**FENCING BILL 1865**

**House of Assembly, October 10 1865, pages 71-75**

Second reading

**The ATTORNEY-GENERAL** said the existing Fencing Act had been passed with a view toencourage the cultivation of land, but it had been found that its definitions were exceedingly vague, and they had led frequently to disputes which were seldom satisfactorily settled. The Bill which he now asked hon. members to read a second time repealed the Act of 1846, No. 10, and provided the following definitions. First that “owner of a dividing fence shall mean the person who, irrespective of the act of parties, is liable to keep such fence in repair, and if more than the person who would be primarily damnified if such fence were destroyed.” It might turn out that such person was the landlord or the person entitled to the inheritance at the determination of a lease. Then there was an attempt to define a party fence. “ A ‘party fence’ shall mean any fence which has been jointly erected by the owners or occupiers of adjoining lands to divide such lands, or towards the erection of which such owners or occupiers have contributed, or towards the cost of erecting which either owner or occupier has contributed under the provisions of this Act or of the Ordinance hereby repealed.” In the Supreme Court a decision had been given some time ago that until a person had compelled his neighbour to pay part of the cost of erecting a fence it did not become a mutual fence, and he had no remedy under the Act of 1846. By the proposed definition any person who had anything to do with a fence either by contract, agreement, or contribution towards its original erection could compel the other party interested in the fence to pay a part of the cost of repairing it. The next definition was of “a sufficient fence,” and was the same as the provision in the existing Act:—“Sufficient, fence shall mean any fence ordinarily capable of resisting the trespass of great cattle.” To compel the maintenance of any other fence might interfere with the free use of land. The next definition was intended to prevent confusion; it was:—“Part occupier” shall mean the person in actual occupation, or if none, then the owner, of the land adjoining or abutting on any party fence.” That would fix the liability, whilst it did not compel the owner to live upon the land. The next and last definition was intended to defeat some of the subterfuges of persons who desired to avail themselves of the labour and outlay of their neighbours who had erected fences. It was not unusual for persons to leave a portion of their land unincluded in the fence, securing it in some way sufficient for their purpose, and thus evading their just liability. A decision had been given that the Act contemplated an entire enclosure, and thus those parties availed themselves of their neighbour’s fence and paid nothing. The definition was:- ‘Avail’—any occupier of land shall be deemed to have availed himself of a fence within the meaning of this Act who shall, in the occupation of such land, erect or use any other fence which abuts on such first-mentioned fence, whether such occupier shall have enclosed the whole of the land or not.” The 4th clause provided that occupiers availing themselves of dividing fence to pay half value. The other clause provided that part occupiers shall keep party fence in repair, or pay half costs of the same. The other clause related to notice or demand, so that litigious persons could not involve absent owners in unexpected lawsuits, and the recovery of the moiety of the costs in cases contemplated by the Bill. The present idea was that a three-rail fence was all that could be required, and if any person erected a more expensive fence he must bear the extra expense. He moved that the Bill be now read a second time.

Mr. MILNE would not oppose the second reading, but was of the opinion that the Bill must be altered in Committee. The hon. member proceeded to point out verbal amendments, which he afterwards enlarged upon in Committee.

Mr SUTHERLAND asked what was "a sufficient fence.” He had heard the matter disputed for 20 years but never heard that it had been settled. A fence might keep our ordinary cattle, but a bull or wild bullock would make nothing of it. The proposed Bill might answer some parties, but he was opposed to be given facilities to claim part payment from who did not use or or require party fences.

Mr COGLIN said the hon. member was against the restraining of tresspass cattle. He himself highly approved of the principle of the Bill but he hoped the hon. mover would allow further time for its consideration by making the second reading an Order for that day week. A proper three-rail fences was sufficient to keep cattle out, and he was convinced that many large proprietors of land would have been happy to have seen that or a similar measure passed last session. He had himself introduced a Bill to restrain trespass by cattle, but did not succeed with it. He hoped, however, that the Attorney-General would carry that Bill through the House.

Mr. MURRAY was pleased with the Bill except in one respect; he would have the sufficient fence sheep-proof. It was well known that agriculturists were introducing very generally sheep upon their farms, and a Bill of that sort should protect the owners of sheep as well as cattle-owners. Without such a provision he could not be satisfied with the Bill, and if it was not taken out of Committee that day hon. members would have an opportunity to consider and perfect it.

Mr. DUNN said he could not agree in the suggestion of the last speaker as to compel generally the erection of sheep-proof fences, which would be unnecessary, and would operate as a very extensive hardship. He recollected that upon the passing of the Bill now in operation there was a great difference of opinion as to what constituted a sufficient fence. It was at length decided that a fence of split posts and three split rails was sufficient. Still there was a difficulty, as in some parts timber was scarce, and mallee poles had to be used; in other places pine alone was available, and in other places the cheapest and best fences were dry stone walls. It would be exceedingly hard to compel a person who had nothing but horse stock to erect fences capable of turning sheep and lambs, when, in fact, for his purposes one rail would be sufficient.

Mr. GOODE considered that there was a great deal of force in the remarks made by the hon. member Mr. Murray. He hoped the hon. mover would not lose sight of the suggestion. It was necessary that fences should be sufficient to exclude small cattle, as farmers were now generally turning their attention to keeping sheep upon their farms. At the present time, also, a number of sheepfarmers were turning their attention to the fencing of runs, and it would be a great injustice to these gentlemen to render them liable to half the expense of a fence which would only restrain large cattle and not sheep from trespass or the liability for trespassing. (Hear, hear.)

Mr. CAVENAGH said the last speaker made the matter a purely squatting question. He should recollect, however, that there was a large class of colonists called farmers, whose object was simply to erect such fences as would protect their crops from their own cattle. The cattle belonging to other people had no right to meddle with them.

Mr. TOWNSEND enquired whether it was intended to take the Bill out of Committee that da . (The Attorney-General—“No.”) Then he would not oppose the second reading, and hoped they would have a better definition of small cattle in Committee.

Mr. COLTON objected, to the introduction of any provision as to small cattle in that Bill. It would be a great injustice to the farmers, and very few persons indeed could derive any benefit from it. A fence capable of turning small cattle would cost at least double that sufficient for large cattle. He did not think that any hon. member would wish to entail such unnecessary expense upon the farmers.

The ATTORNEY-GENERAL said he had, when he asked leave to introduce the Bill, expressly stated that he had no new scheme to propose, but merely hoped to make the intention of the existing Act a reality. He hoped that the definitions proposed would bring into operation all the advantages intended by the present Fencing Act. The amendment suggested would destroy the effect of the 8th clause, which proposed that no greater sum could be recovered than the cost of erecting a three-railed fence. No doubt there would be cases where a sheep-proof fence might be required by one party; but all exceptional cases must yield to the general good. The hon. member Mr. Sutherland made a furious attack upon the Bill almost as furious as his fancied bull would upon a three-rail fence. (A laugh.) He hoped the hon. member would not be one of the Justices who would have to sit upon the Bench and decide upon evidence as to the sufficiency of a fence. Other Justices might not be troubled with doubts as to what a bull might do, and be content to find that a fence which kept out ordinary cattle was a sufficient fence under the Act. The term “party fence” occurred only in the 5th clause, ana it must come within the second definition before a party could make a claim in respect of it. With regard to the recovery of payment, an action could be brought in the Local Court for any sum under £100, and greater amounts could be recovered in the Supreme Court.

The question was put and carried.

The Bill was read a second time and committed.