

THE FENCING ACT 1908

REPORT OF THE PROPERTY LAW
AND EQUITY REFORM COMMITTEE.

NEW ZEALAND

Presented to the Honourable the Minister
of Justice in June 1972

REPORT OF THE PROPERTY LAW AND
EQUITY REFORM COMMITTEE ON
THE FENCING ACT 1908.

INTRODUCTION

Terms of Reference

1. On the recommendation of the Law Revision Commission, the then Minister of Justice requested this Committee to undertake a review of the Fencing Act 1908 (in this report referred to as the 1908 Act). This review has now been completed and our conclusions form the subject-matter of this report.

Draft Bill

2. Our detailed proposals are contained in the form of the draft bill set out in Appendix I to this report.

Working Papers

3. The Committee issued a first working paper in November 1970, and a second in August 1971. The names of those persons and organisations to whom these papers were sent are set out in Appendix II, and those from whom submissions were received are listed in Appendix III. We desire to record our indebtedness to all those who took the trouble to write to us. Space does not permit an explanation of our reasons for accepting or rejecting each of the proposals put to us, but we wish to give an assurance that all of them were carefully considered.

GENERAL APPROACH

Amendment or Replacement?

4. When we commenced our consideration of the 1908 Act we were aware that it had been the subject of criticism over the years, and our original intention was to recommend

remedial amendments. However, our study has led us to the conclusion that, such are the number and nature of the amendments required, the 1908 Act should be repealed and replaced with a completely new enactment. We so recommend.

Separate Act

5. In a written submission on our first working paper the Secretary for Justice indicated that consideration may be given to the preparation of one piece of legislation dealing with all aspects of the property rights of adjoining occupiers inter se. While recognising that this is a question more of policy than of law, the Committee wishes to record its view that it is desirable to continue to have one Act dealing solely with fencing matters. In our opinion, this area of the law is sufficiently self-contained to warrant a separate Act, and both ease of reference and usage lend further support to our view.

Basic Premise

6. The general principle in the 1908 Act, that occupiers of adjoining lands not divided by a sufficient fence are liable, if called upon, to contribute in equal proportions towards the cost of the erection and repair of such a fence between their respective lands, has been retained in our draft bill: see clause 7.

Rural and Urban Fencing

7. The 1908 Act appears to work relatively harmoniously in rural areas, less well in urban ones. The Committee considered whether there was a need for separate provisions relating to rural land on the one hand and urban land on the other. However, we have come to the conclusion that to introduce such a dual approach would be unnecessarily complicated.

SCOPE OF THE LEGISLATIONExisting Provisions Omitted

8. The Committee considers that there are certain provisions in the 1908 Act that should be omitted on the ground that they are not concerned with rights and obligations of adjoining owners in respect of fencing matters. In some cases these provisions appear obsolete, having been superseded by later legislation; in others they may need to be re-enacted in more appropriate legislation. Briefly, these provisions are:

- (a) Section 9 - barbed wire fence may be prohibited in towns. Local authorities have power to prohibit the erection of such fences: see s.386(1)(10) of the Municipal Corporations Act 1954, and s.401(1)(11) of the Counties Act 1956.
- (b) Section 27 - power to erect a fence on road to protect live fence. If required, such a provision could be re-enacted in the Municipal Corporations Act and the Counties Act.
- (c) Section 28 - swing gates across roads and bridges. Subsection (1) could, if necessary, be re-enacted in the Municipal Corporations Act and/or the Counties Act. Subsection (2) appears to us to have been largely superseded by the provisions of the Trespass Act 1968: see especially s.7 of that Act.

- (d) Section 29 - fences on Crown lands to have gates, etc. If this provision is still necessary, it could be re-enacted in the Land Act 1948.
- (e) Section 30 - damaging or destroying fences. This section relates only to rabbit-proof fences and as such is clearly aimed at the control of noxious animals. For this reason we suggest the more appropriate place for it may be the Noxious Animals Act 1956.

Trees on Boundaries

9. In the same way we hold the view that the provisions of s.26 (planting of gorse on or alongside a boundary) and s.26A (removal or trimming of trees injuriously affecting neighbour's land) are misplaced in legislation dealing with fencing matters. Section 26 was the subject of trenchant criticism by the Court of Appeal in Spargo v. Levesque [1922] N.Z.L.R. 122, and in our opinion it can be repealed without further ado. Its purpose is two-fold: to impose controls on noxious weeds, and to require the consent of the adjoining owner before a tree is planted "on or alongside" the boundary. (The words "on or alongside" have themselves given rise to problems of interpretation: see Gilbert v. Sampson [1934] N.Z.L.R. 137.) We consider that the control of noxious weeds is best dealt with in the Noxious Weeds Act 1950, and that disputes concerning the planting of trees on boundaries can be resolved under s.26A.

10. Many of the people who wrote to us commented critically on s.26A, particularly in the light of Henry J's decision in Williams v. Murdoch [1968] N.Z.L.R. 1191. In that case His Honour held that an application under s.26A could not be founded on an interference with the applicant's view, thereby overruling a decision to the

contrary by Mr McCarthy, S.M., in West v. Michael [1960] 10 M.C.D. 51. We have been told that when this provision was framed it was intended to cover an interference with a view, and we are aware that some commentators consider Henry J's interpretation to be too narrow. Nevertheless, we take the view that the rule in Williams v. Murdoch should not be abrogated. We recognise that cases under this section involve a balancing of competing interests, but we are not persuaded that the evil caused by the present lack of legal protection for a view is sufficient to justify a further interference with a landowner's right to use his own land in any way he wishes.

Application of the Act

11. The present legislation contains special provisions relating to Maori land: see sections 3 and 4 of the 1908 Act, and s.3 of the Fencing Amendment Act 1922. In the Committee's opinion, the case for these provisions is no longer valid, and we were advised that our view is shared by the Department of Maori and Island Affairs. Accordingly, we recommend that the legislation should apply to Maori land in all respects as if it were European land. We have also given careful consideration to the extent to which the legislation should apply to Crown land. Our proposals in this respect are referred to in paragraph 16 infra.

"Spite" Fences

12. A number of submissions raised the problem of "spite" fences, by which is meant a fence erected with the primary motive of annoying one's neighbour. There is, of course, nothing in the present fencing legislation to prevent a person erecting any type of fence he wishes, provided he does not call upon his neighbour to contribute towards its cost. We fully accept that this leave plenty of scope for the spiteful neighbour, but we have come to the conclusion that the control of such activities is best left to local authorities. Accordingly, we have not attempted to tackle the problem in our draft bill.

PRINCIPAL PROPOSALS

13. The major changes to the existing legislation are summarised in the succeeding paragraphs of this report. We do not comment on all our proposed amendments: those of relatively minor significance may be gleaned from a perusal of the draft bill.

Definition of "Occupier"

14. In view of the basic scheme of the legislation (see paragraph 6, supra) it is important to be able to determine who is and who is not an occupier within the meaning of the legislation. In clause 2 of the draft bill we have set out a new definition of "occupier", which is to be read together with the proposed definition of "Crown land" in the same clause. The general effect of our proposed definitions is that the occupier of any land for the purpose of the legislation is the owner of that land, except where some other person (including the Crown) is (or has a right to be) in occupation of that land by virtue of a tenancy for a term of not less than 12 months certain. In such cases (subject to certain exceptions in the case of Crown land) the tenant is deemed to be the occupier.

Erection and Repair

15. The 1908 Act distinguishes between the erection of a new fence on the one hand, and the repair of an existing fence on the other. A different form of notice is required in each case: see sections 12 and 32. The Committee sees no need for this distinction. Instead, we propose that, whether the erection of a new fence or the repair of an existing fence is required, the occupier seeking a contribution from his neighbour shall serve on him a notice to do "work". This is defined in fairly wide terms in clause 2, both "repair" (which is itself defined in clause 2) and "erection" being specifically referred to in the definition.

Application to Crown Land

16. The application of the legislation to Crown land has been clarified: see clause 3 of the bill. It was suggested to the Committee that the legislation should not apply to public reserves vested in local authorities. We point out that the 1908 Act does apply to such reserves, and we are not persuaded that a change at this time is justified.

Types of Fence

17. It will be noted that we have put forward the concept of an "adequate" fence, whereas the 1908 Act speaks of a "sufficient" fence. The change is more than a verbal one. The present Act does not define the term "sufficient fence", but it includes a schedule of fences (see the Second Schedule), each of which is a sufficient fence within the meaning of the Act: see s.8. We have departed from this approach. We have defined the term "adequate fence"; briefly, a fence is "adequate" if it is satisfactory for the purpose or purposes which it serves or is intended to serve. While we have retained the idea of a schedule of fences, we have done so as an aid to conveyancing (as to which see paragraph 29 infra); there is no provision in our bill, equivalent to s.8 of the existing Act, to the effect that the fences described in the schedule are deemed to be "adequate fences" within the meaning of the proposed legislation.

Creation and Registration of Fencing Covenants

18. Since the passing of the Fencing Amendment Act 1904, when for the first time fencing covenants became registrable, a vast number have in fact been registered. Originally, the need for this legislation was felt most keenly in the rural areas where new land was continually being broken in and new boundaries created. Recently, most fencing covenants have arisen on the subdivision of land for residential purposes and, since they protected the vendor only, by reason of the sale of the adjoining land they have become spent. Although there

is provision for the removal of such covenants under s.71 of the Land Transfer Act 1952, this procedure is rarely if ever used, and accordingly the spent covenants remain to be brought forward automatically on future titles. The result is an extensive waste of time and effect in ascertaining the enforceability of such covenants, bringing them down on titles, and referring to them in various instruments.

19. The Committee recommends a two-fold approach to the problem. First, we suggest that for a fencing covenant to be registrable it must come within the definition set out in clause 2 of the bill. Thus it must be negative in effect, and enure only for the benefit of the transferor of the land (being the owner of adjoining land). As an aid to conveyancing, we suggest that the addition in a memorandum of transfer of the words set out in clause 5(1)(a) of the bill, or of words to the like effect, should be sufficient to create a fencing covenant that is registrable under the legislation. Secondly, we propose that such a covenant shall cease to have any force or effect after the expiration of a period of 12 years from the date of its registration. In the Committee's view this period will be sufficient in the vast majority of cases, and we received no adverse comments when we put forward this proposal in our working papers.

20. In our first working paper we drew back from recommending the same provision in respect of fencing covenants registered before the passing of the new legislation. Instead, we suggested that such covenants should cease to have any force or effect after the expiration of a period of 12 years from the date of the commencement of the new Act, unless they were renewed. However, somewhat to our surprise, our proposal that new covenants should automatically expire after a given period of time met with general approval, and we then felt sufficiently emboldened to suggest in our second working paper that all fencing covenants should cease to have any

force or effect after the expiration of the appropriate 12 year period, and that there should be no right to renew a fencing covenant whether created before or after the commencement of the new legislation. Again the response was favourable, and we recommend accordingly.

21. Before leaving this matter of fencing covenants, we should advert to the view put to us that our proposals for the automatic expiration of registrable covenants after a given period of time will lead to a proliferation of non-registrable fencing agreements. We doubt that this will be so. However, what parties wish to do off the Register is their own concern. All we intend is that if a person wants the benefit of registration he must accept that the covenant will expire after 12 years.

Form of Notice

22. The principle that the serving of a fencing notice is, as a general rule, an essential condition precedent to compelling the adjoining owners to contribute to the cost of the work on the fence has been retained in our bill: see clause 8. But we have spelt out the matters to be specified in the notice. Briefly, these are -

- (a) the boundary or line of fence along which the work is to be done; and
- (b) particulars of the work to be carried out, with sufficient information to enable the recipient of the notice to comprehend the nature of the work proposed and the material to be used, and to estimate the cost of the work.

23. The Committee considered the possibility of requiring the person serving the notice to include an estimate of the cost of the work, but we concluded that, in the absence of any sanction in the event of the estimate being inaccurate, such a provision would be meaningless.

Service of Notices

24. Difficulties can arise in practice where the person on whom a notice is required to be served is under some legal incapacity, or is abroad, or whose whereabouts are unknown. In clause 10 we have thought it desirable to propose fairly detailed rules for service in such cases, and we also suggest that in any other case not expressly provided for the Court should be empowered to give such directions as to service as it thinks fit: Cf. s.152 of the Property Law Act 1952.

Procedure on Notice to do Work

25. The procedure proposed by the Committee does not differ in principle from that laid down by the 1908 Act, but is more detailed. On receipt of a notice to do work on a fence, the recipient has 21 days in which to serve a cross notice, signifying his objections to the proposals set out in the notice, and making counter proposals. If he fails to serve the cross notice in the prescribed period he will be deemed to have agreed to the proposals in it. The person serving the notice will be entitled to carry out the work after the expiration of 21 days from the date of service of the notice, or, if a cross notice is served, then as soon as all differences between the parties have been resolved by agreement, or by order of the Court. He then has 28 days in which to commence the work. If he neglects to do so either party will then be entitled to commence the work at any time within the next 3 months. If a period of 3 months elapses in which neither party undertakes the work the original notice will cease to have effect, and it will be necessary to start the procedure all over again if either party wishes to avail himself of the provisions of the Act.

Jurisdiction of Magistrate's Court

26. We consider that all matters in dispute under the proposed Act, as under the 1908 Act, should be heard in

a Magistrate's Court, notwithstanding that a question of title may be involved, and notwithstanding that the amount in dispute may exceed the limit of a Magistrate's general jurisdiction.

27. In clause 22 of the bill we have specified the questions that may be settled by the Court. We wish particularly to draw attention to paragraph (e) of subclause (1). It will be noted that this provision envisages a case in which a Magistrate may order that the whole of the cost of the work is to be borne by one of the parties to the exclusion of the other. This is quite deliberate. The sort of case we have in mind here is one where one adjoining owner decides to completely change the use of his land, say from market gardening to pig breeding, necessitating a different type of fence on his boundary. In such a case a Magistrate may consider that, since the new fence is required for the benefit of one owner, due to his unilateral decision to alter the purpose for which he requires the fence, it would be fair to order that owner to meet the whole or the greater part of the cost of the new fence. We do not suggest such a case will arise very often, but when it does the Court should, in our view, have the power to make the appropriate order.

28. The Committee also draws attention to the provisions of subclause (2) of clause 22, which empowers the Court to make any necessary consequential orders, and to enter judgment for a sum of money. We consider the latter power, particularly, would be useful in a large number of cases arising under the legislation.

Schedule of Fences

29. As stated in paragraph 16 supra, we have not included a schedule of "adequate" fences in our draft bill. However, we do suggest that a revised and updated schedule of fences would be of use as a conveyancing device. In serving a notice to do work an occupier

could specify the type of fence he had in mind by reference to one described in the schedule, for example "a fence of type 5 in the schedule to the Fencing Act, to a height of 4 feet".

PRINCIPAL RECOMMENDATION

30. For the reasons summarised above we recommend the repeal of the 1908 Act and the substitution of legislation along the lines of our draft bill.

For the Committee



Chairman

MEMBERS

Mr C.P. Hutchinson, M.B.E., Q.C. (Chairman)
Professor G.P. Barton
Mr G. Cain
Mr J.G. Hamilton
Professor G.W. Hinde
Mr L. McClelland
Mr K.U. McKay
Professor P.B.A. Sim
Mr E.J. Somers
Mr R.G.F. Barker (Secretary)

APPENDIX I

THE FENCING ACT 1972

AN ACT TO REFORM THE LAW RELATING TO THE
ERECTION AND REPAIR OF DIVIDING FENCES
AND IN SUBSTITUTION FOR THE FENCING ACT
1908

1. Short Title and commencement - (1) This Act may be cited as the Fencing Act 1972.

(2) This Act shall come into force on 1 January 1973.

PART I
INTERPRETATION AND APPLICATION

2. Interpretation - In this Act, unless the context otherwise requires -

"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:

"Adjoining occupiers" means the occupiers of the lands on either side of a common boundary or a common fence:

"Crown land" means all land whatsoever (irrespective of the purposes for which the land is used and whether or not it is subject to the Land Act 1948 or any other enactment) in respect of which an estate that includes the fee simple is vested in the Crown, whether by virtue of Crown prerogative, or by operation of law, or by the provisions of any enactment, or by any instrument:

"Crown tenant" means any occupier of Crown land other than the Crown:

"Court" means a Magistrate's Court under the Magistrates' Courts Act 1947:

"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 are 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:

"Fencing covenant" means a covenant, agreement or proviso -

- (a) That a transferee of land may not require the transferor, being the owner of adjoining land, to contribute towards the cost of work on a fence between the land being transferred and that adjoining land; and
- (b) That does not enure for the benefit of any subsequent purchaser for value of that adjoining land:

"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:

"Owner" in relation to any land, means the person for the time being entitled to receive the rack rent thereof, or who would be so entitled if the land were let to a tenant at a rack rent:

"Public reserve" has the same meaning as in the Reserves and Domains Act 1953:

"Road" means a road within the meaning of section 110 of the Public Works Act 1928; and includes any motorway, limited access road, street, access way, service lane, and other public highway:

"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.

3. Application of Act - (1) Except as provided in sections 2 and 20 of this Act -

- (a) Nothing in this Act shall apply to -
 - (i) Crown land in respect of which there

no occupier other than the Crown;
and

(ii) Public reserves not vested in a
local authority, trustees, or
other persons.

(b) The Crown, the Governor-General, the Land
Settlement Board, and any public officer
of the Crown having the administration,
management, or control of Crown land or
public reserves to which this Act does not
apply shall not be liable under this Act
for work on a fence.

(2) This Act shall apply to Crown land, and shall
bind the Crown, to the extent expressly provided in the
said sections 2 and 20 of this Act.

PART II - AGREEMENTS

4. Act not to interfere with agreements - Except as
provided in sections 5 and 6 of this Act, nothing in this
Act shall affect any covenant, contract, or agreement
made between landlord and tenant, or between any adjoining
occupiers, or between any other persons relating to the
cost of work on a fence; but no such covenant, contract
or agreement shall create an interest in land.

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 a fencing covenant as
defined in section 2 of the Fencing Act
1972 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 as defined in section 2 of this Act.

(2) No District Land Registrar shall refuse to register a transfer of land solely on the ground 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.

PART III
LIABILITY FOR WORK ON A FENCE

7. Adjoining occupiers to share cost of fencing - Subject to the provisions of this Act, the occupiers of adjoining lands (other than roads) not divided by an adequate fence are liable to contribute in equal proportions to work on a fence.

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 to 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) Except as provided in section 13 of this Act in the absence of agreement to the contrary, the occupier of any adjoining land shall not be liable to contribute to the cost of any of the following -

- (a) Any part of the work on a fence that is done before notice relating to the work has been duly served on him:
- (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:

(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.

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 objection, 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.

10. Service of notices - (1) Any notice or cross-notice required or authorised by this Act to be served on any person shall be delivered to that person, and may be delivered to him either personally or by posting it by registered letter addressed to that person at his last known place of abode or business in New Zealand. A notice or cross-notice so posted shall be deemed to have been served at the time when the registered letter would in the ordinary course of post be delivered.

(2) If the person is absent from New Zealand, the notice or cross-notice may be delivered as aforesaid to his agent in New Zealand. If he is dead the notice or cross-notice may be delivered as aforesaid to his administrator.

(3) If the person is not known, or is absent from New Zealand, and has no known agent in New Zealand, or is deceased and has no administrator, the notice or cross-notice shall be delivered in such manner as may be directed by an order of the Court.

(4) Any notice or cross-notice required or authorised by this Act to be served on or given by any person who is a minor may be served on or given by -

- (a) Any person who is the guardian or who has the custody of the minor; or
- (b) The minor himself in any case where he has the management and control of the land in respect of which the notice or cross-notice is served or given.

(5) Notwithstanding anything in the foregoing provisions of this section, the Court may in any case make an order directing the manner in which any notice or cross-notice is to be delivered, or dispensing with the delivery thereof.

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) After the expiration of twenty-one 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 twenty-one 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 twenty-eight 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 twenty-eight 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.

15. Person taking advantage of fence - In any case where there is a fence along the boundary between any land and a road, if a person (other than the owner or occupier of that land) adopts or takes advantage of any means by which the fence is rendered of beneficial use to himself, or avails himself of the fence, the occupier of that land may serve on that other person a notice in writing requiring him to pay interest at the rate of 10 per cent on half the value of the fence at the time of the serving of the notice; and, so long as that other person continues to take advantage or avail himself of the fence, he shall be liable to pay that interest to the giver of the notice or his successor in title, and he shall also be liable for repairs to the fence as if he were an adjoining occupier.

16. Fence erected when occupier of adjoining land exempt from liability therefor - (1) Where at the time when any fence was erected the occupier of the land on one side thereof had, by reason of section 3 of this Act or of the Fencing Act 1908 or any corresponding former Act, no liability to contribute to the cost of the erection, then if the occupier for the time being of that land has thereafter become liable to contribute to the cost of work on that fence -

- (a) The person who erected the fence, or his successor in title, may serve upon the occupier of that land a notice in writing requiring him to pay an appropriate share of the value of the fence at the time when the notice is served taking into account any contributions made towards the cost of the erection and maintenance of that fence by any occupier of that land: and
- (b) That occupier shall, within one month after receiving the notice, pay that share to the person who erected the fence, or to his successor in title, and so long as he continues to be the occupier shall thereafter be liable to bear half the cost of work on the fence.

(2) This section shall not apply in any case where the exemption from liability to contribute to the cost of the erection of a fence arose by reason of a fencing covenant or any other covenant, agreement or proviso relating to fencing.

17. Crown tenant's option - Where a fence is erected under the provisions of this Act dividing any land held by any person as Crown tenant from any adjoining land, it shall be lawful for that Crown tenant, instead of paying his proportionate share of the cost of erecting the fence, to pay to the person who erected the fence, or to his successor in title, interest on such proportionate share at the rate of 10 percent per annum during that Crown tenant's term of occupation:

Provided that that Crown tenant shall be liable during that term for repair as an adjoining occupier.

18. 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 hereafter provided in this section.

(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.

19. Where fence to be built - Save as otherwise agreed or ordered by the Court, the middle of a fence shall be upon the boundary line:

Provided that, where a fence is supported by or formed about posts, the posts shall be placed on the boundary line or as near thereto as practicable.

20. Ditch and bank fences - (1) Subject to any agreement or order of the Court, where the occupier of any land has a right to make a ditch and bank fence, he may make the ditch on the adjoining land (including Crown land) and use the soil taken therefrom towards making the bank, or he may make the ditch on his own land and make the bank on that adjoining land.

(2) No ditch or bank shall be made upon any such adjoining land so as to disturb or injure a live fence without the previous consent of the occupier of the land.

PART IV - PROCEDURE

21. Proceedings to be in accordance with Magistrates' Courts Act 1947 - The provisions of the Magistrates' Courts Act 1947 shall apply to all proceedings under this Act.

22. Jurisdiction of the Court - (1) Notwithstanding that a question of title may be involved and whatever the amount involved, 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, and the amount of the appropriate share payable by an occupier, for the purpose of sections 15, 16 and 17 of this Act:
 - (n) The amount of the proportionate share under section 16 of this Act:
 - (o) Any other question or dispute arising out of this Act:
 - (p) The costs of any proceedings, (including such expenses of survey as the Court thinks fit) and the parties by whom and to whom costs are to be paid.
- (2) In any case where the Court has jurisdiction under subsection (1) of this section it may -
- (a) Make such consequential order as it thinks fit:
 - (b) Enter judgment for such sum of money as it thinks fit.

23. 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.

PART V - MISCELLANEOUS
PROVISIONS

24. 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 authorise 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 authorise 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 authorised 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.

25. Rules - The Governor-General may from time to time, by Order in Council, make rules prescribing, in all cases not specially provided for in this Act, the practice and forms in all proceedings before a Court under this Act, and until rules are made and to the extent they do not cover any case the provisions of the Magistrates' Courts Rules 1948 shall so far as practicable be adopted.

26. Repeal and savings - (1) The enactments specified in the Third Schedule to this Act are hereby repealed.

(2) All matters and proceedings commenced under any such enactments, and pending or in progress at the commencement of this Act, may be continued, completed, and enforced under this Act.

FIRST SCHEDULE

No. 1 Form of Notice - section 8(1)

No. 2 Form of Cross-Notice - section 9(2)

SECOND SCHEDULE

Types of Fence - section 8(2)(b)

THIRD SCHEDULE

Enactments Repealed - section 26(1)

APPENDIX II

The Minister of Justice
 The Secretary for Justice
 Members of the Law Revision Commission
 Deans of the New Zealand University Law Schools
 The New Zealand Law Society
 The District Law Societies
 State Advances Corporation
 Department of Agriculture
 Attorney-General's Office
 Forestry Department
 Department of Internal Affairs
 Department of Lands and Survey
 Department of Maori and Island Affairs
 Public Trust Office
 Railways Department
 Ministry of Works
 Real Estate Institute, Wellington Branch
 Real Estate Institute, Auckland Branch
 Real Estate Institute, Christchurch Branch
 N.Z. Institute of Surveyors
 N.Z. Institute of Valuers
 N.Z. Insurance Company
 Perpetual Trustees Estate & Agency Co.
 The Guardian Trust Company
 Trustees, Executors & Agency Co.
 Pyne, Gould, Guinness & Co.
 East Coast Permanent Trustees
 Federated Farmers of N.Z. (Inc.)
 Municipal Association of N.Z. Inc.
 Counties Association
 Mr S. Gale, Wellington
 Russell, McVeagh, McKenzie, Bartlett & Co., Auckland
 Mr E.A. Donovan (Simpson, Coates & Clapshaw)
 Mr Geoffrey Thompson (Hollings, Thompson & Fairburn)
 Mr R.M. Daniell (Daniell, King & Co.)
 Mr A.R. Robinson (Buddle, Anderson, Kent & Co.)
 The Editor, New Zealand Law Journal
 The Managing Editor, Recent Law
 Law Reform Commission, New South Wales
 Law Reform Committee, Western Australia
 Law Reform Commission, Queensland

Law Reform Committee, South Australia
The Chief Justice's Law Reform Committee, Victoria
The Statute Law Reform Committee, Victoria
Law Reform Committee, Tasmania
Mr C.W. Ogilvie, Solicitor-General's Office,
Western Australia
The Attorney-General, Victoria
The Minister of Justice, Queensland
The Attorney-General, South Australia
The Attorney-General, Western Australia
The Attorney-General, Tasmania
The Attorney-General, Australian Capital Territory
The Attorney-General, New South Wales
Mr P.W. Hogg, Monash University, Victoria
Mr W.A. Lalor, Public Solicitor, Territory of
Papua and New Guinea
The Law Commission, London
Law Reform Committee, London
Institute of Advanced Legal Studies, London
British Institute of International & Comparative
Law, London
The Attorney-General, London
British Library of Political and Economic
Science, London
Bodleian Law Library, Oxford
Mr W.A. Kean, Exeter College, Oxford
Professor H.W.R. Wade, St John's College, Oxford
Mr W. Birtles, Kings College, London
Professor H.L. Gray, University of Birmingham
Professor J.C. Smith, University of Nottingham
Professor J.F. Garner, University of Nottingham
The Dean, Faculty of Law, University of Sheffield
The Scottish Law Commission
Faculty of Law, Old College, Edinburgh
Mr R. Hayes, Department of Justice, Eire
The Ghana Law Reform Commission
The California Law Revision Commission
The New York Law Revision Commission
The Florida Law Revision Commission

The Librarian, Harvard Law School
The York University Law Library, Ontario
The Sir James Dunn Law Library, Nova Scotia
The Law Library, University of British Columbia
Mr W. Foster, McGill University, Quebec
Mr S.A. Scott, McGill University, Quebec
The Ontario Law Reform Committee
The Institute of Law Research and Reform, Alberta
The Law Reform Committee, Manitoba
The Law Reform Advisory Commission, Nova Scotia
The British Columbia Law Reform Commission
The Attorney-General, Alberta
The Attorney-General, British Columbia
The Attorney-General, Manitoba
The Attorney-General, Newfoundland
The Attorney-General, Nova Scotia
The Attorney and Advocate General, Prince Edward
Island
The Attorney-General, Saskatchewan
The Minister of Justice, Ontario
The Minister of Justice, New Brunswick
The Minister of Justice, Toronto
The Minister of Justice, Province of Quebec
Professor M.J. Trebilcock, McGill University, Quebec
Mr C.V. La Forest, Q.C., Department of Justice,
Ontario
Professor W.F. Bowker, Q.C., Institute of Law
Research & Reform, Alberta
Mr W. Iles, Law Draftsman's Office, Wellington
Professor E.P. Ellinger, Victoria University of
Wellington
Professor B. Coote, Auckland University
Mr C.I. Patterson (Watts & Patterson) Wellington
Mr J.S. Henry, Auckland
Mr D.F. Dugdale, Auckland
Mr B.H. Davis, Victoria University of Wellington
The Superintendent of Parks & Reserves,
Wellington City Corporation
Mr Warrington Taylor

APPENDIX III

Mr D.F. Dugdale (Kensington, Haynes & White)
Department of Internal Affairs
Department of Local Government, Sydney
Ministry of Works
Hamilton City Corporation
Professor B. Coote, Auckland University
Gisborne City Corporation
The Real Estate Institute of New Zealand
Mr R.J. Pitchforth (Taverner, Keys & Pitchforth)
Municipal Association
N.Z. Institute of Park & Recreation Administration
Otago District Law Society
Mr A.R. Robinson (Buddle Anderson Kent & Co.)
Federated Farmers
State Advances Corporation
Department of Maori and Island Affairs
Wellington City Corporation
The Public Trustee
The Registrar-General of Land
Department of Justice
New Zealand Forest Service
Mr E.A. Donovan (Simpson, Coates & Clapshaw)
Department of Lands and Survey
Hawkes Bay District Law Society
N.Z. Counties Association
N.Z. Institute of Surveyors
Hamilton District Law Society
Wellington District Law Society
Auckland District Law Society

