PROPERTY LAW AND EQUITY REFORM COMMITTEE OF NEW ZEALAND

FENCING ACT 1908

Working Paper

Introduction: The Committee has been studying the Fencing Act 1908. Fencing legislation was originally passed in 1881 to provide for the settlement of questions relating to the cost of erecting and repairing dividing fences and thus to remove difficulties and uncertainties which existed at common law. The basic scheme of the present Act is that occupiers of adjoining lands not divided by a sufficient fence are liable to contribute in equal proportions towards the erection and repair of a fence between such lands. This basic scheme can, however, be varied by agreement.

A large number of matters in the existing legislation has been the subject of criticism over the years and a close consideration of the whole of the Fencing Act 1908 has suggested that many other changes are desirable. The Committee's initial intention was to suggest amendments to certain sections only. A lengthy consideration has lead the Committee to believe that the most satisfactory course is the repeal of the existing Act and its replacement.

The existing Act reflects social conditions of the nineteenth century and in the Committee's view is not suitable in present-day circumstances.

The Committee has now prepared a draft bill setting out its present tentative conclusions. The draft is attached to this working paper. The Committee seeks information and suggestions from all concerned with matters of fencing. The following commentary draws attention to the major changes suggested by the Committee.

1. Omissions: It has been found possible to omit parts of the 1908 Act. The omissions and the reasons for them are as follows:

(a) The definition of rabbitproof fence, Part II of the Second Schedule defining such fences and s.15 relating to procedure where rabbitproof fences are

unnecessary. The scheme of the draft bill is to enable one occupier to notify the other of the work he requires. He may require any type of fence and all disputes thereon are to be determined by a Magistrate. Accordingly questions of rabbitproof fence or not, and the type of such fence, require no particular reference.

(b) The definition of Maori, ss 3 and 4 and s.3 of the Fencing Amendment Act 1922. These provisions all related to Maoris and Maori land. The Committee has the tentative view that no special exemption provisions are now needed in relation to Maori land.

(c) The definition of sufficient fence and ss 8 and 10 relating thereto. The concept of a sufficient fence and the schedules describing such fences are abandoned. Instead a new concept of adequate fence is adopted. This is referred to more fully in paragraph 2 below.

(d) Section 9 relating to barbed wire fences. Local authorities have powers to prohibit barbed wire fences and accordingly this section is surplusage.

(e) Section 16 relating to prescribed fences and a notice to erect a different type of fence. The new concept of adequate fence calls for no scheduled fences, the notice prescribing what is sought.

(f) Section 21 - the clearing of bush along a fence line. This section is not needed. The notice to do work will specify what is required and a Magistrate will determine any problem.

(g) Section 26 gorse etc. and trees on fence line. This section was the subject of trenchant criticism by the Court of Appeal in Spargo v. Levesque (1922) N.Z.L.R. 122. This section appears to be aimed at two situations:

Subsection (1) : Gorse or trees are not to be planted on or alongside a boundary line without consent of adjoining occupier.

Subsection (2) : Sweetbriar bramble or blackberry are not to be planted on or alongside a boundary line.

Thus sweetbriar, bramble or blackberry are absolutely prohibited on boundary lines; gorse or trees are prohibited without consent of the adjoining occupier.

There are difficulties as to whether a shrub is a "tree" under the section, and how close is "on or alongside" Gilbert v. Sampson (1934) N.Z.L.R. 137 said in respect of macrocarpa that 2' to 4' was not alongside. There is the most unusual selfhe p provision in s.26(4) which is not in sympathy with modern thought not withstanding that it was held in Spargo v. Levesque that conviction under the section is a pre-requisite to exercising the right of entry on the adjoining land to cut down gorse, etc., sown in breach of the section. The practical effect of s.26(4) is however minimal as prosecution has to be brought within six months of commission of the offence. This in turn is unsatisfactory for the right to self-help may arise at a stage when the planting is unlikely to be giving cause for complaint.

The section appears to have as its main purpose the control of gorse, sweetbriar, bramble or blackberry.

All these plants are noxious weeds under the Noxious Weeds Act 1950, if it is accepted that "bramble" is blackberry. The Shorter Oxford English Dictionary describes "bramble" as "a rough prickly fruticosus". Although the position was the same in 1908 when the Fencing Act 1908 and Noxious Weeds Act 1908 were both passed it is considered that there is much more awareness of the noxious weeds problem now and that control is best left to the Noxious Weeds Act.

If this is accepted we are left with only "trees" being used on or alongside a boundary either for a live hedge or otherwise. Section 26A of the Fencing Act was inserted in 1956. This gives a Magistrate power to order the removal of any tree, shrub or plant from other land on the application of an occupier of land on which is erected a building used for residential purposes. It is suggested that in residential areas this adequately covers a person who complains of nuisance, etc., caused by the presence of a tree, etc., on a neighbour's boundary.

In rural areas the question of noxious weeds is or can be handled adequately by the counties. There is also some legislation in force at present relating to firebreaks in the case of forests and the Committee has information that the N.Z. Forest Service is considering legislation strengthening these provisions in relation to boundary lines between lands in different ownerships. For all these reasons the Committee is of the view that s.26 of the 1908 Act should be omitted.

(h) Section 26A. The provisions of s.26A which relate to the cutting-down of trees and the like have been omitted from the bill as it is thought that these are more appropriate to the Property Law Act than to an Act relating to dividing fences and the Committee will recommend that that section be incorporated in the Property Law Act 1952.

(i) Sections 31 and 32 - Notices to repair. The draft bill save in two isolated instances does not distinguish repair from any other work. A notice prescribes what is sought and in general nothing turns on whether it is repair or other work such as replacement.

(j) Section 35 - This section relates to liability for reckless use of fire. The proposed clause 14 of the bill in the Committee's view covers this.

(k) Section 39 - Monies recoverable in Court of Competent Jurisdiction. This section contained a declaration as to recovery of monies and it appears unnecessary.

(l) Section 41. This section related to the maximum sum recoverable for half the cost of a fence. The question of costs is now left to the Court by draft clause 27.

2. Approach made in draft bill - general:

The existing Act is founded upon the premise that adjoining occupiers are equally liable. A "sufficient fence" is described. An occupier may give notice to erect a fence where no sufficient fence exists. Notice to repair may be given.

In the Committee's present view the need for a prescribed sufficient fence and the distinction between erection and repair (which gives rise to problems) is unnecessary. The draft bill defines an "adequate fence" and "work on a fence". The Committee adheres (clause 8) to the basic principle of sharing but suggests that there be only one type of notice - namely a notice to do work on a fence. This notice will set out what is proposed with sufficient particularity to apprise the recipient of the nature and extent of work and materials proposed and to enable him to estimate the cost. Cross notice may be given. He may object to the proposals, including an assertion that an existing fence is adequate, and/or counter proposals. All such disputes are, as in the past, to be determined by a Magistrate. Accordingly liability depends on there not being an adequate fence.

3. Alterations from the existing Act:

Reference is now made to some of the more important changes in the draft bill.

(a) Definition of "adequate fence", "fence" and "work".
These definitions must be read together. They embrace some matters which at present appear in substantive sections of the Act. Thus for example s.11(1) of the 1908 Act which states the principle of liability provides that it exists "notwithstanding that such fence may not extend along the whole boundary line". This is referred to in the definition of "fence". So too the definition of work relates to work on all or any part of a fence.

(b) Agreements.
Section 7 of the 1908 Act provides that every covenant or agreement made or entered into between owners of adjoining lands for the purpose of modifying or varying the rights and liabilities conferred or imposed on them by the Act -

(a) runs with the land, whether assigns be named therein or not; and

(b) where the land is under the Land Transfer Act 1952 such covenant or agreement is deemed to create an interest in the land and to be registrable, but does not bind assigns unless registered.

Prior to the Fencing Amendment Act 1904, a fencing covenant was not registrable. In a series of cases prior to 1904 it was decided that fencing covenants did not create "interest in land" and were therefore not registrable and accordingly could not be noted on the certificate of title; that, inasmuch as they could not be noted on the certificate of title, a purchaser could not be affected with notice thereof; and that, for these reasons, a purchaser could not be compelled to carry out an agreement entered into by his predecessor in title: see Brown v. Wellington and Manawatu Railway Co. Lt . (1898) 17 N.Z.L.R. 471, Wellington and Manawatu Railway Co. Ltd. v. Registrar-General of Land (1899) 18 N.Z.L.R. 250, and Wellington and Manawatu Railway Co. Ltd. v. Haselden (1900) 18 N.Z.L.R. 619. The amending Act of 1904 provided that every covenant or agreement made or entered into between owners of adjoining land for modifying or varying their rights and obligations under the 1895 Act was to run with the land, whether assigns were named or not, and that such agreement or covenant was deemed to create an interest in land where the land was subject to the Land Transfer Act 1885 and was registrable against the title.

Under the present law, once a covenant or agreement modifying the rights and liabilities of adjoining owners has been registered, it can only be removed from the register by the method set out in s.71 of the Land Transfer Act 1952 (re-enacting s.10 of the Land Transfer Amendment Act 1939). This section provides that the Registrar may remove a fencing covenant if he is satisfied that either -

(a) there is no person who is or may become entitled to the benefit thereof; or

(b) the persons who are or may have become entitled to the benefit thereof have consented to the cancellation.

It is clear that an enormous number of fencing covenants have been registered since 1904. These are automatically carried forward on future titles. The majority of such covenants arise on the sub-division of land for residential purposes. Most of such covenants protect the vendor only and by reason of the sale of adjoining land have become spent. Little use has been made of the provisions for removal. Hence there is an extensive waste of time and effort in ascertaining the enforceability of such covenants and in bringing down covenants on title and referring to the same in documents.

The draft bill proposes to meet these problems in three ways: First, by permitting agreements to be entered into relating to fencing (clause 4). Secondly, permitting only the registration of negative fencing covenants of a particular type (clause 5). These negative covenants will only remain on the register for a period of 12 years: and thirdly, by limiting the effectiveness of present registered covenants to a period of 12 years unless renewed (clause 6).

(c) Liability to fence.

The liability imposed by the Act on adjoining occupiers has been modified. The definition of occupier in clause 2 of the bill has been altered and now corresponds with that contained in the Rating Act 1967. In the past any occupier, including a weekly tenant, has been liable to fence to the exclusion of the liability of an owner of land and this has been the subject of some criticism for a considerable time. The effect of the proposed amendment is to leave occupiers liable. An occupier however is the owner except when a tenant under a tenancy of a minimum of a year certain is in occupation - see definition of occupier in clause 2 of the draft bill.

(d) Persons using fence on far side of road.

Section 25 of the existing Act has been varied so as to provide that a person claiming interest on the value of a fence must give notice - clause 16. The provisions now accord with those of section 19 of the 1908 Act (now clause 17) relating to excepted land.

(e) Posts on a boundary line - section 24.

The new clause 21 suggests a general principle as to the position of fences and a particular requirement for posts both subject to any agreement or order.

(f) Entry on adjoining land - section 44.

The proposed clause 29 has been varied in subsection (1) to include tractors, aircraft, etc., and the opportunity has been taken to clarify the same.

(g) Immediate work, negligence and fire - sections 33-35.

The provisions of these sections have been varied and compressed with two clauses, 12 and 13. It is thought these two clauses embrace the same matters.

4. General

Throughout the draft bill there are minor changes intended to bring the draftsmanship up-to-date.

Submissions:

The suggestions put forward in the present working paper are tentative only. The Committee would be grateful for any suggestions or constructive criticisms on fencing. It requests that submissions be sent to the following address :-

The Secretary,
Property Law & Equity Reform Committee,
Private Bag 1,
Government Buildings,
Wellington,

on or before 31 March 1971.