

FENCES ACT 1928.

An Act to consolidate the Law relating to
Dividing and Vermin-proof Fences.

19 GEORGE V.
No. 3679.

[12th February, 1929.]

BE it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):—

1. This Act may be cited as the *Fences Act 1928*, and shall come into operation on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette*, and is divided into Parts as follows:—

PART I.—Construction of Dividing Fences ss. 5–15.

PART II.—Maintenance and Repairs of Fences ss. 16 and 17.

PART III.—Special Provisions relating to Vermin-proof Fences ss. 18–28.

PART IV.—Proceedings for the Recovery of Contributions ss. 29–30.

PART V.—General Provisions ss. 31–34.

2. The Acts mentioned in the Schedule to this Act to the extent thereby expressed to be repealed are hereby repealed. Such repeal shall not affect any compensation or contribution fixed, or any notice served, or any award order agreement requisition or reference made under the said Acts or either of them before the commencement of this Act.

3. In this Act, unless inconsistent with the context or subject-matter—

“Court of petty sessions” means a court of petty sessions constituted by two or more justices one of whom is a police magistrate.

“Dividing fence” means a fence separating the lands of different occupiers.

“Municipality” includes city town borough shire.

Repeal.
Schedule.

Interpretation.
D. s. 3.

“Court of petty sessions.”

“Dividing fence.”

“Municipality.”

Fences Act 1915.
"Occupier."

"Occupier" includes any person who is in the actual occupation of or entitled as owner to occupy any land alienated from the Crown by grant lease or licence; but does not include any person in the occupation of or entitled to occupy land under Part I. of the *Mines Act 1928* or in the occupation of land held by yearly licence under any Act relating to the sale and occupation of Crown lands heretofore or hereafter to be in force.^(a)

"To repair."

"To repair" includes to trim keep and maintain a live fence.

Sufficient fence.
ib. s. 4.

4. Subject to the special provisions in Part III. of this Act any fence of any of the kinds hereinafter mentioned and described shall be a sufficient fence^(b) within the meaning of this Act:—

- (a) A post and rail fence at least three feet six inches in height of substantial material firmly erected with no greater distance between the rails or the bottom rail and the ground than one foot unless there is a wire inserted between the rails and the posts not more than nine feet apart.
- (b) A substantial paling or picket fence at least three feet six inches in height with no greater distance between the palings or pickets than four inches.
- (c) A substantial wire fence at least three feet six inches in height having wires tightly stretched with no greater distance between each of the three lowest wires or the bottom wire and the ground than seven inches and the posts or standards or binding wires of which are not more than eleven feet from each other with straining posts not more than one hundred yards apart.
- (d) A bank or wall of substantial materials at least four feet in height and not less than two feet wide at the bottom and nine inches at the top.
- (e) A close hedge or live fence at least four feet six inches in height and capable of resisting the trespass of cattle.
- (f) A log fence not less than four feet high three feet six inches wide at the base and one foot six inches wide at the top.
- (g) A fence at least four feet in height composed of logs and chocks the logs not exceeding eighteen feet in length between the chocks and the chocks of no greater thickness than leaves an opening of one foot between each log and between the bottom log and the ground.

(a) In a number of Acts provision is made declaring persons to be occupiers under this Act. The owner of land in the actual occupation of a tenant is not an "occupier."—*Luxford v. Cairns*, 1914 V.L.R., 433.

Quære, whether the licensee of an unused road is an "occupier" within this Act.—*Murphy v. Murphy*, 1916 V.L.R., 691.

A person holding a licence under the *Unused Roads and Water Frontages Act 1903* (section 10) (see now the *Local Government Act 1928*, Part XLII.) is an occupier of the frontage in respect of which the licence has been issued and the land comprised in such frontage has been "alienated from the Crown" within the meaning of this section.—*Fauz v. Khan*, 1919 V.L.R., 132; 27

C.L.R., 289.

(b) The question as to what is a "substantial fence" under the *Pounds Act* is one for the justices to decide upon the facts of each case, and is not governed by the definition given by this Act of what is a sufficient fence under this Act.—*Reg. v. Hutchinson, ex parte Jessell*, 10 V.L.R. (L.), 332.

Where justices made an order for the erection of a fence and directed that it should be of a kind not set out in this section: *Held*, that a court of petty sessions in prescribing the kind of fence to be erected under section 8 of this Act is not limited by the specifications set out in this section.—*Hose v. Cobden*, 1921 V.L.R., 617.

See also section 28 of *Wire Netting Act 1928*.

- (h) A combination of any of the above-mentioned fences at least four feet in height. Fences Act 1928.
- (i) A ditch not less than two feet six inches broad with a bank or any fence or combination of the above-mentioned fences on either side thereof the top being at least five feet six inches from the bottom of the ditch and three feet above the level of the ground and the slope of the bank on the ditch side thereof being not more than one in three and the slope of the ditch on the bank side not more than one in two.
- (j) A ditch not less than two feet six inches in width and two feet in depth with a bank and wires not less than three feet six inches in height the wires to be tightly strained with not more than eight inches between the wires and seven inches between the bottom wire and the bank and the standards or binding wires to be not more than eleven feet apart.
- (k) A natural stream ditch or watercourse not less than seven feet broad at the top and four feet broad at the bottom and not less than three feet six inches deep with a stream of water running in it and with a bank with a slope of not more than one in three or any fence or combination of the above-mentioned fences on either side thereof being not more than eighteen inches from the edge of the ditch and the top not being less than two feet above the level of the ground.

In the construction of a sufficient fence within the meaning of this section in which wire may be used the wire may be wholly or partly barbed wire.

PART I.—CONSTRUCTION OF DIVIDING FENCES.

5. The occupiers of adjoining lands^(a) not divided by a sufficient fence shall be liable to join in or contribute to the construction of a dividing fence between such lands in equal proportions.

Liability of occupiers of adjoining lands to fence.
Ib. c. 5.

6. When a river creek or natural watercourse forms the boundary of contiguous lands, but is not capable of resisting the trespass of cattle, it shall be competent for the occupiers of such contiguous lands to agree upon such a line of fence on either side of such river creek or natural water-course as shall secure such fence from the action of floods and in the event of their not agreeing upon a line of fence it shall be competent for either party to call in the nearest police magistrate or any justice they may agree to select who shall determine the line of fence to be erected and decide whether any and what compensation in the shape of an annual payment shall be paid to either of the parties occupying such contiguous lands in consideration of loss of occupation of land, and the police magistrate or justice so called in shall be entitled to receive from such occupiers in equal proportions the actual cost of his travelling expenses (if any) incurred

Where river &c. natural boundary power to agree on line of fence.
Ib. s. 6.

(a) Lands which are separated only by a creek which can be crossed by cattle are "adjoining" lands within the meaning of this section.—*Fawaz v. Khan*, 1919 V.L.R., 132; 27 C.L.R., 289.

Fences Act 1915. by him in visiting and inspecting the ground. But the occupation of lands on either side of such line of fence shall not be deemed adverse possession and shall not affect the title to or possession of any such lands save for the purposes of this Act.^(a)

Service of notice to fence.

7. Any person desiring to compel any other person to contribute to the construction of a dividing fence under the provisions of this Act may serve on such person a notice to fence which shall be in writing or in print or partly in writing and partly in print and shall specify the boundary to be fenced and contain a proposal for fencing the same and shall specify the kind of fence proposed to be constructed.^(b)

Proceedings in default of agreement consequent on notice to fence.
Id. s. 8.

8. If within one month after the service of any notice to fence the person serving and the person served with such notice do not agree as to the construction and kind of fence a court of petty sessions on the complaint of either of them may make an order^(c) prescribing the kind of fence to be constructed^(d) and what portion thereof shall be constructed by each such person, and in cases where such further order is necessary the position of such fence, or may refer the determination of the matters to be prescribed by such order to the award of some arbitrator who shall be appointed by an order of such court, and the award of such arbitrator shall be delivered by him within the time named in such order in that behalf to the clerk of the court of petty sessions and shall have the same effect as and be deemed an order of the court; and in case and as often as any arbitrator so appointed dies or neglects declines or becomes incapable of acting the court of petty sessions may appoint another arbitrator in his place who shall have the like powers and duties. Provided that in making any such order or award the court or arbitrator (as the case may be) shall be guided as to which of the kinds of fence hereinbefore described such court or arbitrator orders or awards to be constructed by the kind of fence usually constructed in the place where it is proposed to erect such fence.

(a) *Quære*, whether this section renders it impossible in the cases mentioned in it to acquire title by adverse possession of land of an adjoining holder enclosed by a dividing fence. Notwithstanding this provision it was held that where the occupier on one side broke the fence so as to permit his cattle to get to the creek at a point where the fence was on his side of the creek, he was liable on an information laid by the adjoining occupier under a section corresponding to section 30 (vii.) of the *Pounds Act 1928*.—*Pater-son v. Goode*, 8 A.L.R., 156; 24 A.L.T., 44.

(b) The notice required by this section must be personally served. Personal service does not necessarily mean actual service upon the individual to be served, it is enough if it be sufficiently shown that the document served has come to his knowledge. When a statute requiring service of notice provides no special mode of service, personal service is necessary.—*Reg. v. Heron*, *ex parte Mulder*, 10 V.L.R. (L.), 314.

A notice to fence under this section proposed that the party giving it should fence as specified half of the boundary, and that the other party

should fence the other half. This was agreed to; but the other party, discovering that his half would be the more expensive half, refused to proceed. *Held*, that the justices had jurisdiction to enforce the arrangement.—*Ex parte Ryan*, 5 V.L.R. (L.), 173.

A notice under this section specified the boundary to be fenced as south instead of north of a particular point. *Held*, that as in the circumstances the defendant must have known which boundary was intended the notice was sufficient.—*Luxford v Cairns*, 1914 V.L.R., 433. See *Murphy v. Murphy*, 1916 V.L.R., 691, noted to section 20.

(c) An adjudication under this section as to the kind of fence to be erected between adjoining owners, and the portions to be erected by each, is an "order" within the meaning of that word in the *Justices Act*.—*Luxford v. Cairns*, 1914 V.L.R., 433. The decision in *Reg. v. Kerr*, *ex parte Palmer*, 8 V.L.R. (L.), 235, is not applicable under the present law.

(d) See *Hose v. Cobden*, 1921 V.L.R., 617, noted to section 4.

9. If the person serving and the person served with such notice agree as to the construction of such fence, or if in default of such agreement an order of a court of petty sessions or an award of an arbitrator is made as aforesaid, and in either case either of such persons fails within the time named in that behalf in such agreement order or award or if no such time is named within three months^(a) after the date of such agreement order or award to perform his part of such agreement or to comply with such order or award, then the other of such persons may construct the whole fence as agreed upon or prescribed by such order or award, and may recover half the cost of constructing the same before a court of petty sessions.^(b)

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s. 9.
Proceeding on failure to carry out agreement or order of justices.

10. When the occupier of any land is absent from Victoria or cannot be found or any land is unoccupied the occupier of any adjoining land may insert in a newspaper circulating in the neighbourhood of such land a notice addressed to the occupier of such land describing him as the occupier of such land requiring him to contribute to the construction of a fence and may then proceed *ex parte* to obtain from a court of petty sessions or an arbitrator appointed by the court an order or award (as hereinbefore provided in the case of persons not agreeing as to the construction or kind of fence) authorizing the construction of such fence and specifying the kind of fence to be constructed and the position thereof, and may construct a fence in compliance with such order or award; and if afterwards during the continuance of such fence any person goes into occupation of such adjoining land may within one month thereafter serve any person who if such fence was not in existence would be liable to contribute to the construction of a fence in the place thereof with a copy of such order or award, and shall after the expiration of one month from the date of such service be entitled to recover one-half the then value of such fence; but if such order so made *ex parte* is inequitable a court of petty sessions on the complaint of any person interested in disputing the same made within one month after service of such order or award may relieve the complainant from the whole or any portion of the sum claimed as the value of such fence, and may order that the line of such fence be altered on such terms as are just.

Cases where occupier cannot be found.
Ib. s. 10.

11. Where any fence is constructed under the provisions of this Act dividing any lands held by any person as tenant of any landlord from any adjoining lands the cost thereof as between such landlord and tenant shall be payable in the proportions following, *i.e.*:—

Apportionment of the cost of fencing as between landlord and tenant.
Ib. s. 11.

In case the interest of such tenant at the time of the construction of such fence is less than for a term of three years the whole cost shall be payable by such landlord :

(a) Where in an action for seizing and impounding sheep defendant had pleaded in effect that he had seized them damage-feasant, it was decided that a replication stating that defendant and the plaintiff were adjoining owners, and that they had agreed under Act No. 479 (with which this Act corresponds) that each should fence half the common boundary, and that the plaintiff had done so, but the defendant had not, and not alleging that three months had expired from the time of the agreement, but alleging that a reasonable time had at the time of the trespass, was

bad, as no circuitry of action had yet arisen to be so avoided. But a replication stating such an agreement (independently of the Act) to fence forthwith and that the trespass of the sheep occurred through the defendant's default, was good.—*O'Shea v. D'Arcy*, 6 V.L.R. (L.), 142.

Quære, whether an action will lie for breach of the statutory right to have the fence erected.—*Ib.* see this case for a discussion of the question when the provisions of a statute can be waived.

(b) See note to section 30.

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

In case the interest of such tenant is for a term of six years and less than for a term of twelve years, one-half of such cost shall be payable by such landlord and one-half by such tenant :

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

And in case either such landlord or such tenant under the provisions of this Act pays more than his proper proportion of such cost he may recover before a court of petty sessions the excess from his landlord or tenant (as the case may be) and any tenant may set off any sum recoverable by him under this section against any rent payable to his landlord.

Occupier having a right to purchase to pay owner sum paid by him and interest when purchase completed.
ib. s. 12.

12. Any tenant having a right to purchase any land occupied by him at a fixed rate shall on the completion of the purchase pay to his landlord in augmentation and as part of the purchase money any sum paid by such landlord under the last preceding section together with interest for the same after the rate of Eight pounds per centum per annum.

Persons who enclose land before lands adjoining have been granted shall be authorized to recover from future occupier one-half of the actual value of the dividing fence.
ib. s. 13.

13. (1) Where any person has constructed on the boundary of his land a sufficient fence and the land adjoining is unalienated Crown land the occupier of the first-mentioned land shall be entitled to claim and recover from the person who afterwards becomes the first occupier of such adjoining land one half of the then actual value of the sufficient fence forming the dividing line or fence between such adjoining lands.

(2) The value of such fence shall be ascertained as soon as practicable after the adjoining land has become so occupied and in default of agreement between the parties such value may on the complaint of either of them be determined by a court of petty sessions.

(3) Any sum recoverable under this section may be recovered in a court of petty sessions.

Power to construct a fence upon a road to protect a live fence.
ib. s. 14.

14. If the occupier of any land bounded by a road which road is within any municipality:—

- (a) Desires to plant a live fence on the common boundary of his land and such road and for that purpose to construct a fence upon such road until such live fence has grown up: and
- (b) Gives notice in writing of his desire to the council of such municipality describing the proposed fence and its proposed position; and
- (c) Is not within one month after the service of such notice served with an order of a court of petty sessions made as hereinafter provided not to proceed with the construction of such fence :

Such occupier may at any time not more than six months after the service by him of such notice proceed to construct a fence on such road as proposed in such notice so that no part of such fence is more than six feet distant from the nearest point on the boundary of his land and that the width of such road available for traffic after the construction of such fence is in no place where the same is reduced by the construction of such fence less than thirty feet; and if such occupier forthwith after the construction of such fence proceeds to plant a live fence on the boundary of his land and such road, such occupier constantly with all proper diligence keeping maintaining and protecting from injury such live fence may, for such time not exceeding four years or such longer time as the council of such municipality in writing allows as elapses before such live fence becomes a sufficient fence within the meaning of this Act, maintain on such road the fence so constructed.

Fences Act 1916.

15. Any court of petty sessions, within one month after the service of any notice on the council of any municipality within the last preceding section on the complaint of and good and sufficient cause shown by such municipality, may order the person serving such notice not to proceed with the construction of the fence referred to in such notice.

Power to justices to forbid the construction of fence on a road
Id. s. 15.

PART II.—MAINTENANCE AND REPAIRS OF FENCES.

16. When any dividing fence made or to be made is out of repair or becomes insufficient the occupiers of land on either side thereof shall be liable to the cost of repairing such fence in equal proportions.

Adjoining occupiers to keep dividing fences in repair.
Id. s. 16.

17. The occupier of any land separated from any adjoining land by a dividing fence may serve a notice upon the occupier of such adjoining land requiring him to assist in repairing such fence and if such occupier refuses or neglects for the space of one week after the service of such notice to assist in repairing such fence it shall be lawful for such first mentioned occupier to repair such fence and to demand and recover of and from such other occupier half the cost of repairing the same. Provided that if any dividing fence or any portion thereof is destroyed by accident the occupier of land on either side may immediately repair the same without any notice and shall be entitled to recover half the expense of so doing from the occupier of the adjoining land. Provided always that in case such dividing fence has been destroyed by fire or by the falling of any tree or trees the occupier through whose neglect (if any) such fire has originated or has caused injury to the fence or such tree or trees has or have fallen shall be the party bound to repair the entire fence so damaged as aforesaid.

Procedure to compel contribution to the repair of dividing fence.
Id. s. 17.

PART III.—SPECIAL PROVISIONS RELATING TO VERMIN-PROOF FENCES.

18. In this Part "vermin-proof fence" means a fence of one of the kinds following (that is to say) :—

Definition of "vermin-proof fence."
Id. s. 18

- (a) a substantial slab fence of pieces of timber which pieces shall not be less than four inches by three inches at the small end and shall be at least four feet nine inches in length and shall be placed close together and not less than nine inches in the ground ;

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- (b) a wire net fence four feet ten inches in height. Such fence shall consist of wire netting the lower portion of which shall be not less than three feet in width and of a mesh not exceeding one inch and five-eighths and shall be six inches in the ground or shall have six inches thereof properly secured to the surface of the ground and shall be two feet six inches above the ground, and above such wire netting shall be placed other wire netting not less than two feet in width and of a mesh not exceeding four inches. The whole of such wire netting shall be attached by wire or staples to substantial posts stakes or iron standards. Such posts stakes or iron standards shall be at least six feet nine inches in height, and shall be placed one foot ten inches in the ground, and shall not be more than ten feet apart. Four inches above the netting there shall be a barbed wire stapled to each post stake or standard and drawn through straining posts eight feet in length of which three feet shall be in the ground; such straining posts shall be not more than five chains apart;
- (c) a wire net fence three feet four inches in height made of wire netting which shall not be less than three feet six inches in width and of a mesh not exceeding one inch and five-eighths and which shall be six inches in the ground or shall have six inches thereof properly secured to the surface of the ground. Such wire netting shall be attached by a wire or staples to substantial posts stakes or iron standards with a barbed wire extending from one post stake or standard to another and placed four inches above the netting;
- (d) a post and rail or paling fence of substantial material firmly erected not less than three feet six inches in height having three wires tightly stretched or two wires and top rail in either case with posts or standards of iron or durable wood not more than twelve feet apart and having a galvanized wire netting not less than three feet six inches wide number seventeen gauge and not larger than a one and a half inch mesh firmly affixed thereto and sunken in the ground not less than six inches;
- (e) a post and rail or paling or wire fence or portion or portions of a fence of any of the descriptions in subsection (a) (b) or (c) of section four of this Act and to which is firmly affixed galvanized wire netting not less than three feet six inches wide and number seventeen gauge and not larger than a one and a half inch mesh sunken into the ground not less than six inches; and
- (f) any fence proclaimed by order of the Governor in Council under section two hundred and ninety-two of the *Land Act 1901*, or section twenty-eight of the *Wire Netting Act 1928*, or any corresponding previous enactments to be a vermin-proof fence or rabbit-proof fence; but no fence so proclaimed shall for the purposes of this Act be a vermin-proof fence beyond the limits of the part or portion of Victoria (if any) specified in such order.

19. The Governor in Council may by order proclaim any fence described in such order to be a vermin-proof fence within the meaning of this Part either throughout Victoria or within any portion thereof specified in such order and may at any time revoke any order made under this section or sub-section (f) of the last preceding section.

Fences Act 1915 s. 19.
Power to Governor in Council to proclaim vermin-proof fence.

20. (1) Notwithstanding anything contained in this Act where any adjoining lands are not divided by a vermin-proof fence and the Closer Settlement Board on consideration of a recommendation or report by any inspector of the Board made after a personal inspection by such inspector certifies in writing^(a) that a vermin-proof fence is necessary then each of the occupiers of such adjoining lands shall unless such certificate is negatived as hereinafter provided be liable to contribute in equal proportions—

Liability respecting vermin-proof dividing fence.
Id. s. 20.
Wire Netting Act 1924 s. 22.

- (a) towards constructing a vermin-proof fence between such lands ; or
- (b) towards making vermin-proof any fence previously constructed between such lands ; or
- (c) towards maintaining and repairing any vermin-proof fence previously constructed between such lands.

Provided that any person who feels himself aggrieved by any such certificate of the Closer Settlement Board may within fourteen days appeal against such certificate to the Minister of Lands who upon consideration of such appeal may negative or affirm such certificate.

(2) This section shall not apply to Crown lands or any land vested in the Board of Land and Works or the Victorian Railways Commissioners or in any " Authority " as defined in section three of the *Water Act 1928*.

21. Where a person desires to compel any other person to contribute to the construction of a dividing fence and desires that such fence shall be a vermin-proof fence he shall in the notice to be served on such person pursuant to section seven of this Act distinctly specify the kind of vermin-proof fence proposed to be constructed and where any such notice distinctly specifies the kind of vermin-proof fence proposed to be constructed the power of the court or of any arbitrator to prescribe or award the kind of fence to be constructed shall be limited to prescribing or awarding the particular kind of vermin-proof fence to be constructed.

Notice to fence to specify proposed kind of vermin-proof fence.
Fences Act 1915 s. 21.
Only a vermin-proof fence is to be erected when specified in notice.

22. For the purposes of this Part the making vermin-proof of any dividing fence constructed between any lands shall be deemed to be the construction of a vermin-proof fence, and all the provisions of this Act enabling any person to compel any other person to contribute to the construction of a vermin-proof fence shall equally apply to compelling persons to contribute to the making vermin-proof of any fence so constructed, and such provisions with such substitutions as may be necessary for such purpose shall be read and construed accordingly.

Making a fence vermin-proof to be deemed constructing a vermin-proof fence.
Id. s. 22.

23. Notwithstanding anything in this Act, where any person has (whether before or after the commencement of this Act) constructed on

No contribution in case of certain kinds of fence.
Id. s. 23.

(a) A certificate in writing that a vermin-proof fence is necessary is a condition precedent to liability on the part of an occupier to contribute towards the construction of such a fence. Where a notice to fence was served on defendant in

October and the certificate was not given till the following January: *Held*, that an order could not be made against the defendant.—*Murphy v. Murphy*, 1916 V.L.R., 691.

Fences Act 1915. the boundary of his land a fence of any of the kinds specified in subsection (d) or (e) of section eighteen but having wire netting the mesh of which is larger than one and a half inch and not larger than one and five-eighths inch the occupier of any adjoining land shall not be entitled to compel any such person to contribute towards constructing a vermin-proof fence of another kind in place of such fence or on the ground merely of the size of the mesh to contribute towards making such fence vermin-proof.

Persons who enclose land before lands adjoining have been granted shall be authorized to recover from future occupier one-half of the actual value of the vermin-proof fence.

ib. s. 24.

24. (1) Where any person constructs on the boundary of his land a vermin-proof fence and the land immediately adjoining is unalienated Crown land the occupier of the first-mentioned land shall be entitled to claim and recover from the person who afterwards becomes the first occupier of such adjoining land one-half of the then actual value of the vermin-proof fence forming the dividing line or fence between such adjoining lands.

(2) The value of such fence shall be ascertained as soon as practicable after the adjoining land has become so occupied and in default of agreement between the parties such value may on the complaint of either of them be determined by a court of petty sessions.

(3) Any sum recoverable under this section may be recovered before a court of petty sessions.

Proportion of cost of vermin-proof fence a charge on land until paid.

ib. s. 25.

25. (1) If any person served with a notice requiring him to contribute towards the construction of a vermin-proof fence or the making vermin-proof of any fence previously constructed between any lands proves to the satisfaction of a court of petty sessions upon the hearing of a complaint under section eight of this Act that he is unable to contribute his proportion of the cost of such construction or of the work of making vermin-proof any fence already constructed, such court may make an order that the person giving such notice shall be at liberty to construct the whole of such fence or do the whole of such work.

(2) Upon such construction or work being completed the proportion of such cost for which such first-mentioned person is liable shall become and until paid be and remain a charge upon such land, and the owner of such land until he pays the amount of such proportion shall pay annually to the person so constructing such fence or doing such work interest upon such amount at the rate of Six pounds per centum per annum.^(a)

(3) If default is made in respect to any such annual payment of interest such payment may be enforced at any time by the person entitled to receive such interest in a summary way before a court of petty sessions or by action in any court of competent jurisdiction.

(4) Every mortgagee or lienee of or over any land shall be at liberty when any sum has pursuant to this Act become a charge upon such land to pay the amount of such charge, and such payment when so made shall be deemed a part of the principal sum secured by such mortgage or lien respectively and be subject to the provisions powers and trusts thereof.

Determination of proportion of cost.

(5) When any order is made by a court of petty sessions under this section the amount which any person is liable to contribute as his proportion of the cost of constructing a vermin-proof fence

(a) If the land is under the Transfer of Land Act a caveat should be lodged. See section 72 of that Act.

or of making vermin-proof any fence previously constructed may be determined by such court at the time of making such order, or if not then determined it may on the complaint of either party or of the owner for the time being be determined by a court of petty sessions at any time subsequent to the construction of such fence or the doing of such work. If the complaint is not the complaint of the owner for the time being the court may direct that such owner be made a party to and served with a copy of such complaint and may adjourn the hearing to enable such owner to appear. Fences Act 1915.

26. The provisions of Part II. of this Act shall apply to the maintenance and repairs of fences constructed or made vermin-proof under the provisions of this Part or any corresponding previous enactment. Provisions extended to this Part. *Ib.* s. 26.

27. Every person who wilfully destroys or breaks down or injures or removes any vermin-proof fence belonging to another person or any portion thereof, or cuts, detaches or removes any netting forming part thereof shall in addition to paying the amount of the injury done be liable on conviction before a court of petty sessions for a first offence to a penalty of not less than Five nor more than Fifty pounds, and for a second or subsequent offence to imprisonment with or without hard labour for a term of not less than three nor more than twelve months. Penalty. *Ib.* s. 27.

28. (1) Every person who, on any land within twelve yards from any vermin-proof fence, or on any road sets or uses any snare, trap, engine or contrivance for the taking of hares or rabbits shall be liable on conviction before a court of petty sessions— Penalty for setting traps for hares or rabbits within twelve yards of vermin-proof fences. *Ib.* s. 28.

- (a) for a first offence to a penalty of not less than One pound nor more than Twenty pounds; and
 (b) for a second or subsequent offence to a penalty of not less than Five nor more than Fifty pounds.

(2) In the case of any land as aforesaid (other than a road) the foregoing provisions of this section shall not apply to— Exemption from the provisions of this section.

- (a) the owner or occupier of any such land or any person acting under his written authority; or
 (b) any inspector acting under the authority of the *Vermin and Noxious Weeds Act 1928.*

PART IV.—PROCEEDINGS FOR THE RECOVERY OF CONTRIBUTIONS.

29. All moneys recoverable under this Act in respect of the construction or repairing of any fence by any person serving any notice to fence or repair or any *ex parte* order or award may be recovered from any person liable to contribute to the cost of constructing or repairing such fence who is served with notice to fence or repair or such *ex parte* order or award, or any person who comes in and defends under the provisions of this Act any proceedings consequent on such notice or the service of such order or award: And all such moneys recoverable by any person served with such notice may be recovered from the person serving the same or any person liable to contribute to the construction or repair of such fence as tenant of whom the person serving such notice holds the lands bounded by such fence. From whom moneys recoverable under this Act may be recovered. *Ib.* s. 29.

30. All proceedings for orders and for the recovery of sums of money shall be before a court of petty sessions and every complaint Complaints under this Act. *Ib.* s. 30.

Fences Act 1915. under this Act shall be heard in a summary way at some court of petty sessions sitting near to the locality of the fence to which the same relates, and the costs of every such complaint shall be in the discretion of the justices hearing the same, but notwithstanding when any such court appoints an arbitrator such court may if it thinks fit refer the costs of the reference to the award of such arbitrator.^(a)

PART V.—GENERAL PROVISIONS.

Act not to interfere with agreements.
Id. s. 31.

31. Nothing in this Act contained shall be deemed or taken to affect any covenant contract or agreement made or hereafter to be made relative to fencing between landlord and tenant or between occupiers of adjoining land.

Act not to apply to unalienated Crown lands.
Id. s. 32.

32. This Act except as is in sections thirteen and twenty-four otherwise provided shall not apply to any unalienated Crown lands; nor shall the Crown the Governor the Board of Land and Works nor any public officer appointed by the Governor or by the Governor in Council for the administration management or control of the Crown lands or public works or who by virtue of his office however styled has any such management or control be liable under this Act to make any contribution towards the construction or repairing of any dividing fence between the land of any occupier and any Crown land.

Persons constructing fences can enter upon adjoining lands.
Id. s. 33.

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

Power of landlord to come in and defend proceeding against his tenant under this Act.
Id. s. 34.

34. Any person may come in and defend any proceeding under this Act against any tenant of such person in consequence of which such person may ultimately incur any liability, and any defence which the person originally proceeded against might set up shall be available to the person so coming in to defend.

Section 2.

SCHEDULE.

Number of Act.	Title of Act.	Extent of Repeal.
2651	<i>Fences Act 1915</i>	The whole.
3375	<i>Wire Netting Act 1924</i>	Part II.

(a) In a complaint for work and labour done, and materials for the same provided, the complainant must show that the work and labour was done, and the materials for it provided for the defendant and at his request. A complainant cannot, therefore, succeed in such a complaint where it is shown that the claim arose out of an agreement between the parties that the complainant should erect a dividing fence, and that the defendant should pay one-half the cost of its erection, inasmuch as no particular portion of the fence was erected for the exclusive benefit of the

defendant.—*Wilby v. Hill*, 20 A.L.T., 57. Note that this case did not decide that a complaint under section 9 could not in any circumstances (e.g., in the case of money paid) be brought before a court of petty sessions consisting of a police magistrate and one or more justices sitting near to the locality in which the fence is. The fence was at Sorrento, and the complaint for work and labour was brought at Melbourne before a police magistrate alone, and therefore complainant could not rely on any argument based on the joint operation of sections 9 and 30.