

ANNO VICESIMO NONO

VICTORIAE REGINÆ.

No. I.

An Act to promote the better Drainage of Lands.
[20th June, 1865.]DRAINAGE
PROMOTION.
—

WHEREAS it is expedient to provide for the better Drainage of Preamble. certain Lands Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows:—

1. The following words in inverted commas shall for the purposes of this Act unless the context otherwise indicate bear the meanings set against them respectively:— Interpretation.

“Waters”—Any river creek stream lagoon lake or other running or standing waters the level of which is liable to variation. And the sea where the tide ebbs and flows.

“Flood”—Any flood flush fresh watershed fall tide or other cause of a rise in the level of any waters above the bottom of any drain next hereinafter mentioned.

“Drain”—Any drain channel watercourse or other artificial outlet for the purpose of draining any land into any waters.

“Owner”—The owner for the time being of any land for any freehold estate including the Crown or any leasehold estate whether such owner be or not in actual occupation—or the agent of such owner.

“Tenant”—The person in actual occupation of any land not being the owner.

2. Whenever any tract of land is so circumstaneed that from any permanent or occasional cause considerable quantities of water accumulate and for default of sufficient natural or artificial drainage lie thereon to the injury of such land any one or more of the owners thereof may present a petition to the Governor and Executive Council under his or their hands stating therein the facts as they exist and—describing as accurately as may be the land so under water or liable to be under water and the locality and boundaries thereof—the nature and cause of the accumulation—the name and description of every other owner of the tract (including the Crown) and the number of acres held by such owners respectively—and praying that all owners of the tract except the Crown may be constituted a Union—by some name to be specified—for the purpose of compulsory drainage and contribution under this Act. Petition may be presented for compulsory drainage.

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Proclamation for
compulsory drain-
age.

3. Upon receipt of any such petition the Governor with the advice of the Executive Council may publish the same in the *Gazette* and after the lapse of two months from the day of such publication may subject to the following proviso issue and publish in the *Gazette* a proclamation declaring the then owners of such tract of land and their successors owners for the time being the Crown excepted to be a "Drainage Union" for the purpose of draining and keeping drained the said tract of land. And by virtue of such proclamation so published all such owners and other owners for the time being except the Crown shall become and be a Drainage Union for such purpose only and compellable by mandamus at the instance of any such owners or of the Crown if holding land within the tract or of any person interested in the land or any part thereof to drain and from time to time thereafter to keep drained such land accordingly.

Tract may be ex-
amined by Govern-
ment.

4. Provided that before the issuing of such proclamation if any other owners of such tract of land not including the Crown being not less than one-fifth in number of holdings shall present a counter-petition to the Governor shewing reasonable objections to constituting such Union or if for any other reason the Governor with the advice aforesaid shall so think fit he may employ some competent person to examine such tract of land and report respecting the statements contained in both petitions and the sufficiency of the reasons alleged in the latter and also to make a survey and levels if deemed necessary and to report on the best mode of effecting the drainage of such tract for which purposes the person so employed shall have full power to enter upon any land within the limits of the proposed Union.

Petitioners to give
security for ex-
penses.

5. Provided also that before the issuing of any such proclamation and in the event of an examination report and survey being deemed necessary to be made and before the same shall be made the original petitioner or petitioners shall pay into the Colonial Treasury to the account of a separate fund to be called the "Drainage Union of A or B Fund" such sum as shall in the opinion of the Surveyor General be sufficient to reimburse all expenses likely to be incurred by the Government in the matter and out of which separate fund sufficient sums may for that purpose be from time to time drawn and transferred to the Consolidated Revenue Fund by warrant of the Governor. Provided that if the prayer of the original petition be refused the money so paid by such petitioner or petitioners or the balance thereof shall be returned to them.

Assessment of
values.

6. A sworn appraiser shall be appointed by the Governor with the advice aforesaid to be remunerated according to a scale of fees fixed in like manner and published in the *Gazette* for the purpose of assessing the increased value to accrue to the several holdings including those of the Crown by reason of drainage under this Act. Provided that if any owner object to such mode of assessment in writing addressed to the Minister for Lands the Registrar of the nearest District Court shall by direction of such Minister summon a jury of ten persons not being members of such Union five of whom shall be chosen by lot and who shall on a day to be fixed by the District Court Judge under his direction assess such increased value and the verdict of the majority of such jury shall be final and the cost of such mode of assessment shall be borne by such owner. And according to such increased value the last-mentioned contributions towards the expenses of the Government and also the general contributions of the members of the Union and of the Crown if a holder towards the expenses of such drainage and also the proportions of votes hereinafter mentioned shall be apportioned.

Board of manage-
ment.

7. Directors of such Union not fewer in number than three nor more than seven and two auditors shall be annually elected by a majority

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majority of the votes of members present at a general meeting duly convened by notice published by the Minister for Lands in the *Gazette* and in the nearest local newspaper and such Directors shall from time to time under such by-laws as may be made by virtue of this Act choose one of themselves to be Chairman and shall as a Board manage all the affairs of such Union.

8. At a like general meeting by-laws may be made not inconsistent with this Act and such by-laws when confirmed by the Governor with the advice aforesaid and published in the *Gazette* shall have the force of law. By-laws.

9. In voting at any such meeting for electing Directors or making by-laws every member of the Union shall be entitled to one or more votes according to the assessed increased value to accrue to the several holdings as aforesaid that is to say—if such increased value amount to less than fifty pounds the member shall be entitled to one vote—if fifty pounds and below one hundred pounds two votes—if one hundred pounds and below two hundred and fifty pounds three votes—if two hundred and fifty pounds and below five hundred pounds four votes—and if five hundred pounds and upwards five votes. And every voter shall before voting make and subscribe a declaration in the terms of the first Schedule hereto before some Justice of the Peace. Provided that if the Crown holds land within the Union the Governor and Executive Council shall be entitled to appoint one of such Directors.

10. The Board of Directors may appoint such officers and servants as they may deem necessary and may in the name of their Chairman make valid contracts and sue and be sued on the behalf of the Union and every Director and also every other officer of the Union shall before entering upon business make and subscribe in like manner a declaration in the terms of the second Schedule hereto. Board may appoint officers and make contracts.

11. The Board of Directors of every Union under this Act Assessment. shall within three months after election to office and at a corresponding period in every subsequent year cause an estimate to be made of the probable amount which will be required for the current year commencing on the first day of January and ending on the thirty-first day of December towards making clearing and keeping open drains by sufficient means including steam-engines where found to be requisite in upholding embankments and in doing other necessary works for the purpose of fully carrying out this Act and shall raise the amount so estimated by an assessment not exceeding ten per centum on the increased value accruing to the several holdings including those of the Crown if any from such works. And the occupier of the lands assessed shall primarily pay the rates hereinafter mentioned. Provided that if there be no sufficient provision in the lease or in some other written instrument with reference thereto the tenant may recover from his landlord a fair proportion of such rates to be settled by arbitration in case of dispute.

12. In each and every year there shall be paid by every person Holders of land rated. including the Crown holding land within the Union and towards the revenues of such Union for every portion of land so held a rate not exceeding twenty per centum of the increased annual value thereof to be settled as herein mentioned and all such rates for the first year shall be paid into the hands of the Chairman within two months after notice in writing signed by him and for every succeeding year in such time and manner as may be required by any by-law made under this Act. And in default of payment of such rates or of such amended rates as may be determined on appeal as hereinafter provided such rates or amended rates may be levied by warrant under the hand of such Chairman by distress and sale of the goods and chattels of the person by whom the same

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same may be due and in the event of such goods and chattels not being found of sufficient value to satisfy such rates or amended rates then by sale of the land or a sufficient portion thereof Provided that the surplus if any shall be repaid to the owner of such goods and chattels or land.

Appeal from rates.

13. If any person shall think himself aggrieved by the amount of any such rate he may appeal against the same to the nearest Petty Sessions which Court shall have power to hear and determine the same and to award such relief in the premises as the justice of the case may require and the decision thereof shall be final Provided that the appellant shall give notice in writing under his hand to such Chairman of his intention to appeal seven days at least before the holding of the Court for hearing such appeal Provided also that no Justice being a member of the Union interested in such appeal shall adjudicate therein.

Plans of drainage to be published.

14. Every Drainage Union under this Act shall within one year after its establishment publish in the *Gazette* a plan of the drainage contemplated within the limits of such Union shewing accurately the position and direction width depth and other material particulars of such drainage and distinguishing the parts if any then completed and shall cause tracings of such plan to be lodged with the Surveyor General to be recorded by him for public reference at convenient hours and a like tracing to be lodged for like reference with the Registrar of the District Court of the District And such Union shall thereafter in every successive half-year publish and transmit in like manner like plans and tracings as to all then intended additional drainage Provided that no alteration affecting any navigable water shall be made without the sanction of the Governor and Executive Council.

Accounts.

15. Every such Union shall also once in every half-year at equal distances of time publish twice in the *Gazette* a correct debtor and creditor account certified under the hand of their Chairman and by the auditors of all receipts and payments under this Act for the last half-year and shall transmit the same to the Minister for Lands if the Crown be a holder of lands within the Union.

Members may inspect drains.

16. All members of every such Union and also the Minister for Lands or any person duly authorized by him if the Crown be a holder of land in the Union shall have the right at all seasonable times to examine any drain constructed by the Union Provided that if any damage or injury to any property be done by or by reason of such examination the party causing such damage or injury shall be answerable for the same.

Power to borrow money.

17. Every such Union may borrow by mortgage or otherwise on the credit of any property or revenue belonging thereto for or towards or incidental to the making or completing of any such drains or any works within the purposes of this Act any money not exceeding the estimated revenue of such Union for five years Provided that no money shall be so borrowed without the sanction of the Governor with the advice aforesaid.

Twelve months limitation of actions &c.

18. No action or other proceeding whether civil or criminal or penal shall be commenced by any such Union against any person under this Act after the expiration of twelve months from the day on which the cause of such action or proceeding shall have arisen. Provided that when such person shall be absent from the Colony service of any notice or process in any civil proceeding against such person may be made upon the land in like manner as in cases of ejectment.

Governor may dissolve Union.

19. On the receipt of a petition under the hand of not less than one-third part of the members of any such Union in number and value of holdings and after publication of such petition in the *Gazette*

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Gazette and at least one local newspaper for two months and no sufficient cause against it shewn by other such members more in number and greater in value the Governor may with the advice aforesaid dissolve such Union if then free from all debt as aforesaid from and after a day to be named in a proclamation published in like manner and the Union shall be so dissolved accordingly.

20. Any owner who shall after the passing of this Act cut or Floodgates to certain drains. make any drain the bottom of which at its opening into any waters shall be so low as to injure or endanger any other property and shall omit to construct and fix in and to every such drain a floodgate sufficient when closed to prevent the flow from such waters through such drain of any water over or upon the land of any other owner shall be liable to a penalty not exceeding one hundred pounds and to a further penalty not exceeding twenty pounds for every week after the imposition of the first penalty during which he may fail to construct such floodgate.

21. Whenever any drain cut for the benefit and at the expense Notice of cleansing or repairing drains. of two or more owners but not being within a Union in terms of this Act shall in the opinion of any such owner require cleansing or repair so as to render it effective it shall be competent to such owner to give written notice to each of the other owners requiring them to take measures for such cleansing and repair and at the lapse of fourteen days from the service of such notice it shall be lawful for the owner serving the said notice failing the agreement of all the other owners or for the owners consenting if more than one consent to enter upon any lands through which such drain may pass and to cause such cleansing and repairs to be effected and the owners declining to effect such cleansing and repairs or failing to consent to the same shall be liable to their ratable share of the cost of such cleansing and repairs to be determined and recovered in a summary way before any Bench of Magistrates assembled in Petty Sessions Provided that the Bench shall be satisfied that such cleansing and repair were necessary.

22. Nothing herein shall affect any remedy at law by which Legal remedies not affected. the Crown or any person may recover compensation in damages for any loss or injury to any land stock crops or other property by reason of any breach or neglect by the Crown or any other person of any provision of this Act.

23. Every person who shall wilfully injure or damage any drain Penalties for wilful injury. floodgate or other work connected with drainage under this Act or who shall wilfully encroach or trespass upon damage or injure any property under colour or pretence of carrying out this Act shall in addition to any liability at law to compensate for such injury or damage be liable for every such offence to a penalty not exceeding twenty pounds nor less than one pound.

24. All penalties under this Act may be recovered in a sum- Recovery of penalties. mary manner before any two Justices of the Peace.

25. It shall be lawful for any Union under this Act or any owner of land for the purpose of draining land under this Act to make and cut drains through any adjacent or neighbouring land into any waters Provided that such Union or owner constructing such drain shall be liable at law to make full compensation for any damage thereby occasioned to the proprietor of such adjacent or neighbouring land and be subject to all other the provisions of this Act in respect of drains Provided also that the amount of such compensation shall be settled by arbitration in manner hereinafter enacted Provided also that such compensation shall be estimated at one fifth part above the value of the property affected at the time such loss or damage accrues.

*Drainage Promotion.***Mode of arbitration.**

26. Whenever it shall become necessary to proceed by arbitration the arbitrators and umpire shall be appointed and the arbitration shall be conducted in manner following:—

Appointment of arbitrators where Crown a party.

(1.) Where the Crown is a party the Minister for Lands and the other party may concur in the appointment of a single arbitrator and failing such concurrence then on the request of such other party after appointing an arbitrator in writing under his hand in the form of the third Schedule hereto the Minister for Lands shall at his request also in like manner appoint an arbitrator.

Appointment of arbitrators in other cases.

(2.) In other cases also the parties to the dispute may concur in the appointment of a single arbitrator and failing such concurrence after either party shall in like manner have appointed an arbitrator the other party shall at his request also in like manner appoint an arbitrator.

Appointment to be deemed submission.

(3.) All appointments of arbitrators shall be delivered to the respective arbitrators and shall be attached to the award when made and shall be deemed to be a submission to arbitration.

Submission may be made Rule of Court.

(4.) Any submission to arbitration may on the application of either party be made a Rule of the Supreme Court or of the District Court of the District.

When arbitrator of one party to act as single arbitrator.

(5.) Every request to appoint an arbitrator shall be in the form of the fourth Schedule hereto and if within sixty days after the same shall have been duly served together with a copy of the first appointment the party served shall fail to appoint an arbitrator the arbitrator so first appointed shall be deemed to be appointed by and shall act as a single arbitrator on behalf of both parties.

No appointment to be revoked.

(6.) No appointment of an arbitrator shall be revoked without the consent of both parties to the arbitration nor shall the death of any party operate as a revocation.

Award to be final.

(7.) Every award made in the form or to the effect of the fifth Schedule hereto and signed by the single arbitrator or by both arbitrators or by the umpire as the case may be shall be final and conclusive and binding upon all parties to or interested in the arbitration for all intents and purposes.

Provision for death or failure to act of arbitrator.

(8.) If before the making of the award any arbitrator die or refuse or become incapable to act the party by whom he was appointed may appoint in writing under his hand in like form as in the said third Schedule another person in his stead and if he fail so to do for thirty days after request in writing in that behalf from the other arbitrator such other arbitrator may proceed *ex parte* and make his award as single arbitrator for both parties.

Power of single arbitrator.

(9.) Every arbitrator becoming a single arbitrator in any manner aforesaid shall have the same powers and authorities as are by this Act vested in any arbitrator appointed to be single arbitrator with the concurrence of both the parties.

Provision for death or failure to act of single arbitrator.

(10.) In case a single arbitrator die or refuse or become incapable to act before the making of his award or fail to make his award within sixty days after his appointment or within such extended time if any not exceeding thirty days as shall have been duly fixed by him for that purpose by indorsement on his appointment in the form of the sixth Schedule hereto the matters referred to him shall be again referred to arbitration under the provisions of this Act as if no former reference had been made.

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(11.) In case there be more than one arbitrator the arbitrators ^{Appointment of} ^{umpire.} shall before they enter upon the reference appoint an umpire by indorsement on each of their appointments under their hands in the form of the seventh Schedule hereto and if the person appointed to be umpire die or refuse or become incapable to act the arbitrators shall forthwith appoint in like manner another person in his stead and in case the arbitrators neglect or refuse to appoint an umpire for thirty days after the date on which the last of them was appointed an umpire may be appointed by the Minister for Lands.

(12.) In case arbitrators fail to make their award within sixty ^{When umpire to act.} days after the day on which the last of them was appointed or within such extended time not exceeding thirty days if any as shall have been fixed by them for that purpose by indorsement as aforesaid the matters shall be determined by the umpire and the provisions of this Act with respect to the time for making an award and with respect to extending the same in the case of a single arbitrator shall apply to any umpirage save and except that such time shall commence and be computed from the date of the matters being referred to the umpire.

(13.) Any arbitrator or umpire appointed by virtue of this Act ^{Production of documents.} may require the production of such documents in the possession or power of either party as he may think necessary for determining the matters referred and may examine any persons including the parties as witnesses on oath.

(14.) All costs of and consequent upon the reference shall be in ^{Determination of} ^{costs.} the discretion of the arbitrator arbitrators or umpire as the case may be. Provided that where no special agreement is made beforehand by the parties the charge of each arbitrator or of the umpire shall not in any case exceed one pound.

(15.) Before any arbitrator or umpire shall enter upon the reference he shall make and subscribe before a Justice of the Peace a declaration in the following form— ^{Declaration by arbitrator or umpire.}

I A. B. do solemnly and sincerely declare that I am not directly or indirectly interested in the matter in dispute between A. B. and C. D. referred to me as arbitrator (*or as one of the arbitrators or as umpire*) and that I will faithfully honestly and to the best of my skill and ability hear and determine such matter under the "Drainage Promotion Act of 1865."

(16.) Every such declaration shall be annexed to the award and ^{False declaration a} ^{misdemeanour.} any arbitrator or umpire who shall in such declaration falsely state that he is not so interested or who shall wilfully act contrary to such declaration shall be guilty of a misdemeanour.

(17.) No appointment or award shall be set aside for irregularity or error in matter of form. ^{No avoidance for} ^{error in form.}

(18.) Every award shall be in writing and in duplicate and shall be transmitted by the arbitrator arbitrators or umpire to each party or the agent of each party and where the Crown is a party to the Minister for Lands and shall be deposited in his office. ^{Requisites of award.}

27. This Act shall be styled and may be cited as the "Drainage ^{Short title.} Promotion Act of 1865."

*Drainage Promotion.***FIRST SCHEDULE.***Declaration of Voter.*

I A. B. do hereby solemnly declare that I am the owner of land as described in this Act to the value of pounds and a Member of the Union for Drainage And that I have not yet voted at this election.

SECOND SCHEDULE.*Declaration of Officer.*

I A. B. having been elected Director (*or Chairman or other Officer*) of the Board of Directors of the Union for Drainage do hereby solemnly declare that I will duly and faithfully fulfil the duties of that office to the best of my judgment and ability and that I have not fraudulently or collusively obtained the said office.

THIRD SCHEDULE.*Appointment of Arbitrators.*

Date.

I A. B. (*or Minister for Lands on behalf of the Crown if a party*) do hereby appoint E. F. to be one of two arbitrators under the "Drainage Promotion Act of 1865" to determine in the mode prescribed by that Act the matter hereinafter stated which is in dispute between the Crown (*or myself*) and C. D. (*or the Crown*). And I hereby promise and agree that I will submit to and be bound by the award in writing to be made by the said arbitrator and the other arbitrator appointed by the said C. D. (*or by the Minister for Lands on behalf of the Crown*) or by the umpire if any appointed by them.

(State precisely the question to be determined)

(Signature)*

Witness—

* In case of a Corporation this appointment must be under the Common Seal.

FOURTH SCHEDULE.*Request.*To C. D. (*or the Minister for Lands in case of Crown.*)

Date.

I A. B. having by the instrument of which I annex a copy hereto duly appointed under the "Drainage Promotion Act of 1865" E. F. to be one of two arbitrators to determine the matter of dispute set forth in the said instrument do hereby request you to appoint another arbitrator in due time as under the said Act in default whereof the said E. F. will act as single arbitrator and will alone determine and make his award in writing respecting the said matter.

(Signature)

Witness—

FIFTH SCHEDULE.*Award.*

We E. F. and G. H. arbitrators (*or I E. F. a single arbitrator or I K. L. the umpire*) duly appointed under the "Drainage Promotion Act of 1865" to determine and make our (*my*) award in writing concerning the matter next hereunder stated in dispute between A. B. and C. D.

[*Here copy statement of the matter in dispute in precisely same words as at foot of appointment of arbitrators*]

do by this our (*my*) award in writing under our hands (*my hand*) determine and award as follows:—

[*Here give the determination in plain and simple language taking care to provide for every point in dispute*]

Signatures (*or Signature*)

Witness—

Impounding.

SIXTH SCHEDULE.

Indorsement.

Date.

WE E. F. and G. H. arbitrators (*or I. E. F. single arbitrator or I. K. L. umpire*) duly appointed by the within instrument under the "Drainage Promotion Act of 1865" to determine by arbitration and make award upon the matter therein stated in dispute between A. B. and C. D. (*or Minister for Lands on behalf of the Crown*) do hereby extend the time for making our (*or my*) award until the day of 18

(Signatures (*or Signature*))

Witness—

SEVENTH SCHEDULE.

Appointment of Umpire.

Date.

WE E. F. and G. H. arbitrators appointed by the within instrument to determine the matter in dispute therein stated do hereby before we proceed upon such arbitration appoint K. L. to be umpire under the Act within mentioned and to determine and make his award in writing concerning such matter in the event of our differing concerning the same.

(Signatures)

Witness—