FENCES BILL 1975

House of Assembly, 6 March 1975, page 2736

Second reading

**The Hon. L. J. KING (Attorney-General)** obtained leave and introduced a Bill for an Act to provide for the erection, replacement, repair and maintenance of fences; to repeal the Fences Act, 1924-1926; and for other purposes. Read a first time.

The Hon. L. J. KING: I move:

*That this Bill be now read a second time.*

I seek leave to have the second reading explanation inserted in *Hansard* without my reading it.

Leave granted.

Explanation of Bill

It is designed to give effect to the recommendations of the Law Reform Committee contained in its twenty-sixth report. The present law relating to fences and fencing is an Act of 1924 and was passed to cure the fact that earlier Fencing Acts dealt with country rather than urban conditions. At this stage, where most fencing disputes are urban and the balance of the distribution of population between urban and country has shifted considerably in 50 years, it is apparent that the provisions of the 1924 Act require reconsideration. The type of fencing people wish to erect today is far different from that commonly in use in 1924, and the present position is that, except by agreement, fences of brick or stone, brush fences, wrought iron fences, ornamental fences, low boundary fences, and many others are not within the provisions of the Fences Act.

Many provisions in the present Act have caused considerable argument in the past, and over the years it has become apparent that there are many gaps in the legislation. The definition of “dividing fence” has caused difficulties in that in a number of the inner suburbs, for reasons that are now quite obscure, small rights of way of about 30 centimetres or 60 cm are not uncommon. North Unley and North Adelaide, for example, have many of them. These do cause trouble in practice. The 1924 Act does not contain any definition of “owner of land”, and the definition of “occupier” is deficient in many respects. It has been held that a local council is not an occupier of land within the meaning of the Act. It is undesirable that there should not be a fence between reserves and private property, and it is only fair that, where reserves occur and the adjoining owner asks the council to contribute to the erection of a common fence between him and the reserve, the council should bear its proportion of the expense. The definition of “occupier” does not include the case where property is let to a tenant or a mortgagee: in possession. The lack of any definition of “replacement, repair or maintenance work” has caused considerable argument in the past.

This Bill is aimed at eliminating the gaps and uncertainties in the present law, as well as improving the procedures whereby fencing disputes can be settled. Clauses 1, 2 and 3 are formal. Clause 4 contains the definitions necessary for the interpretation of the Bill and these are designed to eliminate the gaps referred to above. Clause 5 sets out the notice which an owner of land who proposes to erect, replace, repair or maintain a fence must give to the adjoining owner. The notice to be given deals with the matter in much greater detail and in much better form than the corresponding provision under the 1924 Act. Clause 6 is a new provision designed to ensure that the person who makes the original proposal for a fence knows the full scope of the adjoining owners’ objections to the fence so that he can deal with them. Again, it is of importance to any court before which any argument should come that it should know precisely what the objections are to the proposed fence. Clause 7 is consequential.

Clause 8 sets out the conditions under which fencing work may proceed. Clause 9 enables a person seeking contribution to the cost of a fence from an adjoining owner to proceed with the erection of the fence where the adjoining owner cannot be located. Notice of the proposed fence is to be left at the adjoining premises in lieu of service on the owner. If there is any subsequent action for contribution, the court may order the payment of such contribution as it considers just. The clause also provides that a person may, if he so desires, obtain court approval of his proposal and obtain an order that an amount, determined by the court, be paid by the adjoining owner when he can be located. Clause 10 provides that, where there is no owner of adjoining land, a person intending to perform fencing work may apply to the court for approval of his proposal and an order that, when a person becomes owner of the adjoining land, such person shall contribute towards the cost of the fencing work. Clause 11 provides that, where an owner of land abutting a road derives a benefit from a fence on the other side of the road, a court may order him to contribute to the cost of the fence. A similar provision exists in the 1924 Act.

Clause 12 spells out in detail the powers vested in the court to settle fencing disputes. Clause 13 vests the jurisdiction to hear and determine fencing disputes in the Local Court. Under the 1924 Act, fencing disputes are dealt with by courts of summary jurisdiction. The procedure of courts of summary jurisdiction is more suitable to the imposition of fines than the solving of fencing disputes, hence the vesting of jurisdiction in the Local Court. Clause 14 is similar to sections 21 and 22 of the 1924 Act. It enables a landlord to recover some of the cost of fencing work from his tenant. The amount recoverable from the tenant varies according to the length of the tenancy. Clause 15 is a new provision that enables a life tenant who incurs any liability for fencing work to recover some of the cost of the fencing from the remainderman or the reversioner. This is only fair, as it is the remainderman or reversioner who will ultimately obtain the benefit of the use of the fence. Clause 16 is another new provision. It enables one adjoining owner to repair or restore a fence, without notice, where the fence has been damaged or destroyed and must be urgently repaired or restored. Provided the fence was not damaged or destroyed by his own wrongful act or default, the person who has repaired the fence can recover one-half of the cost of the fencing work from the other adjoining owner.

Clause 17 provides that, where a fence is erected on other than the boundary to contiguous land, the occupier of what is, in fact, his neighbour’s property does not acquire title to the land. Clause 18 enables a person to enter on to neighbouring land to carry out authorised fencing work when it is necessary to do so. No such a provision exists in the 1924 Act. Clause 19 provides for the service of notices under the Act. Clause 20 puts the Crown and councils in the same position as that of a private landowner, so far as fencing obligations are concerned, with respect to subdivided land that is sold in the form of ordinary building allotments. Under the 1924 Act, neither the Crown nor local government bodies were liable to contribute to the cost of fencing any property. Clause 21 provides that any obligation to fence land, or to maintain a fence in a state of repair, that may exist by prescription is extinguished. This provision is necessary to put an end to complicated legal arguments that may arise whether the doctrine of lost modern grant applies in South Australia. Clause 22 re-enacts in a modified form a provision of the present Fences Act for the clearing of scrub up to a width of 1.8 metres on each side of the line of a fence or proposed fence. This provision obviously should not apply to urban land, or to land set aside for the conservation of native vegetation. Accordingly, a regulation-making power is inserted to enable the Governor to prescribe the areas in which it is to apply. Clause 23 allows minor variations from the provisions of the Act. Clause 24 provides for the making of rules of court. Clause 25 preserves powers conferred by other Acts.

Mr. COUMBE secured the adjournment of the debate.