



Supplement to
Government Gazette
OF
WESTERN AUSTRALIA

OF TUESDAY, 27TH SEPTEMBER, 1881.

[Published by Authority.]

No. 44.]

PERTH: FRIDAY, SEPTEMBER 30.

[1881.

No. 956.—C.S.O.

Colonial Secretary's Office,

Perth, September 30th, 1881.

HIS Excellency the Governor, being desirous that the public should have an opportunity of forming an opinion upon so important a measure as The Fencing Bill lately passed by the Legislative Council, and from which His Excellency withheld his assent, has been pleased to direct its publication for general information.

By His Excellency's Command,

GIFFORD,

Colonial Secretary.

*A Bill intituled An Act to regulate the Fencing of Land in
Western Australia.*

WHEREAS it is expedient to consolidate and amend the law relating to the erection and upholding of Fences dividing lands belonging to different owners: Be it therefore enacted by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, as follows:—

Preamble.

1 THE following Act, and sections of Acts, are hereby repealed, namely:—The 4th William 4th, No. 4; sections 14, 16, 17, and 18 of the 36th Vict., No. 9; section 3 of the 42nd Vict., No. 11. Provided that all proceedings commenced, had, taken, or done, before the passing of this Act, shall be continued and completed in like manner, and have the same force and effect, as if this Act had not been passed.

Repeal of Acts.

Interpretation of terms.

2 IN the construction of this Act the following words and expressions shall have the several meanings hereby assigned to them:—

“Justices.” Wherever the word “Justices” or “two Justices” appear in this Act, they shall respectively be deemed to mean two Justices of the Peace, of whom one shall be a Government Resident or Police or Resident Magistrate.

“Land” (except when the word is used in section fourteen) shall mean any land alienated from the Crown by grant, or held from the Crown under special occupation lease or license.

“Fence” shall mean any substantial fence reasonably deemed sufficient to resist the trespass of great and small stock, including sheep, but not including pigs and goats, and shall not be deemed to include any fence which shall be wholly or partially constructed of bushes or brushwood.

Short title.

3 THE Short Title of this Act shall be “The Fencing Act, 1881.”

Half the value of existing fences to be paid for by adjoining proprietors.

4 IT shall be lawful for the owner of any land who shall before the passing of this Act have erected a fence dividing such land from land adjoining thereto, to demand and recover of and from the owner or occupier of such adjoining land half the value of such dividing fence; and in the event of the occupier paying the same, he may demand and recover such half-value from the owner. Provided always, that the word owner in this section shall be held to include the holder of a special occupation lease or license. Provided further, that in the case of country land, the amount recoverable from the owners or occupiers of such adjoining land as aforesaid shall, unless otherwise agreed upon, be payable by instalments as follows, *i.e.*:—

If such amount shall not exceed Twenty-five pounds, within one year after adjudication.

If such amount shall exceed Twenty-five pounds and shall not exceed Fifty pounds, within two years after adjudication.

If such amount shall exceed Fifty pounds, and shall not exceed One hundred pounds, within three years after adjudication.

If such amount shall exceed One hundred pounds and shall not exceed One hundred and fifty pounds, within four years after adjudication.

If such amount shall exceed One hundred and fifty pounds, within five years after adjudication.

Occupiers of adjoining land to assist in making dividing fence.

5 THE owner of any land not separated by a dividing fence from any adjoining land may serve a notice, as hereinafter mentioned, upon the occupier, or if there be no occupier then upon the owner or his attorney or agent of such adjoining land, requiring him to assist in or contribute to the erection of a dividing fence in equal proportions; and if such occupier or owner or his attorney or agent shall refuse or neglect, in the space of three months from the service of such notice, to assist in or contribute to the making, or having commenced shall not use due diligence in completing such fence, it shall be lawful for the person serving such notice as aforesaid to make and complete such fence and to demand and recover from such other occupier or owner half the cost thereof.

Half the expense of dividing fence may be recovered from the purchaser of Crown land.

6 THE owner of land who shall have made or who shall hereafter make a fence dividing such land from adjoining unalienated land of the Crown may demand and recover from the owner or occupier of such Crown land when alienated, or held from the

Crown under special occupation lease or license, within a period of six months after such alienation, half the value, at the time of the alienation, of the said dividing fence.

7 WHEN any dividing fence made or to be made shall be out of repair, or become insufficient, the occupiers of land on either side thereof shall be liable to the costs of repairing such fence in equal proportions.

Adjoining occupiers to keep dividing fence in repair.

8 THE occupier of any land separated from any adjoining land by a dividing fence may serve a notice, as hereinafter mentioned, upon the occupier, and if there be no occupier then upon the owner of such adjoining land, requiring him to assist in or contribute to the repairing of such dividing fence in equal proportions; and if such occupier or owner shall refuse or neglect, for the space of three months after the service of such notice, to assist in or contribute to the repairing of such dividing fence, it shall be lawful for such occupier to repair such fence, and to demand and recover of and from such other occupier or owner half the cost thereof; Provided that if any dividing fence or any portion thereof shall be destroyed by accident, the occupier of land on either side may immediately repair the same without any notice, and shall be entitled to recover half the expense of so doing from the occupier or owner of the adjoining land; Provided, always, that in case such dividing fence shall have been destroyed by fire, the owner or occupier through whose neglect such destruction by fire shall have taken place shall be the party bound to repair at his own cost the entire of the fence so damaged as aforesaid.

Occupiers to keep dividing fence in repair.

9 THE occupier of any land, having cleared and kept clear to the distance of ten feet his own side of any dividing fence from rubbish, brushwood, fallen trees, blackboys, and other dangerous fuel, may by notice in writing call upon the occupier, and, if there be no occupier, then upon the owner, of such adjoining land, to clear as aforesaid such dividing fence between the said lands to the distance of ten feet from the said fence; and if such occupier or owner so called upon shall neglect to keep his side of the dividing fence so cleared as aforesaid, then it shall be lawful for the said first-mentioned occupier at any time and from time to time after the expiration of three days from the date of the service of such notice to enter on the said lands and to clear such fence, and to demand and recover all the costs and reasonable expenses as compensation for so doing from the occupier or owner so neglecting as aforesaid as money paid to his use.

Dividing fence to be kept clear by both parties mutually.

Ten feet.

10 WHEN any person, being the tenant of any landlord, shall have been called upon by the owner or occupier of adjoining land to join in the erection of a fence under the provisions of this Act, and where such fence shall have been so erected, the cost, as between such landlord and tenant, shall be payable in the proportions following, *i.e.*:—

Apportionment of cost of fencing as between landlord and tenant.

In case the unexpired interest of such tenant, at the time of the construction of such fence, be not more than one year, the whole cost shall be payable by such landlord;

In case the unexpired interest of such tenant be more than one year and less than for a term of three years, five-sixths of such cost shall be payable by such landlord, and one-sixth of such cost by such tenant;

In case the unexpired interest of such tenant be more than three years and less than for a term of six years, three-fourths of such cost shall be payable by such landlord, and one-fourth of such cost by such tenant;

In case the unexpired interest of such tenant be more than six years and less than for a term of nine years, one-

half of such cost shall be payable by such landlord, and one-half of such cost by such tenant ;

In case the unexpired interest of such tenant be more than nine years and less than for a term of twelve years, one-fourth of such cost shall be payable by such landlord, and three-fourths of such cost by such tenant.

In case the unexpired interest of such tenant be for a term of twelve years or upwards, the whole of such cost shall be payable by such tenant ;

And in case either such landlord or such tenant shall, under the provisions of this Act, pay more than he is liable to pay of such cost, he may demand and recover the same from his landlord or tenant, as the case may be, and any tenant may set off any sum recoverable by him under this section against any rent payable to his landlord.

Provided that the whole of the cost of the erection of any fence heretofore made shall, as between landlord and tenant, be borne by the landlord, unless there be some contract between the landlord and tenant to the contrary.

Persons liable for contribution for fencing and repairs.

11 THE occupier of the adjoining land shall be the person liable in the first instance to contribute to the erection of a dividing fence.

Act not to interfere with existing agreements.

12 NOTHING in this Act contained shall be deemed or taken to avoid or affect any covenant, contract, or agreement made, or hereafter to be made, relative to fencing, between any landlord or tenant.

Act not to apply to unalienated Crown lands.

13 NEITHER the Crown, the Governor, nor any public officer appointed by the Governor, or by the Governor in Council, for the administration, management, or control of the Crown lands or public works, or who may by virtue of his office, however styled, have any such management or control, shall be liable under the authority of this Act to make any contribution towards the erection or repair of any dividing fence between the land of any owner or occupier and any public land. Provided further, that the owner or occupier of land adjoining any fence heretofore erected, or hereafter to be erected, for the protection of any railway, shall not be liable to contribute to the cost of the erection or repairs of such fence.

Party using dividing fences erected on Waste Lands of the Crown to pay half.

14 IF any person shall heretofore have erected, or shall erect a fence dividing the land held or occupied by him from any Waste Lands of the Crown adjoining thereto, and the occupier of such adjoining land shall, in enclosing the same, avail himself of the dividing fence so erected, or any part thereof, such occupier of such adjoining land shall be liable to pay to such first-mentioned person the half of the then value of so much of the dividing fence as shall be made available as a fence to such adjoining land.

Purchaser or Special Occupation Lessee of land within fenced Pastoral Lease to pay compensation for deterioration of such fence.

15 IF any person shall purchase any land, or take up or hold any land under special occupation lease or license, within the boundaries of any land held under a pastoral lease or license which shall have been enclosed by a sufficient fence, and the value of such fence thereby becomes deteriorated by reason of the land, or any portion thereof, within such fence, being purchased or taken up or held under special occupation lease or license, the purchaser of such land, or the person taking up or holding a special occupation lease or license thereof, shall pay to the lessee or licensee of the land on which such fence as aforesaid has been erected, such amount of compensation as may be determined on by one person to be appointed by the purchaser and one by the lessee or licensee. Any difference of opinion between such persons to be determined by an umpire to be appointed by themselves, or in case they shall not

Arbitration.

agree in such appointment, by the Government Resident or Resident or Police Magistrate of the district in which the land is situated, on which such fence as aforesaid shall have been erected.

16 ALL sums of money made payable or recoverable under this Act may be sued for and recovered in a summary manner before any two or more justices, except when otherwise provided by this Act. Mode of recovering cost of fencing.

17 WHERE any notice is required by this Act to be given it shall be in writing, and shall be sent by registered letter through the post, or shall be served personally on the person to whom it is addressed, or his attorney or agent, or left with some adult person at his or her last known place of residence, except when any owner shall be unknown or shall be absent from the Colony of Western Australia without any known attorney or agent, then in either of such cases the notice shall be inserted for three consecutive weeks in some newspaper published in Perth, and for two consecutive weeks in some newspaper published nearest to the land referred to, if there be a newspaper published nearer to such land than Perth; and the production of such newspaper or newspapers shall be proof of the due service of such notice. How notice is to be given.

18 THE owners or occupiers of any adjoining lands may agree between themselves as to what portion or part each shall erect and keep in repair, or keep in repair only, or erect only; and all such agreements shall be in writing, and may be witnessed by the clerk of the nearest court of petty sessions, a copy of which agreement may be lodged in the office of such petty sessions, and certified by such clerk as being a true copy, which copy may be given in evidence upon any case arising in regard to the land and fence referred to therein; and every provision of this Act shall equally apply to any such dividing fence, so far as they can be made applicable, excepting that when any owner erects or repairs, under the provisions of this Act, any portion of the dividing fence which under any such agreement the owner of the land adjoining should have erected or repaired, the whole amount of the cost thereof, instead of half, shall be recovered from the owner or occupier failing or neglecting to erect or repair such dividing fence, according to the provisions of this Act. Agreements as to fencing to be registered with the Clerk of Petty Sessions, and may be given in evidence.

19 IF any dispute or difference shall occur between the owners or occupiers of any adjoining lands respecting the following matters, viz.:— Points upon which justices may decide.

1. The sufficiency or otherwise of any river or other natural boundary instead of a fence.
2. What portion of any fence shall be erected or repaired by each owner.
3. The necessity for any dividing fence to be repaired.
4. Whether due diligence has been used to complete the erection or repair of any fence after it has been commenced.
5. The description and sufficiency of any fence erected or to be erected.
6. The sufficiency or otherwise of any excuse for not using due diligence in the completion of the erection of any fence or repairs, after having commenced the same;

it shall be competent for either party to apply to the court of petty sessions nearest the place where the fence in question exists, or is about to be erected; and two or more of the justices usually attending such petty sessions shall inquire into the matter thus brought before them, and may summon witnesses and examine them upon oath, or by view or otherwise take the best means of informing themselves upon the merits of the case at issue, and shall Justices to whom power to inquire into the matter in dispute their decision to be final.

give judgment thereon, with or without costs, to either party, as they may see fit; and the decision of such justices shall be final and conclusive.

No judgment to be given for a larger sum than the cost of a three-railed fence in country, or four-railed or paling fence in town.

20 IN no case shall a judgment be given under any of the provisions of this Act which will involve an expense in the erection of any fence exceeding in the case of country and suburban lands the fair and usual price charged for the erection of a three-railed fence, and in town allotments a four-railed or paling fence; and in all cases where contribution shall be required for any existing fence the amount to be recovered shall have reference to the actual value and state of any such fence at the time such sum is sought to be recovered and not to the original cost of such fence; such value to be based upon the fair and usual price charged for the erection of a three rail fence in the case of country and suburban lands, and of a four rail or paling fence in town allotments.

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

21 EVERY person engaged in constructing or repairing a fence under this Act, his agents and servants, may, with or without horses, cattle, carts or carriages, at all reasonable times during such construction or repairing, enter upon the contiguous lands and do thereon such acts, matters, and things as are necessary or reasonably required to carry into effect the construction or repairing of such fence; and 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.

Where river, &c., natural boundary power to agree on line of fence.

22 WHEN a river, creek, or natural watercourse forms the boundary of contiguous lands, but is not capable of resisting the trespass of cattle, it shall be competent for the occupants of such contiguous lands to agree upon such a line of fence on either side of such river, creek, or natural watercourse as shall secure such fence from the action of floods, and in the event of their not agreeing upon a line of fence it shall be competent for either party to call in the nearest police magistrate, or any other magistrate they may agree to select, who shall determine the line of fence to be erected and decide whether any and what compensation, in the shape of an annual payment, shall be paid to either of the parties occupying such contiguous lands in consideration of loss of occupation of land; and the police magistrate or other magistrate so called in shall be entitled to receive from such occupiers, in equal proportions, the actual cost of his travelling expenses (if any) incurred by him in visiting and inspecting the ground: But the occupation of lands on either side of such line of fence shall not be deemed adverse possession and shall not affect the title to or possession of any such lands save for the purposes of this Act. Provided, always, that the owner or occupier may, at any time, resume possession of any such lands, in which event he shall fence the natural boundary of such river, creek, or natural watercourse at his own expense, anything in this Act to the contrary notwithstanding.

Money adjudged if not paid within one month may be levied by distress and sale of goods.

23 ALL moneys adjudged by any court of petty sessions to be paid by any party, pursuant to this Act, may, as to moneys recoverable under the provisions of section four, or any instalment of the same, if not paid within the several periods defined in such section, and as to moneys otherwise recoverable under this Act if not paid within one calendar month after such adjudication, be recovered under a warrant (as in schedule to this Act annexed), signed by the said magistrates, directed to any constable or sheriff's bailiff to levy the same by distress and sale of the goods and chattels

of said party so ordered to pay said sum of money together with all costs and charges attending the same. Provided, always, that whenever it shall appear to the said Magistrate that the issuing of any such warrant of distress as aforesaid would be ruinous to the party so ordered to pay the said sum of money together with all costs and charges attending the same, then in such case no such warrant shall be issued, or if the party so adjudged to pay shall not have sufficient goods and chattels out of which such sum so ordered to be paid may be levied, such constable or sheriff's officer shall certify the same under his hand on the back of such warrant, and the party in whose favor such order shall have been made shall be entitled to register the same in the office for registering deeds in Western Australia on payment of a sum of Two shillings and sixpence, and the amount of such order, and all costs and expenses attending the same, together with the sum of six per cent. per annum till paid, shall be thenceforth a charge on the said land of the party making default.

24 IF the amount of such order and costs as aforesaid shall not be paid on or before the expiration of five years from the date of registration thereof, together with all interest due thereon, the party expending the same may, after two months' notice in the *Government Gazette*, require any Licensed Auctioneer to sell the land charged with such costs.

If such costs not paid the land charged therewith may be sold.

25 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 amount of such order and costs 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 amount of such order and costs 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 amount of such order, costs, and interest 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 of the Supreme Court of the said Colony, to be disposed of as the said Court shall determine and direct.

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 Supreme Court.

26 WHEN any land sold as aforesaid shall at the time of such sale be held by a grant from Her 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 lease or license to occupy, and the conditions of such lease or 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

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

Every purchaser entitled to memorandum of sale.

Crown as was possessed by the proprietor thereof at the time of such sale; but if the conditions of such lease or 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 lease or license of occupation, for the same term, and upon the same conditions, as the said original lease or 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 other instrument or private transfer would, by any law for the time being in force in the said Colony, be required to be registered.

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

27 PROVIDED always, that it shall be lawful for any mortgagee, lessee, or other person claiming any estate or interest in any land charged with the amount of such order, costs, and interest as are hereinbefore mentioned, to prevent the sale of any such land by payment of the amount of such order and 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 such order and 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.

Tacked to mortgage debt.

Shortening Ordinance.

28 SECTIONS A, C, and I of the Shortening Ordinance shall be incorporated and read with this Act.

SCHEDULE.

Whereas a sum of _____ was on the _____ day of _____ adjudged by us to be paid by _____ to _____ towards the cost of erecting or repairing a fence dividing their respective lands, and whereas the said sum of money has not been paid pursuant to our said adjudication: We do hereby order and direct that if the said sum of _____ be not paid forthwith, that the same be levied by distress and sale of the goods and chattels of the said _____, together with the costs and charges of said distress and sale.

Given under our hands and seals this _____ day of _____