

Laws of His Majesty's Province of Upper Canada, passed in the year 1834. York: Robert Stanton, 1834.

4 William IV — Chapter 12

An Act to regulate Line Fences and Water Courses, and to repeal so much of an Act passed in the thirty-third year of the Reign of His late Majesty King George the Third, entitled “*An Act to provide for the nomination and appointment of Parish and Town Officers within this Province*,” as relates to the office of Fence Viewers being discharged by Overseers of Highways and Roads. Passed 6th March, 1834.

Whereas much difficulty and inconvenience are experienced and many disputes arise from the want of some Provincial enactment, by which each party interested in the making or repairing any division or Line Fence, may be compelled to make or repair, or pay for making or repairing a fair and just proportion of such Fence: Be it therefore enacted, by the King’s Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Assembly of the Province of Upper Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of Great Britain, entitled “*An Act to repeal certain parts of an Act passed in the fourteenth year of His Majesty’s Reign, entitled, ‘An Act for making more effectual provision for the Government of the Province of Quebec in North America, and to make further provision for the Government of the said Province;*” and by the authority of the same, That it shall and may be lawful for the Inhabitant Householders of each and every Township in this Province, at their annual Town Meeting for the election of Township Officers, to choose from among the Inhabitants of the said Township, in the same manner as by Law other Township Officers are chosen, not less than three or more than eighteen fit and discreet persons to serve the Office of Fence Viewers, who shall perform the duties hereinafter prescribed to Fence Viewers, and who shall take the same Oath of Office, and in the same manner which persons chosen to other Township Offices are or may be by law required to do, and be liable to the same penalties for neglect or refusal to take said oath of office, to which persons chosen to other Township Offices and neglecting or refusing, to take the Oath of Office are or may be by law liable.

II. And be it further enacted by the authority aforesaid, That each of the parties occupying adjoining tracts of Land shall keep up, make and repair a fair and just proportion of the Division or Line Fence between their several tracts of Land and that where there shall be a dispute between the parties, as to the commencement or extent of the part of the said Division or Line Fence which either party may claim or refuse to make or repair, it shall and may be lawful for either party to submit the same to the determination and award of three Fence Viewers, which Fence Viewers are hereby authorised and required, upon being duly notified by either party in such case, to attend at the time and place stated in such notice, and after being satisfied that the other party or parties in the case have been duly notified to appear at the time and place, to proceed to examine the premises; and such Fence Viewers, or any two of them, shall determine any and every dispute in the matter aforesaid, between the said parties; and the award and determination of such Fence Viewers, or any two of

them, on the matters aforesaid, shall be binding on the parties as far as concerns the making or repairing of such Division or Line Fence, and from thenceforth the occupier or occupiers of the said tracts or parcels of Land shall respectively make and repair, and keep in repair, that part of such Division or Line Fence which shall have been assigned in such award or determination to the occupier or occupiers of such tract or parcel of Land, which determination and award shall be made in writing, and signed by such Fence Viewers, or a majority of them, and filed in the Town Clerk's Office, and a copy of the same made out and given to each of the parties: Provided always, nevertheless, that when by reason of any material change of circumstances in respect to the improvement and occupation of adjacent lots or parcels of Land, an award which has been made under this Act shall cease in the opinion of either of the parties to be equitable between them, it shall be in the power of either to obtain another award of Fence Viewers by the same mode of proceeding as is hereinbefore directed; and that if the Fence Viewers who shall have been called upon to make such subsequent award, shall find no reason for making an alteration, the whole cost of such references shall be borne by the party at whose instance it shall have been made.

III. And be it further enacted by the authority aforesaid, That if any person or persons who may be in the occupation of any tract or parcel of Land shall neglect or refuse to make or repair (as the case may be) an equal or just proportion of the Division or Line Fence between such tract or parcel of Land and the adjoining tract or parcel of Land, for a period of thirty days after being required by a demand in writing by the person or persons occupying such adjoining tract or parcel of Land, or after the award of the Fence Viewers as aforesaid, to make or repair such equal or just proportion of the Division or Line Fence; or if the party making such demand shall for such period neglect or refuse to make or repair an equal or just proportion of the Division or Line Fence, it shall and may be lawful for either of the said parties, after first completing his own proportion of such Fence, to make or repair in a substantial manner, and of good sound materials, the whole or any part of the said Division or Line Fence which ought to have been by the other party made or repaired, and to recover in the manner hereinafter mentioned, of the person or persons who may have neglected or refused in manner aforesaid to make or repair such proportion of the Division or Line Fence, the just and full value of such proportion, not exceeding the sum of Two Shillings and Six Pence per rod, to be ascertained and determined in the manner hereinafter provided: Provided always, that any Fence coming within the meaning and intent of the resolution, resolving what shall be considered to be a lawful Fence for that year, entered into by the inhabitant householders at their annual Township Meeting, shall be considered by all Fence Viewers to be a lawful Fence; and when the householders as aforesaid shall neglect or refuse to decide by such resolution what shall be a lawful Fence, then and in that case it shall be lawful for such Fence Viewers, when called upon, to exercise their own judgment, and decide what they consider to be a lawful Fence.

IV. And be it further enacted by the authority aforesaid, That it shall and may be lawful for any Commissioner of the Court of Requests for the Division in which such Fence may be situated, and he is hereby required, upon the demand of any person or persons, to issue a Summons under his hand and seal, directed to three Fence Viewers (by their proper names)

of the Township in which such Fence is situated, requiring them to attend on the day and at the hour therein mentioned, and at a place therein mentioned, to view such Fence, and to appraise the same; also, to issue his Summons to the person or persons so having neglected or refused to make or repair such proportion of the Division or Line Fence, who shall thenceforth be considered as the Defendant or Defendants in the case, requiring him or them to appear at the same time and place, to shew cause why the person or persons claiming payment as aforesaid, who shall thenceforth be considered as the Plaintiff or Plaintiffs in the case, should not recover the same.

V. And be it further enacted by the authority aforesaid, That such Fence Viewers, upon being personally served at least eight days previously with such Summons, at the time and place therein mentioned, and after having duly examined the Fence and received evidence, which, if required by either party, or if the said Fence Viewers shall think it expedient, shall be given under oath, they, or any two of them, shall determine whether the said Plaintiff is entitled to recover any, and if any, what sum, from the said Defendant or Defendants, under the provisions of this Act; and in all cases where the commencement or extent of the part of such Division or Line Fence which each party should make or repair, has not been determined by the award of Fence Viewers as aforesaid, the said Fence Viewers, or any two of them, shall determine the same, which determination shall be final and binding on the occupiers of the said tracts or parcels of Land, and have the same effect as if it had been made by three Fence Viewers in the manner aforesaid, and shall report their determination upon the matters aforesaid in writing, under their hands, to the said Commissioner of the Court of Requests, by whom the said Summons shall have been issued, and shall also, in all cases where they determine that the said Plaintiff is entitled to recover any thing from the said Defendant or Defendants, state what distance of Fence they have determined that the said Defendant or Defendants should have made or repaired.

VI. And be it further enacted by the authority aforesaid, That the said Fence Viewers, if they shall be required by either party, before they shall have made a report as aforesaid of their determination to the said Commissioner of the Court of Requests, shall give to such party requiring the same, a true copy of their said determination.

VII. And be it further enacted by the authority aforesaid, That if either of the said parties shall desire to procure the attendance of any person to give evidence before such Fence Viewers, it shall and may be lawful for the Commissioner of the Court of Requests, by whom any Summons shall have been issued as aforesaid to such Fence Viewers, to issue, upon the application of either of the said parties, a Summons to any person to attend as a witness before the said Fence Viewers at the time and place mentioned in the said Summons to the Fence Viewers, and that the said Fence Viewers, when met as aforesaid, at the time and place mentioned in the Summons, shall be and are hereby authorised, whenever it shall be desired by either party, or they shall think it proper, to administer an oath to any person, except the parties or persons interested, whose evidence they shall wish to take, which oath shall be in the following form:—

“You do solemnly swear, that you will true answer make to such questions as may be asked of you by either of the Fence Viewers now here assembled, touching the matters which they are now to examine and determine.—So help you God.”

and if any person giving evidence as aforesaid under oath, shall be guilty of false swearing, he shall be deemed guilty of perjury, and upon conviction thereof, shall be liable to the same punishment and disabilities that persons convicted of perjury in other cases are now by law liable.

VIII. And be it further enacted by the authority aforesaid, That the Commissioner of the Court of Requests, to whom the determination of the Fence Viewers shall be returned as aforesaid, shall cause the same to be copied into a book kept for that purpose by the Court of Requests for the Division to which he belongs, and thereupon the said Court of Requests shall issue an Execution against the goods and chattels of the said Defendant or Defendants in the same manner as if the party to whom it is due had received a Judgment in the Court of Requests for the sum which the said Fence Viewers shall have determined as aforesaid he was entitled to receive, and also (if the said sum amounts to more than Two Pounds, but not otherwise) for the costs he may have necessarily incurred in the recovery thereof, and when such sum shall not amount as aforesaid to more than Two Pounds, then the other party shall be entitled to an Execution from said Court of Requests against the goods and chattels of the Plaintiff or Plaintiffs, for the costs he may necessarily have been put to in opposing the Plaintiff's claim, the amount of the said costs in either case to be determined by the said Court of Requests: Provided, that when the said sum shall amount to more than two shillings and sixpence per Rod for the length of Fence which such Fence Viewers shall have determined such Defendant or Defendants ought to have made or repaired, the said Plaintiff shall be entitled to recover and have execution for only the sum of two shillings and sixpence per Rod as aforesaid, and his costs: Provided also, that no such writ of execution shall be issued until after the expiration of forty days from the time of such determination.

IX. And be it further enacted by the authority aforesaid, That all and every of such Fence Viewers shall be entitled to receive the sum of five shillings for every day they are necessarily engaged in discharging the duties imposed upon them by this Act, and so in proportion for any time less than one day, and no more; and that every Witness who shall be summoned, and attend as aforesaid before such Fence Viewers, shall be entitled to receive two shillings and sixpence per day; and every Commissioner of the Court of Requests, and Bailiff, shall be entitled to receive for any service performed under this Act the same Fees which they are respectively entitled to receive for similar services in the Court of Requests.

X. And be it further enacted by the authority aforesaid, That any Fence Viewers, legally holding the office of Fence Viewers, who shall neglect or refuse to perform the duties of his office shall forfeit for every neglect, to any person who may sue for the same, a sum not exceeding forty shillings, with costs of suit, to be recovered upon information and complaint before any one of the Justices of the Peace for the District in which such Fence Viewer was chosen, and to be levied by distress under a warrant issued by such Justice.

XI. And be it further enacted by the authority aforesaid, That when any party shall cease to improve his land, or shall lay his enclosure before under improvement in common, he shall not have a right to take away any part of the Partition Fence that to him belongs adjoining to the next enclosure that is improved or occupied: Provided the party occupying the lands adjoining the same will allow and pay therefor so much as the Fence Viewers, or a majority of them, shall in writing determine to be the reasonable value thereof; and whenever any lands which have laid unimproved and in common shall be afterwards enclosed or improved, the occupier or occupiers thereof shall pay for their fair or just proportion of the division or Line Fence standing upon the divisional line between the same land and the land of the enclosure of any other occupant or proprietor, the value thereof to be ascertained and set forth in writing by three Fence Viewers, in case the parties shall not agree among themselves, and the amount of said value to be recovered according to the proportions so estimated in the same manner and form as hereinbefore provided respecting the making and keeping in repair division or Line Fences.

XII. And be it further enacted by the authority aforesaid, That in no case shall any person be authorised to take away any part of the Partition Fence that to him belongs, adjoining to the next enclosure that is improved or occupied, unless the party occupying the lands adjoining the same refuse to pay for the same as aforesaid, nor without first giving due notice to such party for at least twelve months previously to the removal of the same.

XIII. And be it further enacted by the authority aforesaid, That when a water Fence, or a Fence running into the water, is necessary to be made, the same shall be done in equal parts, unless by the parties otherwise agreed; and in case either party shall refuse or neglect to make or maintain the share to such party belonging, similar proceedings shall or may be had as in other cases of the like kind respecting Fences out of the water, in this Act mentioned.

XIV. And be it further enacted by the authority aforesaid, That when Lands belonging to or occupied by different persons, and subject to be fenced and bounded upon or divided from each other by any brook, pond or creek, which of itself is not a sufficient Fence, in such case, if the parties disagree, the same may be submitted to three Fence Viewers, as heretofore provided in cases of disagreement; and if in the opinion of such Fence Viewers such brook, river, pond or creek, is not of itself a sufficient Fence, and that it is impracticable to fence at the true boundary line, they shall judge and determine how or on which side thereof the Fence shall be set up and maintained, or whether partly on one side and partly on the other side, as to them shall appear just, and reduce such their determination to writing, as heretofore provided in other cases; and if either of the parties shall refuse or neglect to make up and maintain the part of the Fence to such party belonging, according to the Fence Viewers' determination in writing as aforesaid, the same may be done and performed as is in this Act before provided in other cases, and the delinquent party shall be subject to the same costs and charges, and to be recovered in like manner.

XV. And be it further enacted by the authority aforesaid, That in all cases where any party shall desire to have a lane between his land and any adjoining tract or parcel of land, and shall make the Fence on one side of the said lane on his own land, he shall not be obliged to make or repair, or pay for making or repairing any part of the Fence on the other side of such lane, any thing herein contained to the contrary in any wise notwithstanding.

XVI. And whereas it is expedient to provide for the opening of Water Courses in this Province, be it therefore enacted by the authority aforesaid, That in all cases when it shall be the joint interest of parties resident within this Province to open a Ditch, or Water Course, for the purpose of letting off surplus water from swamps or sunken miry lands in order to enable the owners or occupiers of such swampy or sunken land to cultivate or improve the same, it shall be the duty of such several parties to open a just and fair share of such Ditch or Water Course in proportion to the several interests that such parties may have in the same; and in cases where a dispute shall or may arise as to the part, width, depth or extent, that any party so interested ought to open or make, the same may be referred to three Fence Viewers in the same way and manner as is heretofore by this Act provided in cases of disputes between parties relative to line or division Fences; and it shall be the duty of such Fence Viewers, to whom such matters shall be referred, to divide or apportion such Ditch or Water Course among the several parties, as in the opinion of such Fence Viewers shall be a just and equitable, proportion, having due regard to the interest each of the parties shall have in the opening of such Ditch or Water Course; and the Fence Viewers shall at the same time decide what length of time shall be allowed to each of the parties to open his or her share of such Ditch, and the determination or award of such Fence Viewers shall be made in the same form, and signed and executed in the same manner, and have the same effect in regard to Ditches or Water Courses, as is provided by this Act in regard to Line or Division Fences.

XVII. And be it further enacted by the authority aforesaid, That when it shall appear to such Fence Viewers that the owner or occupier of any tract or parcel of land is not sufficiently interested in the opening of such Ditch to make him a party, and at the same time that it is necessary that such Ditch should be continued across his land by the other party or parties, at their own expense, they may award the same in manner and form aforesaid, and upon such award, such party or parties may lawfully, and without molestation, open such Ditch or Water Course across such land as aforesaid, at their own expense.

XVIII. And be it further enacted by the authority aforesaid, That if any party shall neglect or refuse to open or make and keep open his share or proportion allotted or awarded to him by such Fence Viewers as aforesaid, within the time allowed by such Fence Viewers, either of the other parties may, after first completing his own share or proportion allotted to him in manner aforesaid, open the share or proportion allotted to such party neglecting or refusing to open the same, and such party so opening such other parties share shall be entitled to recover the value thereof from the party so neglecting or refusing to open his share or proportion, in the same way and manner and form as is in this Act provided relative to Line and Division Fences.

XIX. And be it further enacted by the authority aforesaid, That all fines levied under the provisions of this Act shall be by the Justice or Justices of the Peace by whom the same may be imposed and collected, paid over to the Overseer or Overseers of Highways in' the Division wherein such fine or fines shall have been levied: and such Overseer or Overseers are hereby authorised and required to expend the same in the same manner as other monies coming to their hands to be expended on the Highways, and shall render an account thereof within three months after expenditure thereof, to the Justices in Quarter Sessions assembled.

XX. And be it further enacted by the authority aforesaid, That this Act shall be and continue in force for four years, and from thence to the end of the next ensuing Session of Parliament, and no longer.

XXI. And be it further enacted by the authority aforesaid, That so much of the fifth clause of an Act of the Parliament of this Province, passed in the thirty-third year of the reign of King George the Third, entitled, "*An Act to provide for the nomination and appointment of Parish and Town Officers within this Province,*" as provides that persons chosen to be Overseers of Highways and Roads shall also serve the office of Fence Viewers, shall be, and the same is hereby repealed; and that whatever duties that were before the passing of this Act directed to be performed by such Overseers of Highways and Roads, in relation to Fences, shall hereafter be performed by the persons chosen to be Fence Viewers under the authority of this Act.