of an individual.
- (3) Not later than 21 days after receiving a written request for a copy of a report prepared under section 104II or section 104JJ of this Act from—
  - (a) A creditor, director, or surety of the mortgagor; or
  - (b) Any other person with an interest in any of the mortgaged property; or
  - (c) The authorised agent of any of them—and on payment of the reasonable costs of making and sending the copy, the person who prepared the report must send a copy of the report to the person requesting it.
- (4) Within 7 days after preparing a report under section 104II or section 104JJ of this Act in relation to a grantor that is a body

corporate, the person who prepared the report must send or deliver a copy of the report to the Registrar.

- (5) Where a person fails to comply with this section, that person and, if that person is a body corporate, every director of the body corporate commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

#### **104MM Persons entitled to inspect reports**

A person to whom a report must be sent in accordance with section 104LL of this Act is entitled to inspect the report during normal business hours at—

- (a) The address of the registered office, residence, or other address of the person required to send it specified under section 104DD(2)(c) of this Act; or
- (b) Any other place of business of the person required to send it at any time after the expiration of 7 days after requesting the report to be made available for inspection at that place.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

#### **104NN Duty to notify breaches of other Acts**

- (1) A mortgagee to whom this Part of this Act applies of a mortgagor that is a company and that considers that the mortgagor or any director of the mortgagor has committed an offence against the Companies Act 1955 or the Securities Act 1978 or the Companies Act 1993 must report that fact to the Registrar.
- (2) If a mortgagee fails to comply with subsection (1) of this section, the mortgagee and, if the mortgagee is a body corporate, every director of the mortgagee commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

**10400 Notice that mortgagee no longer in possession of, or receiving income from, mortgaged property**

- (1) Where a person ceases to be a mortgagee to which this Part of this Act applies of a mortgagor that is a company by reason of any act or decision on the part of that person as mortgagee, that person must, not later than 7 days after so ceasing, deliver to the Registrar notice in writing of the fact that the person has ceased to be in possession of the mortgaged property or has ceased to receive income from it, as the case may be.
- (2) Where a person fails to comply with subsection (1) of this section, that person and, if that person is a body corporate, every director of the body corporate commits an offence and is liable on summary conviction to a fine not exceeding \$10,000.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

**104PP Court may terminate or limit exercise of mortgagee's powers**

- (1) The Court may, on the application of a person referred to in subsection (2) of this section,—
  - (a) Order that a mortgagee in possession—
    - (i) Must cease to exercise that person's powers as a mortgagee in possession as from a specified date; or
    - (ii) Must, as from a specified date, exercise that person's powers as a mortgagee in possession only in respect of specified property; or
  - (b) Order that a mortgagee who is receiving the income from any mortgaged property—
    - (i) Must cease to receive the income as from a specified date; or
    - (ii) Must cease to receive the income from specified mortgaged property as from a specified date.
- (2) Any of the following persons may apply to the Court under subsection (1) of this section:
  - (a) The mortgagor:
  - (b) If the mortgagor is a company, a liquidator:

- (c) If the mortgagor is a person who has been adjudged bankrupt, the Official Assignee of the estate of the mortgagor.
- (3) An order may be made under subsection (1) of this section only if the Court is satisfied that—
  - (a) The purpose of entering into possession of the mortgaged property has been satisfied; or
  - (b) Circumstances no longer justify the mortgagee remaining in possession of the mortgaged property or continuing to receive the income from it, as the case may be.
- (4) Unless the Court orders otherwise, a copy of an application under this section must be served on the mortgagee not less than 7 days before the hearing, and the mortgagee may appear and be heard at the hearing.
- (5) An order under subsection (1) of this section may be made on such terms and conditions as the Court thinks fit.
- (6) An order under this section does not affect any other mortgage, security, or charge over the mortgaged property.
- (7) The Court may, on the application of any person who applied for or is affected by the order, rescind or amend an order made under this section.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

#### **104PPA Preferential claims**

- (1) This section applies to a mortgagee, to which this Part applies, of the property of a company, other than a company in liquidation at the time the mortgagee became such a mortgagee, if the mortgagee became such a mortgagee under a security interest that—
  - (a) is over all or any part of the company's accounts receivable and inventory or all or any part or either of them; and
  - (b) is not a purchase money security interest that has been perfected at the time specified in section 74 of the Personal Property Securities Act 1999; and
  - (c) is not a security interest that has been perfected under the Personal Property Securities Act 1999 at the time the mortgagee became such a mortgagee and that arises

- from the transfer of an account receivable for which new value is provided by the transferee for the acquisition of that account receivable (whether or not the transfer of the account receivable secures payment or performance of an obligation).
- (2) A mortgagee to which this section applies must apply accounts receivable and inventory that are subject to the security interest or their proceeds—
- (a) First, to reimburse the mortgagee for the reasonable expenses of the mortgagee in entering into possession of the mortgaged property or receiving income from the mortgaged property, as the case may be, or of doing anything that the mortgagee is required or entitled to do; and
  - (b) Secondly, to pay preferential claims to the extent and in the order of priority specified in Schedule 7 (except clauses 1(1) and 2(1)(b)) to the Companies Act 1993— before paying from those assets any claim of the mortgagee.
- (3) In the application of Schedule 7 to the Companies Act 1993 in accordance with subsection (2) of this section,—
- (a) References to a liquidator are to be read as references to a mortgagee to which this section applies; and
  - (b) References to the commencement of the liquidation are to be read as references to the date on which the mortgagee became a mortgagee to which this section applies; and
  - (c) References to a company being put into or being in liquidation are to be read as references to the mortgagee becoming a mortgagee to which this section applies.
- (4) Nothing in this section applies in relation to a company in respect of whose property a person became a mortgagee to which this section applies before the commencement of the Property Law Amendment Act 1994 and the provisions of section 101 of the Companies Act 1955 shall continue to apply in relation to that company notwithstanding the repeal of that section.
- (5) In this section, the terms **account receivable**, **inventory**, **new value**, **proceeds**, **purchase money security interest**, and **security interest** have the same meanings as in the Personal Property Securities Act 1999.

- (6) The provisions of this section, as in force immediately before the commencement of the Personal Property Securities Act 1999, continue to apply in respect of a company's property that was subject to a floating charge that, before the commencement of that Act, became a fixed or specific charge.

Section 104PPA was inserted, as from 1 July 1994, by section 3 Property Law Amendment Act 1994 (1994 No 13).

Subsection (1) was substituted, as from 1 May 2002, by section 191(1) Personal Property Securities Act 1999 (1999 No 126). *See* also Part 12 of that Act for transitional provisions.

Section 104PPA(1)(b): amended, on 3 December 2007, by section 445 of the Insolvency Act 2006 (2006 No 55).

Section 104PPA(1)(c): amended, on 3 December 2007, by section 445 of the Insolvency Act 2006 (2006 No 55).

Subsection (2) was amended, as from 1 May 2002, by section 191(1) Personal Property Securities Act 1999 (1999 No 126) by substituting the words "accounts receivable and inventory that are subject to the security interest or their proceeds" for the words "property that is subject to the charge". It was further amended by section 191(1) of that Act by inserting, before the words "any claim", the words "from those assets". *See* also Part 12 of that Act for transitional provisions.

Section 104PPA(2)(b): amended, on 1 November 2007, by section 41 of the Companies Amendment Act 2006 (2006 No 56).

Subsections (5) and (6) were inserted, as from 1 May 2002, by section 191(1) Personal Property Securities Act 1999 (1999 No 126). *See* also Part 12 of that Act for transitional provisions.

### **104QQ Defences available to directors in proceedings for offences under this Part**

It is a defence to a director of any body corporate who is charged with an offence under this Part of this Act if he or she proves that—

- (a) The body corporate took all reasonable and proper steps to ensure that the relevant requirement of this Part of this Act was complied with; or
- (b) He or she took all reasonable steps to ensure that the body corporate complied with the relevant requirement of this Part of this Act; or
- (c) In the circumstances he or she could not reasonably have been expected to take steps to ensure that the body corporate complied with the relevant requirement of this Part of this Act.

Part 7A comprising sections 104BB to 104QQ was inserted, as from 1 July 1994, by section 5 Property Law Amendment Act 1993 (1993 No 123).

## Part 8 Leases and tenancies

### *General provisions*

#### **104A Interpretation**

- (1) For the purposes of the succeeding sections of this Part of this Act, except sections 117 to 121,—

**Lease**, in relation to any dwellinghouse, includes an underlease, an agreement for lease or underlease, a periodic tenancy, a tenancy arising by operation or implication of law (other than a tenancy at sufferance), and any other agreement or arrangement (whether oral or in writing) under which for valuable consideration in money or money's worth any person is given the right to occupy the dwellinghouse, whether or not the agreement or arrangement is expressed in the form of a licence or a grant of leave and licence for the use or occupation of the dwellinghouse; but does not include—

- (a) A lease of any land on which a dwellinghouse is erected if the lessee is entitled (whether beneficially or as trustee), on or before the termination of the tenancy, to remove the dwellinghouse or to receive compensation in respect of it:
- (b) A licence to occupy within the meaning of section 121A of the Land Transfer Act 1952:
- (c) A lease under which the lessor, or, where more persons than one are entitled as lessor, any of those persons is also entitled as lessee:
- (d) A lease to which Part 3 of the Unit Titles Act 2010 for the time being applies:

Subsection (1) lease: paragraph (b) was substituted, as from 1 July 1994, by section 2 Company Law Reform (Transitional Provisions) Act 1994 (1994 No 16).

Section 104A(1) lease paragraph (d): amended, on 20 June 2011, by section 233(1) of the Unit Titles Act 2010 (2010 No 22).

**Lessor and lessee**, in relation to a lease of a dwellinghouse, have corresponding meanings, but also, in relation to a lease

of any land, include the respective executors, administrators, successors in title, and assigns of the lessor and lessee.

- (2) For the purposes of this section and the succeeding sections of this Part of this Act, except sections 117 to 121, **dwelling-house** means any building or part of a building let as a separate dwelling; and includes any furniture or other chattels that may be let therewith; and also includes any land, outbuildings, or parts of buildings included in the tenancy; but does not include—
- (a) Any licensed premises within the meaning of the Sale of Liquor Act 1989; or
  - (b) Any premises that include more than 1.25 hectares of land where the lessee's income or a substantial part thereof is derived from the use of that land for agricultural purposes within the meaning of the Rent Appeal Act 1973; or
  - (c) Any camp site within the meaning of the Camping Ground Regulations 1985.
- (3) For the purposes of sections 104D and 104E of this Act, **Court** means a District Court, and any District Court shall have jurisdiction to hear and determine an application made under either of those sections accordingly.

Sections 104A-104F and the heading "General Provisions" were inserted, as from 19 September 1975, by section 4 Property Law Amendment Act 1975 (1975 No 36).

The reference to the Sale of Liquor Act 1989 in subsection (2)(a) was substituted, as from 1 April 1990, for a reference to the Sale of Liquor Act 1962 pursuant to section 230(1) Sale of Liquor Act 1980 (1989 No 63).

The Rent Appeal Act 1973 referred to in subsection (2)(b) was repealed, as from, by section 144(1) Residential Tenancies Act 1986 (1986 No 120)

In subsection (2)(b) the Rent Appeal Act 1973 was repealed by section 144(1) of the Residential Tenancies Act 1986 (1986 No 120). *See* section 142 of the latter Act. In subsection (2)(c) the Camping Ground Regulations 1985 (SR 1985/261), being the corresponding enactment in force, have been substituted for the revoked Camping Ground Regulations 1936.

In subsection (3) the words "District Court" were substituted for the words "Magistrate's Court", as from 1 April 1980, pursuant to section 18(2) District Courts Amendment Act 1979 (1979 No 125).

### **104B Crown to be bound**

The provisions of this Part of this Act shall, in relation to leases of dwellinghouses, bind the Crown.

Sections 104A-104F and the heading “General Provisions” were inserted, as from 19 September 1975, by section 4 Property Law Amendment Act 1975 (1975 No 36).

**104C Restrictions on contracting out**

- (1) Subject to the provisions of subsection (2) of this section and of subsection (2) of section 109 of this Act, no covenant or agreement, whether entered into before or after the commencement of the Property Law Amendment Act 1975 shall, as from the commencement of that Act, have any force or effect to deprive the lessor or lessee of any dwellinghouse of any right, power, privilege, or other benefit provided for by this Part of this Act.
- (2) Nothing in subsection (1) of this section shall apply in respect of any lease of a dwellinghouse granted in accordance with an order made under section 104D or section 104E of this Act, or in respect of any lease of a dwellinghouse if the rent thereby reserved does not exceed 50 percent of the equitable rent of the dwellinghouse.
- (3) Where, in any proceeding under this Part of this Act, it is asserted by any person that the rent reserved by the lease of a dwellinghouse does not exceed 50 percent of the equitable rent of that dwellinghouse, it shall be for the person making that assertion to prove it by showing that the rent does not exceed 50 percent of the equitable rent of the dwellinghouse as determined within the preceding period of 12 months by a Rent Appeal Board acting under the provisions of the Rent Appeal Act 1973.

Sections 104A-104F and the heading “General Provisions” were inserted, as from 19 September 1975, by section 4 Property Law Amendment Act 1975 (1975 No 36).

In subsection (3) the Rent Appeal Act 1973 was repealed by section 144(1) of the Residential Tenancies Act 1986 (1986 No 120).

**104D Leases of dwellinghouses intended to be demolished for public works, etc**

- (1) This section applies to—
  - (a) Any dwellinghouse on land owned by the Crown and held for future public works; and

- (b) Any dwellinghouse on land owned by a local authority and held for future urban renewal or redevelopment; and
  - (c) Any dwellinghouse on land, owned by any person other than the Crown or any local authority, that is—
    - (i) Designated for a public work in an operative or proposed district plan under the Resource Management Act 1991; or
    - (ii) Made subject to a notice of intention to take the land under the Public Works Act 1981; or
    - (iii) Made subject to the powers conferred by a middle-line proclamation issued under that Act; or
    - (iv)
- (2) Any person entitled and proposing to grant a lease of any dwellinghouse to which this section applies may, at any time before granting the lease, apply to the Court for an order authorising the leasing of the dwellinghouse in accordance with this section.
- (3) On any application made to it under subsection (2) of this section the Court may make an order authorising the leasing of the dwellinghouse for any period not exceeding 6 months, subject to such conditions as to the payment of rent, the carrying out of repairs, and other matters as the Court thinks fit.
- (4) The Court shall not make an order under subsection (3) of this section unless it is satisfied—
- (a) That the dwellinghouse complies with all statutory and local body requirements relating to public health, and to the provision of safeguards against and means of warning and escape in case of fire, so far as they apply to the dwellinghouse; and
  - (b) That because of the prospective demolition, redevelopment, or renovation of the dwellinghouse it would be unreasonable to require a lessor of the dwellinghouse to put it in a fit and habitable condition for residential purposes or to keep it in that condition while it is leased.
- (5) Neither the warranty set out in paragraph (a) of subsection (1) section 116H of this Act nor the covenant set out in paragraph (b) of that subsection shall be implied in any lease granted in accordance with an order made under this section.

- (6) Notwithstanding anything in subsection (3) of this section, the Court may from time to time make a further order in accordance with this section authorising the leasing of the dwelling-house for a further period not exceeding 6 months.

Sections 104A-104F and the heading “General Provisions” were inserted, as from 19 September 1975, by section 4 Property Law Amendment Act 1975 (1975 No 36).

Subsection (1)(c)(i) was substituted, as from 1 October 1991, by section 362 Resource Management Act 1991 (1991 No 69). The word “or” has been added to ensure uniformity of style.

In subsection (1)(c)(ii) the Public Works Act 1981, being the corresponding enactment in force, has been substituted for the repealed Public Works Act 1928.

In subsection (1)(c)(iv), Part 38 Local Government Act 1974, being the corresponding enactment in force, was substituted for Part 2 and Part 2A of the repealed Urban Renewal and Housing Improvement Act 1945.

Subsection (1)(c)(iv) was repealed, as from 1 July 2003, by section 262 Local Government Act 2002 (2002 No 84). *See* sections 273 to 314 of that Act as to the savings and transitional provisions.

#### **104E Leases of dwellinghouses where lessor intends to redevelop, etc**

- (1) Any person entitled and proposing to grant a lease of any dwellinghouse pending its demolition, removal, rebuilding, or renovation may, at any time before granting the lease, apply to the Court for an order authorising the leasing of the dwelling-house in accordance with this section.
- (2) On any application made to it under subsection (1) of this section the Court may make an order authorising the leasing of the dwellinghouse for any period not exceeding 6 months, subject to such conditions as to the payment of rent, the carrying out of repairs, and other matters as the Court thinks fit.
- (3) The Court shall not make an order under subsection (2) of this section unless it is satisfied—
- (a) That the applicant intends to demolish, remove, rebuild, or renovate the dwellinghouse within a reasonable period; and
  - (b) That the dwellinghouse complies with all statutory and local body requirements relating to public health, and to the provision of safeguards against and means of warning and escape in case of fire, so far as they apply to the dwellinghouse; and

- (c) That because of the prospective demolition, removal, rebuilding, or renovation of the dwellinghouse it would be unreasonable to require a lessor of the dwellinghouse to put it in a fit and habitable condition for residential purposes or to keep it in that condition while it is leased.
- (4) For the purposes of paragraph (a) of subsection (3) of this section the Court may require the applicant to produce any plans, specifications, contracts, or other evidence of his intention to demolish, remove, rebuild, or renovate the dwellinghouse as it may specify.
- (5) Neither the warranty set out in paragraph (a) of subsection (1) of section 116H of this Act nor the covenant set out in paragraph (b) of that subsection shall be implied in any lease granted in accordance with an order made under this section.
- (6) Notwithstanding anything in subsection (2) of this section, the Court may from time to time make a further order in accordance with this section authorising the leasing of the dwellinghouse for a further period not exceeding 6 months:  
Provided that the total period during which the leasing of a dwellinghouse is authorised under this section shall not exceed 2 years.

Sections 104A-104F and heading were inserted, as from 19 September 1975, by section 4 Property Law Amendment Act 1975 (1975 No 36).

## 104F

Impliedly repealed, as from 1 February 1987, by section 144(1) Residential Tenancies Act 1986 (1986 No 120).

Sections 104A-104F and heading were inserted, as from 19 September 1975, by section 4 Property Law Amendment Act 1975 (1975 No 36).

## 105 Tenancy from year to year not to be implied

No tenancy from year to year shall be created or implied by payment of rent; and if there is a tenancy it shall be deemed in the absence of proof to the contrary to be a tenancy determinable at the will of either of the parties by one month's notice in writing.

Compare: 1908 No 152 s 16; 1949 No 51 s 48(1)

### **106 Covenants implied in leases**

In every lease of land there shall be implied the following covenants by the lessee :

- (a) That he will pay the rent thereby reserved at the time therein mentioned:

Provided that in case the demised premises or any part thereof shall at any time during the continuance of the lease, without neglect or default of the lessee, be destroyed or damaged by fire, flood, lightning, storm, tempest, or earthquake so as to render the same unfit for the occupation and use of the lessee, then and so often as the same shall happen, the rent thereby reserved, or a proportionate part thereof, according to the nature and extent of the damage, shall abate, and all or any remedies for the recovery of the rent or the proportionate part thereof shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee, and in case of any dispute arising under this proviso the same shall be referred to arbitration under the provisions of the Arbitration Act 1908:

- (b) That he will, at all times during the continuance of the said lease, keep, and at the termination thereof yield up, the demised premises in good and tenantable repair, having regard to their condition at the commencement of the said lease, accidents and damage from fire, flood, lightning, storm, tempest, earthquake, and fair wear and tear (all without neglect or default of the lessee) excepted:

Provided that this covenant shall not be implied in any lease of a dwellinghouse.

Compare: 1908 No 152 s 84

Section 106 was amended, as from 19 September 1975, by section 5(1) Property Law Amendment Act 1975 (1975 No 36) by omitting the words “for himself, his executors, administrators, and assigns”.

Paragraphs (a) and (b) were amended, as from 19 September 1975, by section 5(2) Property Law Amendment Act 1975 by omitting the words “or they”.

Paragraph (b) proviso was inserted, as from 19 September 1975, by section 5(3) Property Law Amendment Act 1975 (1975 No 36).

**107 Powers in lessor**

In every lease of land there shall be implied the following powers in the lessor:

- (a) That he may, by himself or his agents, at all reasonable times, enter upon the demised premises and view the state of repair thereof, and may serve upon the lessee a notice in writing of any defect, requiring him, within such reasonable period as may be specified in the notice, to repair the same in accordance with the covenant in that behalf contained or implied in the lease:

Provided that this power shall not be implied in any lease of a dwellinghouse:

- (b) That whenever the rent or any part thereof, whether legally demanded or not, is in arrear for a period of 21 days, or whenever the lessee has failed to perform or observe any of the covenants, conditions, or stipulations contained or implied in the lease, and on the part of the lessee to be performed or observed, the lessor may re-enter upon the demised premises (or any part thereof in the name of the whole) and thereby determine the estate of the lessee therein, but without releasing him from liability in respect of the breach or non-observance of any such covenant, condition, or stipulation:

- (c) That whenever the rent or any part thereof is in arrear he may levy the same by distress:

Provided that this power shall not be implied in any lease of a dwellinghouse.

Section 107 was substituted, as from 19 September 1975, by section 6 Property Law Amendment Act 1975 (1975 No 36).

**107A Abolition of lessor's right to distrain for rent of a dwellinghouse**

- (1) No person shall be entitled to distrain for any rent due under any lease of a dwellinghouse.
- (2) Nothing in this section shall affect the manner in which any judgment debt may be enforced by any person.

Sections 107A and 107B were inserted, as from 19 September 1975, by section 7(1) Property Law Amendment Act 1975 (1975 No 36).

**107B Lessor may sell lessee's personal property following abandonment**

- (1) For the purposes of this section, the lessee of any dwelling-house shall be deemed to have vacated it if—
  - (a) He has not tendered to the lessor any sum by way of rent during the preceding period of 2 months, or any sum by way of rent in respect of that period; and
  - (b) He has not communicated with the lessor in any way during that period of 2 months; and
  - (c) The lessor has no knowledge of the lessee having been in the dwellinghouse at any time during that period.
- (2) If the lessee of any dwellinghouse vacates it—
  - (a) Leaving in the dwellinghouse any personal property; and
  - (b) Owing to the lessor any debt by way of rent in arrear or damages for breach of covenant—the lessor may, in satisfaction of the debt, sell and dispose of any of the personal property in accordance with the provisions of this section.
- (3) If the lessee's present whereabouts are known to the lessor, the lessor shall give to the lessee at least 7 days' notice of his intention to sell the personal property under this section.
- (4) The lessor shall in every case give notice of the sale by advertisement in a newspaper published in the locality in which the dwellinghouse is situated. The advertisement shall state that the sale will be held on or after a specified date (being not sooner than 7 days after the publication of the advertisement), and shall give a brief description of the property to be sold, together with the name of the lessee.
- (5) The lessor may apply the proceeds of the sale in or towards payment of the debt and of the costs and expenses of the advertising and sale, and shall, on demand by the lessee, pay the surplus (if any) to the lessee. If any such surplus is unclaimed for a period of 3 months the lessor shall pay it to the Commissioner of Inland Revenue as unclaimed money, and section 11 of the Unclaimed Money Act 1971 shall apply accordingly.
- (6) Notwithstanding any of the foregoing provisions of this section, the lessor shall, on demand by the lessee or any other person entitled to possession of the property at any time be-

fore the property is sold, surrender the property to the lessee or that other person without charge of any kind.

- (7) The lessor shall not be liable to any other person in respect of the sale of any property under this section unless it is shown that at the time of the sale he had reason to believe that the property was not owned by the lessee.
- (8) No property sold under this section shall be recoverable from the purchaser unless it is shown that he purchased the property otherwise than in good faith.

Sections 107A and 107B were inserted, as from 19 September 1975, by section 7(1) Property Law Amendment Act 1975 (1975 No 36).

#### **108 Effect of licence to assign**

A condition or covenant not to assign or underlet or to do any other act without licence shall not be released or determined by any such licence.

Compare: 1908 No 152 s 87

#### **109 No fine for licence to assign**

- (1) In all leases containing a covenant, condition, or agreement that the lessee shall not, without the licence or consent of the lessor, assign, underlet, part with the possession, or dispose of the demised premises or any part thereof, that covenant, condition, or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of any such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent.
- (2) Neither the assignment or underletting of any leasehold by the assignee of a bankrupt, or by the liquidator of a company, or by the Sheriff under an execution, nor the bequest of a leasehold, shall be deemed to be a breach of any such covenant, condition, or agreement, unless the contrary is expressly declared in the lease.

- (3) For the purposes of this section, terms defined in section 117 of this Act have, except in relation to any dwellinghouse, the meanings assigned to them by that section.

Compare: 1908 No 152 s 95

Subsection (1) was amended, as from 19 September 1975, by section 8(1) Property Law Amendment Act 1975 (1975 No 36) by substituting the words “notwithstanding any express provision to the contrary” for the words “unless the lease contains an express provision to the contrary”.

Subsection (3) was amended, as from 19 September 1975, by section 8(2) Property Law Amendment Act 1975 (1975 No 36) by inserting the words “, except in relation to any dwellinghouse”.

### **110 Licence or consent not to be unreasonably withheld**

- (1) In all leases, whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against assigning, underletting, charging, or parting with the possession of demised premises or any part thereof without licence or consent, that covenant, condition, or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject to a proviso to the effect that the licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with any such licence or consent.
- (1A) For the purposes of this section, a licence or consent shall be treated as unreasonably withheld if it is withheld by reason of the colour, race, or ethnic or national origins of any person.
- (2) In this section the term **lease** has, except in relation to any dwellinghouse, the same meaning as in section 117 of this Act.

Compare: 1936 No 31 s 19

Subsection (1A) was inserted, as from 10 September 1965, by section 3 Property Law Amendment Act 1965 (1965 No 16). It was later amended, as from 19 September 1975, by section 9(1) Property Law Amendment Act 1975 (1975 No 36) by omitting the word “only”.

Subsection (2) was amended, as from 19 September 1975, by section 9(2) Property Law Amendment Act 1975 (1975 No 36) by inserting the words “, except in relation to any dwellinghouse”.

**111 Merger of reversion not to affect remedies**

Where the reversion of land subject to a lease is merged in any remainder or other reversion, or future estate, the person entitled to the estate into which the reversion has merged, and his executors or administrators, shall have the same remedy for non-performance or non-observance of the conditions or covenants expressed or implied in the lease as the person who would for the time being have been entitled to the mesne reversion so merged would have had.

Compare: 1908 No 152 s 86

**112 Rent and benefit of lessee's covenants to run with reversion**

- (1) Rent reserved by a lease, and the benefit of every covenant or provision therein having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein, shall be annexed and incident to and shall go with the reversionary estate in the land or in any part thereof immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and may be recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased. This subsection extends to a covenant to do some act relating to the land, notwithstanding that subject-matter may not be in existence when the covenant is made.
- (2) The benefit of every condition of re-entry or forfeiture for a breach of any covenant or condition contained in a lease shall be capable of being enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased, although that person became, by conveyance or otherwise, so entitled after the condition of re-entry or forfeiture had become enforceable.
- (3) This section shall not render enforceable any condition of re-entry or other condition waived or released before that person became entitled as aforesaid.

- (4) This section shall apply to leases whether made before or after the commencement of this Act, but with respect only to rent accruing due after the commencement of this Act, and to the benefit of a condition of re-entry or forfeiture for a breach committed after the commencement of this Act of any covenant, condition, or provision contained in the lease.
- (5) In the case of leases made before the commencement of this Act, with respect to rent accrued due before the commencement of this Act, and to the benefit of a condition of re-entry or forfeiture for a breach committed before the commencement of this Act of any covenant, condition, or provision contained in the lease, section 88 of the Property Law Act 1908 as in force before the passing of the Property Law Amendment Act 1951 shall continue to apply notwithstanding the repeals hereinafter contained.
- (6) This section applies only to leases made on or after the 1st day of January 1906.  
Compare: 1908 No 152 s 88

**113 Obligation of lessor's covenants to run with reversion**

- (1) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, in so far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, in so far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.
- (2) This section applies only to leases made on or after the 1st day of January 1906.  
Compare: 1908 No 152 s 89

**114 Apportionment of conditions on severance, etc**

- (1) Notwithstanding the severance by conveyance, surrender, or otherwise of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition in the lease, shall be apportioned and shall remain annexed to the several parts of the reversionary estate so severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land that has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had been the only land comprised in the lease.
- (2) This section applies only to leases made on or after the 1st day of January 1906.  
Compare: 1908 No 152 s 90

**115 Restriction on effect of waiver**

Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor or his executors, administrators, or assigns is proved to have taken place on or after the 1st day of January 1906 in any one particular instance, that actual waiver shall not be deemed to extend to any instance or any breach of covenant or condition other than that to which the waiver specially relates, or to be a general waiver of any such covenant or condition, unless an intention to that effect appears.

Compare: 1908 No 152 s 91

**116 Executor not personally liable for covenants**

An executor or administrator shall not be personally liable on any covenant entered into by a testator or intestate as a lessee of land, any rule of law notwithstanding.

Compare: 1908 No 152 s 92

*Leases of dwellinghouses*

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

**116A Interpretation**

For the purposes of sections 116E, 116F, 116I, and 116J of this Act, **Court** means a District Court and any District Court shall have jurisdiction to hear and determine an application made under any of those sections accordingly.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

The words “District Court” were substituted for the words “Magistrates’ Court”, as from 1 April 1980, pursuant to section 18(2) District Courts Amendment Act 1979 (1979 No 125).

**116B Leases to which sections 116C to 116L apply**

- (1) Nothing in paragraph (a) of subsection (1) of section 116H of this Act shall apply to any lease entered into before the commencement of the Property Law Amendment Act 1975.
- (2) Nothing in paragraph (b) of subsection (1) or subsection (2) of section 116H, or sections 116I to 116K or subsection (2) of section 116L of this Act shall apply to any lease entered into before the commencement of the Property Law Amendment Act 1975 until the day 12 months after the commencement of that Act.
- (3) The provisions of sections 116C to 116G and subsection (1) of section 116L of this Act shall apply to any lease of a dwelling-house entered into before or after the commencement of the Property Law Amendment Act 1975.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

**116C Lessee not to be liable for waste**

- (1) A lessee of a dwellinghouse shall not be liable for waste, whether voluntary, permissive, or equitable.
- (2) Nothing in subsection (1) of this section shall—

- (a) Limit or affect the lessee's obligations under any of the covenants implied in the lease by section 116D of this Act; or
- (b) Entitle the lessee to make any additions, alterations, or improvements to the dwellinghouse without the prior consent of the lessor.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

### **116D Covenants implied on part of lessees of dwellinghouses**

In every lease of a dwellinghouse there shall be implied the following covenants by the lessee:

- (a) That he will, at all times during the continuance of the tenancy,—
  - (i) Keep the dwellinghouse in a clean condition; and
  - (ii) Keep any grounds forming part of the dwellinghouse free from any accumulation of tins, bottles, paper, or other refuse or rubbish of any kind—  
having regard to the condition of the dwellinghouse (including any grounds) at the commencement of the tenancy and to any subsequent improvements effected by the lessor:
- (b) That he will, as soon as practicable, make good any damage to the dwellinghouse (including damage to any drains, fences, paths, lawns, gardens, or grounds, or to any clotheslines or other facilities provided in the grounds, or to any conduits serving the dwellinghouse, or to any windows, doors, fixtures, fittings, appliances, furniture, drapes, blinds, or other chattels or facilities leased with the dwellinghouse) caused by or arising from the wilful or negligent act or omission of the lessee or of any person permitted by him to enter or to remain in the dwellinghouse, not being damage caused by fair wear and tear:
- (c) That he will, at the termination of the tenancy, yield up the dwellinghouse (including any grounds) in a clean and tidy condition and free from any accumulation of tins, bottles, paper, or other refuse or rubbish of any kind, having regard to the condition of the dwelling-

house (including the grounds) at the commencement of the tenancy and to any subsequent improvements effected by the lessor.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

**116E Lessor's remedies where dwellinghouse not kept in clean and tidy condition, etc**

- (1) Where the lessee of any dwellinghouse is in breach of either of the covenants implied in the lease by paragraphs (a) and (b) of section 116D of this Act, the lessor may, without prejudice to any other remedy or right to which he may be entitled otherwise than under this section, apply to the Court for an order in accordance with this section.
- (2) If, on an application made under subsection (1) of this section, the Court is satisfied that the lessee is in breach of either of the covenants referred to in that subsection, the Court—
  - (a) Shall make an order requiring the lessee, within such period as the Court may specify in the order, to carry out in a proper and workmanlike manner all such work as the Court considers necessary or desirable to remedy the breach; and
  - (b) May make an order requiring the lessee to pay to the lessor such sum as the Court considers reasonable by way of compensation for the breach.
- (3) Notwithstanding anything in subsection (1) of this section, no application may be made under that subsection unless and until the lessor serves on the lessee a notice in writing specifying the particular breach complained of, and requiring the lessee, within such period (being not less than 7 days), as may be specified in the notice, to remedy the breach.
- (4) Notwithstanding any of the foregoing provisions of this section, if, within the period specified in any notice served on the lessee under subsection (3) of this section, or within such further period as the Court on application made to it in that behalf may allow, the lessee has not either—
  - (a) Carried out in a proper and workmanlike manner all work necessary or desirable to remedy the breach; or

(b) Served on the lessor a notice in writing denying the breach,—

the lessor may forthwith carry out any work necessary or desirable to remedy the lessee's default, and recover the reasonable cost of so doing from the lessee, whether by way of deduction from money paid on account of rent or otherwise.

- (5) If, on an application made under this section, the Court is satisfied that the dwellinghouse has been damaged by any person after the commencement of the lease, it shall be for the lessee to prove that the damage was not caused by and did not arise from the wilful or negligent act or omission of the lessee or of any person permitted by him to enter or to remain in the dwellinghouse.
- (6) For the purposes of an application under this section, or under section 116F of this Act, if any person (other than the lessor or any agent or servant of the lessor) wilfully or negligently damages the dwellinghouse while the lessee is in the dwellinghouse, the lessee shall be deemed to have permitted that person to enter and remain in the dwellinghouse unless the lessee satisfies the Court that he took all reasonable steps to prevent that person from entering the dwellinghouse or, as the case may require, to eject that person from the dwellinghouse.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

#### **116F Lessor's remedies where urgent work required**

- (1) Notwithstanding anything in section 116E of this Act, in any case where the lessee is in breach of either of the covenants referred to in paragraphs (a) and (b) of section 116D of this Act and, as a result of that breach, urgent work on the dwellinghouse is necessary to avoid the risk of further damage, the lessor may enter the dwellinghouse and carry out that work, and apply to the Court for an order requiring the lessee to pay to the lessor the reasonable cost of so doing.
- (2) On an application made under subsection (1) of this section, the Court shall, if it is satisfied—

- (a) That the work in respect of which the application is made has been carried out by the lessor in a proper and workmanlike manner;
- (b) That at the time when the work was carried out by the lessor he believed on reasonable grounds that it was urgently required to avoid the risk of further damage to the dwellinghouse;
- (c) That the work was made necessary as a result of the breach by the lessee of either of the covenants implied in the lease by paragraphs (a) and (b) of Section 116D of this Act; and
- (d) That in all the circumstances the lessor acted reasonably in carrying out the work,—  
make an order requiring the lessee to pay to the lessor the reasonable cost of carrying out the work.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

**116G Lessor may enter dwellinghouse to view condition or carry out work**

- (1) The lessor of a dwellinghouse may, after giving to the lessee not less than 24 hours' notice, enter the dwellinghouse at any reasonable time, personally or by his agent,—
  - (a) To inspect the state of repair of the dwellinghouse; or
  - (b) To carry out any work on the dwellinghouse required by or under this Act to be carried out by him.
- (2) Notwithstanding anything in subsection (1) of this section, the lessor may enter the dwellinghouse without prior notice to the lessee—
  - (a) With the consent of the lessee:
  - (b) Whenever he believes on reasonable grounds that the dwellinghouse is being damaged at that time, whether by any person or otherwise:
  - (c) Where the lessee has vacated the premises.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

**116H Warranty of habitability and covenant to repair implied**

- (1) In every lease of a dwellinghouse there shall be implied on the part of the lessor,—
- (a) A warranty that the dwellinghouse is at the commencement of the tenancy in a fit and habitable condition for residential purposes:
  - (b) A covenant that he will, at all times during the continuance of the tenancy, keep the dwellinghouse in a fit and habitable condition for residential purposes.
- (2) Notwithstanding anything in subsection (1) of this section, the covenant implied in a lease by paragraph (b) of that subsection shall not be construed—
- (a) As limiting or affecting the lessee's obligations under either of the covenants implied in the lease by paragraphs (a) and (b) of section 116D of this Act:
  - (b) As requiring the lessor to rebuild or reinstate the dwellinghouse in the event of damage or destruction by fire, flood, lightning, storm, tempest, earthquake, or other inevitable accident.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

**116I Lessee's remedies where dwellinghouse not in a fit and habitable condition**

- (1) Where the lessor of any dwellinghouse is in breach of the warranty implied in the lease by paragraph (a) of subsection (1) of section 116H of this Act, or of the covenant implied into the lease by paragraph (b) of that subsection, the lessee may, without prejudice to any other remedy or right to which he may be entitled otherwise than under this section, apply to the Court for an order in accordance with this section.
- (2) It shall not be a defence to an application made under this section in respect of a breach of the warranty implied in the lease by paragraph (a) of subsection (1) of section 116H of this Act to show that the lessee inspected or was invited to inspect the dwellinghouse before the commencement of the lease.

- (3) If, on an application made under subsection (1) of this section, the Court is satisfied that the lessor is in breach of the warranty or the covenant referred to in that subsection, the Court—
- (a) Shall make an order requiring the lessor, within such period as the Court may specify in the order, to carry out in a proper and workmanlike manner all such work as the Court considers necessary or desirable to remedy the breach; and
  - (b) May make an order requiring the lessor to pay to the lessee such sum as the Court considers reasonable by way of compensation for the breach; and
  - (c) May make an order reducing the rent that would otherwise be payable under the lease by such amount as the Court considers reasonable for the period during which the work required under paragraph (a) of this subsection is being carried out.
- (4) In determining for the purposes of this section whether a dwellinghouse is in a fit and habitable condition for residential purposes the Court shall have regard to the following matters, namely:
- (a) The general state of repair and decoration of the dwellinghouse;
  - (b) The stability of the dwellinghouse;
  - (c) The degree (if any) to which the dwellinghouse is damp;
  - (d) Whether the dwellinghouse is well-ventilated;
  - (e) The degree (if any) to which the dwellinghouse admits natural light;
  - (f) The bathroom and laundry facilities provided in the dwellinghouse, and the quality and quantity of the water supply to the dwellinghouse;
  - (g) The drainage and other facilities for the disposal of waste-water from the dwellinghouse;
  - (h) The sanitary appliances provided in the dwellinghouse, and the facilities for the disposal of sewage from the dwellinghouse;
  - (i) The facilities provided in the dwellinghouse for the storage, preparation, and cooking of food; and
  - (j) Such other matters as the Court considers relevant.

- (5) Notwithstanding anything in subsection (1) of this section, no application may be made under that subsection unless and until the lessee serves on the lessor a notice in writing specifying the particular breach complained of, and requiring the lessor, within such period (being not less than one month) as may be specified in the notice, to put the dwellinghouse in a fit and habitable condition for residential purposes.
- (6) Notwithstanding any of the foregoing provisions of this section, if, within the period specified in any notice served on the lessor under subsection (5) of this section, or within such further period as the Court on application made to it in that behalf may allow, the lessor has not either—
- (a) Put the dwellinghouse in a fit and habitable condition for residential purposes; or
  - (b) Served on the lessee a notice in writing denying the breach;—

the lessee may forthwith carry out any work necessary to put the dwellinghouse in a fit and habitable condition for residential purposes, and recover the reasonable cost of so doing from the lessor, whether by way of set-off against rent thereafter accruing due, or otherwise.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

### **116J Lessee's remedies where urgent work required**

- (1) Notwithstanding anything in section 116I of this Act, in any case where the lessor is in breach of the warranty implied in the lease by paragraph (a) of subsection (1) of section 116H of this Act, or of the covenant implied in the lease by paragraph (b) of that subsection, and, as a result of that breach, urgent work on the dwellinghouse is necessary to protect the safety or health of the lessee or any other person residing with the lessee or to avoid the risk of further damage to the dwellinghouse, the lessee may carry out that work and apply to the Court for an order requiring the lessor to pay to the lessee the reasonable cost of so doing.
- (2) On an application made under subsection (1) of this section, the Court shall, if it is satisfied—

- (a) That the work in respect of which the application is made has been carried out by the lessee in a proper and workmanlike manner;
- (b) That at the time when the work was carried out by the lessee, the lessee believed on reasonable grounds that it was urgently required to protect the safety or health of the lessee or any other person residing with the lessee or to avoid the risk of further damage to the dwelling-house;
- (c) That the work was made necessary as a result of the breach by the lessor of the warranty or the covenant referred to in subsection (1) of this section; and
- (d) That in all the circumstances the lessee acted reasonably in carrying out the work,—

make an order requiring the lessor to pay to the lessee the reasonable cost of carrying out the work.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

#### **116K Notice terminating lease void in certain cases**

- (1) Where a lessee under a lease of a dwellinghouse serves on the lessor a notice under subsection (5) of section 116I of this Act, or applies to the Court for an order under that section, or applies to the Court for an order under section 116J of this Act, or exercises or commences to exercise or makes known to the lessor his intention to exercise any other remedy to which he may be entitled in the event of a breach by the lessor of the warranty or the covenant implied in the lease by subsection (1) of section 116H of this Act, and by reason of the lessee so doing the lessor—
  - (a) Serves on the lessee a notice purporting to terminate the tenancy, the notice shall be void; or
  - (b) Evicts the lessee, the eviction shall be deemed wrongful and the lessor shall be liable in damages to the lessee accordingly.
- (2) In any proceedings brought by the lessor for the recovery of possession of a dwellinghouse or for the ejectment of the lessee it shall be a good defence to show that the lessor commenced the proceedings by reason of the lessee exercising or

commencing to exercise or making known to the lessor his intention to exercise any of the remedies specified or referred to in subsection (1) of this section.

- (3) In any case where it is alleged—
- (a) That by virtue of paragraph (a) of subsection (1) of this section a notice purporting to terminate the tenancy of a dwellinghouse is void; or
  - (b) That by virtue of paragraph (b) of that subsection the eviction of the lessee from a dwellinghouse was wrongful; or
  - (c) That the proceedings for the recovery of possession of a dwellinghouse or the ejectment of the lessee were commenced by the lessor by reason of the lessee having exercised or commenced to exercise or made known to the lessor his intention to exercise any of the remedies specified or referred to in subsection (1) of this section—
- and it is shown that the notice was served or the lessee was evicted or the proceedings were commenced (as the case may require) within 6 months after the lessee exercised or commenced to exercise or made known to the lessor his intention to exercise any of those remedies, it shall be for the lessor to prove that he did not serve the notice or evict the lessee or commence the proceedings (as the case may require) by reason of the lessee exercising or commencing to exercise or making known to the lessor his intention to exercise any of those remedies.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

## 116L

Section 116L was impliedly repealed, as from 1 February 1986, by section 144(1) Residential Tenancies Act 1986 (1986 No 120).

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

### **116M Notices may be given in prescribed form**

- (1) Any notice required to be given by a lessor of a dwellinghouse to the lessee or by the lessee of a dwellinghouse to the lessor

under any of the provisions of section 116A to 116L of this Act may be given in the prescribed form.

- (2) For the purposes of subsection (1) of this section the Governor-General may from time to time by Order in Council prescribe forms of notices to be given by lessors of dwellinghouses to lessees and by lessees of dwellinghouses to lessors under any of the said provisions of this Act.

Sections 116A to 116M and the preceding heading were inserted, as from 19 September 1975, by section 10 Property Law Amendment Act 1975 (1975 No 36).

### *Relief against forfeiture*

#### **117 Interpretation**

For the purposes of the next 2 succeeding sections,—

**Bankruptcy** does not include the voluntary winding up of any solvent company

**Lease** includes an original or derivative underlease, a grant securing a rent by condition, and an agreement for a lease where the lessee has become entitled to have his lease granted

**Lessee** includes an original or derivative underlessee, a grantee under any such grant as aforesaid, a person entitled under an agreement as aforesaid, and the executors, administrators, and assigns of a lessee

**Lessor** includes an original or derivative underlessor, a grantor as aforesaid, a person bound to grant a lease under an agreement as aforesaid, and the executors, administrators, and assigns of a lessor

**Underlease** includes an agreement for an underlease where the underlessee has become entitled to have his underlease granted

**Underlessee** includes any person deriving title through or from an underlessee.

Compare: 1908 No 152 s 93

#### **118 Restrictions on and relief against forfeiture**

- (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, condition, or agreement in the lease, shall not be enforceable by action or

otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation therefor in money to the satisfaction of the lessor.

- (1A) Where the lease in respect of which such a notice has been served on the lessee has been mortgaged and the lessor has actual notice of the name and address of the mortgagee, he shall forthwith after serving the notice on the lessee serve a copy of the notice on the mortgagee. Failure to comply with the provisions of this subsection shall not of itself prevent the exercise by the lessor of any right of re-entry or forfeiture under any proviso or stipulation in the lease.
- (2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action, the lessee may, in the lessor's action (if any), or in any action brought by himself, or by proceeding otherwise instituted, apply to the Court for relief; and the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the circumstances of the case, may grant or refuse relief, as it thinks fit; and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit.
- (3) Where any such relief as aforesaid is granted, the Court shall direct a minute or record thereof to be made on the lease or otherwise.
- (4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.
- (5) For the purposes of this section a lease limited to continue so long as the lessee abstains from committing a breach of any covenant, condition, or agreement shall be and take effect as a

lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

- (6) This section does not extend—
- (a) To a condition for forfeiture on the taking in execution of the lessee's interest; or
  - (b) In the case of a lease of any premises licensed under the Sale of Liquor Act 1989, to a covenant or agreement not to do or omit any act or thing whereby the licence may be lost or forfeited.
- (7) Except in a case where the lessee is bankrupt this section shall not affect the law relating to re-entry or forfeiture in case of non-payment of rent.
- (8) This section shall have effect notwithstanding any stipulation to the contrary.

Compare: 1908 No 152 s 94

Subsection (1A) was inserted, as from 15 October 1959, by section 3 Property Law Amendment Act 1959 (1959 No 31).

Subsection (6)(a) was amended, as from 23 November 1967, by section 3(1) Property Law Amendment Act 1967 (1967 No 111) by omitting the words "on the bankruptcy of the lessee, or".

In subsection (6)(b), the Sale of Liquor Act 1989 (1989 No 63), being the corresponding enactment in force, has been substituted for the repealed provisions of the Licensing Act 1908.

Subsection (7) was amended, as from 23 November 1967, by section 3(2) Property Law Amendment Act 1967 (1967 No 111) by inserting the words "Except in a case where the lessee is bankrupt".

## **119 Protection of underlessees on forfeiture of superior leases**

Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease, or any part thereof, either in the lessor's action (if any) or in any action brought by that person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease, or any part thereof, in any person entitled as underlessee to any estate or interest in that property, upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, the giving of

security, or otherwise as the Court in the circumstances of each case thinks fit; but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original underlease.

Compare: 1908 No 152 s 96

*Relief against refusal to grant renewal, etc*

**120 Relief of lessee against refusal of lessor to grant a renewal or to assure the reversion**

- (1) In this section, unless the context otherwise requires, the terms **lease**, **lessee**, and **lessor** have the same meanings respectively as in section 117 of this Act.
- (2) This section applies to leases made either before or after the commencement of this Act, and shall have effect with respect to any lease notwithstanding any stipulation to the contrary and notwithstanding the expiry of the term of the lease.
- (3) Where—
  - (a) By any lease to which this section applies the lessor has covenanted or agreed with the lessee that, subject to the performance or fulfilment of certain covenants, conditions, or agreements by the lessee, the lessor will—
    - (i) On the expiry of the lease grant to the lessee a renewal of the lease or a new lease of the demised premises; or
    - (ii) Whether upon the expiry of the lease or at any time previous thereto assure to the lessee the lessor's reversion expectant on the lease; and
  - (b) The lessee is in breach of any such covenant, condition, or agreement, or has failed to give to the lessor notice of his intention to require or to accept a renewal of a lease or a new lease or an assurance of the lessor's reversion, as the case may be, within the time or in the manner, if any, prescribed by the original lease; and
  - (c) The lessor has refused to grant that renewal or that new lease or to assure that reversion, as the case may be,—  
the lessee may in any action (whether brought by the lessor or the lessee and whether brought before or after the commencement of this Act), or by proceeding otherwise instituted, apply to the Court for relief.

- (4) The Court, having regard to all the circumstances of the case, may grant or refuse relief as it thinks fit, and in particular may decree, order, or adjudge—
- (a) That the lessor shall grant to the lessee a renewal of his lease or a new lease, as the case may require; or
  - (b) That the lessor's covenant or agreement to assure the reversion ought to be specifically performed and carried into execution, and that the lessor shall execute such assurances as the Court thinks proper for that purpose,—  
on the same terms and conditions in all respects as if all the covenants, conditions, and agreements aforesaid had been duly performed and fulfilled.
- (5) The Court may grant relief on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise as the Court in the circumstances of each case thinks fit.
- (6)
- (7) The fact that the lessor may have granted any estate or interest in the demised land to any person other than the lessee, which estate or interest would be defeated or prejudicially affected by the grant of relief to the lessee, shall not affect the power of the Court under this section, but in any such case the Court may if it thinks just grant relief to the lessee and cancel or postpone any such estate or interest and may if it thinks fit assess damages or compensation to be paid to that person in respect of the defeat of or prejudicial effect upon the estate or interest. Any damages or compensation to be paid in accordance with this subsection shall as the Court may determine be payable either by the lessor or by the lessee, or partly by the lessor and partly by the lessee in proportions to be fixed by the Court.
- (7A)
- (8) Where pursuant to this section an order is made by the Court for the renewal of a lease of any Maori land, or for the grant of a new lease of any such land, or for the assurance of the lessor's reversion in any such land, confirmation of the renewal or of the new lease, or of an assurance of the reversion, as the case may be, shall be granted under Te Ture Whenua Maori Act 1993 as a matter of right.

Compare: 1928 No 13 s 2; 1947 No 59 Pt I

The original subsection (3)(b) was amended, as from 19 September 1975, by section 11(1) Property Law Amendment Act 1975 (1975 No 36).

Subsection (3)(b) was substituted, and subsection (3)(c) was inserted, as from 9 December 1976, by section 3(1) Property Law Amendment Act 1976 (1976 No 114).

Subsection (6) was repealed, as from 9 December 1976, by section 3(2)(a) Property Law Amendment Act 1976 (1976 No 114).

Subsection (7A) was inserted, as from 19 September 1975, by section 11(2) Property Law Amendment Act 1975 (1975 No 36) and repealed, as from 9 December 1976, by section 3(2)(b) Property Law Amendment Act 1976 (1976 No 114).

In subsection (8), Te Ture Whenua Maori Act 1993 (1993 No 4), being the corresponding enactment in force, has been substituted for the repealed Maori Land Act 1931.

## **121 Limitation of time for application for relief**

- (1) Application for relief in accordance with the last preceding section may be made at any time within 3 months after the refusal of the lessor to grant a renewal of the lease or to grant a new lease or to assure the reversion, as the case may be, has been first communicated to the lessee.
- (2) For the purposes of the last preceding subsection, communication to the lessee of notice in writing of the lessor's intention to refuse at the appropriate time to grant a renewal of a lease or to grant a new lease or to assure the reversion shall be deemed to be equivalent to communication of his refusal to grant the renewal or new lease or to assure the reversion, and in any case where notice of intention is so given the period of limitation fixed by the said subsection shall begin to run from the date of the communication of the notice accordingly.

Compare: 1928 No 13 s 3

## **Part 9 Easements, restrictive stipulations, and matters affecting neighbouring land**

This heading was substituted for the heading "Easements, Restrictive Stipulations, and Encroachments" by section 12(1) Property Law Amendment Act 1975 (1975 No 36).

*Easements in gross*

**122 Easement in gross permitted**

An easement over land may be created without being attached or made appurtenant to other land, and such an easement shall run with and bind the land over which it is created, and all persons claiming title to that land by, through, or under the person creating the easement; and the easement so created shall be to all intents and purposes an incorporeal hereditament, and shall be assignable accordingly.

Compare: 1908 No 152 s 13

*Light and air*

**123 Access or use of light or air**

- (1) Except as herein provided, no tenement shall become servient to any other in respect of the access of either light or air, and no person shall have or acquire by prescription, grant, or otherwise any claim or right to the access of light or air to any land or building from or over the land of any other person:

Provided that nothing in this section shall prejudice or affect any easement or right to access or use of either light or air existing or acquired, by prescription or otherwise, before the 27th day of July 1894 (being the date of the commencement of the Light and Air Act 1894).

- (2) This section applies to all lands in New Zealand, including lands held by or on behalf of the Crown.
- (3) Nothing in this section shall be deemed to repeal or affect any law or statute relating to the pollution of air.

Compare: 1908 No 152 s 113; 1927 No 49 s 5

**124 Conditions precedent to grant of right of light or air**

A grant of the right of access of light or air made at any time on or after the 24th day of November 1927 may be enforced if the grant—

- (a) Is made by deed, or by an instrument in an appropriate form provided by the Land Transfer Act 1915, or the Land Transfer Act 1952, as the case may require:
- (b) Is duly registered within 12 months from the date of the execution thereof by the grantor:

- (c) Limits and defines accurately the area or parcel of land on, to, or over which the uninterrupted access of light or air, or light and air, is intended to be provided for.

Compare: 1927 No 49 s 3

## 125 Effect of grants

- (1) Every such grant shall, if duly registered within the period defined in the last preceding section, confer upon the owner for the time being of the dominant tenement such rights as may be therein defined in respect of the access of light or air, or light and air; and those rights shall enure, unless otherwise provided, notwithstanding that any buildings erected upon the dominant tenement may be altered or destroyed and replaced by other buildings.
- (2) The erection of buildings of any height not encroaching upon the area limited and defined as aforesaid shall not be deemed to be an infringement of the right or a derogation from the grant.

Compare: 1927 No 49 s 4

### *Easements and covenants*

The heading “Easements and covenants” was substituted for the heading “Easements and Restrictive Stipulations”, as from 6 November 1986, by section 4 Property Law Amendment Act 1986 (1986 No 106).

## 126 Interpretation

In sections 126A to 126G of this Act and Schedule 9 to this Act, unless the context otherwise requires,—

**Court** means a District Court

**Easement of vehicular right of way** means a right of way entitling the occupier of the dominant tenement to pass with vehicles over the servient tenement, such easement being created by—

- (a) An instrument registered under the Land Transfer Act 1952; or
- (b) A contract or arrangement that is enforceable at law or in equity against the occupier for the time being of the servient tenement:

**Notice** means a notice given under section 126C of this Act concerning work required in terms of a positive covenant or an easement of vehicular right of way

**Occupier**,—

- (a) In relation to any land other than a public reserve, means the owner of the land, except that,—
  - (i) Where another person is in occupation of the land under a tenancy granted for a term of not less than 10 years certain or continues to be in occupation of it under such a tenancy, that other person shall be the occupier of the land for the purposes of those sections:
  - (ii) Where no person is the occupier of the land by virtue of subparagraph (i) of this paragraph, but a person is in occupation of the land as mortgagee in possession, that mortgagee shall be the occupier of the land for the purposes of those sections:
- (b) In relation to any public reserve, means the local authority, trustees, or persons in which or whom control of the reserve is vested:

**Positive covenant** means a covenant whereby the covenantor undertakes to do something in relation to the covenantor's land that would beneficially affect the value of the covenantee's land or the enjoyment of that land by any person occupying it.

Section 126 was substituted, as from 6 November 1986, by section 4 Property Law Amendment Act 1986 (1986 No 106).

#### **126A Notification of covenants**

- (1) Where a positive covenant or a restrictive covenant relating to any land under the Land Transfer Act 1952, the benefit of which is intended to be annexed to other land, is contained in an instrument coming into operation after the operative date, the following provisions shall apply:
  - (a) The District Land Registrar shall have power to enter in the appropriate folium of the register book relating to the land subject to the burden of the covenant and the land with the benefit of the covenant a notification of the covenant, and a notification of any instrument

purporting to affect the operation of the covenant of which a notification has been so entered, and, if the covenant is revoked or modified, to cancel or alter the notification:

- (b) A notification in the register book of any such covenant shall not give the covenant any greater operation than it has under the instrument creating it:
  - (c) Every such covenant notified on the appropriate folium of the register book shall be an interest within the meaning of section 62 of the Land Transfer Act 1952.
- (2) For the purposes of subsection (1) of this section, the term **the operative date**,—
- (a) In relation to positive covenants, means the 1st day of January 1987:
  - (b) In relation to restrictive covenants, means the 1st day of January 1953.

Sections 126A to 126G were inserted, as from 6 November 1986, by section 4 Property Law Amendment Act 1986 (1986 No 106).

Subsection (1)(a) was amended, as from 1 June 2002, by section 65(4) Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 (2002 No 11), by inserting the words “and the land with the benefit of the covenant” after the words “burden of the covenant”.

### **126B Rights implied in easements of vehicular right of way**

- (1) In every grant of an easement of vehicular right of way there shall be implied the rights set out in Schedule 9 to this Act.
- (2) To the extent that any such rights may be exercised by an occupier in respect of the occupier’s own land, those rights shall be in addition to and not in limitation of the occupier’s rights as occupier of the land.
- (3) Subsection (1) of this section applies only in so far as a contrary intention is not expressed in the instrument, contract, or arrangement creating the easement, and shall have effect subject to the provisions thereof.
- (4) Where the instrument, contract, or arrangement creating the easement was executed, entered into, or made before the date of the commencement of this section, no provision of that instrument, contract, or arrangement shall be taken for the purposes of subsection (3) of this section to express a contrary

intention unless that provision is for the time being legally enforceable.

- (5) The provisions of this section shall be in addition to and not in derogation of the provisions of section 90D of the Land Transfer Act 1952 and section 27(3) of the Housing Act 1955.

Sections 126A to 126G were inserted, as from 6 November 1986, by section 4 Property Law Amendment Act 1986 (1986 No 106).

### **126C Occupier may give notice of work required**

- (1) Where the occupier of any land seeks to require any occupier of any other land to undertake or contribute to the cost of undertaking any work required in terms of any positive covenant, or of any easement of vehicular right of way, that occupier may serve on that other occupier a notice—
- (a) Specifying the work required to be carried out, with sufficient particularity to enable the recipient to comprehend the nature of the work required and to estimate the cost of the work; and
  - (b) Identifying the positive covenant or easement of vehicular right of way under which it is claimed the work is required and the recipient of the notice is obliged to undertake or contribute to the cost of undertaking the work; and
  - (c) Setting out the consequences of failure to comply with the notice.
- (2) If it is proposed that the cost of the work shall be borne by 2 or more occupiers (whether or not including the sender of the notice), the notice shall state the shares that are proposed.
- (3) If it is considered by the sender of the notice that it will be necessary for the purposes of undertaking the work or any part of it to enter upon the recipient's land, not being, in the case of an easement of vehicular right of way, the portion of that land actually comprised in the right of way, the notice shall include a statement to that effect, indicating the intended purpose, extent, and duration of the proposed entry.
- (4) In the absence of agreement to the contrary, an occupier of land shall not be liable to contribute to the cost of any part of the work that is done—

- (a) After the due service of such a notice and before due service of a cross-notice on the occupier who gave the notice or the expiration of 21 days from the date of the service of the notice, whichever first happens:
- (b) After the due service of such a notice and cross-notice, and while differences between the parties remain to be resolved either by agreement or by the Court.

Sections 126A to 126G were inserted, as from 6 November 1986, by section 4 Property Law Amendment Act 1986 (1986 No 106).

### **126D Recipient of notice may serve counter-notice**

- (1) If the recipient of a notice disputes the nature or extent of the work required, or the apportionment of the cost of the work, or any matter relating to entry onto the recipient's land, as specified in the notice, the recipient may, within 21 days after the date of the service of the notice, serve on the occupier who sent the notice a cross-notice signifying the recipient's objection, and may make counter-proposals in that cross-notice.
- (2) Any counter-proposal proposed in a cross-notice shall be specified with the same particularity as is required in the case of a notice by section 126C of this Act.

Sections 126A to 126G were inserted, as from 6 November 1986, by section 4 Property Law Amendment Act 1986 (1986 No 106).

### **126E Effect of change of occupier**

Where a notice or cross-notice is duly given by the occupier of any land to the occupier of any other land in accordance with section 126C or section 126D of this Act, but, before the matter is settled (whether by agreement or order of the Court), one of the parties disposes of his or her interest in either of the parcels of land concerned, the notice or cross-notice shall cease to have effect.

Sections 126A to 126G were inserted, as from 6 November 1986, by section 4 Property Law Amendment Act 1986 (1986 No 106).

### **126F Jurisdiction of Court**

- (1) Notwithstanding that a question of title may be involved, a Court shall have jurisdiction to hear and determine all questions and disputes arising in relation to the following matters:

- (a) Whether any positive covenant or restrictive covenant—
    - (i) Does or does not relate to, or beneficially affect, any land; or
    - (ii) Is or is not enforceable, whether under this Act or otherwise, by or against any person:
  - (b) Whether any easement is or is not an easement of vehicular right of way within the meaning of section 126 of this Act:
  - (c) Whether any work is or is not required in accordance with any such covenant or easement, and the extent and nature of that work:
  - (d) The reasonable and proper cost of any such work, including interest on outlay and reasonable remuneration for the superintendence and labour of an occupier (or of any person acting on an occupier's behalf) when the occupier is or has been personally engaged on the work:
  - (e) The person or persons by whom the cost of any such work is to be borne; and, if the cost is to be borne by 2 or more persons, the proportion of the cost that each of them shall bear:
  - (f) The date on or before which, and the manner in which, any such work is to be done:
  - (g) The use on any land of animals, vehicles, aircraft, hovercraft, or any other mode of conveyance, and any equipment, for the purpose of carrying out any such work:
  - (h) Any other question or dispute arising in respect of any such covenant, easement, or work:
  - (i) The costs of any proceedings (including such expenses of survey as the Court thinks fit), and the parties by whom and to whom costs are to be paid.
- (2) In determining under subsection (1)(e) of this section the proportion of the cost of any work required in respect of any easement of vehicular right of way that is to be borne by any occupiers, the Court shall have regard to the respective benefit derived from the easement by each of the occupiers assuming full and reasonable use by each of them in terms of the easement; but, in any case where the Court is satisfied that there

clearly has been or clearly will be a disproportionate (although still reasonable) use by any of the occupiers, the Court may vary their respective contributions so as to reflect fairly that disproportionate use.

- (3) In any case where—
- (a) A notice has been given under subsection (1) of section 126C of this Act; and
  - (b) That notice stipulates, in accordance with subsection (3) of that section, that entry onto any part of the recipient's land is considered necessary for the purposes of the proposed work; and
  - (c) Any matter relating to such entry is in dispute between the parties,—
- the Court may, by order, authorise entry onto the land, on such terms and subject to such conditions as it thinks fit, if it is satisfied that it would not be reasonably practicable to undertake any necessary work without such entry.
- (4) In any case where a Court has jurisdiction under this section, it may—
- (a) Make such consequential order as it thinks fit;
  - (b) Enter judgment for such sum of money as it thinks fit.
- (5) In such case,—
- (a) The Court may make or enter an interim order or judgment;
  - (b) The order or judgment shall be deemed to be final unless it expressly states that it is an interim order or judgment.

Sections 126A to 126G were inserted, as from 6 November 1986, by section 4 Property Law Amendment Act 1986 (1986 No 106).

### **126G Power for Court to modify or extinguish easements and covenants**

- (1) Where land is subject to an easement or a positive covenant or a restrictive covenant, a Court may from time to time, on the application of the occupier of the land, by order, modify or wholly or partially extinguish the easement or covenant upon being satisfied—
- (a) That, by reason of any change since the creation of the easement or covenant—

- (i) In the nature or extent of the user of the land to which the benefit of the easement or covenant is annexed or of the user of the land subject to the easement or covenant; or
  - (ii) In the character of the neighbourhood; or
  - (iii) In any other circumstances of the case that the Court considers relevant,—  
the easement or covenant ought to be modified or wholly or partially extinguished; or
  - (b) That the continued existence of the easement or covenant in its present form would impede the reasonable user of the land subject to the easement or covenant in a different manner or to a different extent from that which could have been reasonably foreseen by the original parties at the time of the creation of the easement or covenant; or
  - (c) That every occupier of full age and capacity of the land to which the benefit of the easement or covenant is annexed has agreed to the easement or covenant being modified or wholly or partially extinguished, or by his or her acts or omissions may reasonably be considered to have abandoned or waived the easement or covenant wholly or in part; or
  - (d) That the proposed modification or extinguishment will not substantially injure the persons entitled to the benefit of the easement or covenant.
- (2) Without limiting subsection (1) of this section, on an application under that subsection in relation to an easement of vehicular right of way, a Court may make an order modifying or excluding the operation of any of the provisions of Schedule 9 to this Act.
  - (3) Where any proceedings are instituted to enforce an easement or a positive covenant or a restrictive covenant, or to enforce any rights arising out of a breach of any such covenant, any person against whom the proceedings are instituted may, in those proceedings, apply to the Court for an order under this section.
  - (4) Notice of any application made under this section shall, if the Court so directs, be given to the territorial authority (within the

meaning of the Local Government Act 2002) of the district in which the land is situated, and to such other persons and in such manner, whether by advertisement or otherwise, as the Court may direct.

- (5) An order under this section shall, when registered in accordance with the succeeding provisions of this section, be binding on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the benefit of the easement or covenant, and whether or not those persons are parties to the proceedings or have been served with notice.
- (6) In the case of land under the Land Transfer Act 1952, the District Land Registrar may of his or her own motion, and on the application of any person interested in the land shall, make all necessary amendments and entries in the register book for giving effect to the order in respect of all grants, certificates of title, and other instruments affected thereby and the duplicates thereof, if and when available.
- (7) In the case of other land, a memorandum of the order shall be endorsed on such of the instruments of title as the Court directs.

Sections 126A to 126G were inserted, as from 6 November 1986, by section 4 Property Law Amendment Act 1986 (1986 No 106).

Subsection (4) was amended, as from 1 July 2003, by section 262 Local Government Act 2002 (2002 No 84), by substituting the words “Local Government Act 2002” for the words “Local Government Act 1974”. See sections 273 to 314 of that Act as to the savings and transitional provisions.

## **127 Power for Court to modify or extinguish easements and restrictive stipulations**

*[Repealed]*

Section 127 was repealed, as from 6 November 1986, by section 4 Property Law Amendment Act 1986 (1986 No 106).

### *Encroachments*

## **128 District Court may authorise entry for erecting or repairing buildings, etc**

- (1) The owner of any land may at any time apply to a District Court for an order authorising him, or any person authorised by him in writing in that behalf, to enter upon any adjoining

land for the purpose of erecting, repairing, adding to, or painting the whole or any part of any building, wall, fence, or other structure on the applicant's land, and to do on the land so entered upon such things as may reasonably be considered necessary for any such purpose as aforesaid.

- (2) On any such application the Court may make such order as it thinks fit. Any such order, or any provision thereof, may be made upon and subject to such terms and conditions as the Court thinks fit.
- (3) Every application under this section shall be made by originating application in accordance with the rules of procedure for the time being in force under the District Courts Act 1947. The Court, for the purposes of hearing and determining the application, shall have all the powers vested in it in its ordinary civil jurisdiction.
- (4) For the purposes of this section, the term **owner**, in relation to any land, means any person registered under the Land Transfer Act 1952 as the proprietor of an estate in fee simple in the land or as lessee or mortgagee of the land, or any person who is for the time being entitled to receive the rent of the land, whether on his own account or as agent or trustee for or mortgagee of any other person, or who would be entitled so to receive the rent if the land were let, or any tenant of the land bound by any express or implied covenant to keep any building thereon in repair.

Compare: 1950 No 27 s 2

The words "District Court" were substituted for the words "Magistrates' Court", as from 1 April 1980, pursuant to section 18(2) District Courts Amendment Act 1979 (1979 No 125).

## **129 Power of Court to grant special relief in cases of encroachment**

- (1) Where any building on any land encroaches on any part of any adjoining land (that part being referred to in this section as the piece of land encroached upon), whether the building was erected by the owner of the first-mentioned land (in this section referred to as the encroaching owner) or by any of his predecessors in title, either the encroaching owner or the owner of the piece of land encroached upon may apply to the High

Court, whether in any action or proceeding then pending or in progress and relating to the piece of land encroached upon or by an originating application, to make an order in accordance with this section in respect of that piece of land.

- (2) If it is proved to the satisfaction of the Court that the encroachment was not intentional and did not arise from gross negligence, or, where the building was not erected by the encroaching owner, if in the opinion of the Court it is just and equitable in the circumstances that relief should be granted to the encroaching owner or any other person, the Court, without ordering the encroaching owner or any other person to give up possession of the piece of land encroached upon or to pay damages, and without granting an injunction, may in its discretion make an order—
  - (a) Vesting in the encroaching owner or any other person any estate or interest in the piece of land encroached upon; or
  - (b) Creating in favour of the encroaching owner or any other person any easement over the piece of land encroached upon; or
  - (c) Giving the encroaching owner or any other person the right to retain possession of the piece of land encroached upon.
- (3) Where the Court makes any order under this section, the Court may, in the order, declare any estate or interest so vested to be free from any mortgage or other encumbrance affecting the piece of land encroached upon, or vary, to such extent as it considers necessary in the circumstances, any mortgage, lease, or contract affecting or relating to that piece of land.
- (4) Any order under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit, whether as to the payment by the encroaching owner or any other person of any sum or sums of money, or the execution by the encroaching owner or any other person of any mortgage, lease, easement, contract, or other instrument, or otherwise.
- (5) Every person having any estate or interest in the piece of land encroached upon or in the adjoining land of the encroaching owner, or claiming to be a party to or to be entitled to any bene-

fit under any mortgage, lease, contract, or easement affecting or relating to any such land, shall be entitled to apply for an order in accordance with this section, or to be heard in relation to any application for or proposal to make any order under this section. For the purposes of this subsection the Court may, if in its opinion notice of the application or proposal should be given to any such person as aforesaid, direct that such notice as it thinks fit shall be given to that person by the encroaching owner or any other person.

- (6) Any District Court shall have jurisdiction to exercise the powers conferred upon the High Court by this section, and application may be made to a District Court accordingly, in any case where the value of the piece of land encroached upon (without the buildings thereon) does not exceed the amount to which the jurisdiction of the District Court is limited in civil cases, and in any case where a District Court would have jurisdiction in accordance with section 37 of the District Courts Act 1947:

Provided that a party intending to invoke the powers given to a District Court by this subsection shall, except in any case where the Court derives its jurisdiction under that section, give notice of his intention to all other parties before the hearing, and in all cases any party shall be entitled as of right to have the action or proceeding or application transferred to the High Court, or to appeal to the High Court against any order purporting to be made by the District Court under this section.

(7)

- (8) Any order under this section may be registered as an instrument under the Land Transfer Act 1952 or the Deeds Registration Act 1908 or Part 1 of the Crown Minerals Act 1991, as the case may require.

Section 129 was substituted, as from 18 October 1957, by section 5 Property Law Amendment Act 1957 (1957 No 39).

The words “High Court” were substituted for the words “Supreme Court”, as from 1 April 1980, pursuant to section 12 Judicature Amendment Act 1979 (1979 No 124).

The words “District Court” were substituted for the words “Magistrates’ Court”, as from 1 April 1980, pursuant to section 18(2) District Courts Amendment Act 1979 (1979 No 125).

Subsection (7) was repealed by section 101(1) of the Stamp and Cheque Duties Act 1971.

Subsection (8) was amended, as from 1 October 1991, by section 362 Resource Management Act 1991 (1991 No 69) by substituting the words “or Part 1 of the Crown Minerals Act 1991” for the words “or the Mining Act 1971”.

### **129A Relief in cases of mistake as to boundaries or identity of land**

- (1) Where (whether before or after the commencement of this section) any person who has or had an estate or interest in any piece of land (in this section referred to as the original piece of land) has, while he had that estate or interest, erected a building on any other piece of land (that other piece together with any land reasonably required as curtilage and for access to the building being in this section referred to as the piece of land wrongly built upon), if the building has been so erected because of a mistake as to any boundary or as to the identity of the original piece of land, that person, or any other person for the time being in possession of the building or having an estate or interest in either the original piece of land or the piece of land wrongly built upon, or any other person mentioned in subsection (6) of this section, may apply to the High Court, whether in any action or proceeding then pending or in progress and relating to the piece of land wrongly built upon or by an originating application, to make an order in accordance with this section.
- (2) If in the opinion of the Court it is just and equitable in the circumstances that relief should be granted to the applicant or any other person, the Court may in its discretion make an order—
  - (a) Vesting the piece of land wrongly built upon in the person or persons specified in the order:
  - (b) Allowing any person or persons specified in the order to remove the building and any chattels and fixtures or any of them from the piece of land wrongly built upon:
  - (c) Where it allows possession of the building to any person or persons having an estate or interest in the piece of land wrongly built upon, requiring all or any of the persons having an estate or interest in that piece of land to pay compensation in respect of the building and other

improvements to the piece of land wrongly built upon to such person or persons as the Court may specify:

- (d) Giving the person who erected the building or any person or persons claiming through him the right to possession of the piece of land wrongly built upon for such period and on such terms and conditions as the Court may specify.
- (3) Where appropriate, the Court may make any such order without ordering the applicant or any other person to give up possession of the piece of land wrongly built upon, or to pay damages, and without granting an injunction.
- (4) Where the Court makes any order under this section, the Court may, in the order, declare any estate or interest in the piece of land wrongly built upon to be free from any mortgage, lease, easement, or other encumbrance affecting that piece of land, or vary, to such extent as it considers necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to that piece of land.
- (5) Any order under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit, whether as to the payment by any person of any sum or sums of money, or the execution by any person of any mortgage, lease, easement, contract, or other instrument, or otherwise.
- (6) Every person for the time being in possession of the building or having any estate or interest in the piece of land wrongly built upon or in the original piece of land, or claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract, or other instrument affecting or relating to any such land, and the local authority concerned, shall be entitled to apply for an order in accordance with this section, or to be heard in relation to any application for or proposal to make any order under this section. For the purposes of this subsection the Court may, if in its opinion notice of the application or proposal should be given to any such person as aforesaid, direct that such notice as it thinks fit shall be given to that person by the applicant or any other person.
- (7) Any District Court shall have jurisdiction to exercise the powers conferred upon the High Court by this section, and

application may be made to a District Court accordingly, in any case where the value of the piece of land wrongly built upon (without the buildings thereon) does not exceed the amount to which the jurisdiction of the District Court is limited in civil cases, and in any case where a District Court would have jurisdiction in accordance with section 37 of the District Courts Act 1947:

Provided that a party intending to invoke the powers given to a District Court by this subsection shall, except in any case where the Court derives its jurisdiction under that section, give notice of his intention to all other parties before the hearing, and in all cases any party shall be entitled as of right to have the action or proceeding or application transferred to the High Court, or to appeal to the High Court against any order purporting to be made by the District Court under this section.

(8)

(9) Nothing in this section shall restrict the operation of section 129 of this Act.

Section 129A was inserted, as from 23 October 1963, by section 3 Property Law Amendment Act 1963 (1963 No 60).

The words “High Court” were substituted for the words “Supreme Court”, as from 1 April 1980, pursuant to section 12 Judicature Amendment Act 1979 (1979 No 124).

The words “District Court” were substituted for the words “Magistrates’ Court”, as from 1 April 1980, pursuant to section 18(2) District Courts Amendment Act 1979 (1979 No 125).

Subsection (8) was repealed by section 101(1) Stamp and Cheque Duties Act 1971 (1971 No 51).

### *Landlocked land*

The heading “Landlocked land” was inserted, as from 19 September 1975, by section 12(2) Property Law Amendment Act 1975 (1975 No 36).

## **129B Reasonable access may be granted in cases of landlocked land**

- (1) For the purposes of this section,—
- (a) A piece of land is landlocked if there is no reasonable access to it:
  - (b) **Owner**, in relation to any landlocked land, means the owner of the legal estate in fee simple, except where

the landlocked land is leased to any person for a term of not less than 21 years, in which case the term **owner** means that other person:

- (c) **Reasonable access** means physical access of such nature and quality as may be reasonably necessary to enable the occupier for the time being of the landlocked land to use and enjoy that land for any purpose for which the land may be used in accordance with the provisions of any right, permission, authority, consent, approval, or dispensation enjoyed or granted under the provisions of the Resource Management Act 1991.
- (2) The owner of any piece of land that is landlocked (in this section referred to as the landlocked land) may apply at any time to the Court for an order in accordance with this section.
  - (3) On an application made under this section—
    - (a) The owner of each piece of land adjoining the landlocked land shall be joined as a defendant to the application:
    - (b) Every person having any estate or interest in the landlocked land, or in any other piece of land (whether or not that piece of land adjoins the landlocked land) that may be affected if the application is granted, or claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract, or other instrument affecting or relating to any such land, and the local authority concerned, shall be entitled to be heard in relation to any application for or proposal to make any order under this section.
  - (4) The applicant shall, as soon as practicable after filing his application in Court, serve a copy of it on the local authority concerned.
  - (5) For the purposes of subsection (3) of this section the Court may, if in its opinion notice of the application or proposal should be given to any person mentioned in that subsection, direct that such notice as it thinks fit shall be given to that person by the applicant or by any other person.
  - (6) In considering an application under this section the Court shall have regard to—

- (a) The nature and quality of the access (if any) to the landlocked land that existed when the applicant purchased or otherwise acquired the land;
  - (b) The circumstances in which the landlocked land became landlocked;
  - (c) The conduct of the applicant and the other parties, including any attempts that they may have made to negotiate reasonable access to the landlocked land;
  - (d) The hardship that would be caused to the applicant by the refusal to make an order in relation to the hardship that would be caused to any other person by the making of the order; and
  - (e) Such other matters as the Court considers relevant.
- (7) If, after taking into consideration the matters specified in subsection (6) of this section, and all other matters that the Court considers relevant, the Court is of the opinion that the applicant should be granted reasonable access to the landlocked land, it may make an order for that purpose—
- (a) Vesting in the owner of the legal estate in fee simple in the landlocked land the legal estate in fee simple in any other piece of land (whether or not that piece of land adjoins the landlocked land);
  - (b) Attaching and making appurtenant to the landlocked land an easement over any other piece of land (whether or not that piece of land adjoins the landlocked land).
- (8) Any order under this section may be made upon such terms and subject to such conditions as the Court thinks fit in respect of—
- (a) The payment of compensation by the applicant to any other person; and
  - (b) The exchange of any land by the applicant and any other person; and
  - (c) The fencing of any land, and the upkeep and maintenance of any fence; and
  - (d) The upkeep and maintenance of any land over which an easement is to be granted; and
  - (e) The carrying out of any survey that may be required by the District Land Registrar before he will issue, in respect of any piece of land affected by the order, a cer-

- tificate of title free of any limitations as to title or parcels within the meaning of Part 12 of the Land Transfer Act 1952; and
- (f) The time in which any work necessary to give effect to the order is to be carried out; and
  - (g) The execution, stamping, and delivery of any instrument; and
  - (h) Such other matters as the Court considers relevant.
- (9) Every order made under subsection (7) of this section shall provide that the reasonable cost of carrying out any work necessary to give effect to the order shall be borne by the applicant for the order, unless the Court is satisfied, having regard to the matters specified in paragraphs (b) and (c) of subsection (6) of this section, that it is just and equitable to require any other person to pay the whole or any specified share of the cost of such work.
- (10) Where the Court makes an order under this section, the Court may, in the order—
- (a) Declare any estate or interest in any piece of land affected by the order to be free of any mortgage, lease, easement, or other encumbrance affecting that piece of land, or vary, to such extent as it considers necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to that piece of land:
  - (b) Declare that the legal estate in fee simple in any piece of land to be vested in the owner of the legal estate in fee simple in the landlocked land shall so vest subject to the same terms, conditions, liabilities, and encumbrances as those on and subject to which the owner holds the estate in the landlocked land, and shall be subject in all respects to any instrument of mortgage, charge, lease, sublease, or other encumbrance affecting that estate in the landlocked land as if the piece of land to be vested had been expressly included in the instrument.
- (11) Where the Court makes an order (in this subsection referred to as the principal order) under subsection (7) of this section, it may, at the same time or at any other time on an application made to it in that behalf, make—

- (a) An order authorising any person named in the order, his agents, employees, and contractors, with or without animals, vehicles, aircraft, hovercraft, and any mode of conveyance and any equipment, to enter upon any piece of land specified in the order for the purpose of carrying out any work necessary to give effect to the principal order:
  - (b) Such other consequential order as the Court may think necessary or desirable to give full effect to the principal order.
- (12) Any order made under subsection (7) of this section may be registered as an instrument under the Land Transfer Act 1952, the Deeds Registration Act 1908, or Part 1 of the Crown Minerals Act 1991, as the case may require.
- (13) This section shall bind the Crown, and shall apply to all land, including Maori land and Crown land:  
Provided that the Court shall not have power under this section to grant reasonable access to any land over—
  - (a) Any land that is comprised in any National Park within the meaning of the National Parks Act 1980; or
  - (b) Any land that is comprised in any public reserve within the meaning of the Reserves Act 1977; or
  - (c) Any railway line within the meaning of the New Zealand Railways Corporation Act 1981.
- (14) Notwithstanding any of the foregoing provisions of this section, on an application made under this section the Court may decline to make an order if it is of the opinion, having regard to all the circumstances of the case, that the applicant is entitled and should be required to seek relief under section 124 of the Public Works Act 1928, or under section 316 or sections 326A to 326D of Te Ture Whenua Maori Act 1993, or under any of the provisions of any other enactment.
- (15) Nothing in Part 10 of the Resource Management Act 1991 shall apply to any transfer, exchange, or other disposition of any land made in pursuance of an order of the Court made under this section.

Sections 129B and 129C were inserted, as from 19 September 1975, by section 12(2) Property Law Amendment Act 1975 (1975 No 36).

Subsection (1)(c) was amended, as from 1 October 1991, by section 362 Resource Management Act 1991 (1991 No 69) by substituting the words “of the Resource Management Act 1991” for the words “of the Town and Country Planning Act 1977”.

Subsection (12) was amended, as from 1 October 1991, by section 362 Resource Management Act 1991 (1991 No 69) by substituting the words “or Part 1 of the Crown Minerals Act 1991” for the words “or the Mining Act 1971”.

In the proviso to subsection (13) the National Parks Act 1980 (1980 No 66) has been substituted for the repealed National Parks Act 1952.

The Reserves Act 1977 (1977 No 66) has been substituted for the repealed Reserves and Domains Act 1953.

The New Zealand Railways Corporation Act 1981 (1981 No 119) has been substituted for the repealed Government Railways Act 1949.

In subsection (14), the Local Government Act 1974, has been substituted for the repealed Municipal Corporations Act 1954, the repealed Counties Act 1956 and the Public Works Act 1928 (consolidated by section 248(1) Public Works Act 1981 (1981 No 35)).

Subsection (14) was amended, as from 1 July 1993, by section 362(1) Te Ture Whenua Maori Act 1993 (1993 No 4) by substituting the expression “section 316 of Te Ture Whenua Maori Act 1993” for the expression “section 418 or section 419 of the Maori Affairs Act 1953”.

Subsection (14) was amended, as from 1 July 2002, by section 59(1) Te Ture Whenua Maori Amendment Act 2002/Maori Land Amendment Act 2002 (2002 No 16), by inserting the expression “or sections 326A to 326D” after the expression “section 316”.

Subsection (14) was amended, as from 1 July 2003, by section 262 Local Government Act 2002 (2002 No 84), by omitting the words “the Local Government Act 1974 or”. See sections 273 to 314 of that Act as to the savings and transitional provisions.

The original subsection (15) was amended, as from 1 April 1980, by section 8(3) Local Government Amendment Act 1979 (1979 No 59).

Subsection (15) was substituted, as from 1 October 1991, by section 362 Resource Management Act 1991 (1991 No 69).

### *Trees and structures on neighbouring land*

The heading “Trees and structures on neighbouring land” was inserted, as from 19 September 1975, by section 12(2) Property Law Amendment Act 1975 (1975 No 36).

## **129C District Court may order removal or trimming of trees, or removal or alteration of structures injuriously affecting neighbour’s land**

- (1) For the purposes of this section,—  
**Occupier**, in relation to any land to which this section applies, means a person who is entitled to occupy the land and who

satisfies the Court that he is residing or intends within a reasonable time to reside in a building erected or to be erected on the land

**Structure**, in relation to any land, means—

- (a) Any building, wall, fence, or other improvement erected on the land by any person (not being the Crown) otherwise than pursuant to a building permit or building consent issued by the local authority concerned; or
- (b) Any building, wall, fence, or other improvement erected on the land by the Crown, not being a building, wall, fence, or other improvement for which a building permit or building consent from the local authority concerned would have been necessary if that building, wall, fence, or other improvement had been erected on the land by any other person:

*Structure*: this definition was amended, as from 1 July 2003, by section 262 Local Government Act 2002 (2002 No 84), by inserting the words “or building consent” after the words “building permit” in both places they occur. *See* sections 273 to 314 of that Act as to the savings and transitional provisions.

**Tree** includes any shrub or plant.

- (2) This section applies to—
  - (a) Any land which may be used for residential purposes under rules in the relevant proposed or operative district plan; and
  - (b) Any land on which is erected any building used for residential purposes.
- (3) The occupier of any land to which this section applies may at any time apply to a District Court for an order requiring the occupier of any other land (whether or not that land is land to which this section applies) to remove or trim any trees growing or standing on that other land, or to remove, repair, or alter any structure erected on that land.
- (4) Where the occupier of that other land is not the owner thereof both the occupier and the owner shall be joined as defendants to any such application.
- (5) On any such application the Court may make such order as it thinks fit, if, having regard to all the circumstances of the case, and, where required, to the matters specified in subsection (6) of this section, the Court considers the order to be fair and

reasonable, and to be necessary to remove or prevent, or to prevent the recurrence of—

- (a) Any actual or potential danger to the applicant's life or health or property, or to the life or health of any person residing with the applicant; or
- (b) Any undue obstruction of a view than an occupier would otherwise be able to enjoy from the applicant's land or from any building used for residential purposes erected on that land; or
- (c) Any other undue interference with the reasonable enjoyment of the applicant's land for residential purposes:

Provided that, except for the purpose referred to in paragraph (a) of this subsection, the Court shall not make an order under this section relating to any tree the preservation of which is the subject of a requirement lawfully made by a heritage protection authority under the provisions of Part 8 of the Resource Management Act 1991.

- (6) In any case where the applicant alleges that a tree is obstructing his view or is otherwise causing injury or loss to him the Court, in considering whether to make an order under this section, shall have regard to the following matters:
  - (a) The interests of the public in the maintenance of an aesthetically pleasing environment:
  - (b) The desirability of protecting public reserves containing trees:
  - (c) The value of the tree as a public amenity:
  - (d) The historical, cultural, or scientific significance (if any) of the tree:
  - (e) The likely effect (if any) of the removal or trimming of the tree on ground stability, the water table, or run-off.
- (7) The conditions of any such order may, if the Court thinks fit, include conditions requiring the applicant to give security or indemnity in respect of any costs, expenses, or damage.
- (8) The Court shall not make an order under this section unless it is satisfied—
  - (a) That the tree or structure is causing or is likely to cause loss of or injury or damage to the applicant's life or health or property, or the life or health of any other person residing with the applicant; or

- (b) That the tree or structure is obstructing any view that an occupier of the applicant's land would otherwise be able to enjoy, or is otherwise causing injury or loss to the applicant by diminishing the value of the property or reducing the enjoyment of it for residential purposes—and that the hardship that would be caused to the applicant or to any other person residing with the applicant by the refusal to make the order is greater than the hardship that would be caused to the defendant or to any other person by the making of the order.
- (9) Where the application relates to any land on which a building intended for residential purposes has not been erected, the Court shall not make an order under this section unless it is satisfied that such a building will be erected on the land within a reasonable time. Unless the Court, having regard to all the circumstances of the case, otherwise determines, an order made in such a case shall not become operative unless and until the building is erected, and, if no such building is erected within a reasonable time, the order may be vacated on the application of any interested person.
- (10) An order may be made under this section whether or not the wrong being caused by the tree or structure constitutes a legal nuisance, and whether or not it could be the subject of any proceedings otherwise than under this section.
- (11) In determining whether or not to make an order under this section the Court shall have regard to the time when the applicant became the occupier of his land in relation to the time when the wrong commenced, but if the Court thinks fit, having regard to all the circumstances of the case, an order may be made notwithstanding that the applicant became the occupier of his land after the wrong commenced.
- (12) Every order made under this section shall provide that the reasonable cost of carrying out any work necessary to give effect to the order shall be borne by the applicant for the order, unless the Court is satisfied, having regard to the conduct of the defendant, that it is just and equitable to require the defendant to pay the whole or any specified share of the cost of such work.
- (13) If an order made under this section in respect of the removal or trimming of any tree, or of the removal, repair, or alteration

of any structure, is not duly complied with within one month after the date of the order, or within such longer period as may be specified in the order or allowed by the Court, the applicant for the order may at any time thereafter cause the land in respect of which the order was made to be entered upon and the work necessary to give effect to the order to be carried out; and, unless the Court otherwise orders, any order of the Court made under subsection (12) of this section (not being an order requiring the defendant to meet the whole of the cost referred to in that subsection) shall be vacated, and the applicant shall be entitled to recover from the defendant the whole of the reasonable cost of the work necessary to give effect to the Court's order:

Provided that, unless the parties otherwise agree, the applicant shall not exercise the rights conferred by this subsection except with the leave of the Court, which may be granted upon or subject to such conditions as the Court thinks fit, whether as to security or indemnity against any costs, expenses, or damage, the avoidance of or making good of any injury or damage, the disposal of the trees or structure or any part thereof, or otherwise.

- (14) This section shall bind the Crown, and shall apply to all land, including Maori land, Crown land, and public reserves.

Sections 129B and 129C were inserted, as from 19 September 1975, by section 12(2) Property Law Amendment Act 1975 (1975 No 36).

Subsection (2)(a) was substituted, as from 1 October 1991, by section 362 Resource Management Act 1991 (1991 No 69). The word “; and” has been added to ensure uniformity of style.

Subsection (5) was amended, as from 1 October 1991, by section 362 Resource Management Act 1991 (1991 No 69) by substituting the words “made by a heritage protection authority under the provisions of Part 8 of the Resource Management Act 1991” for the words “by a local authority under any of the provisions of the Town and Country Planning Act 1977 or the Local Government Act 1974”, (the two last mentioned Acts had been substituted for the repealed Town and Country Planning Act 1953, Municipal Corporations Act 1954 and the Counties Act 1956).

## **Part 10**

### **Assignments of things in action**

#### **130 Assignment of debts and things in action**

- (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal or equitable thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim that debt or thing in action, shall be and be deemed to have been effectual in law (subject to all equities that would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal or equitable right to that debt or thing in action from the date of the notice, and all legal or equitable and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.
- (2) Where the debtor, trustee, or other person liable in respect of any such debt or thing in action has had notice that the assignment is disputed by the assignor or any one claiming under him, or that there are other opposing or conflicting claims to that debt or thing in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same; or he may, if he thinks fit, pay the same into the Court, under and in conformity with the provisions of the Acts for the relief of trustees.

Compare: 1908 No 152 s 46

## **Part 11**

### **Marriage settlements**

#### **131 Implied powers in tenants for life**

In every conveyance of land by way of settlement on marriage there shall be implied the following powers in the trustees of the settlement, that is to say,—

- That they may lease, or concur in respect of the said share in leasing, the land comprised in the settlement for any term not exceeding 21 years, to take effect in possession or within 6 months from the making of the lease, at a reasonable yearly rent, without taking any

fine or premium for the making of the lease, and so that the lessee or lessees do execute a counterpart thereof.

Compare: 1908 No 152 s 97

Section 131 was amended, as from 1 January 1957, by section 89(2) Trustee Act 1956 (1956 No 61) by omitting the words “in every tenant for life in possession of the property or of any undivided share thereof; or in his guardian, or in the committee of his estate, or, where there is no tenant for life in possession, then”, and the words “he or”.

### **132 Powers of trustees of settlement**

- (1) There shall also be implied in the trustees of the settlement, at the request in writing of any tenant for life in possession, or his guardian or manager, or if there is no such tenant for life, then at their own discretion, the following power, that is to say,—
  - That they may dispose of the land comprised in the settlement, or any part thereof, either by way of sale or in exchange for other land of the like nature and tenure in New Zealand; or, where an undivided share in any land is in settlement, may concur in a partition of that land, and may give or take any money by way of equality of exchange or partition.
- (2) The money to arise from any such sale or to be received for equality of exchange or partition shall, with all convenient speed, be laid out in the purchase of other land of like nature and tenure in New Zealand; and any land so purchased or taken in exchange shall be settled in the same manner and subject to the same trusts, powers, and provisos as the land so sold or given in exchange.
- (3) The money so arising or so received shall, until laid out as aforesaid, be invested in securities authorised by law for the investment of trust funds, and the interest thereof shall be paid to the persons entitled to the rents and profits of the land comprised in the settlement.

Compare: 1908 No 152 s 98

Subsection (1) was amended, as from 1 April 1970, by section 129(7) Mental Health Act 1969 (1969 No 16) by substituting the word “manager” for the word “committee”.

*Marriage settlements by minors*

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Section 133 was repealed, as from 1 February 1977, by section 57(1) Matrimonial Property Act 1976 (1976 No 166).

**Part 12**  
**Powers of attorney****134 Execution by attorney in his own name**

- (1) The donee of a power of attorney may execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal (where sealing is required) by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law to all intents as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.
- (2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

**134A Competency of married minors**

A minor who is or has been married may, as if he were of full age, by deed appoint an attorney on his behalf for the purpose of executing any deed, or making any appointment otherwise than by will, or doing any other act he might himself execute or do.

Section 134A was inserted, as from 1 February 1977, by section 56 Matrimonial Property Act 1976 (1976 No 166).

**135 Continuance until notice of death or revocation received**

- (1) Subject to any stipulation to the contrary contained in the instrument creating a power of attorney, the power shall, so far as concerns any act or thing done or suffered thereunder in good faith, operate and continue in force until notice of the death of the donor of the power or until notice of other revocation thereof has been received by the donee of the power.
- (2) Every act or thing within the scope of the power done or suffered in good faith by the donee of the power after such death

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or other revocation as aforesaid, and before notice thereof has been received by him, shall be as effectual in all respects as if that death or other revocation had not happened or been made.

- (3) A certificate in the form numbered 1 in Schedule 8 to this Act, or to the like effect, shall, if given by any such attorney (not being a corporation aggregate) immediately before or at any time after any act done or thing suffered by the attorney, be taken to be conclusive proof of the non-revocation of the power of attorney at the time when the act was done or the thing suffered in favour of all persons dealing with the donee of the power in good faith and for valuable consideration without notice of the death of the donor of the power or other revocation.
- (4) Where the donee of the power is a corporation aggregate, a certificate in the form numbered 2 in Schedule 8 to this Act, or to the like effect, if given by a director, manager, secretary, or other officer duly authorised in that behalf by the corporation, immediately before or at any time after any act done or thing suffered by the attorney, shall be taken to be conclusive proof of the non-revocation of the power of attorney at the time when the act was done or the thing suffered in favour of all persons dealing with the donee of the power in good faith and for valuable consideration without notice of the death of the donor of the power or other revocation.
- (4A) Where any such certificate relates to the execution of any instrument it shall be sufficient if the certificate is endorsed on the instrument and signed by the attorney or by any of the persons specified in subsection (4) of this section, as the case may require.
- (4B) Every person commits an offence and is liable on summary conviction to a fine not exceeding \$100 who wilfully or negligently signs any certificate for the purposes of this section if the certificate is false in a material respect.
- (5) This section applies to powers of attorney executed in or out of New Zealand.

Compare: 1908 No 152 s 100

Sections (3) and (4) were substituted, and subsection (4A) and (4B) were inserted, as from 19 September 1975, by section 13(1) Property Law Amendment Act 1975 (1975 No 36).

**136 Irrevocable power of attorney for value**

- (1) Where a power of attorney given for valuable consideration (whether executed in or out of New Zealand) is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—
- (a) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, mental deficiency, or bankruptcy of the donor; and
  - (b) Any act done at any time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, mental deficiency, or bankruptcy of the donor, had not been done or had not happened; and
  - (c) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, mental deficiency, or bankruptcy of the donor.
- (2) This section applies only to powers of attorney created by instruments executed on or after the 1st day of January 1906.

Compare: 1908 No 152 s 101

**137 Power of attorney made irrevocable for fixed time**

- (1) Where a power of attorney (whether executed in or out of New Zealand, and whether given for valuable consideration or not) is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—
- (a) The power shall not be revoked for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, mental deficiency, or bankruptcy of the donor; and
  - (b) Any act done within that fixed time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, mental deficiency, or

bankruptcy of the donor had not been done or had not happened; and

- (c) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice, either during or after that fixed time, of anything done by the donor during that fixed time without the concurrence of the donee, or of the death, mental deficiency, or bankruptcy of the donor within that fixed time.
- (2) This section applies only to powers of attorney created by instruments executed on or after the 1st day of January 1906.  
Compare: 1908 No 152 s 102

**138 Conveyance under power of attorney from person not in New Zealand**

No person shall be entitled to object to the execution or proposed execution of a conveyance solely on the ground that the execution is under a power of attorney from a person not in New Zealand.

Compare: 1908 No 152 s 103

**139 Application to corporations**

- (1) The provisions of this Part of this Act apply with the necessary modifications with respect to any power of attorney executed by any corporation to the same extent as if the corporation were a person and the dissolution of the corporation (however occurring) were the death of a person within the meaning of this Part of this Act.
- (2) The provisions of subsection (1) of this section are in addition to and not in derogation of the provisions of sections 44 and 399 of the Companies Act 1955 or sections 181 and 343 of the Companies Act 1993.
- (3) The provisions of subsection (1) of this section do not apply to a corporation which is dissolved before the commencement of this Act, but do apply to powers of attorney whether executed before or after its commencement.

In subsection (2), sections 44 and 399 of the Companies Act 1955, being the corresponding enactments in force, have been substituted for sections 42 and 333 of the repealed Companies Act 1933.

Subsection (2) was amended, as from 1 July 1994, by section 2 Company Law Reform (Transitional Provisions) Act 1994 (1994 No 16) by inserting the words “or sections 181 and 343 of the Companies Act 1993”.

## Part 13

### Partition of land and division of chattels

#### **140 In action for partition Court may direct land to be sold**

- (1) Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates request the Court to direct a sale of the land and a distribution of the proceeds, instead of a division of the land between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale accordingly.
- (2) The Court may, if it thinks fit, on the request of any party interested, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the Court that, by reason of the nature of the land, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstance, a sale of the land would be for the benefit of the parties interested.
- (3) The Court may also, if it thinks fit, on the request of any party interested, direct that the land be sold, unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale; and, on such an undertaking being given, may direct a valuation of the share of the party requesting a sale.
- (4) On directing any such sale or valuation to be made, the Court may give also all necessary or proper consequential directions.
- (5) Any person may maintain such action as aforesaid against any one or more of the parties interested without serving the other or others, and it shall not be competent to any defendant in the action to object for want of parties; and at the hearing of the cause the Court may direct such inquiries as to the nature of the land and the persons interested therein, and other matters,

as it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration:

Provided that all persons who, if this Act had not been passed, would have been necessary parties to the action shall be served with notice of the decree or order on the hearing, and, after that notice, shall be bound by the proceedings as if they had originally been parties to the action, and shall be deemed parties to the action; and all such persons may have liberty to attend the proceedings, and any such person may, within a time limited by rules of Court, apply to the Court to add to the decree or order.

- (6) On any sale under this section the Court may allow any of the parties interested in the land to bid at the sale, on such terms as the Court deems reasonable as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters.

Compare: 1908 No 152 s 105

#### **141 Proceeds of sale, how applied**

- (1) All money received under any such sale may, if the Court thinks fit, be paid to trustees appointed by the Court, and applied, as the Court from time to time directs,—
- (a) In the discharge of any encumbrance affecting the land directed to be sold; and, subject thereto,
- (b) In the payment of the residue to the parties interested.
- (2) Where the Court so directs, the trustees (if any) may in their discretion apply the money in manner aforesaid; and where no such direction is given any party interested may apply to the Court for an order that the money be so applied.
- (3) Until the money can be applied as aforesaid it shall be from time to time invested in such securities as the Court may approve, and the interest and dividends thereof shall be paid to the parties interested.

Compare: 1908 No 152 s 106

**142 Costs in partition suits**

In an action for partition the Court may make such order as it thinks just respecting costs up to the time of the hearing.

Compare: 1908 No 152 s 107

**143 Division of chattels**

- (1) Where any chattels belong to persons jointly or in undivided shares, the persons interested to the extent of a moiety or upwards may apply to the Court or a Judge thereof for an order for division of the chattels or of any of them, according to a valuation or otherwise, and the Court or Judge may make such order and give such consequential directions as the Court or Judge thinks fit.
- (2) Where the value of the chattels concerned does not exceed \$200,000 the foregoing application may be made to a District Court, and that Court may make such order and give such consequential directions as the Court thinks fit.

Subsection (2) was amended, as from 1 December 1961, by section 2 Property Law Amendment Act 1961 (1961 No 96) by substituting the expression "\$4,000" for the expression "\$2,000". This amount was further increased, as from 1 April 1980, to \$16,000 by section 16(1) District Courts Amendment Act 1979 (1979 No 125), to \$60,000, as from 13 November 1989, by section 10 District Courts Amendment Act 1989 (1989 No 107) and to "\$200,000", as from 1 July 1992, by section 19(1) District Courts Amendment Act 1991 (1991 No 61).

## Part 14 Apportionment

**144 Interpretation**

In this Part of this Act, unless the context otherwise requires,—

**Annuities** includes salaries and pensions

**Dividends** includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other companies or corporations, divisible between all or any of the members thereof, whether those payments are usually made or declared at any fixed time or otherwise; and all such divisible revenue shall for the purposes of this section be deemed to have accrued by equal daily increments during and within the period for or in respect of which the payment of the same revenue is declared

or expressed to be made; but **dividends** does not include payments in the nature of a return or reimbursement of capital

**Rent** includes rents and all periodical payments or renderings in lieu of or in the nature of rent.

Compare: 1908 No 152 s 108(1)

**145 Income apportionable in respect of time**

All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

Compare: 1908 No 152 s 108(2)

**146 Time when apportioned part payable**

The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other payment as soon as the entire portion of which the apportioned part forms part becomes due and payable, and not before; and where the payment is determined by re-entry, death, or otherwise, as soon as the next entire portion of the same would have become payable if the same had not so determined, and not before.

Compare: 1908 No 152 s 108(3)

**147 Recovery of apportioned parts**

All persons and their respective executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determined with their own death, shall have such or the same remedies, legal and equitable, for recovering such apportioned parts as aforesaid when payable (allowing for a proportionate part of all just allowance) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively:

Provided that where any person is liable to pay rent reserved out of or charged on lands or other hereditaments of any tenure, that person and the said lands or other hereditaments shall not be resorted to for any such apportioned part forming part of an

entire or continuing rent as aforesaid; but the entire or continuing rent, including the apportioned part, shall be recovered and received by the person who, if the rent had not been apportionable under this Part of this Act or otherwise, would have been entitled to the entire or continuing rent; and the apportioned part shall be recoverable from the last-mentioned person by the executors, administrators, or other parties entitled thereto under this Part of this Act.

Compare: 1908 No 152 s 108(4)

#### **148 Exceptions and application**

- (1) Nothing in this Part of this Act shall render apportionable any annual sums payable under policies of assurance of any description.
- (2) This Part of this Act does not extend to any case in which it is expressly stipulated that apportionment shall not take place.

Compare: 1908 No 152 s 108(5), (6), (7)

### **Part 15** **Debts charged on real estate**

#### **149 Devisee, etc, of real estate not to claim payment of mortgage out of personal estate**

- (1) Where a person dies seized of or entitled to any land that is at the time of his death charged with the payment of any sum or sums of money by way of mortgage, and that person has not by his will or by deed or other document signified any contrary or other intention, the devisee or other person to or on whom the land is devised or devolves shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of that person, but the land so charged shall, as between the different persons claiming through or under the deceased, be primarily liable to the payment of all mortgage debts with which the same is charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof.
- (2) A general direction in a will that the debts or that all the debts of the testator be paid out of his personal estate, or out of his residuary real and personal estate, or out of his residuary real

estate, shall not be deemed to signify an intention contrary to or other than the rule hereby established, but such an intention must be further signified by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his land.

- (3) Nothing in this section shall affect or diminish any right of the mortgagee of any such lands to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the deceased or otherwise.
- (4) Nothing in this section shall apply to any will made on or after the 1st day of January 1971.

Compare: 1908 No 152 s 109

Subsection (4) was inserted, as from 1 January 1971, by section 36(3) Administration Act 1969 (1969 No 52).

## Part 16

### Rentcharges and other annual sums

#### **150 Recovery of annual sums charged on land**

- (1) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to that annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, so far as those remedies might have been conferred by the instrument under which the annual sum is payable, but not further.
- (2) If at any time the annual sum, or any part thereof, is unpaid for 21 days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

- (3) If at any time the annual sum or any part thereof is unpaid for 40 days next after the time appointed for any payment in respect thereof, then, although no legal demand for that payment has been made, the person entitled to receive the annual sum may enter into possession of and hold the land charged, or any part thereof, and take the income thereof, until thereby or otherwise the annual sum, and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and the possession when taken shall be without impeachment of waste.
- (4) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed convey the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the cost of the execution of the trusts of that deed; and the surplus, if any, of the money raised or of the income received under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.
- (5) This section applies only where the instrument under which the annual sum is payable comes into operation on or after the 1st day of January 1906, and then only in so far as a contrary intention is not expressed in the instrument, and shall have effect subject to the terms and provisions thereof.
- (6) The rule of law relating to perpetuities shall not apply to any powers or remedies conferred by this section, nor to the same or like powers or remedies conferred by any instrument for re-

covering or compelling the payment of any annual sum within the meaning of this section.

Compare: 1908 No 152 s 110

*Discharge of encumbrances on sale*

**151 Provision by Court for encumbrances on sale**

- (1) Where land subject to any encumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the encumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.
- (2) Thereupon the Court may, if it thinks fit, and either after or without any notice to the encumbrancer, as the Court thinks fit, declare the land to be free from the encumbrance, and make any order for conveyance or vesting order proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.
- (3) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

Compare: 1908 No 152 s 111

## **Part 16A**

### **Debentures issued by companies**

Part 16A comprising sections 151A to 151D was inserted, as from 1 July 1994, by section 6 Property Law Amendment Act 1993 (1993 No 123).

#### **151A Interpretation**

In this Part of this Act, **company** means—

- (a) A company within the meaning of section 2 of the Companies Act 1955:
- (b) A company within the meaning of section 2 of the Companies Act 1993.

Part 16A comprising sections 151A to 151D was inserted, as from 1 July 1994, by section 6 Property Law Amendment Act 1993 (1993 No 123).

#### **151B Perpetual debentures**

Notwithstanding any rule of equity, a condition contained in any debentures or in any deed for securing any debentures, issued or executed by a company, whether before or after the commencement of this section, is not invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long.

Part 16A comprising sections 151A to 151D was inserted, as from 1 July 1994, by section 6 Property Law Amendment Act 1993 (1993 No 123).

#### **151C Power to reissue redeemed debentures in certain cases**

- (1) Where either before or after the commencement of this section a company has redeemed any debentures previously issued, then,—
  - (a) Unless any provision to the contrary, whether express or implied, is contained in the case of a company within the meaning of section 2 of the Companies Act 1955, in the articles of the company, or in the case of a company within the meaning of section 2 of the Companies Act 1993, in the constitution of the company, as the case may be, or in any contract entered into by the company; or

- (b) Unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled,—  
the company shall have, and shall be deemed always to have had, power to reissue the debentures, either by reissuing the same debentures or by issuing other debentures in their place.
- (2) On a reissue of redeemed debentures the person entitled to the debentures shall have, and shall be deemed always to have had, the same priorities as if the debentures had never been redeemed.
- (3) Where a company has either before or after the commencement of this Act deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the company having ceased to be in debit while the debentures remained so deposited.
- (4) The reissue of a debenture or the issue of another debenture in its place under this section, whether the reissue or issue was made or after the commencement of this section, whether the reissue or issue was made before or after the commencement of this section, is not to be treated as the issue of a new debenture for the purpose of any provision limiting the amount or number of debentures to be issued.

Part 16A comprising sections 151A to 151D was inserted, as from 1 July 1994, by section 6 Property Law Amendment Act 1993 (1993 No 123).

Subsection (4) was substituted, as from 20 May 1999, by section 7 Stamp Duty Abolition Act 1999 (1999 No 61).

### **151D Specific performance of contracts to subscribe for debentures**

A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

Part 16A comprising sections 151A to 151D was inserted, as from 1 July 1994, by section 6 Property Law Amendment Act 1993 (1993 No 123).

## Part 17

### Service of notices

#### 152 Service of notices

- (1) Any notice required or authorised by this Act to be served on any person shall be delivered to that person, and may be delivered to him either personally or by posting it by registered letter addressed to that person at his last known place of abode or business in New Zealand. A notice so posted shall be deemed to have been served at the time when the registered letter would in the ordinary course of post be delivered, unless the intended recipient of the notice proves that, otherwise than through any fault on his own part, it was not delivered at that time.
- (2) If the person is absent from New Zealand, the notice may be delivered as aforesaid to his agent in New Zealand. If he is deceased, the notice may be delivered as aforesaid to his personal representative.
- (3) If the person is not known, or is absent from New Zealand and has no known agent in New Zealand, or is deceased and has no personal representative, the notice shall be delivered in such manner as may be directed by an order of the Court.
- (4) Notwithstanding anything in the foregoing provisions of this section, the Court may in any case make an order directing the manner in which any notice is to be delivered, or dispensing with the delivery thereof.
- (5) This section does not apply to notices served in proceedings in the Court.
- (6) In this section the expression **the Court** means—
  - (a) In any case where any notice relates to any sum of money, being a sum not exceeding \$200,000, due or alleged to be due to any person, or required or proposed to be paid to any person, a District Court:
  - (b) In any other case, the High Court.
- (6A) Without limiting the generality of the foregoing provisions of this section, this section applies to every notice to be served for the purposes of section 92 or section 118 of this Act, notwithstanding anything in the instrument of mortgage or lease.

- (7) Except as provided by subsection (6A) of this section, this section applies only if and so far as a contrary intention is not expressed in any instrument, and shall have effect subject to the provisions of any instrument.

Compare: 1939 No 6 s 8; 1950 No 27 s 6

Subsection (1) was amended, as from 13 November 1982, by section 8(1) Property Law Amendment Act 1982 (1982 No 49) by inserting the words “, unless the intended recipient of the notice proves that, otherwise than through any fault on his own part, it was not delivered at that time”.

Subsection (6)(a) was amended, as from 1 December 1961, by section 3 Property Law Amendment Act 1961 (1961 No 96) by substituting the expression “\$10,000” for the expression “\$4,000”. This amount was further increased, as from 1 April 1980, to \$40,000 by section 16(1) District Courts Amendment Act 1979 (1979 No 125), to \$150,000, as from 13 November 1989, by section 10 District Courts Amendment Act 1989 (1989 No 107) and to “\$200,000”, as from 1 July 1992, by section 19(1) District Courts Amendment 1991 (1991 No 61).

The words “District Court” were substituted for the words “Magistrates’ Court”, as from 1 April 1980, pursuant to section 18(2) District Courts Amendment Act 1979 (1979 No 125). The words “High Court” were substituted for the words “Supreme Court”, as from 1 April 1980, pursuant to section 12 Judicature Amendment Act 1979 (1979 No 124).

Subsection (6A) was inserted, as from 11 December 1982, by section 8(2) Property Law Amendment Act 1982 (1982 No 49).

Subsection (7) was amended, as from 11 December 1982, by section 8(3) Property Law Amendment Act 1982 (1982 No 49) by substituting the words “Except as provided by subsection (6A) of this section, this” for the word “This”.

## **Part 18**

### **Miscellaneous**

#### **153 Restriction on validation of instruments**

Where any instrument executed before the 4th day of August 1908, being the date of the commencement of the Property Law Act 1908, was by any provision of that Act rendered valid and effectual, and would but for the operation of that Act have been or remained invalid or ineffectual, that instrument shall be deemed to have been validated only where the person claiming thereunder was at the commencement of that Act in possession of the property affected by the instrument, and shall not be validated if the validation would have created a title adverse to the possession of any such person.

Compare: 1908 No 152 s 121

**154 Protection of solicitors and trustees acting under this Act**

- (1) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words to be given by or to be contained in any such instrument, or to be adopted in connection with or applied to any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting in good faith in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.
- (2) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with, or the application to, any contract or transaction of any further or other powers, covenants, provisions, stipulations, or words is improper.
- (3) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary capacity, those persons shall also be protected in like manner.
- (4) Where such persons as aforesaid are acting without a solicitor they shall also be protected in like manner.

Compare: 1908 No 152 s 122

**155 Repeals and savings**

- (1) The enactments specified in Schedule 6 to this Act shall at the commencement of this Act cease to have effect in New Zealand.
- (2) The enactments specified in Schedule 7 to this Act are hereby repealed.
- (3) All matters and proceedings commenced under any of the said enactments and pending or in progress at the commencement

of this Act may be continued, completed, and enforced under this Act.

- (4) All instruments, acts of authority, and acts of parties, and all periods of time, which originated or were subsisting under any of the said enactments, or under any enactment theretofore in force, and are subsisting or in force on the commencement of this Act, shall enure for the purposes of this Act as if they had originated under this Act, and accordingly shall, where necessary, be deemed to have so originated, but not so as to extend any period of time that began to run before the commencement of this Act.
- (5) Neither the repeal of the enactments specified in the said Schedule 7 nor the repeal effected by any of those enactments of an enactment theretofore in force shall affect—
  - (a) Any deed or instrument made, signed, or acknowledged, or any proceeding taken or pending, or anything done or suffered, or any estate, right, title, interest, or benefit created, conferred, or acquired under or by virtue of any such enactment; or
  - (b) Any obligation or duty undertaken or imposed, or any forfeiture incurred, expressly or by implication, under or by virtue of any deed or instrument as aforesaid or under any such enactment.
- (6) In particular the repeal of sections 7, 8, 21, 22, 23, and 50 of the Property Law Act 1908 and of the proviso to section 35 of that Act shall not revive anything not in force or existing when the repeal takes effect.
- (7) Any alteration made in the law by this Act, whether by the repeal of an enactment or otherwise, shall not, unless otherwise expressly provided by this Act, affect—
  - (a) Any right accrued, or obligation incurred, before the commencement of this Act under the law so altered; or
  - (b) The validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered before the commencement of this Act,—

and, unless as aforesaid, the law existing before such commencement shall remain in full force and effect for the purpose of governing and construing all instruments executed before

its commencement and such instruments as aforesaid shall be read and construed and have only the effect and consequences given to them under that law.

- (8) Any provision of Te Ture Whenua Maori Act 1993 or any other enactment relating to property that prevailed over the provisions of any enactment hereby repealed shall in like manner prevail over the provisions of this Act.

Compare: 1908 No 152 ss 1(3), 124

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**Schedule 1** Section 3(3)  
**Provisions which do not apply to land transfer land**

Number of Section	Subject-matter
8 .....	Construction of supplemental or annexed deed.
10 .....	Partitions, exchanges, etc
43 .....	Fee to pass without words of limitation.
44 .....	Form of conveyance.
47 .....	What a conveyance of land is deemed to include.
48 .....	Declaration by tenants in common to become joint tenants.
52, except Rule (v) in paragraph (b)	Application of stated conditions of sale.
55 .....	Rights of purchaser as to execution.
57 .....	Validity of conveyances by executors, etc.
58 .....	Restriction on constructive notice.
72 .....	Covenants implied in conveyance by way of sale, etc.

Number of Section	Subject-matter
73	Covenants implied in conveyance subject to encumbrance.
76	Form of mortgage.
143	Division of chattels.
150	Recovery of annual sums charged on land.

## Schedule 2

Section 44

### Conveyance in fee simple

This Schedule was amended, as from 10 July 1967, by section 7 Decimal Currency Act 1964 (1964 No 27) by substituting the expression “\$200” for the expression “£100”.

THIS deed, made the            day of           , one thousand nine hundred and           , between AB, of Auckland, in New Zealand, merchant, of the one part, and CD, of the same place, carpenter, of the other part [*Recitals, if any*]: (Now this deed) witnesseth that, in consideration of the sum of \$200 paid by the said CD to the said AB (the receipt whereof is hereby acknowledged), the said AB doth hereby convey unto the said CD all that piece of land [*referring to the marks and numbers in the Surveyor-General’s map or other official record map, and describing particularly the situation, boundaries, and measurements, and specifying any variation in any of the above particulars since the date of the last conveyance*]: as the same is delineated on the plan drawn hereon, it being thereon coloured red [*referring to plan coloured as the circumstances may require*].

[*Special provisions, if any.*]

In witness whereof the said AB hath hereunto subscribed his name.

AB

Signed by the above-named AB in the presence of—

EF,

[*Place of abode and description.*]

## Schedule 3

Section 76

### Statutory mortgage under the Property Law Act 1952



**Covenants, conditions, and powers implied in mortgages**

(1)

That the mortgagor will pay to the mortgagee the principal sum mentioned in the mortgage, with interest thereon, in accordance with the provisions of the mortgage.

(2)

That the mortgagor will forthwith insure and, so long as any money remains owing on the security, will keep insured against loss or damage by fire, all buildings and erections for the time being situate on the land described in the mortgage; the insurance to be effected in the name of the mortgagee, and in some insurance office in New Zealand to be approved by the mortgagee, and to be for the full insurable value of such buildings and erections as aforesaid; and will deliver the policy or policies of insurance, or cause the same to be delivered, to the mortgagee, who shall be entitled to the exclusive custody thereof; and will duly and punctually pay all premiums and sums of money necessary for the purpose of keeping every such insurance on foot; and will, not later than the forenoon of the day on which any premium falls due, deliver or cause to be delivered the receipt therefor to the mortgagee.

(3)

That the mortgagor will during the continuance of the mortgage punctually pay all rates, taxes, and charges as and when the same become due in respect of the said land.

(4)

That the mortgagor will from time to time, so long as any money remains owing on the security, well and substantially repair, and keep in good and substantial repair and condition, all buildings or other improvements erected and made upon the said land: And that the mortgagee shall at all reasonable times be at liberty, by himself, his agents or servants, to enter upon the said land to view and inspect the said buildings and improvements.

(4A)

That the mortgagor will during the continuance of the mortgage do all things and pay all sums that may be required to be paid or done by the occupier of the land under any covenant to which section 64A of the Property Law Act 1952 applies that is positive in effect and to which the land is subject.

Clause (4A) was inserted, as from 6 November 1986, by section 5(1) Property Law Amendment Act 1986 (1986 No 106).

(5)

That if the mortgagor fails to insure or keep insured the said buildings and erections as aforesaid, or to deliver or cause to be delivered any premium receipt as aforesaid, or to pay the said rates, taxes, and charges, or to repair the said buildings and improvements, or to keep them in good and substantial repair and condition as aforesaid, or to do all things and pay all sums that may be required to be done and paid under any such covenant as aforesaid, then and in any such case, and as often as the same shall happen, it shall be lawful for but not obligatory on the mortgagee, at the cost and expense in all things of the mortgagor, to insure the said buildings and erections or any of them in such sum as aforesaid or in any less sum, or to pay any such premium, or to pay the said rates, taxes, and charges, or to repair the said buildings and improvements and keep them in good and substantial repair and condition, or to do all things and pay all sums that may be required to be done and paid under any such covenant as aforesaid.

Clause (5) was amended, as from 6 November 1986, by section 5(2)(a) and (b) Property Law Amendment Act 1986 (1986 No 106) by inserting the words “or to do all things and pay all sums that may be required to be done and paid under any such covenant as aforesaid”.

(6)

That in the event of the said buildings and erections or any of them being destroyed or damaged by fire, all money received by the mortgagee under any insurance in respect of any such destruction or damage shall be applied, at his sole option, either in or towards rebuilding or repairing the buildings and erections so destroyed or damaged, or in or towards payment of the principal, interest, and other money for the time being

covered by the security, notwithstanding that the same or any of them may not have accrued due under the terms of the mortgage:

Provided that if the mortgagee applies the said money in or towards payment of the principal and other money as aforesaid the mortgagor shall have the right to pay off the whole amount remaining due under the mortgage at any time within 2 months after the application of the said money has been so made.

(7)

That all money expended by the mortgagee in and about effecting or keeping on foot any insurance as aforesaid, or in paying any of the said rates, taxes, and charges, or in repairing or keeping in repairs any of the said buildings and improvements as aforesaid, or in lawfully exercising or enforcing any power, right or remedy in the mortgage contained or implied in favour of the mortgagee, shall be payable to him by the mortgagor on demand, and until paid shall be charged on the said land, together with interest at the rate agreed upon in the mortgage, computed from the date or dates of the said money being expended.

(8)

That where the mortgagor makes default for the space of 2 months in payment of the principal sum and interest, or any part thereof, or in the performance or observance of any other covenant expressed or implied in the mortgage, and thereafter at least one month's notice in writing of his intention so to do has been served by the mortgagee on the mortgagor in accordance with section 152 of the Property Law Act 1952, the mortgagee may sell the mortgaged property, or any part thereof, either altogether or in lots, by public auction or by private contract, or partly by the one and partly by the other of those modes of sale, and subject to such conditions as to title or evidence of title, time or mode of payment of purchase money, or otherwise as the mortgagee thinks fit, with power to the mortgagee to buy in the mortgaged property or any part thereof at any sale by auction, or to rescind any contract for the sale thereof, and to resell the same without being answerable for

any loss or diminution in price, and with power to execute assurances, give effectual receipts for the purchase money, and do all such other acts and things for completing the sale as he may think proper: And also that the mortgagee may exercise such other incidental powers in that behalf as are conferred upon mortgagees by law: And that the mortgagee will apply the money arising from any such sale as aforesaid, in the first place in payment of the costs and expenses incidental to the sale or otherwise incurred in respect of the mortgage, and in the second place in satisfaction of the principal, interest, and other money for the time being owing under the mortgage, and in the third place in payment of money owing under the subsequent registered mortgages (if any) in the order of their priority; and will pay the surplus (if any) to the mortgagor:

Provided that a purchaser at any sale as aforesaid shall not be answerable for the loss, misapplication, or non-application of the purchase money by him paid; nor shall he be obliged to see to the application thereof; nor shall he be concerned to inquire whether any default has been made as aforesaid, or whether any notice has been given as aforesaid, or otherwise as to the necessity, regularity, or propriety of the sale; nor shall he be affected by notice that no such default has been made or notice given as aforesaid, or that the sale is otherwise unnecessary, irregular, or improper.

(9)

That if and whenever the mortgagor makes default as mentioned in the last preceding covenant the mortgagee may call up and compel payment of all principal, interest, and other money for the time being owing under the mortgage, notwithstanding that the time or times herein appointed for the payment thereof respectively may not have arrived.

(10)

That the mortgagee will, on payment by the mortgagor of all money due under the mortgage at the time and in the manner mentioned in the mortgage for payment of the principal sum, or at any time thereafter on payment of all money then due (3 clear months' notice of the intention to pay the same having

been given), return to the mortgagor the mortgage deed, having endorsed thereon or annexed thereto a memorandum of discharge in the form numbered (1) in Schedule 5 to the Property Law Act 1952, together with all deeds and documents deposited with the mortgagee on account of the mortgage.

**Covenants, conditions, and powers implied in mortgages subject to prior mortgages**

(11)

That the mortgagor will duly and punctually pay all principal, interest, and other money secured by, and will perform and observe all the covenants and conditions contained or implied in, any mortgage having priority to this present mortgage.

(12)

That if the mortgagor makes default in the payment of any money secured by or in the performance or observance of any of the covenants and conditions contained or implied in any mortgage having priority to this present mortgage it shall be lawful for but not obligatory upon this present mortgagee to pay that money and perform and observe those covenants or conditions, and the provisions of the foregoing clause (7) shall, with the necessary modifications, apply with respect of all money so paid and all expenses incurred in performing or observing the covenants or conditions of the prior mortgage.

(13)

That compliance with the provisions of any mortgage having priority to this present mortgage which relate to insurance against loss or damage by fire shall be deemed, so far as it extends, to be compliance with any provisions as to the like insurance contained or implied in this present mortgage.

**Covenants implied in mortgages of a term of years in land**

(14)

That the rent reserved by the lease under which the mortgagor holds the land has been paid, and the covenants and conditions

expressed or implied in the lease, and to be performed and observed by the lessee, have been performed and observed up to the date of the mortgage.

(15)

That the mortgagor will from time to time, so long as any money remains owing on the security, pay the rent reserved by the lease under which the mortgagor holds the land, and perform and observe the covenants and conditions expressed or implied in the lease and to be performed and observed by the lessee, and will at all times keep the mortgagee indemnified against all actions, expenses, and claims on account of the non-payment of the said rent, or the breach or non-observance of the said covenants or conditions, or any of them.

(16)

That if the mortgagor makes default in the payment of the rent reserved by the lease under which the mortgagor holds the land, or in the performance or observance of any of the covenants and conditions expressed or implied in the lease and to be performed and observed by the lessee, it shall be lawful for but not obligatory upon the mortgagee to pay that rent and to perform and observe those covenants and conditions, and the provisions of the foregoing clause (7) shall, with the necessary modifications, apply with respect to all money so paid and all expenses incurred in performing or observing the covenants and conditions of the lease.

### Interpretation

(17)

The expressions **mortgagor** and **mortgagee** in the foregoing provisions shall, where such meaning is not inconsistent with the context, extend to and include the executors, administrators, and assigns of the mortgagor and mortgagee respectively.

(1)

Discharge of mortgage debt

I [or We] hereby acknowledge that I [or we] have received all moneys intended to be secured by the within— [or above—] written [or annexed] mortgage.

Dated this            day of            19            .  
Witness to the signature of CD:            CD, Mortgagee.  
EF,  
[Place of abode and description.]

(2)

Assignment of mortgage

In consideration of the sum of \$            paid to me by CD, of            , the receipt whereof is hereby acknowledged. [Where mortgagor joins, add and with the concurrence of XY, the mortgagor named and described in the within— [or above—] written [or annexed] mortgage, who hereby admits that the principal sum of \$            , with the interest thereon from the            day of            , is now owing upon the security of the said mortgage], I hereby assign unto the said CD all moneys secured by the within— [or above—] written [or annexed] [or by the said] mortgage, and all my rights, powers, and remedies thereunder, and all my estate and interest in the land [or property] therein described.

Dated this            day of            19            .  
Witness to the signature of AB:            AB, Assignor.  
EF,  
[Place of abode and description.]  
Witness to the signature of XY:            XY, Mortgagor  
GH,  
[Place of abode and description.]  
Accepted CD, Assignee  
Witness to the signature of CD:  
KL,  
[Place of abode and description.]

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**Schedule 6**

Section 155(1)

**Enactments of the Parliaments of England  
and Great Britain ceasing to have effect  
in New Zealand**

- 13 ELIZ I, ch 5—An Act against fraudulent deeds, gifts, alienations, etc.
- 27 ELIZ I, ch 4—An Act against covenous and fraudulent conveyances.
- 39 and 40 GEO III, ch 98—The Accumulations Act 1800.

**Schedule 7**

Section 155(2)

**New Zealand enactments repealed**

- 1908, No 40—The Deeds Registration Act 1908: Subsection (2) of section 40. (1931 Reprint, Vol VII, p 1155.)
- 1908, No 152—The Property Law Act 1908. (1931 Reprint, Vol VII, p 1077.)
- 1926, No 46—The Finance Act 1926: Section 14.
- 1927, No 49—The Property Law Amendment Act 1927. (1931 Reprint, Vol VII, p 1140.)
- 1928, No 13—The Property Law Amendment Act 1928 (1931 Reprint, Vol VII, p 1141.)
- 1932, No 27—The Property Law Amendment Act 1932.
- 1936, No 31—The Law Reform Act 1936: Part 7.
- 1936, No 58—The Statutes Amendment Act 1936: Section 63.
- 1939, No 6—The Property Law Amendment Act 1939.
- 1944, No 18—The Law Reform Act 1944: Sections 4 to 7.
- 1949, No 51—The Statutes Amendment Act 1949: Subsection (1) of section 48.
- 1950, No 27—The Property Law Amendment Act 1950.
- 1950, No 54—The Crown Proceedings Act 1950: So much of Schedule 1 as relates to the Law Reform Act 1944.
- 1950, No 65—The Limitation Act 1950: So much of Schedule 2 as relates to the Property Law Act 1908.

- 1951, No 84—The Property Law Amendment Act 1951.

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### Schedule 8

This Schedule was inserted, as from 19 September 1975, by section 13(2) Property Law Amendment Act 1975 (1975 No 36).

#### \*Form 1

#### Certificate of non-revocation of power of attorney

I, [*Full name*], of [*Place of residence*] in New Zealand, [*Occupation*], hereby certify:

1. That by deed dated [*Date of instrument creating the power of attorney*] [*Full name or donor of power of attorney*], of [*Place of residence of donor*], in New Zealand, [*Occupation of donor*] appointed me his attorney on the terms and subject to the conditions set out in the said deed.
2. That at the date hereof I have not received any notice or information of the revocation of that appointment by the death of the said [*Full name of the donor*] or otherwise.

Signed at ..... this ..... day of ..... 19..... .

\*NOTE—This form should not be used if the person holding the power of attorney is a corporation aggregate.

**\*Form 2**  
**Certificate of non-revocation of power of  
attorney**

I, *[Full name]*, of *[Place of residence]* in New Zealand, *[Occupation]*, hereby certify:

1. That I am a[n] director *[or manager or secretary or officer]* of the *[Full name of corporation holding power of attorney]*, a duly incorporated company *[or society or association]* having its registered office *[or principal place of business]* at *[Address of registered office or principal place of business]*, and as such am authorised to give this certificate.
2. That by deed dated *[Date of instrument creating the power of attorney]*, *[Full name of donor of power of attorney]*, of *[Place of residence of donor]*, in New Zealand, *[Occupation of donor]* appointed the said *[Full name of corporation]* his attorney on the terms and subject to the conditions set out in the said deed.
3. That to the best of my knowledge and belief neither the said *[Full name of corporation]* nor any servant or agent of the corporation has received any notice or information of the revocation of that appointment by the death of the said *[Full name of donor]* or otherwise.

Signed at ..... this ..... day of ..... 19..... .

\*NOTE—This form should be used only if the person holding the power of attorney is a corporation aggregate.

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**Schedule 9**  
**Rights implied in easements of vehicular  
right of way**

This Schedule was inserted, as from 6 November 1986, by section 6 Property Law Amendment Act 1986 (1986 No 106).

1

The right of the grantee, the grantee's servants, tenants, agents, workmen, licensees, and invitees (in common with the grantor, the grantor's tenants, and any other person lawfully entitled) at all times by day and by night to go, pass, and repass, with or without vehicles, machinery, and implements of any kind, over and along the land over which the easement is granted.

2

The following rights of the occupiers of the land for the benefit of which, and the land over which, the easement is granted:

- (a) The right to establish a driveway, and to effect necessary repairs to any existing driveway, and to carry out any necessary maintenance and upkeep, where necessary altering the state of the land over which the easement is granted; and any necessary rights of entry on the land over which the easement is granted with or without machinery, plant, and equipment:
  - (b) The right to have that land over which the easement is granted kept clear at all times of obstructions whether caused by parked vehicles, deposit of materials, or unreasonable impediment to the use and enjoyment of the driveway:
  - (c) The right to a reasonable contribution from other occupiers towards the cost of establishment, maintenance, upkeep, and repair of the driveway to an appropriate standard:
  - (d) The right to recover from the other occupiers the cost of repairs to the driveway occasioned by any wilful or negligent act, and all such costs occasioned by them, their agents, servants, contractors, permitted occupants, residents, or invitees arising out of the use of the driveway:
  - (e) Where work is carried out by one occupier on the land of an adjoining owner pursuant to paragraph (b) of this clause or to any order of a Court, the right of the latter owner or occupier to have the land restored as far as possible to its former condition after the completion of the work, subject to the right of contribution described in paragraph (c) of this clause.
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**Notes****1 General**

This is an eprint of the Property Law Act 1952. The eprint incorporates all the amendments to the Act as at 20 June 2011. The list of amendments at the end of these notes specifies all the amendments incorporated into this eprint since 3 September 2007.

Relevant provisions of any amending enactments that contain transitional, savings, or application provisions that cannot be compiled in the eprint are also included, after the principal enactment, in chronological order.

**2 About this eprint**

This eprint has not been officialised. For more information about eprints and officialisation, please *see* <http://www.pco.parliament.govt.nz/eprints/>.

**3 List of amendments incorporated in this eprint (most recent first)**

Unit Titles Act 2010 (2010 No 22): section 233(1)  
Property Law Act 2007 (2007 No 91): section 366(c)  
Companies Amendment Act 2006 (2006 No 56): section 41  
Insolvency Act 2006 (2006 No 55): section 445

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