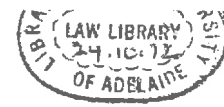


This material has been reproduced on this webpage by or on behalf of the University of Adelaide under licence from the Attorney-General for the State of South Australia. The material is reproduced for academic and educational purposes only. Any further reproduction of this material by you may be the subject of copyright protection under the Copyright Act 1968.

SOUTH



AUSTRALIA



TWENTY-SIXTH REPORT
of the
LAW REFORM COMMITTEE
of
SOUTH AUSTRALIA
to
THE ATTORNEY-GENERAL

**CONCERNING THE AMENDMENT OF THE
LAW RELATING TO FENCES AND FENCING**

1972

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

MR. B. R. COX, Q.C., Solicitor-General.

MR. R. G. MATHESON.

MR. K. P. LYNCH.

MR. J. F. KEELER.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

TWENTY-SIXTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA CONCERNING THE AMENDMENT OF THE LAW RELATING TO FENCES AND FENCING

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

You referred to us the question of the reform of the law relating to fences and fencing. We have now considered the matter and report as follows:—

The present Act is an Act of 1924 and was passed as appears from South Australian Parliamentary Debates, 1924, volume 1, page 1022 to cure the fact that earlier Fencing Acts dealt with country rather than urban conditions.

There had been previous legislation going back to 1846 and the history of the previous legislation is set out in the judgment of Blackburn J. in the case of *Roper Valley Station Pty. Ltd. v. MacFarlane* 1970 A.L.R. 371 at 373 and 374.

At this stage where most fencing disputes are urban and the balance of the distribution of population between urban and country has shifted considerably in fifty years, we think that quite a number of sections of the 1924 Act require reconsideration.

We should say that we have been much assisted in this task by a working paper of the Property Law and Equity Reform Committee of New Zealand dealing with reform of their Fencing Act of 1908.

Probably the best way to deal with this particular form of reform is to take the 1924 Act section by section and deal with the reforms which we think might profitably be made to it.

At common law an owner was under no obligation to erect and maintain fences around his land: see *Hunt's Boundaries and Fences* 6th Edn. page 95 and *District Council of Noarlunga v. Coventry* 1967 S.A.S.R. 71 at 75. Accordingly it must be borne in mind throughout this Act that whatever is enacted is in derogation of the common law and has therefore to be spelt out in some detail.

The first three sections of the present Act are purely procedural and do not concern us in the matter of law reform.

In relation to section 4 there is no definition of "adequate fence" in the present Act or to be more accurate it is referred to but not in those words in section 17 as to when it ceases to be a "sufficient fence" and we think that as there have been differing views in Courts of Summary Jurisdiction on this point it might be as well to spell it out as the New Zealand Committee have done in their Act. The definition is:—

"'adequate fence' means a fence which as to its nature, condition and state of repair is reasonably satisfactory for the purpose which it serves or is intended to serve."

There is also no definition of "adjoining occupiers" in South Australia. The present section 6 assumes such a definition but we think it would be wise to have one in, but to have a rather more extended one than appears in the New Zealand definition. The New Zealand definition is as follows:—

"'adjoining occupiers' means the occupiers of the lands on either side of a common boundary or a common fence."

This does not deal with the case where the adjoining occupiers are separated by a right of way as distinct from a road. It was held in the Supreme Court of Western Australia that where adjoining occupiers are separated by a right of way the properties are not adjacent: see *Ramsey v. Offer* 20 *W.A.L.R.* 65. The difficulty is that in a number of the inner suburbs for reasons which are now quite obscure, small rights of way of the order of one or two feet are not uncommon. North Unley and North Adelaide for example have quite a number of them and they are also to be found in a number of other inner suburbs. Whether they were originally to take up any question of deficiencies in measurement or for a number of other reasons which have been given as explanations at various times, these do cause trouble in practice and we think that a further clause should be added to the definition of "adjoining occupiers" namely "occupiers of lands who would have a common boundary but for an intervening right of way, shall be deemed to be adjoining occupiers for this purpose".

In considering this question of who is an "occupier" one should also consider the decision in *The District Council of Noarlunga v. Coventry*, to which reference has already been made, in which Mr. Justice Walters held that a local governing body was not an occupier of land within the meaning of the Fences Act where it held a reserve vested in it pursuant to section 14 of the then Town Planning Act.

We do not quarrel with His Honour's decision which followed previous authorities but we think it undesirable that there should not be a fence between reserves and private property. Private owners are entitled to some consideration as well as Councils and in any case many reserves do derive some revenue but however this point may be the old aphorism is that "good fences make good neighbours" and reserves are quite often used particularly at night for socially undesirable purposes and it would seem to us to be better if, where reserves occur and the adjoining owner asks the Council to contribute to the erection of a common fence between him and the reserve, that the Council should bear its proportion of the fence.

The definition of occupier should be further amended as follows by adding a proviso:—

"Provided that where the land is Crown land, any person who occupies it under a lease, licence or other authority granted by the Crown for a term less than 12 months certain shall not be an occupier unless he has an exclusive right to occupy the land."

It is necessary to specially mention lessees from the Crown because of the decision of the Full Court in *Brown v. McLaughlin* 4 *S.A.L.R.* 96 affirmed by the Privy Council *L.R.* 4 *P.C.* 543.

We have also under our Act no definition of "fence". We think it would be wise to adopt the New Zealand definition which reads:—

“ ‘fence’ means a fence whether or not continuous or extending along the whole boundary separating the lands of adjoining occupiers; and includes all gates, culverts, and channels which are part of or incidental to a fence; and also includes any natural or artificial watercourse or live fence, or any ditch or channel or raised ground which serves as a dividing fence.”

One of the reasons no doubt for the New Zealand definition being cast in the form that it is, is the decision of the Supreme Court of New Zealand in *Payne v. Payne* 1969 *N.Z.L.R.* 509, that where the fence erected was not as far as practicable continuous throughout its length the adjoining occupier is not liable to contribute. This is not a very satisfactory decision particularly as there are some areas which are too hilly, too inaccessible or separated by so deep a valley that it is not practicable to fence along the whole boundary, or it may be that there are creeks or other natural obstacles running through the property. A number of the latter, under the latest Planning and Development Act and regulations will in any event be, on subdivision, vested in Councils and not in adjoining occupiers *ad medium filum*, as was the rule prior to the enactment of the present Act. This may have further undesirable consequences in that the person who has commissioned the fence may himself get out of liability on that basis unless there is some such definition in: *Ettridge v. The Vermin Board of the District Council of Murat Bay*, a decision of our Full Court reported in 1930 *S.A.S.R.* page 210.

Our present definition of “occupier” is unsatisfactory because the words “entitled as owner to occupy” for example do not include the case of where property is let to a tenant: see *Luxford v. Cairns* 1914 *V.L.R.* 433 and this was apparently the position at common law: see *Cheetham v. Hampson* 4 *Term Reports* 318. In addition it does not include a mortgagee in possession: see *Rodd v. Campbell Legge* page 326. We think that the New Zealand definition is a good one and we set it out hereunder:—

“ ‘occupier’, in relation to any land, means the owner thereof, except where another person (including the Crown) is in occupation of the land as mortgagee in possession, or has a right to occupy the land by virtue of a tenancy granted for a term of not less than 12 months certain, in which case the term ‘occupier’ means that other person: Provided that, where the land is Crown land, any person who occupies it under a lease, licence, or other authority granted by the Crown for a term not less than 12 months certain shall not be an occupier, unless

(a) He has an exclusive right to occupy the land;
or

(b) The lease, licence, or other authority is granted for agricultural purposes, whether or not the lessee, licensee, or holder of the authority has an exclusive right to occupy the land:”.

There is no definition of “owner” in our Act. We do not agree with the New Zealand definition which turns on whether or not a rack rent is payable in respect of the land. Rack rents are practically unknown in South Australia and we suggest that the straightforward definition be adopted that—

“ ‘owner’ means the registered proprietor of an estate in fee simple in the land.”

We also have no definition of "repair" or of "work" and "work on a fence" and these have caused considerable argument in the past. The New Zealand definitions appear to be useful and we set them out as follows:—

"'repair' includes trimming, keeping and maintaining a live fence, and cleaning, deepening, straightening, altering, or enlarging the course of a natural or artificial watercourse or any ditch or channel or raised ground which serves as a fence:

'work' and 'work on a fence' includes the erection, replacement, repair, and maintenance of a fence in whole or in part, and the preparation of the land along or on either side of a boundary between adjoining occupiers for any such purpose."

Section 5 of our Act which deals with the type of fence which can be erected comes from the situation in 1924 when some political compromise had to be attained in order to get past the fact that the only fence which was then compulsory was a post and rail fence as used in the country. We have progressed a long way from the type of fences envisaged in section 5 and the position is that at present except by agreement, fences of brick or stone, brush fences, wrought iron fences, ornamental fences, low boundary fences and many others are not within section 5. We think that section 5 should be repealed and that in its place a section should be inserted providing that any fence shall be a sufficient fence within the meaning of this Act if it is a fence agreed to by the parties or in default of agreement held by the Court to be a proper and sufficient fence for the locality in which it is desired to erect the fence.

New Zealand has provisions in section 5 and 6 for the creation and registration of fencing covenants. They are as follows:—

"5. *Creation and Registration of Fencing Covenants*—(1) A fencing covenant by the transferee of any land may be created by—

- (a) The inclusion in the memorandum of transfer of the land to him (whether or not he signs the transfer) of the words "The transferee shall be bound by the statutory fencing covenant in favour of *the transferor*" or words to that effect; or
- (b) The inclusion in the memorandum of transfer of the land to him of a covenant or agreement signed by him, or a proviso (whether or not signed by him) that constitutes a fencing covenant within the meaning of section 2 of this Act.

(2) The District Land Registrar shall register any transfer notwithstanding that it contains a fencing covenant.

6. *Expiry of Registered Fencing Covenants*—(1) Where a fencing covenant is registered under the Land Transfer Act 1952 after the commencement of this Act, or where a covenant, agreement, or proviso was registered under the Land Transfer Act 1952 before the commencement of this Act by virtue of section 7 of the Fencing Act 1908, the covenant, agreement, or proviso, and the registration thereof, shall have no further force or effect after the expiration of 12 years from the date of the registration or the date of the commencement of this Act, whichever is the later.

(2) Until the expiry of the said period of 12 years, the burden of any covenant, agreement, or proviso which is registered against the title to the land to which it relates shall run with the land, whether or not assigns are named in the covenant, agreement, or proviso.”

Until recently we would have thought these entirely unnecessary but the Court of Appeal held in *Crowe v. Wood* 1970 3 *W.L.R.* 516 that a right to have one's neighbour keep up fences was a right which lay in grant and was of such a nature that it would pass under section 62 of the Law of Property Act. Section 62 of the Law of Property Act is in terms identical with section 36 of our Law of Property Act 1936 so that clearly the same position can arise in South Australia. We think the protection given in *Crowe v. Wood* is too wide and that the New Zealand protection probably meets the case although in the last resort this is no doubt a matter of Government policy, but we draw your attention to it and to the fact that at the moment there seems to be a requirement to keep up fences of a rather indeterminate obligation, particularly as the decision has not been entirely favourably received in England. There is for example a critical article on the decision in 115 *Sol. Jo.* at page 195.

We should at this point also deal with the problem of whether or not there is any prescriptive obligation to fence in South Australia, a matter which is not considered in the New Zealand Report. Certainly such a prescriptive obligation exists in England: see *Halsbury Laws of England* 3rd Edn. vol. 3 para. 744 page 391: *Hunt's Boundaries and Fences* (supra) at pages 100-109: *Lawrence v. Jenkins*, *L.R.* 8 *Q.B.* 274 and *Crowe v. Wood* (supra). The Prescription Act 1832 2 & 3 Will. IV c.71 is in force in South Australia: see *White v. McLean* 24 *S.A.L.R.* 97 and so is the doctrine of lost modern grant. It would appear from the English authorities and textbooks to which reference has just been made that this right does not arise under the Act of 1832 because it is not a true easement but it does arise under prescription at common law. Whether prescription at common law exists in South Australia has never been decided. It has been considered in the Canadian States and has divided the authorities of the various States; Ontario holding that it does so exist and the other States that it does not, but since *Crowe v. Wood* holds that this particular right can be prescriptive and can lie in grant it is possible that the doctrine of lost modern grant may apply notwithstanding that it is of course obvious that there are no titles in South Australia going back to the first year of Richard I: 1189. However, to put the matter beyond doubt in South Australia it may be wise to add a clause that no title to or obligation to repair a fence by prescription exists or shall be deemed ever to have existed in South Australia.

Turning now to Part II of our present Act, section 6 of the present Act dealing with liability to contribute seems to us to be in no need of amendment.

Section 7 however is we think in too curtailed a form. We think that the New Zealand section 8 of their proposed bill deals with the matter with much greater particularity and in much better form. It is as follows:—

“8. *Notice to do Work to be Given*—(1) Any person who desires to compel any other person under this Act to contribute to the cost of work on a fence shall serve on him a notice in the form numbered 1 in the First Schedule to this Act or to the like effect.

(2) The notice shall—

- (a) Specify the boundary or line of fence, or the parts of the boundary or the line of fence, along which the work is to be done; and
- (b) Specify (whether by reference to a fence described in the Second Schedule to this Act or otherwise) the work proposed to be carried out with sufficient particularity to enable the person on whom the notice is served to—
 - (i) Comprehend the nature of the work proposed and the materials to be used; and
 - (ii) Estimate the cost of the work.

(3) If it is proposed that the cost of the work shall be borne otherwise than in equal shares, the notice shall state the shares that are proposed.

(4) In the absence of agreement to the contrary, the occupier of any adjoining land shall not be liable to contribute to the cost of—

- (a) Any part of the work on a fence that is done before notice relating to the work has been duly served on him; and
- (b) Any part of the work that is done after the due service of such a notice and before the due service of a cross-notice on the person who gave the notice or the expiration of 21 days from the date of the service of the notice, whichever first happens; and
- (c) Any part of the work that is done after the due service of such notice and cross-notice and while differences between the parties remain to be resolved either by agreement or by the Court.”

(The First and Second Schedules of the New Zealand report were not supplied with the report.)

And we think that this covers the matter adequately.

Again, it is of importance to any Court before any argument should come that they should know precisely what the objections are to the proposed fence and so should the person who made the original proposal so that he can deal with them. It is true that our present section 8 provides for the procedure in a case where the parties do not agree so that informally no doubt the neighbour who made the proposal probably knows what the objections are but he may not know the full scope of them and we think that section 9 of the New Zealand Act providing for cross-notices is a useful section and should be included. It reads as follows:—

“9. *Objections to Proposed Fence*—(1) If the person receiving a notice objects to any of the proposals therein contained, he may, within twenty-one days after the service of the notice, serve on the person who gave the notice a cross-notice signifying his objections, and he may make counter-proposals in that cross-notice.

(2) A cross-notice shall be in the form numbered 2 of the First Schedule hereto or to the like effect, and any work proposed in a cross-notice to be carried out shall be specified with the same particularity as is required in the case of a notice by subsection (2) of section 8 of this Act.

(3) If the person receiving a notice fails to serve a cross-notice within the said period of twenty-one days, he shall be deemed to have agreed to the proposals contained in the notice served on him."

This is then followed by clauses 11-14 of their Act which are consequential and again we think they are better than our present Act and we set them out hereunder:—

"11. *Where Notices Vary*—If a notice and cross-notice have been duly served or if notices to do work have been duly served and the proposals in those notices do not correspond, then (unless within twenty-one days after the service of the last notice or cross-notice the differences are resolved by agreement) the matters in dispute may be determined by the Court in manner hereinafter provided.

12. *Provision for Doing Work*—(1) Where a person serves notice under this Act in respect of work on a fence, he may proceed to do the work—

(a) At the expiration of 21 days from the date of the service of the notice if he is not duly served with a cross-notice within that period; or

(b) If within the said period of 21 days he is duly served with such a cross-notice, as soon as all differences between the parties are resolved either by agreement or by the Court.

(2) If the person who served the notice fails to commence to do the work within the 28 days commencing on the day on which he first became entitled to commence the work or such longer period as may be agreed to by the parties or fixed by the Court (in this section referred to as the prescribed period) either party may thereupon, or at any time within three months thereafter, proceed to do the work.

(3) If the party who last proceeded to do the work fails for a period of 28 days to carry out the work with due diligence, the other party may proceed to complete the work.

(4) If for any period of three months after the expiration of the prescribed period and before the completion of the work neither party does any part of the work, all notices, cross-notices, agreements and orders relating to the work (other than agreements and orders to which subsection (5) of this section applies) shall, in relation to the uncompleted part of the work, lapse and become of no effect, but nothing in this subsection shall restrict the giving of further notices and cross-notices or the making of further agreements or orders.

(5) At any time before or after the expiration of any period of three months to which subsection (2) or subsection (4) of this section applies, the period may be extended either by agreement of the parties or order of the Court.

(6) Where in accordance with this section either party does any work on a fence, he may recover from the other party as a debt the other party's proportion of the cost of the work done.

13. *Contribution Where Immediate Work Required*—Subject to the provisions of section 14 of this Act, if any fence is damaged or destroyed by sudden accident or other cause and requires immediate work, either of the adjoining occupiers may do that work without any notice, and may recover half the cost thereof from the other occupier.

14. *Liability for Damage Caused by Occupier*—If any fence is damaged or destroyed in circumstances in which apart from this Act an occupier would be liable therefor, he shall be liable for the whole cost of making good the fence.”

We then think that our Act should go on to provide for proceedings in the nearest local court of limited jurisdiction. The provision for proceedings in Courts of summary jurisdiction is quite inapt to modern fencing disputes most of which are suburban. A fence these days is a quite costly undertaking and is we think a matter for consideration by a Magistrate. In any case the procedure of Courts of summary jurisdiction is under the Justices Act tailored towards complaints ending in a conviction for some breach of the law rather than to this procedure which has to be quite often varied and supplemented by special directions to make it work under the Fences Act as it now stands, whereas the procedure of the Local Court dealing with a claim for a liquidated amount would clearly cover the position.

New Zealand has no equivalent of our sections 10, 10a, 11 and 12 and we think they are valuable and should be retained. However 11 does not have a detailed section relating to the jurisdiction of the Court and as we are at this stage recommending that this be changed to the Local Court we think it would be wise to set it out in detail as it is in the New Zealand Act. Their section 27 covering this matter reads as follows:—

“27. *Jurisdiction of the Court*—The Court shall have jurisdiction to hear and determine all questions and disputes arising under this Act in relation to the following matters:

- (a) whether an existing fence is an adequate fence;
- (b) work on a fence;
- (c) the persons by whom work on a fence is to be done;
- (d) the reasonable and proper cost of work on a fence, including interest on outlay and reasonable remuneration for the superintendence and labour of an occupier when he is or has been personally engaged on the work;
- (e) The person or persons by whom the cost of any work on a fence is to be borne; and, if the cost is to be borne by two or more persons, the proportion of the cost which each of them shall bear;
- (f) the line of fence to be adopted, and the amount of compensation (if any) to be paid for loss of occupation of land and the manner of payment thereof;
- (g) the date on or before which, and the manner in which any work is to be done;
- (h) the removal of a fence that is not erected on the proper boundary;
- (i) whether there has been a failure to exercise due diligence under subsection (3) of section 12 of this Act;
- (j) whether immediate work is or was required under section 13 of this Act;

- (k) the entry on adjoining land for the purpose of carrying out the work;
- (l) the use on adjoining land of animals, vehicles, aircraft, hovercraft, any mode of conveyance and any equipment;
- (m) the value or cost of a fence for the purpose of sections 16 and 18 of this Act;
- (n) the amount of the proportionate share under section 17 of this Act;
- (o) any other question or dispute arising out of this Act;
- (p) the costs of any proceedings, and the parties by whom and to whom costs are to be paid.”

We think that as a matter of construction our section 25 or its New Zealand equivalent should be put in at this point in the Act and not at a later point. The New Zealand section 28 is wider and we think better than ours which deals really only with the case of landlord and tenant. Their section 28 reads as follows:—

“28. *Power to Come in and Defend Proceedings*—Where any proceedings have been commenced under this Act in relation to any fence, any person who may ultimately incur any liability in respect of the fence may come in and—

- (a) raise any defence in the proceedings against any party thereto;
- (b) avail himself of any defence in the proceedings that any party thereto might set up.”

We think that sections 13-16 of our Act should remain in their present form. New Zealand has an alternative provision to survey where a fence cannot be erected on the boundary of adjoining lands. It reads as follows:—

“19. *Give and Take Fence*—(1) Where it is impracticable or undesirable to erect a fence on the boundary of adjoining lands, and the occupiers cannot agree upon a line of fence on either side of that boundary, the line of the fence shall be determined by the Court in manner hereinafter provided.

(2) The Court may appoint one or more persons to inspect the proposed line of fence, and shall determine whether a fence is necessary, and, if so, what line is to be adopted; and whether any, and, if so, what compensation (whether an annual payment or otherwise) is to be made to either of the occupiers in consideration of loss of occupation of land.

(3) The reasonable costs of inspection shall be borne as the Court in its discretion shall direct.

(4) The occupation of lands on either side of the line of fence shall not constitute a tenancy or be deemed adverse possession, and shall not affect the title to or possession of any lands, save for the purposes of this Act.”

We think that this is a very useful provision and we think it may with advantage be extended to cases where parties expressly agree that the fence shall not be on the common boundary. This not infrequently

happens in the country where "squaring off" of paddocks makes it far easier for both parties to work their paddocks and it not infrequently happens in the suburbs in the case of irregular blocks. The alternative in the suburbs is to transfer a very small area from one owner to another under the Real Property Act and the costs of the transfer quite often outweigh the small amount of land involved in the matter. This is important because it was decided in the Supreme Court of New Zealand that a fence must be on the boundary between adjoining occupiers except in the exceptional cases already in their Act and not in ours before any occupier can invoke any rights under the Act. See *Ahearn v. Havier* 1967 *N.Z.L.R.* 245.

We do not know why Part III of our Act is in a separate place. We would have thought that it should have been with Part II as part of the liability of adjoining occupiers. We see no reason why any amendment should be made to the wording of the present sections which appear, when the additional definition as to a fence being out of repair is added to the Act as we have recommended above, to be adequate but we think they should form part of Part II possibly immediately prior to the jurisdiction section. We think that there should be a further section put in at this point with regard to the Crown instead of our section 31 reading something as follows:—

"Nothing in this Act shall apply to Crown land in respect of which there is no occupier other than the Crown or to impose any liability on the Crown the Governor the Crown Lands Board or any other instrumentality of the Crown or any officer in the service of the Crown having the administration management or control of Crown lands."

Turning now to Part V of our present Act we see no reason for any alteration in sections 21 and 22 which seem to have worked well. Section 23 we have already dealt with. Section 24 however we think is better dealt with in section 29 of the New Zealand Act because their section deals with the question of causing damage by entry. It reads as follows:—

"29. *Right of Persons Constructing Fences to Enter on Adjoining Land*—(1) Where an occupier is doing or proposes to do work under this Act and access to the fence over his own land is more difficult, inconvenient, or expensive than over the adjoining land, the Court may authorize that occupier, his agents, workmen, and contractors, with or without animals, vehicles, aircraft, hovercraft, and any mode of conveyance and any equipment, to enter upon any portion of the adjoining land at all reasonable times and do such things thereon as are reasonably necessary to carry out the work.

(2) The following provisions shall apply with respect to any order made under subsection (1) of this section:

- (a) the right of entry thereby conferred shall be exercised so as to cause as little damage as possible to the land entered upon, and shall be upon such terms and conditions, including payment of compensation, as the Court thinks fit;
- (b) no such order shall authorize any person to cut down, lop, or injure any tree or shrub without the consent of the owner.

(3) If an owner or occupier of land, by himself or his agents or servants, obstructs any entry authorized by an order made under subsection (1) of this section, he shall be liable (in addition to any other penalty that he may incur) to pay the entire cost of the work, unless the Court (on application made by him in that behalf) orders him to pay part only of that cost."

Section 25 we have already dealt with. Section 26 does not seem to us to be a matter for a Fences Act but rather for dealing with under the Weeds Act or some similar legislation and we recommend its deletion from this Act. Sections 27-30 do not require any attention and section 31 has already been dealt with.

The New Zealand Act has a section in it which we think ought to be in ours, namely the normal power to make Rules of Court which should be in any Act of this type and we recommend the inclusion of the normal section for this purpose.

Since this paper was discussed and reduced to its final form Mr. Hackett-Jones of Parliamentary Counsel has been good enough to draft a bill which gives effect to the amendments we have suggested but which amends the suggested drafting in the report so as to give coherence and uniformity of expression to the redrafting.

We are most grateful to him for his work and the draft bill is appended to this report.

We have the honour to be

HOWARD ZELLING

B. R. COX

JOHN KEELER

K. P. LYNCH

R. G. MATHESON

The Law Reform Committee of South Australia.

A BILL FOR

An Act to provide for the erection, replacement, repair and maintenance of fences; to repeal the Fences Act, 1924-1926; and for other purposes.

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

- Short title. 1. This Act may be cited as the Fences Act, 1972.
- Commencement. 2. This Act shall come into operation on a day to be fixed by proclamation.
- Repeal and saving provision. 3. (1) The following Acts are repealed:—
the Fences Act, 1924;
the Fences Act Amendment Act, 1926.
- (2) Any proceedings commenced pursuant to the repealed Act may be continued and completed subject to and in accordance with the provisions of that Act in all respects as if this Act had not been enacted.
- Interpretation. 4. (1) In this Act, unless the contrary intention appears—
“adjoining owners” means the owners of contiguous land:
“cost” in relation to fencing work—
(a) includes the cost of any survey that is reasonably required for the purposes of the fencing work;
(b) includes the cost of any work reasonably required to facilitate the performance of the fencing work;
and
(c) where an adjoining owner has done, or proposes to do, any of the work personally, includes a reasonable allowance for his labour:
“council” means a municipal or district council and includes any body corporate that is, by virtue of any Act, deemed to be, or vested with the powers of, a municipal or district council:
“court” in relation to any proceedings relating to a fence or fencing work means the local court nearest to the location or proposed location of the fence or fencing work to which the proceedings relate, or any other local court in which the parties agree to litigate the proceedings:
“Crown lands” means Crown lands within the meaning of the Crown Lands Act:
“dividing fence” means a fence dividing contiguous land of adjoining owners:
“fencing work” means the erection of a new dividing fence, or replacement, repair or maintenance work in relation to an existing dividing fence:

“owner”—

- (a) in relation to land alienated from the Crown by grant, means the proprietor of an estate in fee simple in the land;
- (b) in relation to land of the Crown subject to an agreement for sale, or a right of purchase, means the person entitled to the benefit of that agreement or right of purchase;
- (c) in relation to land held of the Crown under a lease, means the lessee;

and

- (d) in relation to land held of the Crown under a licence, the term of which exceeds twelve months, means the licensee:

“proponent” and “adjoining owner” mean, respectively—

- (a) the owner of land who proposes to erect a fence dividing his land from contiguous land, or to perform replacement, repair or maintenance work in relation to such a fence:

and

- (b) the owner of that contiguous land:

“public road” means a road or thoroughfare to which the public has access:

“replacement, repair or maintenance work” means the replacement, repair or maintenance of the whole or any part of a fence and includes trimming or maintaining any vegetation that serves as a fence, and cleaning, deepening, straightening, enlarging or altering any watercourse, ditch, channel or other geographical configuration that serves as a fence:

“the repealed Act” means the Fences Act, 1924-1926, repealed by this Act.

(2) For the purposes of this Act land is contiguous with other land if—

- (a) there is a common boundary between that land and the other land;
- or
- (b) that land is separated from the other land by a right of way of no more than one metre in width.

5. (1) Where the owner of any land proposes to erect a fence dividing his land from the land of an adjoining owner, he may serve notice of that intention upon the adjoining owner.

Notice of intention to perform fencing work.

(2) The notice must be in the Form No. 1 in the schedule to this Act and must state—

- (a) the length and position of the proposed fence;
- (b) the nature of the proposed fence;
- (c) an estimate of the cost of the erection of the proposed fence;

- (d) the amount that the proponent seeks to recover from the adjoining owner towards the cost of the proposed fence;
 - (e) where the proposed line of the fence encroaches into the land of the adjoining owner, whether the proponent proposes to pay compensation to the adjoining owner for loss of occupation, and, if so, the amount of that compensation;
 - (f) the name and address of any contractor or other person by whom the proposed fence is to be erected.
- (3) Where the owner of any land proposes to perform any replacement, repair or maintenance work in relation to a fence dividing his land from the land of an adjoining owner, he may serve notice of that intention upon the adjoining owner.
- (4) The notice must be in the Form No. 2 in the schedule to this Act and must state—
- (a) the nature and location of the proposed work;
 - (b) the cost of the proposed work;
 - (c) the amount that the proponent seeks to recover from the adjoining owner towards the cost of the proposed work;
- and
- (d) the name and address of any contractor or other person by whom the proposed work is to be performed.

Cross-notice.

6. (1) Where an adjoining owner objects to any of the proposals contained in a notice served upon him in pursuance of this Act, he may, within twenty-one days after the service of the notice, serve a cross-notice upon the proponent.
- (2) The cross-notice must be in the Form No. 3 in the schedule to this Act and—
- (a) must state to which of the proposals the adjoining owner objects;
- and
- (b) may contain counter-proposals in relation to the proposed erection of a fence or the proposed performance of replacement, repair or maintenance work.
- (3) Where the proponent objects to any counter-proposal contained in a cross-notice under this section, he may, within twenty-one days after the service of the notice, serve notice in writing of his objection upon the adjoining owner.
- (4) An objection may be made to a proposal or counter-proposal either because the objector objects generally to the proposals or counter-proposals or because of some specific objection to the proposal or counter-proposal but it shall not be necessary to assign any reason for an objection in a notice under this Act.

7. Where a person to whom a proposal or counter-proposal has been made under this Act does not serve notice of his objection to the proposal or counter-proposal in accordance with this Act, he shall be deemed to have agreed to the proposal or counter-proposal.

Agreement upon basis of proposals and counter-proposals.

8. (1) Where notice of the proposed erection of a fence, or the proposed performance of replacement, repair or maintenance work in relation to a fence has been served in accordance with this Act, the proponent may proceed with the fencing work—

Performance of fencing work.

(a) after the expiration of twenty-one days from the date of service of the notice, if he is not served with a cross-notice during that period;

or

(b) if he is served with a cross-notice during that period, after agreement has been reached upon the proposals and counter-proposals (if any) or any differences have been adjudicated upon by the Court.

(2) Except as otherwise provided in this Act, no contribution shall be recoverable under the provisions of this Act in respect of fencing work performed before the proponent becomes entitled to proceed with the fencing work under subsection (1) of this section.

(3) If the proponent does not proceed with the fencing work within twenty-eight days after the day on which he becomes entitled to do so in accordance with subsection (1) of this section, or such longer period as may be agreed upon by the parties or fixed by the court, the adjoining owner may proceed with the fencing work.

(4) If the fencing work is discontinued by either party for more than twenty-eight days prior to its completion, the other party may proceed to complete the work.

(5) If neither the proponent nor the adjoining owner proceeds with the fencing work for a period in excess of the prescribed period, or the work is discontinued for any such period, the agreement shall, as to the part of the work that then remains to be performed, lapse.

(6) The prescribed period referred to in subsection (5) of this section is a period agreed upon by the proponent and the adjoining owner, or determined by order of the court, or in the absence of any such agreement or order, a period of four months.

9. (1) Where a person desires to perform fencing work in the nature of erecting, replacing, repairing, or maintaining a dividing fence, and the identity or whereabouts of the adjoining owner has not, after reasonable inquiry by the proponent, been ascertained, he may apply to the court for a determination under this section.

Whereabouts of adjoining owner unknown.

(2) The court may upon the hearing of the application approve with or without modification, a proposal for the performance of fencing work submitted to the court by the proponent, and order that an amount, determined by the court, be paid by the adjoining owner towards the cost of the fencing work.

(3) An order under this section may be enforced against the adjoining owner when his identity and whereabouts are ascertained or against a person who becomes the owner of the land in succession to that person.

10. (1) Where a person proposes to perform fencing work in the nature of erecting, replacing, repairing or maintaining a dividing fence, and there is no adjoining owner of the contiguous land from which his land is or is to be divided, he may apply to the court for a determination under this section.

No adjoining owner.

(2) The court may, upon the hearing of the application approve, with or without modification, a proposal for the performance of fencing work submitted to the court by the proponent, and may order that when a person becomes the owner of the contiguous land, he shall pay to the proponent an amount, determined by the court, towards the cost of the fencing work.

Case where fence divides land from public road and owner of land abutting upon road derives benefit from fence.

11. (1) Where a person has erected a fence dividing his land from a public road, and any other person who is the owner of land abutting upon the road derives use of, or benefit from, the fence, by reason of the proximity of the fence to his own land the person by whom the fence has been erected may institute proceedings in the court for the recovery from that other person of a contribution towards the cost of erecting the fence or any further fencing work in relation to the fence.

(2) The court may order the person against whom the proceedings are taken to make such contribution as it considers just in view of the benefit that he derives in consequence of the erection of the fence or the performance of the further fencing work.

Jurisdiction and powers of court.

12. (1) Where any difference or dispute arises in relation to fencing work, or any liability arising under this Act, any person affected by the difference or dispute may by application to the court seek a determination of the matter.

(2) Upon the hearing of an application under subsection (1) of this section the court may determine the matter in such manner as it considers just and may—

- (a) make any finding, determination or order in relation to the erection of a fence, the nature of the fence to be erected, the line of fence to be adopted and the amount of compensation (if any) to be paid for loss of occupation of land as a result of the erection of a fence otherwise than upon the boundary of contiguous land;
- (b) make any finding, determination or order in relation to the performance of replacement, repair or maintenance work in relation to a dividing fence;
- (c) determine the person or persons by whom any fencing work is to be performed, and where it is to be performed by different persons, the part of the work to be performed by each;
- (d) re-open and correct or vary any agreement arrived at under this Act upon such terms as the court considers just;
- (e) re-consider and vary upon such terms as the court considers just an order under section 9 or section 10 of this Act;
- (f) determine the time at which fencing work is to be performed and the manner of its performance;
- (g) make any order that may be necessary or expedient in relation to entry upon or access to land for the purposes of performing fencing work;
- (h) order the removal of a fence or any portion of a fence not erected upon the proper boundary;
- (i) determine the cost of fencing work and the persons by whom and the proportions in which the cost is to be borne;

(j) make any order or give any direction that may be necessary or expedient to overcome difficulties ascertained during the progress of fencing work;

(k) determine, and order payment of, compensation for any damage for which compensation is payable under this Act, or any other Act or law;

and

(l) make such order for costs as the court considers just.

(3) Where the owner of land claims to be entitled to the payment of an amount from an adjoining owner in respect of the performance of fencing work either in pursuance of the provisions of this Act, or any agreement under this Act, he may apply to the court for an order for payment of that amount.

(4) The court may upon an application under subsection (3) of this section make an order for any person to pay an amount for which he is so liable.

(5) In the absence of agreement as to the nature of the fence to be erected, the court shall not order the owner of any land to pay towards the erection or replacement of a fence any amount in excess of his proportionate share of the amount that would be required for the erection of, or the conversion of an existing fence into, an adequate fence.

(6) For the purposes of this section—

(a) an adequate fence is a fence that conforms with general standards of good fencing existing in the locality in which the fencing work has been or is to be performed and is adequate for the purposes of the owner against whom contribution is sought;

and

(b) a fence may be a adequate fence notwithstanding that it is discontinuous where any vegetation, watercourse, ditch or other geographical configuration serves as a fence or portion thereof.

(7) Subject to subsection (8) of this section in any proceedings under this section the *onus* of establishing a right to contribution in respect of the cost of fencing work, and the extent of that contribution shall lie upon the person who asserts the right to contribution.

(8) Any dispute as to the relative proportion in which the cost of fencing work is to be borne shall be determined according to the benefit that each of the adjoining owners derives from the performance of the fencing work, and, in the absence of proof to the contrary it shall be presumed that the adjoining owners derive equal benefit from the performance of the fencing work.

(9) Any person who is, in accordance with this Act, liable to either of the adjoining owners of land in respect of fencing work shall be entitled to appear in any proceedings relating to that fencing work under this section.

Jurisdiction
of court.

13. The jurisdiction of a court in proceedings under this Act—

- (a) is exercisable by a local court of limited jurisdiction where the proceedings do not involve a claim for an amount in excess of two thousand five hundred dollars;
- and
- (b) is exercisable by a local court of full jurisdiction where the proceedings involve a claim for an amount in excess of two thousand five hundred dollars (whether or not the amount of the claim exceeds the amount of a claim cognizable by the court in pursuance of the Local and District Criminal Courts Act).

Registration
of charge in
respect of
fencing
liability.

14. (1) Where, upon application to the Registrar-General, a person satisfies the Registrar-General by such evidence as he may require—

- (a) that the registered proprietor of an estate in fee simple in land specified in the application is liable by judgment of a court to pay to the applicant any amount pursuant to the provisions of this Act;
- and
- (b) that demand has been duly made of that registered proprietor for payment of that amount but that the amount has remained unpaid for a period of one month after the date of the demand, and remains unpaid at the date of the application,

the Registrar-General shall register a charge upon the land specified in the application.

(2) Where a charge is registered pursuant to the provisions of this section, the person who first incurred the liability and any person who succeeds to the title to the land subject to the charge shall be jointly and severally liable to discharge the liability in respect of which the charge is registered.

(3) Where the Registrar-General is satisfied by such evidence as he may require that the liability has been discharged, he shall remove the charge by entering a memorandum of its removal upon the certificate of title to the subject land.

Landlord and
tenant.

15. (1) Subject to any agreement between a landlord and tenant and the provisions of this section, the landlord may recover, as a debt due to him, contribution towards the satisfaction of any liability incurred by the landlord during the tenancy in respect of fencing work performed in relation to fences dividing the land occupied by the tenant from the land of adjoining owners.

(2) The contribution recoverable under subsection (1) of this section shall be determined in accordance with the following principles:—

- (a) where at the time of the performance of the fencing work a period of less than three years remains of the term of the tenancy, no contribution is payable by the tenant;
- (b) where at the time of the performance of the fencing work a period of at least three years but less than six years remains of the term of the tenancy, a contribution of one-quarter of the liability incurred by the landlord is payable by the tenant;

(c) where at the time of the performance of the fencing work a period of at least six years but less than twelve years remains of the term of the tenancy, a contribution of one-half of the liability incurred by the landlord is payable by the tenant;

and

(d) where at the time of the performance of the fencing work a period of at least twelve years remains of the term of the tenancy, the landlord may recover a sum sufficient to satisfy his total liability from the tenant.

(3) Subject to any relevant agreement, where a tenant exercises a right or option to purchase land occupied by him for a sum fixed in an agreement, or fixed in accordance with principles contained in an agreement, with the landlord, the former landlord may recover as a debt from the former tenant, in augmentation of the purchase price, any sum paid by the landlord during the tenancy, in respect of fencing work relating to the land subject to the tenancy.

(4) It shall be a defence to an action for the recovery of any moneys under this section that—

(a) the fencing work was not required as a result of any act or default on the part of the tenant;

(b) the tenant was not afforded adequate opportunity to make representations in relation to the proposals and counter-proposals (if any) before they became binding on the landlord or was afforded such an opportunity and objected to the proposals or counter-proposals by notice in writing served upon the landlord a reasonable time before the proposals or counter-proposals became binding upon him;

and

(c) the tenant was not bound by the order of a court to make contribution towards the cost of the fencing work by order of a court made pursuant to the provisions of this Act before the commencement of the fencing work.

16. (1) Subject to this section, where a dividing fence is damaged or destroyed, and there is an urgent need to repair or restore the fence, either of the adjoining owners may, without notice to the adjoining owner, carry out the requisite fencing work and recover one-half of the cost of the fencing work from the other adjoining owner.

Damage to or destruction of dividing fence.

(2) Where a dividing fence is damaged or destroyed as a result of a wrongful act or default on the part of any person, an adjoining owner who has properly incurred any cost or expense in repairing or restoring the fence (whether in pursuance of this Act or otherwise) may recover from that person, as a debt, the cost or expense so incurred.

(3) An adjoining owner shall not be entitled to recover contribution for any fencing work under this Act in so far as that fencing work consists in the repair of damage resulting from his own wrongful act or default.

17. Notwithstanding the provisions of the Real Property Act, where a dividing fence is erected otherwise than upon the boundary to contiguous land either in pursuance of an agreement under this Act, or of an order of the court, neither of the adjoining owners shall, by reason

Position of fence does not give rise to title by adverse possession.

of his occupation of the land enclosed by the fence, be deemed to be in adverse possession of any land of the other so as to acquire title to that land in derogation of the title or interest of the other.

Power of entry.

18. (1) Subject to subsection (2) of this section and to any agreement or order, any person may, for the purpose of carrying out authorized fencing work, enter at any reasonable time upon land with any vehicle or equipment reasonably required for the purposes of the fencing work and do anything that may be reasonably required for the purposes of the fencing work.

(2) Except in the case of an emergency, the powers conferred by this section shall not be exercised unless at least two days before the land is entered in pursuance of this section notice in writing of the intended entry has been served upon the owner of the land.

(3) The powers conferred by this section shall be exercised as far as reasonably practicable so as not to cause injury to the land or property of any other person.

(4) In this section—

“authorized fencing work” means—

(a) fencing work in respect of which agreement has been reached in pursuance of this Act;

(b) fencing work authorized in accordance with the order of a court;

or

(c) fencing work otherwise authorized by this Act.

Manner in which notice is to be given.

19. (1) Any notice under this Act must be signed by the person giving the notice or his solicitor, attorney or agent.

(2) Service of a notice under this Act must be effected personally or by registered post.

Application of Act.

20. (1) This Act does not apply in respect of Crown lands, or lands reserved for, or dedicated to, a public purpose.

(2) Subject to subsection (1) of this section, this Act does apply to land vested in a council.

Extinguishment of prescriptive fencing rights.

21. Any obligation to fence land, or to maintain a fence in a state of repair, that may exist by prescription, is hereby extinguished.

Departures from requirements of this Act.

22. (1) A notice or cross-notice that complies in substance with the requirements of this Act shall, notwithstanding that it is not in the form required by this Act, be deemed to comply with this Act.

(2) Where fencing work is carried out substantially in conformity with an agreement or order under this Act, the court before which any proceeding relating to the fencing work are brought may determine that subject to any adjustment or rights and liabilities ordered by the court, the rights and liabilities of the adjoining owners shall be determined as if the fencing work had been carried out in conformity with that agreement or order.

(3) Where a determination is made under subsection (2) of this section the rights and liabilities of the adjoining owners shall be determined in accordance with that determination.

23. Rules of court regulating the practice and procedure of the court in proceedings under this Act may be made subject to and in accordance with the Local and District Criminal Courts Act, and, without limiting the generality of the foregoing, those rules may—

Rules of court.

(a) empower the court to extend the time limited by this Act for the service of any notice (either before or after the expiration of the time so limited) upon proof to the satisfaction of the court that just cause for the extension of time exists;

and

(b) provide for reference of any matter of dispute arising in proceedings under this Act to an arbitrator appointed by the court.

24. The provisions of this Act shall not be construed as derogating from powers conferred upon any authority, body or person by any other Act.

This Act is not to derogate from powers conferred by other legislation.

THE SCHEDULE

FORM No. 1

NOTICE OF INTENTION TO ERECT A FENCE

To A.B. Owner of [*Describe land with sufficient particularity to identify it*].

TAKE NOTICE that I propose that a fence be erected between the land described above and the contiguous land [*Describe land with sufficient particularity to identify it*] of which I am the owner.

The particulars of my proposal are as follows:

- (a) [State the length and position of the proposed fence.]
- (b) [Describe the nature of the proposed fence.]
- (c) [State the cost of the erection of the proposed fence.]
- (d) [State the amount that the person by whom the notice is given seeks to recover from the person to whom the notice is given.]
- *(e) [State whether the person by whom the notice is given proposes to pay compensation to the person to whom the notice is given for loss of occupation of any land, and, if so, the amount of the compensation.]
- (f) [State the name and address of any contractor or other person by whom the proposed fence is to be erected.]

N.B.—IF YOU DO NOT WITHIN TWENTY-ONE DAYS AFTER SERVICE OF THIS NOTICE SERVE UPON ME A CROSS-NOTICE IN ACCORDANCE WITH THE FENCES ACT, YOU WILL BE DEEMED TO HAVE AGREED TO THESE PROPOSALS AND WILL BE BOUND THEREBY.

This notice is given pursuant to the Fences Act, 1972.

Dated this day of 19 .

(Signed) C.D.

Address for service of a cross-notice:

[Set forth an address at which service of a cross-notice may be effected upon the person by or on whose behalf the notice is given.]

* This item is to be omitted where the line of the proposed fence does not encroach upon the land of the person to whom the notice is given.

NOTICE OF INTENTION TO PERFORM REPLACEMENT,
REPAIR OR MAINTENANCE WORK

To A.B., Owner of [Describe land with sufficient particularity to identify it].

TAKE NOTICE that I propose that fencing work be performed in relation to a fence dividing the land described above from contiguous land [Describe land with sufficient particularity to identify it] of which I am the owner:

The particulars of my proposal are as follows:

- (a) [Describe the nature of the proposed fencing work.]
- (b) [State the cost of the proposed fencing work.]
- (c) [State the amount that the person by whom the notice is given seeks to recover from the person to whom the notice is given.]
- (d) [State the name and address of the contractor or other person by whom the proposed fencing work is to be performed.]

N.B.—IF YOU DO NOT WITHIN TWENTY-ONE DAYS AFTER SERVICE OF THIS NOTICE SERVE UPON ME A CROSS-NOTICE IN ACCORDANCE WITH THE FENCES ACT, YOU WILL BE DEEMED TO HAVE AGREED TO THESE PROPOSALS AND WILL BE BOUND THEREBY.

This notice is given pursuant to the Fences Act, 1972.

(Signed) C.D.

Address for service of a cross-notice:

[Set forth an address at which service of a cross-notice may be effected upon the person by or on whose behalf the notice is given.]

CROSS-NOTICE

To C.D.

TAKE NOTICE that I object to the notice given by you pursuant to the Fences Act, and dated the day of 19 .

The particulars of my objection are as follows:

[Set forth the proposals to which objection is made. (If objection is made to all of the proposals, a statement of that fact will suffice.)]

* I make the following counter-proposals:

[Set forth any counter-proposals.]

* N.B.—IF YOU DO NOT WITHIN TWENTY-ONE DAYS AFTER SERVICE OF THIS NOTICE SERVE UPON ME A WRITTEN NOTICE OF OBJECTION IN ACCORDANCE WITH THE FENCES ACT, YOU WILL BE DEEMED TO HAVE AGREED TO THE ABOVE COUNTER-PROPOSALS AND WILL BE BOUND THEREBY.

This notice is given pursuant to the Fences Act, 1972.

(Signed) A.B.

* These items are to be omitted where no counter-proposals are made.