

WESTERN AUSTRALIA

GUL. IV. REGIS

No. 4

An Act to regulate the Fencing of Town and Suburban
Allotments. [Assented to 7th April, 1834.

Preamble

WHEREAS the cultivation and improvement of located lands lying in and adjacent to town sites in the Colony of Western Australia may be much promoted by compelling, under certain restrictions, the erection of party fences thereto: Be it therefore enacted by His Honour the Lieutenant-Governor of Western Australia and its Dependencies, with the advice of the Legislative Council, that the proprietor or tenant of a town or suburban allotment or his or her

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agent respectively being desirous of erecting the common boundary fence between the same and any next adjoining land (not being Crown land reserved for any special purpose), whether within or without any town site, may require in writing the proprietor of such adjoining land (or the agent of such last-mentioned proprietor if absent from the said Colony) to erect a moiety of such common boundary fence in such manner and of such kind or description as may thereafter be mutually agreed on by or on behalf of both the said proprietors, or as for want of such agreement shall be determined by two arbitrators, of whom one shall be named in writing by the party making such requisition, and the other shall be named in like manner by the party to whom such requisition shall be addressed.

Boundary fence to be erected on a written requisition between town allotments

2. And be it further enacted that every requisition made under the provisions of this Act shall be served either personally on the party to whom the same shall be addressed or by leaving the same at the last or usual place of abode of such party, and that every such requisition to fence any adjoining ground whereof the proprietor shall be unknown or absent from the said Colony without any known agent within the same, shall be made and published by three successive advertisements in the 'Government Gazette' of the said Colony.

Mode of serving such requisition

When proprietor not known

3. And be it further enacted that if the proprietor or agent on whom any such requisition shall be served or to whom the same shall be notified by three successive advertisements as aforesaid shall not within fourteen days after such service, or within the like period after the last of such advertisements, either execute a written agreement for the erection of the boundary fence so required or join in appointing arbitrators as aforesaid for determining the nature and mode of constructing of such fence; in such case the Government Resident at the town site in which the land required to be fenced is situate (or any neighbouring Justice of the Peace, in case there shall be no Government Resident at such town site or such Resident shall be sick or absent) shall proceed on the application and together with the arbitrator of the party making such requisition to determine in writing the kind or description of such common boundary fence, and the particular moiety thereof to be erected by the party to whom such requisition shall be addressed, and a copy of such determination shall be served on such last-mentioned party in the same manner as such requisition, or in case of the absence of such last-mentioned party from the said Colony, shall be notified by an advertisement in the said 'Gazette.'

If the party served shall not within fourteen days determine the nature of the boundary fence; mode of determining same

4. And be it further enacted that any such written agreement or determination as aforesaid or any award made by arbitrators appointed in pursuance of any such requisition as aforesaid, of which agreement, award, or determination, notice shall be published in the said 'Gazette,' shall from the date of such notice be binding on the heirs and assigns of the parties making such agreement, or affected by such award or determination.

Agreement or determination to be binding after publication in the 'Gazette'

5. And be it further enacted that if any proprietor or agent, having been served with any such requisition, or to whom any such requisition shall be notified by advertisement as aforesaid, shall not within three calendar months after the execution of any written agreement made in pursuance of such requisition, or within the like period

If the party served shall not erect the fence required within three calendar months from date of agreement, &c., the

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party making the requisition may proceed to erect such fence

after the date of any award made by arbitrators appointed in pursuance of such requisition, or within the like period after the service or notification by advertisement of any such determination made on default of appointment of arbitrators as aforesaid, erect and finish a moiety of the fence referred to by such agreement, award, or determination, and in conformity therewith respectively; in either of the said cases, the party making such requisition as aforesaid may proceed, without any further notice or demand, to erect the particular moiety required to be erected by such requisition, of the common boundary fence therein referred to; and for that purpose to enter with all necessary workmen, servants, cattle and vehicles, on the adjoining ground so required to be fenced off, and may there cut down, dig up, and prepare all necessary timber, earth, or other materials for constructing such moiety; and may cut down and remove any tree or trees which may in reasonable probability endanger such fence when erected; or which may obstruct the erection thereof.

And may enter on the land and cut down necessary timber, &c.

Mode of recovering costs of such fence from the opposite party

6. And be it further enacted that any proprietor, tenant, or agent, who shall have erected a moiety or other less portion of any party fence under the authority of this Act, and shall be desirous of recovering the costs thereof in the mode hereby provided, shall make affidavit, to be sworn before any Justice of the Peace, that such moiety or other portion of party fencing has been erected at the costs therein mentioned on or in respect of the adjoining allotment therein described, in conformity with the provisions of this Act; to which affidavit shall be annexed a certificate, under the hands of two respectable householders, certifying that such costs are according to the market prices of fencing labour and materials; and every such affidavit and certificate may be registered in the office of the Registrar of Deeds and Transfers.

Affidavit may be registered in Registry of Deeds, &c.

Such costs shall become a charge on the allotment, with interest

7. And be it further enacted that the costs sworn to in any such affidavit shall, from the time of such registration thereof as aforesaid, become a charge, in the nature of a mortgage debt, on the allotment described in such affidavit; and shall bear interest after the rate of ten pounds for one hundred pounds by the year, to be raised, if not sooner paid, at the same time and in the same manner as the said costs.

If such costs not paid the land charged there-with may be sold

8. And be it further enacted that if any such costs as aforesaid shall not be paid on or before the expiration of twenty-four calendar months from the date of registration thereof, together with all interest due thereon, the party expending the same may, after fourteen days' notice in the 'Government Gazette,' require any Government Auctioneer to sell the allotment charged with such costs.

Governor may order the erection of dividing fences between streets, &c., and private allotments

9. And be it further enacted that it shall be lawful for the Governor, or other Officer for the time being administering the Government of the said Colony, to order the erection, at the public expense in the first instance, of any common boundary fence between a street or highway, and any town allotment not being fenced in the time and manner prescribed by the conditions and regulations under which such allotment was granted; and the costs of every such fence, so erected as last aforesaid, being estimated according to the market price of labour and materials, shall be certified, together with a description of the allotment thereby fenced off, under the hand of the Government Resident, or other Officer under whose

Costs thereof certified and registered

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superintendence the same shall have been erected, who shall cause such certificate to be registered in the office of the Registrar of Deeds and Transfers; and from the time of registration of such certificate, such costs shall become a charge on the allotment described in such certificate; and if such costs shall not be paid to the Collector of Colonial Revenue, on or before the expiration of twelve calendar months from the date of such registration, it shall be lawful for the Governor, or other Officer for the time being administering as aforesaid, to direct any Government Auctioneer to sell such last-mentioned allotment by public auction after fourteen days' notice in the said 'Gazette.'

To become a charge on the private allotment

If not paid the land may be sold

10. And be it further enacted that the proprietor or tenant of a town or suburban allotment next adjoining to ground belonging to His Majesty (not being reserved for any special purpose) may, at pleasure, erect the common boundary fence between such allotment and such adjoining Crown land, and may require in writing the person who shall subsequently obtain a grant from His Majesty of, or license to occupy, such adjoining Crown land, to appoint in writing an arbitrator for the purpose of awarding (together with an arbitrator to be in like manner appointed by the party making such requisition) the proportion to be paid by such subsequent grantee or occupant of the value of such fence; and in case the party to whom any such requisition as last aforesaid shall be addressed shall not, within fourteen days after service thereof, appoint an arbitrator in conformity therewith, the Government Resident of the town site in or nearest to which such adjoining Crown land shall be situate (or any neighbouring Justice of the Peace, in case there shall be no Government Resident at such town site, or such Resident shall be sick or absent) shall, on the application and together with the arbitrator of the party making such requisition as last aforesaid, determine under their respective hands the proportion of the value of such fence to be paid by the party obtaining such grant or license of occupation; and a copy of such determination shall be served on the same person and in the like manner as any such last-mentioned requisition; and every such award or determination as last aforesaid may be registered in the Office of Deeds and Transfers; and the proportion or sum thereby awarded to be paid shall, from the date of such registration, become a charge in the nature of a mortgage debt on the land so granted as last aforesaid, and shall bear interest after the rate of ten pounds for every one hundred pounds by the year; and if such proportion or sum, together with all interest due thereon, be not duly paid within twenty-four calendar months after registration thereof, the party entitled to receive the same may, after fourteen days' notice in the said 'Gazette,' call upon any Government Auctioneer to sell the land charged therewith by public auction.

The proprietor, &c., adjoining unreserved Crown land may erect fence

Mode of recovering a proportion of the costs of such fence

11. And be it further enacted that the proprietor or tenant of any town or suburban allotment, who shall have erected, before the commencement of this Act, at his or her sole expense, the whole of any common boundary fence between such allotment, and any next adjoining ground, whether within or without any town site, shall be entitled to recover against the proprietor of such last-mentioned land, a proportion of the value of such last-mentioned fence, by such and the like mode of proceeding as is hereinbefore provided and directed for recovering a

Mode of recovering a proportion of the costs of party fencing erected before the date of this Act

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proportion of the value of any boundary fence, erected by the proprietor or tenant of any allotment, between the same and any next adjoining unreserved Crown land.

Mode of selling lands under this Act

Distribution of proceeds

Proviso in case of dispute as to right of sale or appropriation of proceeds

Proceeds paid into Civil Court

Estate or interest to be acquired by purchasers at any such sale as aforesaid

Every purchaser entitled to memorandum of sale

No person to recover under this Act unless his own portion of fence be first erected

12. And be it further enacted that every such Auctioneer as aforesaid, who shall be called upon to sell any land liable to sale under the provisions of this Act, is hereby required to sell the same by public auction (but subject nevertheless to all charges and incumbrances thereon existing, and duly registered before the registration of the costs of fencing, for the recovery of which such land shall be sold) : and by and out of the proceeds, after deducting the expenses of sale, to pay to the person or persons on whose application such sale shall have been made, the costs of fencing and interest charged by the provisions of this Act on the land thereby sold, and sought to be recovered by such sale : Provided always that when any doubt or dispute shall arise as to the right of any person applying for the sale of land, under the authority of this Act, to make such application, and notice of such dispute shall be given to or received by the Auctioneer called upon to make such sale ; in such case, it shall not be incumbent on such Auctioneer to sell in conformity with such application until such dispute shall have been decided by some competent Court of law in the said Colony ; and that in case there shall be any doubt or dispute after any such sale as aforesaid, as to the person or persons entitled to receive the fencing costs sought to be recovered by such sale, or as to the person or persons entitled to receive the surplus of the proceeds of such sale after all lawful deductions : in either of the said cases, it shall be lawful for the Auctioneer effecting the sale at or after which any such dispute shall arise, to pay the disputed proceeds or disputed portion of proceeds into the hands of the Registrar Clerk of the Civil Court of the said Colony, to be disposed of as the said Court shall determine and direct.

13. And be it further enacted that when any land sold as aforesaid shall at the time of such sale be held by a grant from His Majesty, all the estate and interest conferred by such grant shall, subject to all such prior charges and incumbrances as aforesaid, be vested by force of such sale in the purchaser thereof ; and if any land so sold as aforesaid shall be held by a mere license to occupy, and the conditions of such license shall at the time of such sale have been duly fulfilled, in such case the purchaser of such land at any such sale as aforesaid shall acquire the same right to claim a grant thereof from the Crown, as was possessed by the proprietor thereof at the time of such sale ; but if the conditions of such license shall not at the time of such sale have been duly fulfilled, in such case the right or interest acquired by the purchaser of such land at any such sale as aforesaid, shall be a right to a first license of occupation for the same term and upon the same conditions as the said original license ; and in any of the said three cases, the purchaser shall be entitled to receive a written memorandum of the particulars of such sale, from and under the hand of the Auctioneer effecting the same ; and such memorandum shall be duly registered in the same manner as any instrument of private transfer would by any law for the time being in force in the said Colony be required to be registered.

14. And be it further enacted that no person who shall have erected any portion of a party fence under the authority of this Act shall be entitled to recover the costs thereof in the manner hereby provided,

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until such person shall have first erected his or her own moiety of such fence.

15. Provided always and be it further enacted that it shall be lawful for any mortgagee, lessee or other person claiming any estate or interest in any land charged with any such costs as are hereinbefore mentioned, to prevent the sale of any such land by payment of such costs and all interest due thereon, at any time before the day on which such sale can be lawfully had by authority of this Act; and the amount of costs and interest so paid, may be deducted, together with legal interest on such amount after the current rate by any lessee paying the same out of the rent payable by such lessee; and may be tacked by the mortgagee paying the same to his or her mortgage debt, and shall be payable, together with interest thereon after the current rate, at the same time and leviable in the same manner as such mortgage debt.

Any mortgagee, lessee, &c., may prevent a sale by payment of the fencing costs

Tacked to mortgage debt

16. And be it further enacted that on complaint on oath to any Justice of the Peace by the proprietor of any town or suburban allotment or by his or her agent that he or she has required, in writing, the proprietor or tenant of any adjoining allotment to effect any repairs alleged to be necessary in the common boundary fence dividing the said respective allotments, as ought by any agreement or award or otherwise by law to be effected by such last-mentioned proprietor or tenant, and that such requisition has not been complied with for the space of fourteen days after service thereof, it shall be lawful for such Justice to summon before him the party so complained against, and to summon and examine upon oath all necessary witnesses, and to make such order respecting such repairs as to him shall seem meet; and in case the person so complaining shall, under authority of any such order, effect any such repairs, and shall require in writing the proprietor or tenant, on whose account the same shall have been so effected, to pay the costs thereof, and such last-mentioned requisition shall not be complied with within the space of fourteen days after service thereof; in such case it shall be lawful for any Justice of the Peace on complaint of the person so acting under any such order as last aforesaid to levy and raise the costs of such repairs by distress and sale of the goods and chattels, wheresoever found, of the party not complying with such last-mentioned requisition.

Who may compel contribution for repairs—how recovered

17. And be it further enacted that if any fence erected or about to be erected under the authority of this Act shall appear to be endangered by any tree or trees or the erection thereof shall be obstructed by any natural impediment, and the proprietor of the land on which such tree or trees or impediment shall be situate shall refuse, after written application, to allow the same to be cut down or removed (or if the proprietor of such last-mentioned land shall be unknown or abroad without any known agent in the said Colony), it shall be lawful for any Justice of the Peace, on the application of any person interested in such fence, if it shall appear to such Justice after personal view or inspection that such fence is or might be endangered or obstructed by any tree or trees or natural impediment, to authorise in writing the cutting down or removal of such tree or trees or impediment by the party making such application as last aforesaid, and to make such order as to him shall seem meet touching the costs of such cutting down or removal; and the amount of costs awarded by any such order shall be recoverable

Justices of the Peace may authorise the removal of dangers or impediments to fences

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in the same manner as the ordinary costs of party fencing are hereby made recoverable: Provided that the proprietor of the ground upon which such tree or trees or impediment shall be situate, or his or her agent, shall in all practicable cases have previous notice by summons or otherwise of any such view or inspection.

Penalty on wilfully obstructing, &c., persons erecting or repairing fences under this Act

18. And be it further enacted that if any person shall, by force or otherwise, obstruct, hinder or molest any other person or persons acting under the authority of this Act in or during the erection or repairing of any fence, or the cutting down or removal of any tree or trees or impediment, every person so offending shall for every such offence, on being summarily convicted thereof by any one Justice of the Peace, forfeit and pay (besides all costs of conviction) any sum not exceeding ten pounds to the use of His Majesty, his heirs and successors.

Arbitrators appointed under this Act may apportion, &c., and may appoint umpires

19. And be it further enacted that any arbitrators appointed for any of the purposes of this Act, either by the mutual agreement of parties interested or by the provisions of this Act, are hereby empowered to determine the particular portion of any party fence to be kept in repair by each of the respective proprietors of the land divided by such fence; and in case any such arbitrators shall not be able to agree on their award it shall be lawful for such arbitrators to refer all matters submitted to their arbitration to the decision of an umpire, to be by them jointly appointed in writing.

Holders of land by license deemed proprietors

20. And be it further enacted that any person holding any land within the said Colony, by or under a license to occupy, shall be deemed a proprietor within the meaning of this Act.

Mode of registering documents to be registered under this Act

21. And be it further enacted that the Registrar of Deeds and Transfers shall register every such affidavit, certificate, award or determination as aforesaid required or permitted to be registered by this Act by making an entry thereof respectively in his Registry Book of Memorials, setting forth the date of filing the same respectively, the name of the person making such affidavit or certificate, and the name of the person filing any such award or determination as aforesaid; the description of the allotment therein respectively described; and the amount of costs thereby respectively sworn to, certified or awarded.

Amount of fees payable to Registrar of Deeds and Transfers

22. And be it further enacted that there shall be paid to the Registrar of Deeds and Transfers, for receiving and registering any such affidavit, award, determination or certificate as is hereinbefore required or permitted to be registered, the fee or sum of five shillings; and for receiving and entering any such memorandum of sale as aforesaid, the same fee as shall for the time being be payable for the receipt and registration of any deed of bargain and sale; and for every search for any such affidavit, award, determination, certificate or memorandum the fee or sum of two shillings and sixpence: Provided always that every certificate hereinbefore required to be registered of the cost of any street or highway fence erected by or on account of Government, in pursuance of the provisions for that purpose herein contained, shall be registered without the payment of any fee.

Right of appeal to Quarter Sessions

23. And be it further enacted that if any person shall think himself aggrieved by any judgment, order or conviction of any Justice of the Peace made under this Act such person may appeal therefrom to

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the next Court of Quarter Sessions, which Court shall hear and determine the matter of such appeal, and shall summon all necessary parties and witnesses, and shall make such order in affirmance or reversal of the judgment or conviction appealed from, and for payment of the costs of the appeal, as to such Court shall seem meet; and shall enforce such order, if necessary, by distress and sale of the goods and chattels of any person refusing or neglecting to obey such order, or by imprisonment of such person for any time not exceeding six calendar months: Provided that notice of such appeal be given to the Justice from whose judgment, order or conviction such appeal shall be made at the time of such judgment, order or conviction being passed or made; and that such appellant deposit with the last-mentioned Justice the sum of five pounds, to enter into a recognizance with two sureties for the purpose of securing payment of the costs of such appeal.

24. And be it further enacted that this Act shall commence and be in force with respect to all parts of the said Colony (save and except Augusta and Albany) on the tenth day of July in the present year, and shall commence and be in force at Augusta and Albany on the tenth day of October in the present year.

Commencement
of this Act

RICHARD DANIELL,
LIEUTENANT-GOVERNOR AND COMMANDER-IN-CHIEF.
