fresh assessment if he likes. The respondent must pay the costs of appeal in both cases.

H. C. OF A. 1911.

SENDALL v. FEDERAL COMMISSIONER OF LAND TAX.

CRACE v. FEDERAL COMMISSIONER OF LAND TAX.

Appeal allowed.

Solicitors, for the appellants, *Vindin & Littlejohn*; *Macnamara & Smith.*

Solicitor, for the respondent, Crown Solicitor for the Commonwealth.

C. E. W.

Appl *Hazlett* v *Presnell* 149 CLR 107

Appl *Hazlett* v *Presnell* 56 ALJR 884

Foll *Mulgrave Shire Council, Ex parte* (1989) 41 APA 169

Foll *Brenner* v *First Artists' Management Pty Ltd* [1993] 2 VR 221

Aff *South Australia* v *Victoria* (1914) 18 CLR 115

Appl *Abebe* v *Commonwealth* (1999) 162 ALR 1

Appl *Abebe* v *Commonwealth* (1999) 55 ALD 1

Cons/Appl *Hooper* v *Kirella Pty Ltd* (1999) 47 IPR 21

Cons *Truth About Motorways* v *Macquarie Infrastructure* (2000) 200 CLR 591

[HIGH COURT OF AUSTRALIA.]

THE STATE OF SOUTH AUSTRALIA . PLAINTIFFS;

AND

THE STATE OF VICTORIA . . . DEFENDANTS.

H. C. OF A. 1911.

MELBOURNE, *February* 20, 21, 22, 24, 25, 27, 28; *March* 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21; *May* 22.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Jurisdiction of High Court—"Matters between States"—Dispute as to boundary between States—Boundary fixed by Imperial Statute—Authority of Governors to mark boundary on the ground—Effect of marking—4 & 5 Will. IV., c. 95—The Constitution (63 & 64 *Vict., c.* 12), *sec.* 75.

The "matters" between States, in respect of which original jurisdiction is by sec. 75 of the Constitution conferred on the High Court, are matters which are of a like nature to those which can arise between individuals and which are capable of determination upon principles of law.

Therefore, the boundary between two States having been fixed by an Imperial Act of Parliament before federation,

Held, that the High Court had jurisdiction to entertain an action by one of these States against the other seeking a declaration that certain land adjoining that boundary and in the *de facto* occupation of the latter State formed part of the territory of the former State.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

The boundary between the Colony of South Australia and that portion of the Colony of New South Wales which now forms the State of Victoria having been fixed by 4 & 5 Will. IV., c. 95, and by Letters Patent thereunder of 19th February 1836 as the 141st meridian of East longitude.

Held (*Higgins* J. dissenting), that an authority was to be implied in the Governors of South Australia and New South Wales jointly, possibly without, and certainly with, the concurrence of the Crown signified through a Secretary of State, to permanently locate and mark on the ground that boundary as soon as circumstances called for an exercise of that authority; and that, if the boundary having been so located and marked was afterwards found to have been marked and located in the wrong place, the error could not thereafter be corrected by any judicial authority.

In 1847, by the authority of the Governors of New South Wales and South Australia and with the knowledge and approval of the Secretary of State, a line was located and marked on the ground as being the 141st meridian, but was in fact, as was discovered in 1869, about two miles to the westward of that meridian. The line so marked was proclaimed by the respective Governors as the boundary and was the *de facto* boundary thenceforward. From 1869 onwards the Government of South Australia protested against the continuation of the error in the marking out of the boundary and sought to have it rectified, but without result. In an action by the State of South Australia against the State of Victoria in the High Court claiming a declaration that the strip of land between the 141st meridian and the line so marked out was part of the territory of South Australia.

Held, that South Australia had no right of which the High Court could take cognizance.

By *Higgins* J.—As the true 141st degree of East longitude was made the boundary by a British Act of Parliament, nothing that the surveyors did, nothing that the Colonial Secretaries or Ministers did, nothing that the Governor did, nothing that the Secretaries of State did, nothing that the King did, altered, or could have altered, that boundary. Even the King's prerogative must yield to an Act of Parliament. But *quœre*, have the plaintiffs any cause of action, as South Australia, or, rather, its legislature, is mere donee of a power "to regulate the sale and other disposal" of the Crown lands?

TRIAL of action.

An action was brought in the High Court by the State of South Australia against the State of Victoria in respect of a piece of land bounded on the north by the River Murray, on the South by the Southern Ocean, on the East by the 141st meridian of East longitude and on the West by a line parallel to, and about two miles to the West of, such meridian, which piece of land had

been in the *de facto* occupation of New South Wales and afterwards of Victoria since 1847. The plaintiffs claimed—(1) Possession of the said land. (2) Mesne profits from the year 1850 till possession should be delivered to the plaintiffs. (3) A declaration that the plaintiffs were and always had been entitled to the land and that the defendants were not and never had been entitled to possession thereof. (4) If the eastern boundary of the State of South Australia, so far as it coincided with the western boundary of the State of Victoria, had not been already sufficiently ascertained, an inquiry into the true position thereof, with all directions and declarations necessary to finally determine the same. (5) An account of all sums received from sales or letting or licences in respect of the said land since the year 1850. (6) An injunction to restrain the defendants from further trespassing upon the said land or in any manner dealing with the same, or from interfering with or preventing the plaintiffs or their officers from entering upon and surveying the said land, or otherwise dealing with the said land.

All the material facts are fully set out in the judgments hereunder.

The action was directed to be heard before the Full Bench.

Sir Josiah Symon K.C., *Paris Nesbit* K.C., *Murray* K.C., *Cleland* and *Shierlaw*, for the plaintiffs. The High Court has jurisdiction under sec. 75 of the Constitution to entertain this action, and to decide what is the true boundary between the two States. Formerly the jurisdiction to settle disputes as to the boundaries of Colonies was in the King in Council and was not a judicial jurisdiction: *Blackstone's Commentaries*, vol. I., pp. 237, 241; *Chitty's Prerogative of the Crown*, p. 38; *Penn* v. *Lord Baltimore* (1); *Story's Constitutional Law*, p. 499; *Rhode Island* v. *Massachusetts* (2). That was a case as to chartered Colonies. But South Australia was founded under a Statute, 4 & 5 Will. IV. c. 95, which fixed its boundaries, and a dispute as to those boundaries would not necessarily be a political matter. In the United States jurisdiction is given to the Supreme Court by Art. III. sec. 2 of the Constitution to deal with "controversies" between

(1) 1 Ves., 444. (2) 12 Pet., 657.

H. C. OF A 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

two or more States, and under that the Supreme Court has held that it has authority to determine disputes as to boundaries: *Rhode Island* v. *Massachusetts* (1); *Kansas* v. *Colorado* (2); *Black's Constitutional Law*, 2nd ed., p. 147; *Iowa* v. *Illinois* (3).

[ISAACS J. referred to *United States* v. *Texas* (4); *Maryland* v. *West Virginia* (5).]

The word "matters" in sec. 75 of the Constitution is wider than "controversies." If the Supreme Court has jurisdiction in such disputes between the States of the Union, which are sovereign States, *à fortiori* the High Court has jurisdiction in such disputes between the States of the Commonwealth. The whole question is purely a judicial one, namely, what did the Imperial Act mean when it fixed the eastern boundary of South Australia as the 141st meridian? If it means what the plaintiffs contend for, that is, the true 141st meridian, then the plaintiffs are entitled to the strip of land which is now occupied by the defendants, and can sue for and recover possession of, or, rather, dominion over, it under the Constitution.

The Imperial Parliament having fixed the boundary as the 141st meridian, that line could not be departed from intentionally or otherwise, except by the authority of another Act of that Parliament.

[GRIFFITH C.J. referred to *Damodhar Gordhan* v. *Deoram Kanji* (6).]

The Act constituting Victoria a Colony, 13 & 14 Vict. c. 59, cannot be said to have recognized the line marked by Wade in 1847 as the 141st meridian, because that line was then only marked up to about 150 miles from the Murray. If there was any authority elsewhere than in the Imperial Parliament to fix a boundary line as being the 141st meridian, which was not in fact the 141st meridian, it was in the King in Council. The Governors of New South Wales and South Australia could not, by agreement or otherwise, do so, even with the authority of the Secretary of State. Even if they could, the facts show, first, that

(1) 12 Pet., 657.
(2) 185 U.S., 125; 206 U.S., 46.
(3) 151 U.S., 238, at p. 242.
(4) 143 U.S., 621, at p. 640; 162 U.S., 1.
(5) 217 U.S., 1, 577.
(6) 1 App. Cas., 332, at p. 381.

the line was fixed under a mistake as to the starting point, and as soon as the error was discovered the Government of South Australia sought to have the matter put right; and secondly, that the line was only fixed temporarily, and with the intention that at a later time a permanent line should be fixed. The onus is upon the defendants to show that the line so fixed has now become the true boundary. Where the boundaries of adjoining tracts of land have been defined under a mistake of fact the owners are not bound: *Maryland* v. *West Virginia* (1); *Schraeder Mining and Manufacturing Co.* v. *Packer* (2). The boundary having been fixed by Act of the Imperial Parliament no estoppel will arise to prevent the plaintiffs asserting their rights, and on the facts the plaintiffs have done nothing which could in any circumstances be said to amount to an estoppel. They protested as soon as the error was discovered, and have ever since continued to protest, and have sought by all means in their power to have the error rectified.

Reference was also made to *De la Croix* v. *Chamberlain* (3); *James* v. *Stevenson* (4); *Central Railroad Co. of New Jersey* v. *Jersey City* (5).

Mitchell K.C., *Irvine* K.C., *Harrison Moore* and *Starke*, for the defendants. When by the Act 4 & 5 Will. IV. c. 95 the 141st meridian was fixed as the eastern boundary of South Australia, it did not mean the exact scientific line—that cannot even now be located—but a line to be located or marked out on the ground either by the Governors of New South Wales and South Australia, certainly with, and possibly without, the concurrence of the Secretary of State, or by the Secretary of State himself, that is, by the King's actions through the Secretary of State. The Crown always had a prerogative right to determine where the boundary of a Colony was. There are many examples of the exercise by the King in Council of that prerogative, and the fixing of a boundary in such a way is not an alienation of territory, but the boundary is deemed to have been originally where it has been so fixed. Here the line was determined by agreement between the

(1) 217 U.S., 1.
(2) 129 U.S., 688.
(3) 12 Wheat., 599.
(4) (1893) A.C., 162.
(5) 209 U.S., 473.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Governors of New South Wales and South Australia, and was ratified by the Secretary of State. That ratification was equivalent to a prior command: *Buron* v. *Denman* (1). The agreement so arrived at is binding on the plaintiffs. The proclamation of the line so fixed as the boundary having been approved by the Secretary of State was effectual for its purpose. The boundary so fixed was intended to be permanent, and has been recognized by the Imperial Parliament in the Act constituting the Colony of Victoria, 13 & 14 Vict. c. 59, and in the *Commonwealth of Australia Constitution Act*, especially in sec. 123 of the Contitution. The boundaries of the States for the purpose of that section must be taken to be the *de facto* boundaries.

This Court has no jurisdiction in this matter. The dispute as to the boundary was not justiciable before federation. The jurisdiction given by sec. 75 of the Constitution to deal with matters between States is limited to matters arising in connection with the Constitution, or which at the time the Constitution was enacted were justiciable between States. Some limit must be put on the word "matters," for it cannot include matters which are undoubtedly political. The plaintiffs can still ask the King in Council to settle the dispute, as they always could, even although the King in Council has refused to interfere without the consent of the defendants. This Court has no authority to determine and authoritatively lay down the boundary line. The American cases which decide that the Supreme Court has jurisdiction to settle boundary disputes between States are inapplicable, because there the States are sovereign States, and it was necessary that the Supreme Court should assume jurisdiction, for there was not any other tribunal that could determine the dispute as there is here.

[Reference was also made to *Dominion of Canada* v. *Province of Ontario* (2); *Attorney-General for N.S.W.* v. *Brown* (3); *Cape Breton Case* (4); *Penn* v. *Lord Baltimore* (5); *Campbell* v. *Hall* (6); *Rhode Island* v. *Massachusetts* (7); *Broom's Constitutional Law*, 2nd ed., p. 60; *Kansas* v. *Colorado* (8); *Quick & Garran's*

(1) 2 Ex., 167, at p. 188.
(2) (1910) A.C., 637.
(3) 2 S.C.R. (N.S.W.) App., 30.
(4) 5 Moo. P.C.C., 259.
(5) 1 Ves., 444.
(6) Cowp., 204.
(7) 12 Pet., 657, at p. 738.
(8) 206 U.S., 46, at p. 95.

Constitution of the Australian Commonwealth, p. 275; *Anson's Law and Custom of the Constitution*, vol. II., pp. 148, 157, 162; *Jephson* v. *Riera* (1); *Cameron* v. *Kyte* (2); *Virginia* v. *Tennessee* (3); *De Bussche* v. *Alt* (4); *Hunt on Boundaries*, 5th ed., pp. 218, 250; *Maryland* v. *West Virginia* (5); *Rhode Island* v. *Massachusetts* (6); *United States* v. *Stone* (7); *Indiana* v. *Kentucky* (8); *Clegg* v. *Edmondson* (9); *Boyd's Lessee* v. *Graves* (10); *Musgrave* v. *Pulido* (11); *Midland Railway Co.* v. *Wright* (12); *Louisiana* v. *Mississippi* (13).]

Sir Josiah Symon K.C. and *Paris Nesbit* K.C., in reply referred to *Seeton on Decrees*, 6th ed., vol. II., p. 1893; *Attorney-General of British Columbia* v. *Attorney-General of Canada* (14); *Broom's Legal Maxims*, 7th ed., p. 465; *St. Catherine's Milling and Lumber Co.* v. *The Queen* (15); *Kent's Commentaries*, vol. IV., p. 222; *Rhode Island* v. *Massachusetts* (16); *Chitty's Blackstone*, vol. I, p. 254; *Perkins* v. *Gay* (17).

[ISAACS J. referred to *Turner* v. *Walsh* (18).

HIGGINS J. referred to *Vosburgh* v. *Teator* (19).]

Cur. adv. vult.

The following judgments were read:—

May 22.

GRIFFITH C.J. This is a suit brought in the original jurisdiction of the Court by the State of South Australia against the State of Victoria, claiming, in substance, a declaration that a strip of territory about two miles in width along the border between the two States, and which has for upwards of 60 years been in the *de facto* occupation first of New South Wales and afterwards of Victoria, forms part of the territory of the plaintiff State, with consequent relief. The boundary between the two States was, by the Act 4 & 5 Wm. IV. c. 95 and the Letters Patent issued under

(1) 3 Kn., 130.
(2) 3 Kn., 332.
(3) 148 U.S., 503, at p. 522.
(4) 8 Ch. D., 286.
(5) 217 U S., 1, at p. 41.
(6) 4 How., 591, at p. 628.
(7) 2 Wall., 525.
(8) 136 U.S., 479.
(9) 8 D. M. & G., 787.
(10) 4 Wheat., 513.
(11) 5 App. Cas., 102.
(12) (1901) 1 Ch., 738.
(13) 202 U.S., 1.
(14) 14 App. Cas., 295.
(15) 14 App. Cas., 46, at p. 59.
(16) 13 Pet., 23; 14 Pet., 210; 15 Pet., 233.
(17) 3 Sergeant & Rawle (Penn), 325.
(18) 6 App. Cas., 636.
(19) 32 N.Y., 561.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

that Act, defined to be the 141st meridian of East longitude. The boundary line in actual use, known as Wade's and White's line, lies to the West of the mouth of the Glenelg River, and two miles or more to the westward of the true line of the meridian.

The suit is brought, in accordance with sec. 61 of the *Judicature Act*, in the name of the plaintiff State. Apart from that section it might have been brought in the name of the Attorney-General of South Australia (as was for some time the practice in controversies between the Canadian Provinces and between them and the Dominion). This is mere matter of form. In substance the Sovereign as head of the body politic of the State of South Australia is plaintiff, and as head of the body politic of Victoria is also defendant. All this is now so well recognized that it may be regarded as elementary. See, for instance, *Dominion of Canada* v. *Province of Ontario* (1).

It is objected by the defendants that the High Court has no jurisdiction to entertain such a suit.

Sec. 75 of the Constitution enacts that the High Court shall have original jurisdiction in "all matters between States." The analogous words in the Constitution of the United States of America are "controversies between States," and it is the settled law of the Republic that the Supreme Court of the United States has under these words jurisdiction to entertain questions of boundaries between States. The reasons, however, upon which this construction was based are not fully applicable to the Australian Constitution. One main argument was that at the time of the Union there were notoriously in existence several controversies as to boundaries, and that the power to settle them, which had been conferred upon the Confederation, was not transferred to Congress, and must therefore be taken to have been transferred to the Supreme Court, for otherwise it would have been non-existent anywhere. In the case of Australia, the power undoubtedly existed in the Imperial Parliament, and possibly also in the Sovereign. But, for reasons which I will afterwards give, recourse to either power may be regarded as now practically unavailable.

I assent to the argument that the jurisdiction of the High

(1) (1910) A.C., 637, at p. 645.

Court, if any, is judicial and not political. So far, therefore, as a controversy requires for its settlement the application of political as distinguished from judicial considerations, I think that it is not justiciable under the Constitution.

The word "matters" was in 1900 in common use as the widest term to denote controversies which might come before a Court of Justice.

Instances of such controversies which would clearly be justiciable are questions arising under mail contracts, contracts for the construction and maintenance of telegraph lines at joint expense, and running agreements over railways.

In my opinion a matter between States, in order to be justiciable, must be such that a controversy of like nature could arise between individual persons, and must be such that it can be determined upon principles of law. This definition includes all controversies relating to the ownership of property or arising out of contracts.

In the simple case of a trespass by one State upon territory in the *de facto* possession of another, I have no doubt that this Court would have jurisdiction. And, since actual possession of one part of a tract of land held under a single title is in the eye of the law possession of the whole, I think that the same result would follow whether the complaining State were in actual possession of the land trespassed upon or not.

The objection that the exercise of such a jurisdiction in the case of a long continued trespass followed by actual occupation and exercise of dominion would have the effect of transferring the quasi-allegiance of the inhabitants of the tract in question from one State to another, has been answered by the Supreme Court of the United States by pointing out that the right to the land is the principal, and the rights flowing out of its occupation are merely accessory. This seems to me to be sound sense. Another answer may be given—that if the occupation is wrongful the only consequence is that the persons who inhabit the disputed tract have been in the enjoyment of supposed rights under a misapprehension of fact, and will revert to their real rights when the error is corrected. This is, in truth, not an objection to the juris-

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

diction, but an argument, of greater or less weight, against the exercise of the jurisdiction in the particular case.

There is another way in which the point of jurisdiction may be approached, which leads to the same result. The law of the Empire, including the Statute law, is binding as well upon the dependencies, regarded as political entities, as upon individual subjects. If, therefore, any dependency infringes the law of the Empire governing its relations with a neighbouring dependency it is guilty of a wrong towards that other dependency. Similar wrongs committed by one independent State against another are not justiciable, because there is no tribunal which has jurisdiction to take cognizance of them. But if there is a tribunal which has jurisdiction to summon a dependency before it, there is no reason why such a wrong should not be redressed. This Court has such jurisdiction. The question, therefore, whether the State of Victoria has infringed the Statute law of the Empire as regards South Australia may be inquired into by this Court as a "matter between States," within the meaning of sec. 75 of the Constitution.

For these reasons I am of opinion that this Court has jurisdiction to entertain a suit of this nature.

The objection to the jurisdiction of the Court in this particular case is also presented in another way, namely, that even if the plaintiffs' claim, considered as a claim to territory, may be entertained and adjudicated upon by the Court, yet the facts show that the claim is based upon grounds to which the Court cannot give effect—in other words, that it does not rest upon grounds cognizable in a Court of law. This is in reality not an objection to jurisdiction, but in the nature of a plea in bar. I will deal with the point thus regarded after dealing with the facts.

I proceed now to the facts of the case, and, first, those relating to the laying out of Wade's and White's line.

By the Act 4 & 5 Wm. IV c. 95, which recited *inter alia* that that part of Australia which lay between the 132nd and 141st degrees of East longitude and between the Southern Ocean and 26° of South latitude consisted of waste and unoccupied lands which were supposed to be fit for the purpose of colonization, it was enacted that it should be lawful for the King with the advice of the Privy Council to establish within the part of

Australia mentioned one or more Provinces and to fix the respective boundaries of such Provinces.

As this territory then formed part of the Colony of New South Wales, the laws of that Colony would ordinarily have continued to apply to the new Provinces when established. It was, however, provided by sec. 1 of the Act that those laws should not be applicable. The result was that any new Province which might be established was to be treated in law (as it was in fact) as new territory acquired by settlement, with the consequence that the settlers would take with them the Common and Statute Law of England so far as applicable.

By Letters Patent of 19th February 1836 the King, in exercise of the powers conferred by the Act, "erected and established" a Province to be called the Province of South Australia. The Letters Patent proceeded: "And we do hereby fix the boundaries of the said Province in manner following (that is to say):—On the North the 26th degree of South latitude on the South the Southern Ocean on the West the 132nd degree of East longitude and on the East the 141st degree of East longitude," including Kangaroo Island and all other adjacent islands. The first settlement was shortly afterwards made at Adelaide.

The only detailed maps of that part of Australia then in existence which were produced to the Court were Admiralty Charts, of which three were put in evidence. One of them, published by the Admiralty in 1814 (called "Flinders' Chart of Terra Australis, Sheet 4, 1802," being Plate V. of the Atlas to Flinders' Voyages), represents the position of the 141st meridian of East longitude as being about 18 minutes of longitude to the East of Mount Gambier, which is a marked natural feature visible from the sea, and is the only natural feature in the immediate locality shown on the map, except Cape Northumberland, the position of which is a few miles to the East of Mount Gambier. The position assigned is very near the true position as now ascertained. Another chart, described as "compiled from surveys of Flinders and other navigators to the year 1829" (Plate 1 of the Atlas), is on a smaller scale, and shows the position of the 141st meridian as being about midway between Cape Northumberland to the West and Cape Bridgewater to the East, which

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

also is very near its true position. The mouth of the River Glenelg does not appear on either map. The third chart throws no further light on the matter.

In February 1839 Mr. John Arrowsmith, the well known geographer of that time, published a map of "The Maritime Portion of South Australia from the surveys of Captain Flinders and of Colonel Light, Surveyor General (of South Australia)," (a copy of which has been shown to us since the trial), in which the mouth of the Glenelg River is shown as lying to the West of the 141st meridian.

In the year 1839, Sir George Gipps, then Governor of New South Wales, instructed Mr. C. J. Tyers to proceed to Melbourne and undertake certain surveys, as described in a memorandum from the Governor to the Deputy Surveyor General dated 13th September of that year. The circumstances which gave rise to sending Mr. Tyers are thus stated in a despatch of 28th September 1840 from Governor Gipps to the Secretary of State:—

"To the westward of Port Phillip, and near upon the confines of South Australia, is Portland Bay, where an unauthorized settlement was formed in 1835 by some gentlemen from Van Diemen's Land, in the same manner that the first unauthorized settlement was formed at Melbourne and Geelong by the Port Phillip Association. The attention of the Government was drawn to Portland Bay in 1839, and the necessity of forming a settlement there manifested itself shortly afterwards, when the fact was ascertained that stations had been established in the fine country to the north of it, on the River Glenelg, visited by Sir Thomas Mitchell in 1836, and by him called Australia Felix.

"An object, also, which presented itself of considerable interest in this quarter, was to settle the position of the meridian line which separates the Province of South Australia from New South Wales; and to ascertain on which side of that meridian line (or the 141st degree of East longitude from Greenwich) the mouth of the River Glenelg was situated, the same having been very differently placed by different authorities, particularly by Mr. Arrowsmith and Sir Thomas Mitchell.

"Upon this duty I despatched, in the month of September 1839, Mr. Charles Tyers, a gentleman whose services I had lately

secured for the Surveyor-General's Department of New South Wales, and who, in addition to much experience in practical astronomy, possesses a knowledge of the principles on which geodetic operations on an extensive scale can alone be carried on."

Mr. Tyers' first duty, as stated in the Governor's memorandum, was to ascertain the best line of communication between Geelong (in the district of Port Phillip) and Portland Bay, selecting sites for future villages. Another duty was to make a survey of Portland Bay, both by land and sea, and to lay out a township. Lastly, he was to proceed to the River Glenelg "to make a correct survey of the lower part of its course and to ascertain the boundary between the Colony of New South Wales and that of South Australia." He was enjoined at all times to consider that one of the first objects of his employment was to fix astronomically as many spots on his route as possible, and that he should lose no opportunity of taking observations.

It appears from this despatch that Arrowsmith's Map of 1839 had reached Australia in that year.

The work done by Tyers is set out in a report, of which a copy was sent with the despatch of 28th September 1840, and of which Sir G. Gipps thought so highly that he said he had caused it to be printed "in order that by being circulated among officers of the Department it might stimulate them to exertions and serve as a model for other operations."

The report begins by saying that the chief object of the expedition was to determine the exact position of the boundary line between New South Wales and South Australia and proceeds: "To effect this three different methods were adopted, viz., triangular (Qu. triangulation) from Melbourne, chronometric measurement from Sydney and lunar observations near the boundary." The report then set out in detail the observations made from time to time.

Tyers assumed the longitude of Fort Macquarie in Port Jackson (Sydney) to be 151 deg. 15 mins. 14 secs., which, as appears from the evidence of Mr. Baracchi, was (with a difference of 2 secs.) the mean of the results of thirteen separate series of lunar observations made between 1770 and 1822, but which is

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

now known to be erroneous to the extent of about 0 deg. 2 min. 16 sec.

From this assumed longitude he calculated, by chronometer, that of Melbourne. From Melbourne he made a series of geodetic measurements to Portland Bay, and calculated that the approximate longitude of "Mr. Henty's flagstaff" at that place was 141 deg. 35 min. 52 sec. East.

From that point he measured on the ground a distance of 35 min. 52 sec. due West, which brought him to a point near, and to the East of, the mouth of the Glenelg River, where he laid down in the sand a large broad arrow of limestone blocks, which was still *in situ*, though disturbed, in February of this year, and which, as he thought, marked the approximate meridian of 141 deg. He also set up marks at several other places on the ground in a North and South line from his starting point. It is an interesting coincidence that according to the latest knowledge this approximate meridian was marked very nearly in the right place.

On his return from the Glenelg, Tyers made further trigonometric observations and revised his previous work. He found that his three modes of calculation brought out different results. The mean of the three methods according to his revised calculations gave 141 deg. 2 min, 54 sec. as the longitude of his approximate meridian mark. He then submitted his work to Captain Owen Stanley of *H.M.S. Britomarte*, who checked the trigonometrical and chronometric work, making the longitude of that spot to be 141 deg. 2 min. 21 sec. by the former, and 141 deg. 2 min 50 sec. by the latter, method.

Mr. Tyers in his report appends to Captain Stanley's letter a memo. to the effect that "by the above mean the longitude of the Sandhill" (where the approximate meridian was marked) "is 141 deg. 2min. 35.5 sec. East"—*i.e.*, the mean between 141 deg. 2 min. 21 sec. and 141 deg. 2min. 50 sec. And this he appears to have accepted as the true position.

Mr. Tyers' ascertainment, however, did not go unchallenged. In April 1841 Mr. Arrowsmith wrote a letter to the London *Times*, criticising it, and maintaining the accuracy of his own map of 1839. He contended, strangely enough, that Tyers had

placed Melbourne three miles too far to the eastward. Tyers replied by a letter published in the *Port Phillip Patriot* in September 1841, defending the accuracy of his own conclusion.

I anticipate for a moment to say that Arrowsmith adhered to his position, and in 1852 published another map which also showed the 141st meridian as being to the East of the mouth of the Glenelg.

Thus the matter rested for some time. There was no settlement near the mouth of the Glenelg, and no immediate necessity for marking the boundary. In 1844, however, settlement had advanced in that direction from both sides, and the question of boundary was raised by Captain Grey (afterwards Sir George Grey), then Governor of South Australia, in a despatch to the Secretary of State, dated 30th September of that year, in which he directed attention to the very imperfect manner in which the eastern and western boundaries of that Province were then defined. He pointed out that it would be extremely difficult "to determine with accuracy a number of points upon the earth's surface through which the 141° of East longitude passes, and this operation could certainly only be executed at a cost which the revenues of this Colony would for a long series of years be inadequate to defray; but, even admitting that the position of the 141° of East longitude had been accurately determined, it would still be necessary to define the boundary line by marks, the repair and superintendence of which would be a constant source of expense." He went on to say that both from advancing settlement and from affrays which had taken place with the aboriginal natives the matter had ceased to be one of mere theoretical speculation, and recommended that the eastern boundary should be defined by natural land marks, which he indicated, instead of by a degree of longitude. The Secretary of State invited the opinion of the Governors of New South Wales and Western Australia on the matter. The Governor of New South Wales, in turn, invited the opinion of Mr. C. J. Latrobe, who was then Superintendent of the District of Port Phillip, which had been created in 1839, and which afterwards became the Colony of Victoria. In his reply, dated 22nd December 1845, Mr. Latrobe pointed out that since the date of Governor Gipps' despatch the

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

necessity of clearly defining and determining the boundaries between South Australia and New South Wales had become more and more evident "in consequence of the gradual occupation of the country through which the present line of boundary between South Australia and Port Phillip is supposed to run and the difficulty of deciding, for police and other purposes, the real positions in one or the other territory of the frontier stations" (*i.e.*, pastoral properties). He did not, however, concur in Governor Grey's proposed solution of the difficulty.

In a report dated 15th July 1846 from Mr. Commissioner Bonney to Major Robe, Lieutenant-Governor of South Australia, that officer called the attention of the Lieutenant-Governor to "the necessity of having the eastern boundary of the Province at least approximately defined as soon as possible," and added:— "The country through which it passes is now occupied for 70 miles from the coast, and there are at least twelve or fourteen settlers whose runs lie so near the boundary line that I considered my jurisdiction over them uncertain, and therefore refrained from interfering with them.

"The loss to the revenue is not the only evil resulting from the want of a defined boundary. A number of bad characters resort to this neutral ground, knowing that the police cannot interfere with them until the question of jurisdiction is determined."

On 22nd July 1846 Lieutenant-Governor Robe forwarded a copy of this report to Governor Gipps, expressing his concurrence in Mr. Bonney's views, and asking for an expression of opinion as to Governor Grey's despatch and "any suggestions as to provisional arrangements for preventing the inconveniences complained of until some definite and marked boundary can be determined on the spot." Lieutenant-Governor Robe's despatch was received by Governor Sir C. Fitzroy (who had succeeded Sir G. Gipps as Governor of New South Wales). In his reply, of 15th September 1846, he enclosed a Minute of his Executive Council on the subject of Governor Grey's proposals, and also a report from Mr. Latrobe, in which that officer, while concurring in the proposal of the Executive Council of New South Wales (which was to appoint a Commission "to determine upon a new line adhering as closely as possible to the 141st

meridian as the only one that could be satisfactorily adopted"), said that he considered that "some immediate steps must be taken to define a boundary line for the satisfaction and guidance of magistrates and Commissioners of Crown lands of the two Colonies, and settlers, upon what is, under present circumstances, debatable ground."

He suggested that this should be done in the following manner:—"Having fixed on a starting point on the coast near the mouth of the River Glenelg—whether the point fixed by Sir Thomas Mitchell, that of Mr. Tyers, or that of Captain Stokes—let a due North and South line be run to the Murray River, sufficiently indicated at greater or lesser intervals, according to the character of the country that may be traversed, by marked trees, surface lines, or piles of stones, in the same manner as is now done in the rough survey of boundary lines between stations."

At this point it is convenient to mention that Sir T. Mitchell (Surveyor General of New South Wales) had fixed Cape Northumberland, some ten miles to the westward of the mouth of the Glenelg, as the *locus* of the 141st meridian, while Captain Stokes had fixed that *locus* as about 40 seconds of arc to the eastward of Mr. Tyers' position.

After discussing the best mode of carrying out the work, Mr. Latrobe proposed that "taking Mr. Tyers' point as the starting point," the line in question should be run by officers appointed for that purpose.

On 28th September 1846 Lieutenant-Governor Robe addressed Governor Fitzroy, adverting to his despatch of 22nd July, the reply to which he had not yet received, and stating that he had received further reports relating to some murders committed in the neighbourhood of the undefined boundary, and "showing the necessity of some measures being taken for a provisional adjustment of a line of demarcation or for giving to the local magistracy of each Province jurisdiction within the limits of the other until the question of the boundary shall have been finally determined."

He added that: "It appears to me that unless some boundary be adopted which will admit of a more certain and practical

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

demarcation than a meridian of longitude, much inconvenience will result to both Colonies as the borders become settled, and that the sooner the question is settled the better.

"I will therefore look with anxiety for a communication from Your Excellency upon a matter of so much importance.

"I am aware that no alteration of the present boundary can be made except by Act of Imperial Parliament, but I am very desirous of concurring with Your Excellency in any recommendations you may deem expedient to make to Her Majesty's Government in order that no time may be lost by further reference to this Colony by the Secretary of State, and in the meantime of co-operating with you in measures for the repression of the evils complained of by the local magistrates."

A copy of this despatch was sent by the Colonial Secretary of South Australia to the Surveyor General, Captain Frome, asking for his opinion as to the locality which he would propose to adopt as the starting point from which to commence the survey. Captain Frome replied on 9th October 1846, remarking that: "The position of the mouth of the Glenelg River, the nearest natural feature to this meridian on the sea coast, has been determined within the last few years with considerable claims to accuracy by Mr. Tyers and Captain Stokes."

After commenting on the difference between Tyers' and Stokes' positions and the modes by which they had been determined, he added: "This close approximation renders it a matter of choice which of the determinations to adopt, either of them being entitled to be considered as close a result as can be arrived at by the methods adopted. If it is necessary to ascertain accurately the position on the coast of the 141st degree of East longitude, independent of all other than the first meridian—that of Greenwich—careful transit observations on the spot of the moon, culminating stars, or observations of the occultation of fixed stars by the moon must be resorted to, the first of which methods would require a good transit, and the latter a powerful telescope to be sent to the Glenelg in the hands of some person whose practical skill in astronomical observations could be depended upon.

"I would, however, recommend to His Excellency that Mr.

Latrobe's proposal of 'taking Mr. Tyers' point as the starting point' for a meridian line to be run from the coast northward to the Murray River should be adopted, considering that gentleman's determination to be within the necessary degree of accuracy for fixing the 141 degree of East longitude."

On 14th October 1846 Lieutenant-Governor Robe forwarded a copy of the report to Governor Fitzroy, expressing his satisfaction that Captain Frome concurred in Mr. Latrobe's view as to the propriety of marking on the ground the 141st meridian East from Greenwich "deduced from a point near the mouth of the Glenelg River the longitude of which has been determined by the joint labours of Mr. Tyers and Captain Stokes." He added: "It is of course unnecessary for me to remind Your Excellency that however desirable it may be to adopt, at some future period, natural features of the country as the boundary of the Provinces, none other than the 141st meridian of East longitude can be recognized without the authority of a new Act of Parliament."

In November 1846 by direction of the Colonial Secretary of New South Wales, Mr. Wade, a surveyor, was instructed to report himself to Mr. Latrobe "in order to his being employed in marking a boundary for police purposes between the Port Phillip District of New South Wales and the Province of South Australia."

By a despatch of 30th December 1846 Governor Fitzroy informed Lieutenant-Governor Robe that a competent surveyor had been instructed to proceed to the mouth of the Glenelg for the purposes of the projected survey. The despatch concluded as follows:—

"With respect to the difference of a few seconds of longitude between Captain Stokes and Mr. Tyers as to the position of the Glenelg River, as stated by Captain Frome in his letter of the 22nd October, enclosed in Your Excellency's despatch of the 26th of that month, I apprehend that the best means in our power to ascertain the 141st meridian of East longitude, so as to meet the provisions of the Imperial Act, will be to direct the surveyors employed to strike a mean between the calculations of Captain Stokes and Mr. Tyers."

Formal instructions were given to Mr. Wade on 28th January 1847 by Mr. Lonsdale, who was acting as Superintendent of the Port Phillip District. They contained the following passage:—

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

"With respect to the difference of a few seconds of longitude between Captain Stokes and Mr. Tyers as to the position of the Glenelg River, it is apprehended by His Excellency Sir C. Fitzroy that the best means to ascertain the 141st meridian of East longitude is to strike a mean between the calculations of Captain Stokes and Mr. Tyers; and this, therefore, as far as the New South Wales Government is concerned, is the mode to be adopted in settling this point for the present survey. Should, however, any further question arise upon this subject I trust I may be able to communicate such additional instructions as may be necessary before you begin the work."

A copy of Tyers' report was also sent to him, but he had no information as to the exact position which Stokes assigned for the mouth of the river.

Mr. Wade accordingly proceeded to the Glenelg, where he discovered the mark put down by Tyers to denote his approximate meridian. In his journal he says, under date 26th March:— "The mean longitude of this approximate meridian according to Mr. Tyers is 141 deg. 2 min. 35 sec. East. The latitude of the sandhill at which he commenced measuring his true North line, 38 deg. 4 min. 18 sec. South, variation 5 deg. 37 min. East. According to this the boundary line will be two miles twenty eight chains (2 miles 28 chains) to the West of the approximate meridian marked by Mr. Tyers, and this is the point from which in the absence of any information respecting the position of the 141st meridian of East longitude as laid down by Captain Stokes I intend to commence measuring the boundary line between the two Provinces."

It will be observed that he took Tyers' final memorandum as expressing the true result of his calculations. He accordingly measured a distance of 2 miles 28 chains West from Tyers' approximate meridian mark, and denoted the position by "a mound of earth on the summit of a hummock about 7 chains from the sea coast," and from that point he proceeded to lay off and mark on the ground a North and South line. After laying down the line for about 123 miles, to the 36th parallel of South latitude, it became impracticable from various reasons to continue his operations, which were for the time abandoned.

Mr. Wade did not receive any information as to Captain Stokes' position until he had made some progress with his work, and did not make any alteration in respect of it. This fact was brought to the knowledge of the Government of South Australia on 15th April 1847 by Mr. E. R. White, who accompanied Wade as their representative, in a letter, in which he said:—"In the absence of any positive information relative to the position of the 141st degree of East longitude as laid down by Captain Stokes, I concurred with Mr. Wade in deeming it advisable to assume the 141st meridian of Mr. Tyers, and commence marking the boundary without any further delay; and this has been accordingly done, which, I trust, may meet with the approbation of His Excellency the Lieutenant-Governor." In a later letter, of 7th May, Mr. White informed his Government that Mr. Wade had on 28th April received a letter instructing him that in the event of his not having received an extract from Captain Stokes' "Discoveries in Australia" relative to the longitude of the mouth of the Glenelg, he was to go on as he had commenced, and that Mr. Wade had received the extract at the same time as the letter.

On 31st August 1847 Mr. Latrobe forwarded Wade's report to Governor Fitzroy with a later letter from that officer, in which, referring to the abandonment of the survey, he pointed out that "the object for which the survey was called had been nevertheless in a great measure carried into effect, as the scrub in which his present survey had terminated is supposed to extend to the Murray, and is, from its barren character, adjudged totally incapable of maintaining stock."

Mr. Latrobe suggested "that as soon as the preliminary steps may be taken the boundary line as surveyed by Mr. Wade, from the coast to the 36th degree of latitude or thereabouts, should for the present at least be adopted and proclaimed as the recognized boundary in this quarter between the respective Colonies," and added: "This is a measure which is urgently called for, particularly at the present time, when it is imperative upon the Government to define the general boundaries of runs to be held under licence on that boundary line as elsewhere."

Governor Fitzroy minuted the letter as follows:—

"Inform Mr. Latrobe that I concur with him in opinion that

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

the object of the survey has, it would appear, been sufficiently attained for all practical purposes at present.

"Let a communication be addressed to the Government of South Australia, with a copy of Mr. Latrobe's letter and of Mr. Surveyor Wade's report, and suggesting in accordance with Mr. Latrobe's recommendation that 'the boundary line, as surveyed by Mr. Wade from the coast to the 36th degree of latitude, should be adopted and proclaimed as the recognized boundary line as far as it extends between the respective Colonies.'"

The Colonial Secretary of New South Wales accordingly on 20th October wrote to the Colonial Secretary of South Australia, transmitting for the information of Lieutenant-Governor Robe a copy of Mr. Latrobe's letter and the enclosed reports. The letter proceeded:—"In forwarding these documents I am also directed to inform you that Sir Charles Augustus Fitzroy concurs with His Honour the Superintendent in opinion that the object of the survey appears to be sufficiently attained for all practical purposes at present, and to suggest for the consideration of the Lieutenant-Governor that, in accordance with the Superintendent's recommendation, 'the boundary line surveyed by Mr. Wade from the coast to the 36th degree of latitude' should be adopted and proclaimed 'as the recognized boundary line' as far as it extends between the respective dependencies."

Apparently acting on this expression of opinion, Lieutenant-Governor Robe on 16th December 1847 published a proclamation, which, after reciting the Act 4 & 5 Wm. IV., and the Letters Patent of 19th February 1836, proceeded:—"And whereas from the progress of settlement on the eastern frontier of the said Province, and on the borders of the territory of New South Wales, it has become necessary to mark out and ascertain the 141st degree of East longitude, so fixed as the boundary of South Australia on the East as aforesaid; and for this purpose, by an arrangement previously entered into, the Government of New South Wales has, with the consent and concurrence of the Government of South Australia, caused the position of the 141st meridian of longitude, East from Greenwich, to be correctly ascertained at a spot on the sea coast near the mouth of the River Glenelg; and, therefrom, the said meridian to be surveyed northward as far as

the 36th parallel of South latitude by Henry Wade, Esquire, surveyor, and to be marked upon the ground by a double row of blazing upon the adjacent trees, and by mounds of earth at intervals of one mile where no trees exist:

"And whereas it is expedient that the said survey should be authoritatively adopted and made known:

"Now, therefore, by virtue and in pursuance of the power and authority to me confided, I, the Lieutenant-Governor aforesaid, in the name and on behalf of Her Most Gracious Majesty, do hereby notify and proclaim, that the line so marked as aforesaid, and particularly described in the schedule hereto annexed, and delineated on the public maps deposited at the Survey Office, at Adelaide, as the meridian of the 141st degree of East longitude, is and shall be deemed and construed to be the eastern boundary of the Province of South Australia, to all intents and purposes; and all and singular Her Majesty's Officers, Ministers, and subjects in the said Province, and all others whom it may concern, are required to take due notice hereof accordingly."

On the same day Lieutenant-Governor Robe transmitted to the Secretary of State copies of the correspondence which had passed between himself and the Governor of New South Wales on the subject in a despatch which I must read at length:—

"My Lord,—In September 1844 Governor Grey called the attention of Lord Stanley to the necessity of having the boundaries of this Province defined, and His Lordship, in a despatch dated 24th May 1845, intimated his purpose of communicating on that subject with the Governors of the adjacent Colonies.

"As the country about Mount Gambier and the Glenelg River became occupied by squatters, it was essential that part of the boundary should be marked out and recognized by the Governments of New South Wales and this Colony. I accordingly opened a correspondence with the Government of New South Wales on the subject, which resulted in the appointment of a surveyor to mark on the ground so much of the 141st degree of East longitude as passes through the occupied district.

"The arrangements for the survey were undertaken by Mr. Latrobe, by direction of Sir Charles Fitzroy, and an assistant surveyor was attached to the survey party, at my request, to

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

report to this Government from time to time the progress of the work. The survey was conducted by Mr. Wade, appointed by the Government of New Soush Wales, and his assistant, appointed by me, was Mr. E. R. White. They appear to have prosecuted the work very well and very satisfactorily.

"I transmit herewith for Your Lordship's information copies of all the correspondence that has passed between the two Governments on this subject, together with a map of the boundary compiled from Mr. White's sketches, and a copy of my proclamation recognizing that boundary as marked on the ground.

"It will be necessary to define at some early period that portion of the 141st meridian which crosses the Murray River, as the banks of that stream are occupied by cattle and sheep stations, both in this Colony and in New South Wales."

The enclosed map showed Mr. Wade's boundary line as starting from the point marked by that gentleman as stated in his report, to the West of the mouth of the Glenelg.

On the same day the Colonial Secretary of South Australia sent to the Colonial Secretary of New South Wales a copy of the proclamation, which he described as having been issued by Lieutenant-Governor Robe in furtherance of Governor Fitzroy's suggestion communicated in the Colonial Secretary's letter of 20th October.

A verbal error occurred in the proclamation which was duly corrected in a proclamation of 23rd December, and communicated to the Governor of New South Wales and the Secretary of State.

By a despatch of 8th January 1848 to the Secretary of State Governor Fitzroy, after referring to previous correspondence on the subject between Governor Gipps and Lieutenant-Governor Robe and to the resumption of the correspondence by himself, summed it up by saying that:—"It was ultimately arranged that a due North and South line should be run from a point on the sea coast to the River Murray, sufficiently indicated on the ground at greater or less intervals, according to the character of the country traversed, by marked tree lines, surface lines, or piles of stones. The point where the 141st degree cuts the sea coast had been

determined by Mr. Surveyor Tyers, and also by Captain Stokes, R.N., by different modes of computation.

"The conclusions they arrived at differed only by a few seconds of longitude; and it was mutually arranged that the actual points of commencement should be the mean of these results. The work was accordingly commenced in the early part of last year by Mr. Surveyor Wade, who successfully conducted it as far as the 36th deg. of latitude, being a total distance from the sea of upwards of 123 miles. Here he was unfortunately compelled to abandon the further marking of the line until another opportunity in consequence of the impossibility of obtaining supplies for his party.

"Although it is to be regretted that the survey has thus been left incomplete, the object for which it was undertaken has, nevertheless, for all practical purposes, been effectually done; as there is reason to suppose that the scrub in which the survey has, for the present, terminated, extends to the Murray.

"I have now the honour to add that the line thus marked has been formally adopted by the Government of South Australia as the eastern boundary of that Province. I enclose a copy of Governor Robe's proclamation on this subject, to which is subjoined a detailed schedule of the boundary line marked on the ground."

Sir Charles Fitzroy appears to have forgotten the fact that the actual starting point adopted was Tyers' position, instead of the mean between Tyers' and Stokes', as originally intended. But I do not attach any importance to this point, in view of subsequent events.

In consequence of some errors said to have been discovered in the schedule to Lieutenant-Governor Robe's proclamation some delay occurred. On 26th July 1848 Mr. Latrobe wrote to the Colonial Secretary of New South Wales, adverting to the suggested errors, pointing out that it appeared that the alleged discrepancies were of no great moment, and proposing a compliance with a suggestion that a description of the boundary line (that is, of the country through which it passed) as sent to the Surveyor-General on 7th January 1848 should be proclaimed. This letter was sent by Governor Fitzroy for report to Sir T. Mitchell, the

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

Surveyor-General of New South Wales, who minuted it as follows:—

"As the line proposed, and which has been surveyed, was understood to be merely for police purposes and temporary, the slight discrepancies noticed need not, as Mr. Latrobe suggests, prevent the line from being proclaimed." Governor Fitzroy then added a minute: "Let Mr. Latrobe's suggestions be acted upon and the boundary line proclaimed accordingly."

Some further delay (unexplained) occurred, but a proclamation was issued on 4th March 1849 by Sir C. Fitzroy, which, after reciting the Letters Patent of 20th February 1836, proceeded as follows:—"And whereas it having become necessary to mark out and ascertain the said 141st degree of East longitude between the said territory of New South Wales and the said Province of South Australia, an arrangement was entered into with the Government of South Australia for that purpose, in consequence of which the position of the said 141st degree of East longitude has been correctly ascertained at a spot on the sea coast near the mouth of the River Glenelg, and therefrom northward as far as the 36th parallel of South latitude; and whereas it is expedient that the said boundary line, so marked and surveyed, should be made known: Now, therefore, I, Sir Charles Augustus Fitzroy, as such Governor as aforesaid, do hereby notify and proclaim the line so marked and surveyed, and particularly described in the schedule hereto annexed, and delineated on the public maps in the Survey Office in Sydney and Melbourne respectively, shall be deemed and construed to be the boundary line between the said territory of New South Wales and the Province of South Australia respectively as far as the same extends."

Half of the cost of Mr. Wade's survey was paid by South Australia, the expenditure having been sanctioned by the Lords of the Treasury on 22nd November 1850, they having been informed on 6th November by the Secretary of State, Lord Grey, that "the service was one of absolute necessity," in which opinion they concurred.

In a despatch of 30th June 1848 from the Secretary of State to Governor Fitzroy, Earl Grey said that, in intimating to Lieutenant-Governor Young (of South Australia) his approval of the

manner in which the work "relative to the boundary which has been established between New South Wales and South Australia" had been performed, he had informed him that he considered it very desirable that no time should be lost in carrying on the survey to the River Murray.

This work was accordingly carried on by Mr. E. R. White, and completed about the end of 1850.

From that time to the present the line marked by Messrs. Wade and White has been the *de facto* boundary between South Australia and that part of New South Wales which is now Victoria. It is, as already stated, common ground that it is not upon the true 141st meridian, but lies two miles or more to the West of it—but its accuracy was not challenged by South Australia until the year 1869 under circumstances to be presently stated.

From the facts which I have narrated only one conclusion can be drawn, namely, that in 1847-8 the Governor of New South Wales and the Lieutenant-Governor of South Australia with the authority of the Secretary of State agreed together that the boundary between these Colonies, described in the Statute and Letters Patent as the 141st degree of East longitude, should be ascertained to the best of their ability and marked out on the ground, and that the line so marked out should be accepted and acted upon for all purposes of government as being the true line of the 141st meridian and as the boundary between the Colonies, and that Wade's and White's line was marked in pursuance of that agreement.

The principal debate in the present case has been as to the effect of the agreement. It is contended for the plaintiff State that the respective Governors had no authority in fact or law to make an agreement for ascertainment or demarcation of the boundary, that the agreement in fact made was provisional only, and that in any case it could not have the effect of establishing any other boundary than that prescribed by the Act and Letters Patent. The term "agreement" is, of course, not used in the sense of a compact conferring any contractual rights, properly so called, as between the parties to it.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

Before dealing with these contentions in detail it is desirable to refer briefly to the subsequent events.

The District of Port Phillip, which, as already said, had been established in the year 1839, was in 1850 erected into a Colony under the name of Victoria by the Act 13 & 14 Vict. c. 59.

By that Act the boundaries of the new Colony were defined as "the territories now comprised in the (said) District of Port Phillip and bounded" by a line from Cape Howe to the nearest source of the River Murray "and by the course of that river to the Eastern boundary of the Colony of South Australia." It is contended for the defendant State that this description is a legislative recognition of Wade's line, which was then known to the Imperial authorities, although White's extension to the Murray had not been completed in August 1850, when the Act was passed. A reference in a Statute to a boundary which has, at the time of passing the Act, been marked on the ground and recognized, affords, I think, *primâ facie*, strong evidence for thinking that the legislature is dealing with the territory then so delimited, especially when the object of the Act is to establish a new Colony, and to define its limits. But the force of the argument in the present case is much diminished, if not altogether destroyed, by the circumstance that the words used in the Act of 1850 are a mere quotation from the words of an earlier Act, 5 & 6 Vict. c. 76, sec. 2 (1842), which provided for the representation of the District of Port Phillip in the Legislative Council of New South Wales, and which was passed before Wade's line had been marked.

The plaintiffs' counsel also relied upon a legislative recognition of the boundary by the Act 18 & 19 Vict. c. 55 (1855), which conferred a Constitution upon the Colony of Victoria. By that Act the boundaries of the several electorates were defined, amongst them being the electorate of Follett, which was described as "bounded on the West by the (141 deg.) one hundred and forty-first meridian being the line dividing the Colony of Victoria from South Australia, on the South and East" &c.

It appears that this description of the western boundary of Follett was a literal quotation from a proclamation issued by Sir C. Fitzroy on 30th December 1848 under a power conferred upon him by his Commission to divide the Colony of New South

Wales into counties. This proclamation was issued after Wade's line had been marked, and with the express authority of the Secretary of State, given in answer to a despatch of 6th December 1847, which was accompanied by a map showing the position of the proposed counties. From the map it appeared that the western boundary of the Colony of New South Wales was located in the position denoted by Wade's line, *i.e.*, some distance to the West of the mouth of the Glenelg.

An argument is based upon the words "the line dividing the Colony of Victoria from the Colony of South Australia," which was then a marked line. I think that some weight should be given to these facts, but I do not regard them as conclusive in the sense contended for.

Between 1857 and 1865 a geodetic survey of Victoria was made, from which it appeared that Wade's line lay some distance to the westward of the true 141st meridian. In March 1865 a map of Victoria was published by the Lands Department of that Colony, which showed on its face two lines, one of which was described as "141st meridian as defined by Mr. Edward White, and marked on the ground," the other as "Boundary between Victoria and South Australia being the 141st meridian as adopted by Arrowsmith." It may be taken that the accuracy of the demarcation of 1847 was at this time generally regarded as open to doubt. All later maps have shown the two lines, with or without words of description.

In June 1866 the Colonial Secretary of South Australia addressed a letter to the Colonial Secretary of New South Wales enclosing a memorandum from the Surveyor-General of the former Colony, which suggested the adoption and confirmation by the Governments of New South Wales and Queensland of the existing boundary of South Australia and its projection northward from the point on the South bank of the Murray, at which it then terminated to the 26th parallel of South latitude (the northern boundary of South Australia).

In reply to this communication Sir H. Parkes (then Colonial Secretary of New South Wales) transmitted a report from the Surveyor-General of that Colony, in which that officer, after pointing out that the method proposed by the Government of

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

South Australia of determining the boundary line between the two Colonies was the most economical and expeditious, "being only a prolongation of the existing boundary between South Australia and Victoria," submitted that there were "doubts as to the identity of such line with the true geographical boundary of the Colony viz. the 141st meridian." He went on to point out how the probable error might have arisen, and that, admitting it to have been the best that science with the appliances then available could effect, it fell far short of the accuracy obtainable by the use of telegraphic signals, and referred to the approaching completion of telegraphic communication between Sydney and Adelaide.

Further correspondence followed, with the result that in 1868 Messrs. Todd and Smalley, the Government Astronomers of South Australia and New South Wales respectively, were instructed to proceed to the Murray River and there ascertain the true location of the 141st meridian as accurately as possible. On 8th December 1868 these gentlemen made their report, which certified that the meridian line was "2 miles 19 chains East of the prolongation of the present boundary line between Victoria and South Australia" the North end of which was marked, and that the position of the meridian had been permanently indicated by a substantial brick pyramid. The meridian of this pyramid, known as Todd and Smalley's line, was adopted by South Australia and New South Wales as the boundary between those Colonies, and it appears from the latest calculations, some of which were only completed during the hearing of this case, that the probable error in its position is, at most, a few hundred feet.

In November 1869 the Chief Secretary of South Australia addressed the Chief Secretary of Victoria, adverting to the fact that it was proposed to lay out roads "on the Victorian side of the boundary line" to meet those of South Australia, and suggesting that before such steps were taken or a new map of Victoria published it might be well for the Government of Victoria to consider the fact of the line referred to being about $2\frac{1}{4}$ miles to the west of the 141st meridian, which was fixed by the Imperial Statute 4 & 5 Wm. IV. as the boundary of the new Colony of South Australia. He further suggested that it would appear desirable

that the Government Astronomers of the two Colonies should at an early date "make a voltaic determination of the difference between the South end of the boundary line and the Melbourne Observatory, following a similar course to that pursued in determining the true boundary North of the Murray."

The Chief Secretary of Victoria replied on the 16th of the same month, promising to issue instructions for giving effect to the proposal.

The Government Astronomer of South Australia (who was also Postmaster-General) appears to have been prevented by operations connected with the laying of the telegraph line from Adelaide to Port Darwin from taking any immediate action in the matter. In August 1873, however, the Chief Secretary of South Australia again addressed the Chief Secretary of Victoria, referring to the previous correspondence, and asking that instructions might be given to the Government Astronomer of Victoria, "in order that the necessary arrangements for definitely fixing the boundary may be completed as early as possible." In December 1873 the Chief Secretary of Victoria replied, stating that "the existing line having been, as is well known, determined and marked on the ground in the year 1847, proclaimed as the boundary in the *South Australian Government Gazette* of the 16th December of that year, and universally accepted ever since as the established line of demarcation between the two Colonies for all purposes, this Government cannot now give its consent to any course of action which might tend in any way to disturb so well recognized a line as it is, or that could be capable hereafter of being construed into any kind of admission that it regarded at the present time with favour a proposition for amending or altering what has served for many years to define the territorial limits of the two Colonies." But he offered to concur with the Government of South Australia in determining as nearly as possible the position of the 141st degree of East longitude, subject to the condition that the work was to be done in the interests of science only, and that the two Governments should agree beforehand that the result, whatever it might be, should in no degree affect the boundary between the Colonies as fixed in the year 1847.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

Some controversial correspondence followed, and in 1876 the Government of South Australia prepared a draft of a petition to the Queen in Council, setting out the facts of the case so far as they were considered relevant, and asking for a determination whether the proclamations of the Governors of South Australia and New South Wales were or ought to be binding upon the Colony of South Australia. The contention of South Australia was that the proclamations were *extra vires* and void, inasmuch as a contrary view would, in effect, amount to a ceding of territory by South Australia and the acquisition of territory by New South Wales. The Government of Victoria was asked to concur in the draft case and in an agreement to give effect to Her Majesty's decision, but they declined to do so.

Correspondence on the subject was continued, and in 1887 a draft case was agreed to by the Governments of both Colonies subject to the approval of their respective Parliaments. That of the Parliament of South Australia was obtained, but the Parliament of Victoria refused to concur. This case submitted substantially the same point for decision as that of 1876.

On 1st August 1894 Lord Kintore, then Governor of South Australia, issued a proclamation purporting to revoke that of 1847, and by a despatch of 7th August he invited the intervention of the Secretary of State to bring about a settlement of the matter. The Marquis of Ripon, then Secretary of State for the Colonies, replied by a despatch dated 19th September 1894, in which he said that it would not be possible for him to invite Parliament to legislate on the subject unless at the request of both Colonies concerned after they had agreed upon the nature of the legislation desired. He also said that he would be prepared in the alternative to advise Her Majesty to refer the matter for the decision of the Judicial Committee of the Privy Council without previous litigation under the powers conferred by sec. 4 of the Act 3 & 4 Wm. IV. c. 41, but that this course could only be taken if both Colonies agreed to request his intervention in the matter, and added that unless the Colony of Victoria should be willing to come to an agreement with South Australia for the purpose of obtaining the decision of the Judicial Committee he

feared that it would not be in his power to assist the Government of South Australia to bring the dispute to a settlement.

Such was the state of things when the Commonwealth was established.

It may be taken that from 1869 to the present time the Government of South Australia have done everything in their power to protest against the continued acceptance of Wade's and White's line and to procure a rectification of it.

On the other hand for more than 60 years first New South Wales and afterwards Victoria have exercised the fullest dominion over the land lying to the East of the line. A great portion of the land has been dealt with by lease and licence to occupy, some has been alienated in fee, municipal rates have been collected, and the electoral franchise has been exercised by the inhabitants in elections under the laws of Victoria, and in federal elections as citizens of Victoria.

I proceed now to deal with the questions of fact and law arising for decision.

And, first, as to the authority of the Governors of South Australia and New South Wales in 1847 to ascertain and mark out the boundary between the Colonies.

When a tract of waste land in a newly discovered country is divided by the Sovereign power into separate Colonies under separate administrations, and with different laws, the necessity of the case requires that the boundary between them should be ascertained as soon as settlement approaches the border, since otherwise it would be impossible for inhabitants of that locality to know the laws by which they are bound or the authorities whom they are to obey. When the boundary prescribed is a degree of latitude or meridian of longitude, the necessity of the case further requires that it should be denoted by physical and visible marks. Authority to ascertain, and if necessary demarcate, the boundary must therefore reside somewhere. In the case of such a boundary as last mentioned, the exact location of which is in the existing state of human knowledge a matter incapable of ascertainment with absolute scientific precision, the necessity of the case requires that the persons in whom the authority to demarcate the boundary resides should have a further authority

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

to ascertain the preliminary question of fact. The doctrine of authority arising from necessity is well recognized in our law. See, for instance, *Australasian Steam Navigation Co.* v. *Morse* (1).

In 1847 the whole executive authority of the Colonies of New South Wales and South Australia was vested in the respective Governors acting under the direction of the Secretary of State, what is called responsible Government not having been introduced until the years 1855 and 1856 respectively. In my opinion, therefore, those Governors jointly, possibly of their own motion, and certainly by direction or with the concurrence of the Crown signified through the Secretary of State, had authority to demarcate the boundary between the two Colonies, and for that purpose to determine as a preliminary question of fact the true location of that boundary, provided that the circumstances were such as to call for an exercise of that authority. These circumstances sufficiently appear from the correspondence between the Governors already quoted, to which may be added the fact that in 1846 and 1847 new provisions had been made by Imperial Statute for dealing with the waste lands of the Crown in Australia, under which leases of lands on either side of the boundary had been applied for.

In my judgment, therefore, the occasion for the exercise of the authority to demarcate had actually arisen when the agreement was made and the proclamations were issued.

Secondly, as to the permanency or provisional nature of the transaction of 1847. There are indications in some of the communications from subordinate officers of the respective Governments that they thought that a provisional demarcation could be made, using the word in the sense that the line might be corrected from time to time if discovered to be wrong. But I cannot find any trace of such a notion in the despatches which passed between the two Governors, or in the proclamations published by them, or in the despatches from the Secretary of State signifying his approval of their action. It is manifest that they were all aware that it was then impracticable to ascertain with scientific precision the exact location of the 141st meridian, and

(1) L.R. 4 P.C., 222.

that they agreed that the position assigned to it by Tyers should be accepted—in other words, that, on a question of fact to be decided upon evidence, Tyers' evidence should be accepted as conclusive for the purpose of the demarcation. The suggestion that the demarcation of the line was temporary or provisional only was, in fact, not made until the year 1893. It was strongly pressed upon us that, even if the Governors had authority to demarcate the line, that authority was only to demarcate it by the best known means, and that they could have done better than to accept the position assigned by Tyers. It is sufficient, in my judgment, that the Governors and the Secretary of State should have honestly adopted what they thought under all the circumstances of the case, of which they were better judges than we are, was the best course to adopt. That they did so is incontrovertible. The argument that Tyers' position was known to be only an approximation was also used in support of the contention that the delimitation could not have been intended to be permanent, but I cannot attach any weight to this argument, in view of the actual facts.

Thirdly, as to the effect of this determination. It is suggested for the plaintiff State that if it were valid, and the finding of fact were erroneous, it would have the effect of an alienation of territory, which was, of course, not within the power of either Governor to make. But, in my opinion, this is an erroneous view of the nature of such a transaction. The real transaction is the ascertainment of a fact by persons competent to ascertain it, and a finding of fact so made, and accepted by both, is in the nature of an award or judgment *in rem.*, binding upon them and all persons claiming under them. So regarded, it is not an alienation of territory at all, although, but for the finding, one party might have had possession of more territory than he has when effect is given to it. This was the view taken by Lord *Hardwicke* in *Penn* v. *Lord Baltimore* (1) of such a transaction. In the alternative view there could never be any finality until there had been a judicial decision by some competent tribunal. In the present case, as I will show, there was no such tribunal in existence.

(1) 1 Ves., 444.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

It may, I think, be taken to be good law, as laid down in the case just mentioned, that a boundary line so ascertained is to be presumed to be correct until the presumption is displaced. The main questions in the present case are whether it is displaced by the mere fact of the discovery of the error, and, if so, whether this Court can rectify the error.

Although the line as laid down and accepted was binding for the time being upon the two Colonies, it was in 1848 capable of correction under the Royal Prerogative.

It clearly appears from the very interesting records of the Privy Council referred to by Mr. *Mitchell* that up to the middle of the 18th century the Royal Prerogative to determine questions of disputed boundaries between Dependencies of the Crown was recognized and exercised. (*Pennsylvania and Maryland Case*, 1683-1709; *Connecticut and Rhode Island Case*, 1725-6; *Virginia and North Carolina Case*, 1726-7; *Rhode Island and Massachusetts Case*, 1734-46; *Second Pennsylvania and Rhode Island Case*, 1734 to 1769; *New Hampshire and New York Case*, 1764; *New York and Quebec Case*, 1768). It also appears that the jurisdiction was exercised *in invitos*, and not merely on reference by both parties (*Massachusetts and Connecticut Case*, 1754).

We were not referred to any instances of the exercise of the Prerogative after the Revolution of the North American Colonies until the middle of last century, when the *Cape Breton Case* (1) was referred to the Judicial Committee. In 1872 the *Pental Island Case* (between New South Wales and Victoria), and in 1886 the *Manitoba and Ontario Boundary Case*, were similarly referred to the Judicial Committee. In all these cases the Committee reported to the Sovereign without giving reasons for their decision. In the two latter cases the reference was made by consent of the parties, but the jurisdiction exercised in making the final Order in Council in the *Pental Island Case* was certainly an exercise of the Prerogative; for the consent of the Colonies concerned could not confer jurisdiction. It must, therefore, I think, be taken that the Prerogative then still existed, whether its exercise *in invitos* had or had not fallen into abeyance.

(1) 5 Moo. P.C.C., 259.

It is possible, indeed, that it was exercised *per incuriam*. In the *Ontario and Manitoba Case* the Judicial Committee reported that it was "desirable and most expedient" that the boundary of which they recommended the adoption should be declared by an Act of the Imperial Parliament. This, I think, should be regarded rather as an expression of opinion that the Prerogative, if it still existed, should not be exercised as between self-governing Dependencies than as an expression of opinion as to its continued existence.

I think that Lord Ripon's despatch of 19th September 1894 may be taken as a definite expression of opinion that the Prerogative so freely exercised in the 18th century ought not, in the existing conditions of the self-governing Dependencies, to be exercised without the consent of the Dependencies concerned. The Prerogative may, therefore, I think be regarded as having then fallen into abeyance, and as no longer affording a practicable means of solution of such difficulties.

I am disposed also to think that the boundary might after 1847 have been corrected by common consent of the two Colonies with, and possibly without, the formal approval of the Crown. This was certainly the position after 1861, when the Act 24 & 25 Vict. c. 44 was passed.

But in my judgment there was no other way of disputing or disturbing the delimitation of 1847.

Effective occupation is ordinarily the best proof of title to territory. In my judgment, for reasons already given, the effective occupation which followed on the adoption of Wade's and White's line was conclusive upon all persons unless and until the boundary should be otherwise determined by competent authority.

Settlement by agreement being out of the question, and the prerogative being, at best, in abeyance, it becomes necessary to consider whether the power exercised by the Crown under the Prerogative is now vested in this Court.

For this purpose regard must be had to the nature of that power and the nature of the right of a Dependency to invoke its exercise.

In the 18th century the Judicial Committee had not been

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

established. The reference in colonial boundary cases was, in practice, to the Committee of the Council for Trade and Plantations. The Committee was not bound to follow any rules of law, but no doubt advised the Sovereign to do what they thought just and fair.

It appears from an opinion given by *Sir W. Murray* A.-G. (afterwards Lord *Mansfield*) on 5th November 1754, with regard to a second controversy between the Colonies of Connecticut and Massachussets on a question of boundary, that it was not the practice of the Crown to disturb settlements of boundaries which had been made between Colonies and acquiesced in for a considerable time, though originally made without authority. This rule would, perhaps, have been equally applicable to the determination of such questions whether they were regarded as political or judicial. *Sir W. Murray* said :—"I am of opinion that in settling the above mentioned boundary the Crown will not disturb the settlement by the two Provinces so long ago as 1713, and Commissioners appointed in 1708. I apprehend His Majesty will confirm their agreement, which of itself is not binding upon the Crown, but neither Province should be suffered to litigate such an amicable compromise of doubtful boundarys. . . . If the matter was gone into at large, in my apprehension the question should not now be suffered to be agitated between the Provinces. The agreement ought to stand unless there are objections to it on the part of the Crown in respect of the inhabitants, or the King's sovereignty, or upon any account whatsoever. But if the King approves the agreement I think it is now too late for the parties to dispute it."

It is evident that that very learned lawyer, who may be taken to have been fully acquainted with the rules then adopted as to the exercise of this branch of the Prerogative, assumed that when such a settlement had been made, the *de facto* boundary adopted should be regarded as presumably right until revised by the Sovereign. Lord *Hardwicke's* opinion expressed in *Penn* v. *Lord Baltimore* (1), already referred to, is to the same effect.

It is also to be inferred, in my opinion, that in the exercise of the Prerogative in such cases the Sovereign was guided by

(1) 1 Ves., 444.

general rules of justice and good conscience, and not by any formal rules of law such as can be invoked by a suitor who has a right to redress recognized by law. It follows, in my judgment, that the jurisdiction exercised by the Sovereign was political and not judicial, and that the Dependency petitioning for redress did not invoke the exercise of the judicial power of the realm. The principle stated in the case of *Moses* v. *Parker* (1) is, I think, conclusive on the point. In that case an application was made to the Judicial Committee for leave to appeal from a decision of the Supreme Court of Tasmania given under a Statute of the Colony by which certain claims to Crown land were referred to the Supreme Court for examination and report. The decision and report of the Court were to be binding, final and conclusive between the parties concerned, and the Governor was bound to act in accordance with the report.

The Statute provided that :—"In examining into and reporting upon all such applications and matters as aforesaid, the said Court and Clerk of the Court shall be guided by equity and good conscience only, and by the best evidence that can or may be procured, although not such as would be required or be admissible in ordinary cases; nor shall the said Court or Clerk of the Court be bound by the strict rules of law or equity in any case, or by any technicalities or legal forms whatever." A similar power had previously been vested in Commissioners. The Judicial Committee held that a decision given under the Statute was not a judicial decision admitting of appeal. They said (2):—"It is no more judicial than was the action of the Commissioners and the Governor. The Court is to be guided by equity and good conscience and the best evidence. So were the Commissioners. So every public officer ought to be. But they are expressly exonerated from all rules of law and equity, and all legal forms." This language, in my opinion, accurately describes the nature of the jurisdiction exercised by the Sovereign in the exercise of the Prerogative in question. This conclusion is strongly supported by the circumstance that in the cases referred to the Judicial Committee during the nineteenth century lay Lords sat on the Committee; and that no formal judgment was delivered. The

(1) (1896) A.C., 245.

(2) (1896) A.C., 245, at p. 248.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Griffith C.J.

same practice was followed in the *Queensland Constitutional Case* in 1885.

The plaintiff State had not, therefore, in 1869, or at any later time, any right to invoke the judicial power of the realm in order to revise the settlement of 1847.

This Court, although it has jurisdiction to entertain the complaint in the present case, regarded as a complaint of invasion of territory, cannot give effect to any other than legal rights, and must give effect to the legal rights of the defendant State. Its functions are judicial only. It follows that, since the boundary of 1847 is valid until set aside by competent authority, and since the claim to have that boundary rectified is not a cause of action capable of judicial decision, the plaintiff State has no right of which this Court can take cognizance. The suit, therefore, fails and must be dismissed.

I may add, although what I now say is *obiter* only, that, even if the Court could with propriety inquire into the validity of the settlement of 1847, the long delay which has occurred would, in my opinion, be a bar to the claim of the plaintiff State, notwithstanding its long continued but ineffective protests. I think, with respect, that the principles laid down by the Supreme Court of the United States in the very recent case of *Maryland* v. *West Virginia* (1), following many previous decisions, and agreeing with those stated by *Sir W. Murray*, are sound, and should be adopted. I say so much for the satisfaction of the litigants, who earnestly invited the expression of our opinion on this aspect of the case.

BARTON J. I have read the judgment of the learned Chief Justice. In view of his full narration of the facts and of his statement, in which I agree, of the principles applicable to the facts, I deem it unnecessary to add a separate opinion, either on the question of jurisdiction or on the main questions of fact and law.

I agree that the claim should be dismissed.

O'CONNOR J. I have read the judgment of my learned brother the Chief Justice, and I agree with the conclusions at which he

(1) 217 U.S., 1.

has arrived, both upon the law and upon the facts. I do not propose to refer in detail to the facts and documents proved in evidence with which he has so adequately dealt. There are, however, some aspects of the case with respect to which I wish to state my reasons separately.

It is not denied that the true line of the 141st meridian, if marked on the ground in accordance with present knowledge, and by the aid of modern scientific methods and instruments, would be a little over two miles to the East of the marked line which has been the *de facto* boundary between the litigant States for the last sixty years. South Australia asserts that the strip of land between the true line of the 141st meridian and the *de facto* boundary is South Australian territory wrongfully in Victoria's possession. She asks in this suit to have her right declared, and the strip of land restored to her possession. She claims certain other relief which is merely consequential. The suit is therefore in substance one in which a State seeks to recover portion of her territory, of which she alleges that an adjoining State is in wrongful occupation. It is no doubt true that change of allegiance in the inhabitants of the disputed territory and other political consequences would necessarily follow, if it were adjudged that South Australia was entitled to possession. But that does not render this a suit for the determination of political rights over the land in dispute, nor is it any the less a suit the substantial object of which is to obtain redress for an alleged infringement of the plaintiff State's rights of property. The defence may in effect be summarized in a very few lines. It is objected, in the first place, that the Court has no jurisdiction to entertain the suit, the matters to be determined being in their nature not justiciable, and therefore not cognizable in a Court of Justice. It is also contended, and it is to this ground that the bulk of the evidence was directed, that, after what is proved to have taken place between the two States in the fixing, proclaiming and adopting of Wade's line, as marking the true position of the 141st meridian, and its subsequent recognition by both States for many years without question in the administration of their respective territories, it would be impossible for the Court to give effect to the plaintiff State's claim.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

O'Connor J.

Jurisdiction to entertain suits between States is conferred by sec. 75 of the Constitution in these words:—"In all matters . . . . between States . . . . the High Court shall have original jurisdiction." The generality of the word "matters" in this context is restricted by sec. 71. Reading the sections together the power which is thus vested in the High Court is judicial power, and judicial power only.

"Matters" must therefore be read as meaning "matters capable of judicial determination." In other words, it is only where the matter in controversy between States is "justiciable" that the High Court can entertain it. Lord *Loreburn* L.C. in *Dominion of Canada* v. *Province of Ontario* (1) states what is I think the true test for ascertaining whether a claim is, or is not, "justiciable"—Can it, he says, "be sustained on any principle of law that can be invoked as applicable?" This requirement, that the matter in dispute between States must be such that it can be determined on some recognized principle of law, differentiates in this respect the Australian from the American Constitution. At the time when the latter Constitution was framed, boundary disputes existed between several of the States. As each State had full rights of sovereignty over its own territory, no common code of laws could be applied in the determination of these controversies, and in most cases they were settled as such disputes are usually settled between independent nations. In some cases principles of international law were appealed to, but much oftener considerations of fair dealing, public convenience, or political expediency were the bases of adjustment. The earlier Union or Confederation of States had vested in it the power to settle such disputes between States, and when, in the framing of the United States Constitution, the power to adjudicate in "controversies between the States" was conferred on the Supreme Court of the United States, it was clearly intended to vest in that tribunal all the power of settlement and adjudication which up to then had been exercised by the Confederation, that is to say, the power to determine matters not justiciable as well as matters justiciable. The Supreme Court of the United States, in settling boundary controversies between States, has always acted on that

(1) (1910) A.C., 637, at p. 645.

view of its powers. That is made abundantly clear in one of the latest cases, *Maryland* v. *West Virginia* (1). The Australian Constitution, on the other hand, limits the power of settling disputes between States in boundary disputes, as in other cases, to those in which the matters in controversy can be determined by the application of recognized legal principles. Several decisions of the Supreme Court of the United States in State boundary disputes were cited during the argument. In following their guidance in the present case the distinction I have pointed out must be kept in mind. I do not, however, propose to refer to the American cases. The language of the Commonwealth Constitution in this respect is so entirely free from ambiguity that in my opinion no authorities are needed for its interpretation. It plainly says, and it clearly means, that whenever a question is raised as to the position of a boundary line between two States this Court will have jurisdiction to entertain it, if the question arises in a controversy between the States which is capable of being determined on recognized legal principles.

I have already pointed out that in this case South Australia's claim is, in substance, for redress against the infringement of her rights of possession to land which she claims to be portion of her territory. Whether the land in dispute is or is not portion of South Australian territory will depend upon the position of the boundary line which, according to recognized principles of law, delimited her territory on its eastern side at the time when her cause of complaint arose. Going back to its foundation her right rests upon a chain of Imperial Statutes. The boundaries are set out in the first of them, the 4 & 5 Will. IV. c. 95, which authorized issue of the Letters Patent under which the Colony was created. No less an authority than an Imperial Statute could alter the boundaries so laid down, and no Imperial Statute has altered them. Moreover, a title under Imperial Statute is of such high authority that no agreement between the Governors of the Colonies concerned, nor any act of the King or his Ministers could modify the rights created by the Statute, or restrict their exercise, unless power to so alter, modify, or restrict is to be found in the Statute itself, or in some latter enactment

(1) 217 U.S.R., 1.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

O'Connor J.

of the Imperial Parliament. South Australia's right to the possession of the disputed territory depends upon the interpretation of 4 & 5 Will. IV. c. 95 — no other statutory provision is material—and upon its application to the facts in evidence. The Statute, being in force throughout Australia, is binding on both the litigating States; its interpretation and application to the facts of the case are obviously matters capable of being determined on recognized legal principles. It follows that the claim is clearly within the jurisdiction of the High Court. Before, however, entering upon the matters thus in controversy, I shall shortly advert to a view suggested during the argument by my learned brother *Higgins*, and which he has expressed in the judgment he is about to deliver. The suggestion is a doubt whether the power to deal with her public lands, conferred on South Australia by her *Constitution Act* (18 & 19 Vict. c. 56), entitles her to such possession as is necessary for the maintenance of the present suit. With every respect to my learned brother's view, I can see no ground for the doubt suggested. As far back as 1847, the Supreme Court of New South Wales held that, on the first settlement of Australia by the British nation, the waste lands of the portions settled were "in point of legal intendment, without office found" in the Sovereign's possession (*Attorney-General* v. *Brown* (1)). The expression "Sovereign's possession" in that connection means, not the personal possession of the King, but the possession of the King as representing the supreme executive power of the British Empire. As rights of self-government were conferred on each Colony exclusive rights of executive authority over matters within the ambit of the rights conferred became of necessity vested in the executive power of the Colony. The Statute granting the right of self-government to South Australia expressly empowered the legislature to regulate the sale and other disposals of the public lands and the disposal of the proceeds for the Public Service of the Colony. That grant necessarily involved a cession to the executive power of the Colony of all rights of possession in public lands for public purposes which theretofore had been in the King as representing the supreme

(1) 2 S.C.R. (N.S.W.) App., 30, at p. 33.

Executive of the Empire. If that were not so, the right of self-government in respect of public lands would have been an empty form. Within the limits of self-government conferred by its Constitution the executive power of each self-governing Colony, though subject to control by Imperial enactment, is as independent of the executive power of the Empire as it is of the executive power of any Colony of the Empire. As pointed out by this Court in *Sydney Municipal Council* v. *The Commonwealth* (1) the Crown, as represented by the Executive in Great Britain and in each of the self-governing possessions of the Empire, is a separate juristic person, each within the ambit of its authority independent of the other, and I entertain no doubt that, if the British Government, by one of His Majesty's Ministers, were to enter into possession of a portion of the South Australian public lands, contrary to South Australian laws, His Majesty's Minister would be liable to be dispossessed by writ of intrusion at the suit of the State of South Australia, just as any other intruder would be liable. It is clear therefore that, but for the ground of defence to which I shall next refer, there could be no answer to the claim of the plaintiff State.

The main defence rests on the facts relating to Wade's ascertainment and marking of the position of the 141st meridian at the instance of the then Governors of South Australia and New South Wales, their approval and proclamation of the line so ascertained and marked, the ratification of their action by the British Government, and the subsequent adoption of the line by both Colonies concerned for nearly twenty years without question as the actual boundary between them for all purposes of administration. I entirely concur in my learned brother the Chief Justice's statement as to the facts concerning these matters, and I adopt his conclusions. I agree that Wade's ascertainment of the line was as accurate as was practicable, having regard to the condition of knowledge and the appliances for scientific observation then reasonably available in Australia—that the line was adopted and proclaimed by the Governors respectively, not as a provisional but as a permanent boundary line on South Australia's eastern side, intended to represent, as nearly as could

(1) 1 C.L.R., 208.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

O'Connor J.

be then ascertained, the true position of the 141st meridian. It is obvious that the ascertainment and marking of the line at that time had become essential for the efficient administration of both Colonies. It also appears plainly from the documents that the King's Ministers then charged with the administration of the Colonies approved and ratified the action of the Governors with full knowledge of all the facts. Under these circumstances the inference which, in my opinion, naturally arises, is that the boundary marked by Wade, and afterwards continued by White to the River Murray, represents the position of the 141st meridian as ascertained and marked by the British Government for the purpose of fixing the eastern boundary of the Province of South Australia in accordance with the Letters Patent which authorized its establishment.

The word "boundary," used in the connection now under consideration, imports, from the very nature and purpose of the thing described, a line of demarcation capable of being marked on the ground as the visible and permanent delimitation of separate independent adjoining jurisdictions. A line of demarcation, the position of which is liable to be moved a mile or so East or West whenever a new method of observation is discovered, or a new instrument of greater accuracy is invented, is a thing entirely inconsistent with the ordinary conception of a boundary line between the territories of adjoining Governments, exercising jurisdiction independent of each other. In other words, the very term "boundary" connotes in its ordinary natural meaning a line of division capable of being permanently fixed. I agree, therefore, that, where the Crown is empowered to create a new Province, a power must necessarily be implied in the Executive Government to ascertain and mark permanent boundaries unless the Statute or other document authorizing the establishment of the Province expressly or impliedly prevents that implication from arising.

Turning now to the Act 4 & 5 Wm. IV. c. 95, so far from being inconsistent with such a power, it expressly authorizes its exercise. It enables the British Government to erect and establish within the limits prescribed one or more Provinces and "to fix the respective boundaries of the Provinces." The Letters Patent

issued in pursuance of the Act establish one Province to be called the Province of South Australia. The eastern boundary is fixed in the following terms—I quote material words only:—"We do hereby fix the boundaries of the said Province in the manner following, that is to say . . . . on the East the 141st degree of East longitude."

In describing a boundary as the 141st meridian of "East longitude" a definite position on the earth's surface is indicated—just as it would be if the description were "a line running North and South passing through a point a thousand miles East of Greenwich." In either case the position of the line is capable of being ascertained with more or less accuracy. It must be taken to have been within the knowledge of Parliament when the Act of 4 & 5 Wm. IV. was passed that in marking out a meridian of longitude in South Australia at that period a line within two or three miles of the scientifically true position was as near an approach to accuracy as could be fairly expected, also that a visible permanent line of demarcation between the new Province and the adjoining Colony on the East would very early become essential for the purposes of administration. Under these circumstances a reading of the expression "fix the boundaries" which would confine its operation to a fixing on paper could hardly have been within the contemplation of the legislature. In its ordinary every day meaning the words are wide enough to cover a fixing and marking on the ground as well as a fixing by written description, and in that wide sense they ought in my opinion to be construed. It follows that the ascertainment and marking of Wade's line, and its approval and ratification by the British Government amounted to no more than an exercise of the power to fix the boundaries of the new Province conferred by the Statute which authorized its creation. What then were the rights of the Province and the adjoining Colony respectively when it was, many years afterwards, ascertained by the more accurate methods and instruments then available that there had been a substantial error in laying down Wade's line as marking the true position of the 141st meridian? Did the line ascertained and marked under the circumstances to which I have referred remain the legal line of demarcation, notwithstanding

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

O'Connor J.

the discovery of the error—or was South Australia entitled to disregard Wade's line and have the boundary moved eastward to the position in which the most accurate methods of the present day would place it, with the consequential right to possession of the lands which Wade's line had erroneously enclosed within Victorian territory. Those are the vital questions in this case, and the answer to them according to my view is embodied in the observations which I have already made. The power to fix territorial boundaries must imply the power to fix them permanently. A boundary liable to re-adjustment on the discovery of every new method or instrument which ensures a nearer approach to scientific accuracy in the ascertainment of meridians of longitude is not the kind of boundary which the British Parliament had in mind in enacting the 4 & 5 Wm. IV. c. 95. On the contrary, the language of the Statute, its subject matter and object and the conditions of Australian colonization at the time when it was passed, all lead to the conclusion that the legislature intended to endow the British Government with full power to ascertain and fix on the ground with all the accuracy attainable under the circumstances the true position of the 141st meridian as the permanent line of demarcation between the separate adjoining jurisdictions which it was the effect of the Statute to create. It was in pursuance of that power that the British Government by its officers laid down Wade's line and continued it afterwards to the River Murray. That line thereby and then became the fixed boundary of the Province on its eastern side, as binding on South Australia ever afterwards as if it had been described in express terms by the original Letters Patent. Whether the King in Council could when the error was subsequently discovered have entertained a claim on the part of South Australia to have the error corrected it is not necessary to determine. It is plain from the evidence that at least since the grant of self-government to the several Colonies of Australia the British Government has always declined to exercise any such jurisdiction without the consent of both Colonies concerned. The power exercised by the King in such cases before that time was a political, not a judicial, power. This Court, as I have shown, has no power other than judicial. It has cognizance

only of claims which are capable of enforcement in a Court of Justice, and in my opinion South Australia has not now and never had, after the proclamation of the boundary constituted by Wade's line, a right, capable of being so enforced, to any territory on its eastern side not included within that boundary.

I therefore agree that the plaintiff State has failed to establish its claim and that the suit must be dismissed.

ISAACS J. The first question is as to the jurisdiction of the Court to entertain the suit. This depends on the meaning of the word "matters" in sec. 75 of the Constitution. In my opinion that expression, used with reference to the judicature, and applying equally to individuals and States, includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties.

To extend the meaning of the term beyond this, would leave the Court without any limits of jurisdiction between States except the fact of some dispute, irrespective of cause or subject matter, and therefore possibly a controversy without any standard of right, but involving judicial interference with political and administrative action and discretion, a position unheard of, and altogether outside the pale of sober thought.

The defendants contend that the question raised by this section is not legal but political.

The necessary parliamentary authority to create the Colony of South Australia was given on 15th August 1834 by 4 & 5 Will. IV. c. 95, by which the King was empowered, with the advice of his Privy Council, between the 132nd and 141st degrees of East longitude, to establish one or more Provinces and to fix the respective boundaries of such Provinces.

On 19th February 1836, the King, by Letters Patent with the necessary advice, and purporting to act in pursuance of his parliamentary powers, established South Australia and fixed its boundaries, the eastern boundary being 141 degrees East longitude. This act of the King, including the fixation of the boundaries, was not a prerogative act; but in strict and acknow-

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Isaacs J.

ledged pursuance of a parliamentary authority, and deriving its efficacy therefrom.

The Letters Patent had the statutory force of the enactment under which they were issued, and the plaintiff State, that is, the Crown " in right of " the State of South Australia (*Burrard Power Co. Ltd.* v. *Rex* (1)), or the Crown " as represented by " that State (*Attorney-General for Dominion of Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia* (2)), contends, as appears from the statement of claim, and as in argument stated, that its eastern boundary having been by Imperial legislation declared to be the 141st meridian, that could not be altered, intentionally or otherwise, by any departure from that meridian without the consent of the British Parliament, which has never been given. It avers that Wade's line, being over two miles distant from the meridian, is therefore not the true boundary, and should be so declared, as against the defendant State, that is, the Crown in right of the State of Victoria.

That raises a question of law determinable by reference to legal considerations only, and justiciable by this Court. If it be not so justiciable, then whenever new States may be admitted or established, or the boundaries of States may be altered under the provision of Chapter VI. of the Constitution, this Court cannot, but the King in Council exclusively may, for all future time, entertain a dispute as to boundaries. This, however, is not within the range of possibility, and, if not, it seems to follow that the Court has, with regard to the present boundaries of existing States, jurisdiction equally with respect to the future boundaries of those or future States.

It was contended on behalf of the defendant State that the jurisdiction still remains political because the ascertainment and settlement of boundaries between disputing Colonies is a branch of the Royal Prerogative, and it is said this must be so because, in addition to the direction of the Act and the statutory Letters Patent, circumstances have occurred, as in such cases circumstances do occur, which must, from their nature, be resolved not according to any rules of positive law, but by the application of

(1) (1911) A.C., 87, at p. 95.

(2) (1898) A.C., 700, at p. 709.

political considerations, or by resort to rules of international law, not applicable to dependencies of the same Empire.

It is all important to observe that the Act of 4 & 5 Will. IV. c. 95, in conferring the power of His Majesty, required him both in the establishment of Provinces and the fixation of their boundaries to act with the advice of the Privy Council, which means in constitutional practice, with the advice of the Ministry of the day. In other words, the permitted declaration of the Royal Will was in this instance to be, not an exercise of the Prerogative conferred by the common law to govern the Colonies, but an act of responsible administration on the part of the Imperial Government under parliamentary authority. It is quite clear, therefore, that no prerogative power could derogate from the act of the King pursuant to his legislative will with the concurrence of Parliament.

The argument, however, as to the Prerogative of the King in Council, acting as a tribunal to determine disputes, went so far as to maintain that the settlement of inter-provincial boundaries, whenever a dispute arises, and however the Province is created and governed, is always a political question, and if determined at all, must be determined exclusively by the King in Council. No British precedent or authority covers so wide a proposition. Some observations of the American Supreme Court were quoted in favour of the view, but they appear to me consistent with a less expansive meaning, and if not, then to be irreconcilable with the opinion of Lord *Hardwicke* L.C. The case of *Penn* v. *Lord Baltimore* (1) is a guide on this and other material points of law that call for our determination. There the same objection was raised, namely, that the King in Council alone had jurisdiction.

The Lord Chancellor speaks of the "original jurisdiction" of the King and Council in boundary questions, compares it to trials in Commotes or Lordships and observes (2):—"But in those disputes, where neither had jurisdiction over the other, it must be tried by the King and Council; and the King is to judge, though he might be a party; this question often arising between the Crown and one Lord-Proprietor of a province in America: so in the case of the Marches, it must be determined in the King's

(1) 1 Ves., 444.

(2) 1 Ves., 444, at p. 447.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Isaacs J.

Court, who is never considered as partial in these cases; it being the judgment of his Judges in B.R. and Chancery. So where before the King and Council, the King is to judge, and is no more to be presumed partial in one case than in the other. This Court therefore has no original jurisdiction on the direct question of original right of the boundaries."

The Lord Chancellor's opinion then was that the King and Council had jurisdiction to judge as a judicial tribunal of the controversy, even where the King himself was one of the parties —the latter consideration having no relevance except to judicial action.

He goes on to show that the relief prayed before him was on another ground, namely, agreement, and says (1) "an action of covenant could be brought in B.R. or C.B. . . . . without going to the Council."

He holds that (1) "the King in Council is the proper Judge of *the original right*," but cannot decree specific performance of the agreement; a Court of Equity can alone do that. His words are (1): "If that agreement is disputed, it is impossible for the King in Council to decree it as an agreement. *That Court*," says the Lord Chancellor, "cannot decree *in personam* in England unless in certain criminal matters; being restrained therefrom by Statute 16 Car., and *therefore* the Lords of the Council have remitted this matter very properly to be determined in another place on the foot of the contract."

Reference to the Order in Council of 16th May 1735, when Lord *Hardwicke* himself was present, shows that the King ordered that the consideration of the report of the Committee of the Council for Plantation affairs should be adjourned that John Thomas and Richard Penn might have an opportunity to proceed in a Court of Equity to obtain relief on the articles of agreement insisted by them, with liberty to apply to the Plantation Committee as the nature of the case might require. This is the language of a Court, not of a mere political body exercising purely political functions.

Several Orders in Council made by the Sovereign upon boundary disputes between American Colonies were exhibited to the

(1) 1 Ves., 444, at p. 447.

Court, and relied on as proof of the Royal Prerogative, which, it is urged, has not been taken away. The latest is that between New York and Quebec in 1768. But there is, first of all, the view of Lord *Hardwicke*, expressed while the function was in operation, that it was of a judicial nature, so that its continuance, like the present legal power of the Judicial Committee under the *Privy Council Act* (3 & 4 Will. IV. c. 41), would not offer any obstacle to the concurrent jurisdiction of this Court. And next, if it could be considered political, I should be prepared to hold its operation had long ceased with regard to the States of this Commonwealth.

In *Campbell* v. *Hall* (1) Lord *Mansfield*, speaking for the Court, pointed out that the King's prerogative power is a power subordinate to his own authority as a part of the supreme legislature in Parliament.

That was the case of a conquered country where the Prerogative is greater than in the case of a newly settled country, and I may here observe that in the view of *Blackstone*, writing in 1768, American Colonies fell within the class of conquered or treaty countries. Having promised a particular form of constitution to Grenada the Court held the promise irrevocable, as an invitation to subjects to settle there. The Prerogative so far as inconsistent with that promise was abandoned.

And by parity of reasoning, when the King in Parliament has undertaken to deal with the establishment of a dependency, and has declared that its boundaries shall be fixed by the King with the advice of his Privy Council, and when the King in Parliament has further proceeded to confer a representative self-governing Constitution upon the dependency comprised within the boundaries so fixed (18 & 19 Vict. c. 56). it would be highly unconstitutional in the British sense, and in my opinion also inconsistent, and therefore unlawful, for the King to assert as a common law Prerogative, by virtue of his regal dignity alone, the power to treat as a mere political question, regardless of legal rights, and to deal with it by his own personal authority free from the concurrence of Parliament, a boundary dispute between that dependency and another possessing similar powers of self-government

(1) 20 St. T., 239, at p. 323.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Isaacs J.

(18 & 19 Vict. c. 54). Such personal authority is as inconsistent with the parliamentary declaration of territorial limits as with that of legislative limits. If the Sovereign by his own Royal Prerogative may determine politically disputes as to the first, I see no reason why he may not similarly determine the other.

The principle, as I conceive, is contained in the judgment of the Privy Council in the case of *In re Lord Bishop of Natal* (1), where Lord *Westbury* L.C. says :—"With respect to the first question, we apprehend it to be clear, upon principle, that after the establishment of an independent legislature in the Settlements of the *Cape of Good Hope* and *Natal*, there was no power in the Crown by virtue of its Prerogative (for these Letters Patent were not granted under the provisions of any Statute) to establish a Metropolitan See or Province, or to create an Ecclesiastical Corporation whose *status*, rights, and authority the Colony could be required to recognize.

"After a Colony or Settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or Settlement as it does to the United Kingdom." The only Prerogative —and, at all events, the only surviving Prerogative—in relation to such a matter must be of a judicial nature, exercisable either upon appeal in the ordinary way, or original under the 4th section of the Act of 3 & 4 Will. IV. c. 41.

The result is that in 1869, when the controversy first arose, there was no political jurisdiction resident in the Sovereign with or without the aid of the Imperial Council to declare the position of the true boundary *in adversum* between South Australia and Victoria.

There was a right under the 4th section of the Act of 1833 to refer the matter to the Judicial Committee, but Her Majesty by the Secretary of State (Lord Ripon) in 1894 declined to exercise that power except upon the joint request of the Colonies concerned.

It is not unworthy of observation that, as the matters which under that section are referable to the Judicial Committee are obviously those of a judicial nature (see *Todd's Parliamentary*

(1) 3 Moo. P.C.C., N.S., 115, at p. 148.

Government in the Colonies, p. 305, and the speech of *Sir George Jessel*, Solicitor-General, *Hansard*, vol. 209, p. 984), this dispute, if the defendants' argument be correct, could never have been lawfully referred or dealt with under that section. If, however, it could have been referred as being a judicial matter, this Court must of necessity have jurisdiction.

As a competent forum for inter-State controversies its status is complete; and the *lex fori* must be either direct Imperial legislation or Colonial legislation authorized by some Imperial enactment.

If on examination of the case it be found that the claim is not supported by any law binding the defendants, but is dependent on political considerations merely, the Court must say so. It has jurisdiction to entertain the suit, but in the course of its exercise it may be compelled to adjudge adversely to the plaintiffs on the ground that no paramount law can be found to support their claim. An instance of such a case is found in *Shekh Sultan Sani* v. *Sheikh Ajmodin* (1). A suit was brought in an Indian Court to declare the rights of the plaintiff to certain saranjam (which is an assignment of lands or their revenue by the State for the support of troops) and a jaghir, a kind of grant. The decision was against him. The Privy Council ultimately held in these terms:—"Their Lordships are of opinion that the question to a saranjam or jaghir shall be granted on the death of its holder is one which belongs exclusively to the Government to be determined upon political considerations, and that it is not within the competency of any legal tribunal to review the decision which the Government has pronounced." But the Court has always jurisdiction to determine in the first place whether the standard is political or legal.

Passing now to the matter in issue, the question is not where we, as a Congress of Astronomers, could locate the 141st degree with the least probability of error—for utter precision is even at present impossible—but where, according to law, it should be held in this action to be, as between these parties and for the purpose of the boundaries between the two States. The contention for the plaintiff State, divested of immateriality, is short and

(1) 20 L.R. Ind. App., 50, at p. 68.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Isaacs J.

simple. The Imperial law says the 141st meridian is the true boundary. Wade's line is not that meridian astronomically considered, and therefore Wade's line is not, and cannot be considered, the true boundary. The defendants' contention is also short and simple. It is that Wade's line was arrived at as the result of a scientific attempt authorized by the two States to ascertain the position of the meridian for the purpose of locating their true boundary, and as a step indispensable to enable them to carry on in the future their respective governmental functions—legislative, administrative and judicial; that it was delimited with the honest endeavour to fulfil the conditions of the law; was accepted by both parties at the time; acted on by both unquestioningly for 20 years, and since then under informal protest by one, and should not be disturbed. I agree that the true boundary is and must be taken always to be in law the 141st meridian and no other line. I see no right in this Court to declare the boundary to be any line but that which it finds upon the evidence controlling the issue, and according to the law applicable to this case, to answer the description of the 141st meridian. But it does not follow that the Court is compelled to resort to the evidence of the position of the astronomical meridian as it may now be scientifically approximated as the controlling evidence, and to disregard all that has taken place since the Letters Patent were issued.

The Imperial Parliament empowered the King to establish a Province or Provinces between the meridians of the 132nd and 141st degrees of East longitude and to fix their respective boundaries, and words were added providing that all persons resident in those Provinces should not be subject to other Australian laws past or future, but only to such laws as might be made within the Provinces by persons there resident and empowered so to do by His Majesty in Council. This instant repeal of all legislation in the new Provinces of itself carries with it the necessary implication of Parliament that the point where the old jurisdiction ceased and the new jurisdiction began would be definitely indicated to residents whose position was affected by the change. It certainly did not contemplate an indeterminate boundary, or that the residents of either side should rely on their own astronomical

knowledge at the peril of becoming law-breakers liable to punishment, nor did it contemplate a boundary shifting according to the progress of science. Further, Parliament did not intend that the titles of settlers would become insecure or void, judicial jurisdiction should arise and disappear, laws come into or cease from operation, in conformity with the advance in mechanical art, or the personal equations of skilled astronomical observers.

The territory was severed from New South Wales and handed over for immediate independent colonization and government as a practical measure. The Preamble declared that divers of His Majesty's subjects, possessing amongst them considerable property, were desirous to embark, and that it was highly expedient they should be enabled to carry their laudable purpose into effect. Nothing could have been further from the mind of Parliament or more inimical to its declared object than the possibility of annulling, by unexpected boundary alterations, Crown grants to the prospective settlers who were induced to embark with their property to the new Province. The meridian of a degree of longitude is an imaginary circle necessarily requiring a physical act to locate its position with reference to the earth. The success of the operation of locating a meridian on the earth's surface depends upon the state of science for the time being. And Parliament, having in view its declared object, must have contemplated that operation being performed with all the attendant difficulty and possible want of astronomical precision that beset the knowledge of the day. In other words, the 141st meridian of the Statute, and the Letters Patent following it, meant the 141st meridian as it could with reasonable certainty be marked when required upon the surface of the earth, by trustworthy men possessing the recognized standard of professional skill and using due care. When, therefore, the time arrived at which the necessities of government called for the identification of the boundary, the two Colonies concerned proceeded to do what, in my opinion, they were in duty bound to do, what they were expected by the terms of the Statute and the Letters Patent to do, and what indeed the circumstances forced upon them. The necessity of delimitation might plainly arise suddenly and urgently—in those days communication with London was tedious and protracted—

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Isaacs J.

instant action was necessary to protect life and property, to restrain lawlessness and punish crime, as well as to promote settlement. The Imperial authorities had not undertaken the task of delimitation, the Governor's Commissions did not contain any restriction in this respect, and the irresistible inference, to my mind, is that the task had been left to the local authorities, who were assigned functions and responsibilities side by side, and with no other means of fulfilling them, and therefore it was by necessary implication an act within the scope of their authority and within their powers. This inference is confirmed by the subsequent approval by the Secretary of State of the way the work had been done and his desire to continue it. And, once done, it was of the essence of the matter that it should be permanent. A boundary line known to be incorrect and delimited as a mere passing convenience, simply to establish liability for murder and to try and punish offenders, can hardly be conceived as even a temporary compliance with the paramount law.

Nor is it a reasonable supposition that the line was fixed with an implied reservation that it was to be subsequently altered if found incorrect. The notion is scarcely conceivable that titles were to be taken and paid for, and homes built, political ties and institutions formed and established, all with the consciousness that the boundary once fixed might at any moment be altered, and at indefinite intervals swing backwards and forwards. The only reasonable idea is permanency of a boundary delimitation in accordance with the law so far as that was then practically possible, having regard to the circumstances of the country, the state of science when the operation was undertaken, and the urgency of the occasion. The argument of instability, if sound in the present case, would apply to every meridianal State line on the Continent.

If, however, the fixation of Wade's line was undertaken only as a temporary expedient outside the requirements of the law, and by way of establishing a line of demarcation which was not intended to represent actually the 141st meridian, but only an approximation to it, then it was not a compliance with the law, and South Australia would, in my opinion, succeed. I do not accede to the doctrine that acquiescence by the two States in

a known illegal course, involving an intentional breach of Imperial law, would of itself, or together with its actual or anticipated result, create any right to continue that unlawful course. The doctrine of *MacAllister* v. *Bishop of Rochester* (1) and *Islington Vestry* v. *Hornsey Urban Council* (2) seems to meet that case, because public duties cannot be so divested, or governmental jurisdiction and power so created. But the line was established, according to my reading of the evidence, as a lawful, definite and permanent line between the two Colonies, so as to identify their respective limits for all purposes and for all time.

What, then, was in fact done ? The proclamations are, I think, sufficient, and, strictly speaking, exclusive evidence of the nature of the proceeding by which the boundary was ascertained. The terms of those documents are not doubtful. Lieutenant-Governor Robe's proclamation recites the necessity which has arrived to mark out and ascertain the 141st degree of East longitude which had been fixed by the Letters Patent ; it recites the arrangement between the two Colonies, by which the position of that meridian had been " correctly ascertained at a spot on the sea coast near the River Glenelg," the survey of the meridian northward as far as the 36th parallel of South latitude, and its marking by artificial means, and then declaring it was expedient that the survey should be " authoritatively adopted " and made known, proceeded formally to notify and proclaim that the line so marked " is and shall be deemed and construed to be the eastern boundary of the Province of South Australia to all intents and purposes."

So far as words can make the adoption of a boundary line permanent and definite, that proclamation did so.

In shorter, but equally explicit, terms Governor Fitzroy's proclamation declared the survey the true boundary line.

There thus seems no room for any belief except that the line was regarded as definitively established beyond the possibility of future question.

But in a matter of so much moment to the States concerned, and in which the actual intention of the parties, notwithstanding official pronouncement, was so strenuously contested, I think it

(1) 5 C.P.D., 194. (2) (1900) 1 Ch., 695.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Isaacs J.

highly desirable to shortly review the progress of the chief events which led up to the formal and official adoption of Wade's line.

The earliest relevant reference to the eastern boundary of South Australia is contained in a despatch dated 30th September 1844 from Governor Grey of that Colony to Lord Stanley (Ex. R.). The Governor reminded the Secretary of State that it would be extremely difficult to determine with accuracy a number of points upon the earth's surface through which the 141st degree of East longitude passes, and pointed out that in addition to difficulty there would be attendant expense both in ascertainment and maintenance. He stated "the question of the position of the eastern boundary of this Province has now ceased to be one of mere theoretical speculation" on the grounds of both settlement and order, and recommended the substitution of indicated natural landmarks instead of the meridian, so that, at the earliest point of discussion, the difficulty of accurate ascertainment was recognized.

The Secretary of State, while aware of the inconveniences, thought the correction not sufficiently urgent, and communicated with the Governor of New South Wales on the subject.

Sir Thomas Mitchell reported to his Governor in favour of the substitution of natural landmarks for the 141st meridian.

Superintendant Latrobe on 22nd December 1845 (Ex. V.) assented, but suggested other marks. Governor Gipps laid the question before his Executive Council on 3rd February 1846. That body did not favour either of the boundaries proposed, but agreed that some legal alteration of the boundary was desirable. The course they proposed was that the 141st degree should be adhered to, with this modification, viz., that a Commission should be authorized by the Queen to lay down a boundary, that is, a new legal boundary, deviating from the meridian line where within a limited distance geographical features presented themselves as favourable natural frontier marks.

Governor Gipps on 29th April 1846 in a despatch to the Secretary of State suggested instead of the 141st meridian, but deviating as little as possible from it, a conventional boundary to be arrived at by the two Governors, and approved by the Queen.

While these matters were under consideration the urgency of

immediate action in delimiting the boundary increased. Commissioner Bonney of South Australia called the attention of the Governor to the necessity of having the eastern boundary approximately defined as soon as possible. He pointed out three things, that the country was occupied for 70 miles from the coast, that there were 12 or 14 settlers so close to the boundary as to create uncertainty as to liability for rents, thus causing loss of revenue, and lastly the fact of bad characters resorting to the debatable territory.

Lieutenant-Governor Robe then (22nd July 1846) communicated with Governor Gipps enclosing part of Bonney's report, stating his concurrence in Bonney's views as to the desirability of an early determination of the boundary, and asking for suggestions for provisional arrangements to prevent the inconveniences complained until some definite and marked boundary could be determined on the spot. Even the time necessary to mark the boundary without delay should, in his Excellency's opinion, be covered by temporary arrangement.

Governor Fitzroy, who in the meantime had succeeded to the Government, obtained a report from Superintendent Latrobe on the subject. That gentleman again stated his concurrence with the Executive Council's conclusions already mentioned, but with a view to the immediate definition of the boundary line said in effect that, whichever of the three points (Mitchell's, Tyers' or Stokes'), which were variously thought to represent the 141st degree, was taken, a true North and South line should be run to the Murray River. He seemed to prefer Tyers' point. Governor Fitzroy on 15th September 1846 replied to Lieutenant-Governor Robe communicating the earlier views of the Executive Council and Latrobe's suggestions. Lieutenant-Governor Robe replied (28th September 1846) drawing attention to several murders committed in the vicinity of the undefined boundary, and expressing the necessity of some *measures* for a provisional adjustment of a line of demarcation, or for giving the local magistracy reciprocal jurisdiction, until the question of boundary shall have been finally determined.

While that letter was under consideration by the Governor of New South Wales, Mr. Mundy, the Colonial Secretary of South

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Isaacs J.

Australia, by direction of the Governor directed the Surveyor-General to report on the subject of laying out the boundary line between the two Colonies, and especially warned him that no other line than that of the 141st meridian could be adopted as the law then stood. Captain Frome, the Surveyor-General, asked (9th October 1846) whether he was required to determine it by reference to Greenwich only, in which case he would require various original astronomical observations—obviously requiring much time, trouble and expense—or whether he was at liberty to make Tyers' point a starting point, a course he recommended as substantially accurate. Lieutenant-Governor Robe thereupon (14th October 1846) communicated with Governor Fitzroy stating Frome's concurrence with Latrobe's as to adopting Tyers' line, and added:—"It is of course unnecessary for me to remind your Excellency that, however desirable it may be to adopt at some period natural features of country as to the boundary of the provinces, none other than the 141st meridian of East longitude can be recognized without the authority of a new Act of Parliament."

On 26th October 1846 Lieutenant-Governor Robe forwarded to Governor Fitzroy a further letter of Frome, who was evidently and naturally anxious that South Australia should get all the territory she was entitled to, and referring to a slight difference between Tyers' and Stokes'. Governor Robe says: "As the Imperial Parliament has decided that the boundary shall be on the 141st degree of East longitude, it remains for us to ascertain that meridian *by the best means in our power*, to prevent further litigation among the occupiers of the soil." On 30th December 1846 Governor Fitzroy replies to both despatches and indicates what he considers the best means. He says:—"I apprehend that *the best means in our power* to ascertain the 141st meridian of East longitude so as to meet the provisions of the Imperial Act will be to direct the surveyors employed to strike a mean line between the calculation of Captain Stokes and Mr. Tyers." The Governors therefore thoroughly appreciated their duty to discharge this important function by the best means in their power consistent with the requirements and emergencies of the situation, and after weighing the possibilities

they jointly arrived at a conclusion which we, at this distance of time and with a less perfect acquaintance with the necessities and facilities then present, are not in a position to reverse.

Instructions were accordingly given to Surveyor Wade (28/1/47), who was deputed to do the work for both parties (see Ex. V.). As, however, positive information as to Stokes' point was not furnished to Wade, he with the concurrence of White, the person who was watching for and reporting to South Australia, adopted the point which Tyers had determined to be the 141st meridian, and on this basis, which was in favour of South Australia, the survey proceeded.

On 12th May 1847 Colonial Secretary Mundy conveyed to White the Governor's approval of his report, and both Governments adopted the line as the correct line of the meridian. The fact of authoritative recognition by both parties was by each of them communicated in the ordinary course of official duty to the Secretary of State.

As Governor Fitzroy said (8/1/48), "the line thus marked had been formally adopted by the Government of South Australia as the eastern boundary of that Province. This resumé of the internal preparations for the proclamations shows that the final official documents accurately stated the acts and intentions of the parties, and that unless and until the law should be altered the demarcation was to stand.

The notion of the delimitation being only of a temporary nature originated in 1893 in a despatch of Sir John Downer's, dated 18th January of that year. The dispute had then lasted from 1869—that is, 24 years—without any suggestion that the recognition of Wade's line was intended to be subject to revision. The contention up to 1893 had been that, notwithstanding the intended adoption of the line as the permanent frontier, the law denied it that character because in fact astronomically it was not the 141st degree of East longitude. And there are, among others, two circumstances of great importance which evidence the belief that up to 1869 the South Australian authorities understood the line was intended to be permanent, of course because it was thought to be accurate, and that even up to 1894 the successive administrations of that Province had no conception of any

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Isaacs J.

element of a temporary tentative character in the official recognition of 1847.

The first is, that the South Australian land grants went practically up to Wade's line—a mere strip of road reservation being left manifestly for mere convenience of communication between the private land and the frontier. Any possible rectification of boundary might turn out to be as probably one way as the other, and I cannot conceive the Governments of the Province issued their grants to South Australians with the latent idea that some day they might all be illegal and void. The other circumstance is, that until 1st August 1894 Lieutenant-Governor Robe's proclamation of 1847 was allowed to stand. On that date, however, Lord Kintore by proclamation revoked Lieutenant-Governor Robe's proclamation, reciting amongst other things that it had long since served the temporary purpose for which it was issued. I cannot but think this revocation would have been long previously effected if the idea of a temporary purpose had been entertained. On the supposition that Lieutenant-Governor Robe's proclamation was inherently void, revocation was unnecessary, and so it was until 1894 allowed to remain unnoticed.

As to the Home authorities, Earl Grey acknowledged Governor Fitzroy's despatch of 18/1/48 on 17th May 1848 and signified his approval of the care with which the work of delimitation appeared to have been accomplished. If the assent, not of the Governor personally, but of the Imperial Government—as a Government—was necessary, this was given. I do not rest on any such assent as necessary for the definite legality of the boundary so ascertained. That I consider as completed by the Governor acting by proclamation as the King's representative for executive purposes, and by the implied authority which the Commission conferred upon him. I regard the communication to and the approval by the Secretary of State of the delimitation of the boundary as evidence that all parties thought it had been finally and satisfactorily accomplished. The Imperial Treasury (11/12/50) also approved of the expenditure, clearly on the basis that the work was final. On 30th June 1848 Earl Grey considered further that this survey should be carried on to the Murray.

Proceeding then on the clear basis that Wade's boundary line, with its extension to the Murray, was adopted as a permanent frontier, and was so acted on for many years, how does that stand in law?

I put aside all the arguments that the later legislation, Imperial and local, must be construed as enacting by declaration or necessary implication that Wade's line right or wrong must be taken as the true boundary. I do not read the Imperial enactments as attempting to vary rights, or to silence doubts, and particularly do I reject the contention that in separating Victoria from New South Wales, a process affecting these two Colonies only, there was any idea present to the British Parliament so unjust as to prejudice whatever rights or claims South Australia might have, and might otherwise establish. I read every enactment as assuming the eastern boundary of South Australia to be what prior enactments and the Letters Patent had declared it to be, namely, the 141st degree of East longitude.

But assuming that, the question is what effect the law attributes to the intended permanent delimitation, and the adoption of the accuracy of Tyers' ascertainment of the 141st meridian, and Wade's consequent marked line, with White's extension of it?

In my opinion the law for the purposes of this case regards the line so marked as the 141st meridian intended by the Letters Patent. I do not rest my opinion on the mere fact of agreement, or estoppel from agreement. I take my stand upon the ground that the final adoption by proclamation of the line was the ultimate step of the process of separating South Australia from New South Wales which was authorized by the Act of Will. IV., and begun by the Letters Patent. Whether that step was or was not subject to revision by the King in Council at the time it is quite immaterial to inquire, because it was not objected to, and was in fact approved by the Secretary of State.

Learned counsel for the plaintiff State contended that alienation was incompetent, and I agree. They also argued that, as soon as the astronomical position of the meridian is found to differ from the line as projected on the ground, alienation is necessarily proved. This is answered by the view already stated.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Isaacs J.

Lord *Hardwicke* L C. in *Penn* v. *Lord Baltimore* said (1):—"To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made, without collusion, (which cannot be presumed) the boundaries so settled are to be presumed to be the true and ancient limits." And again (2) "if there is no fraud or collusion, *it must be presumed* to be the true limits being made between parties in an adversary interest; each concerned to preserve his own limits, and no pecuniary or other compensation pretended."

And without giving weight to any other evidence—because the judgment (p. 452) shows that Lord *Hardwicke* assumed the evidence left it doubtful where the true boundary was—the Lord Chancellor decrees specific performance on the footing that the agreement is binding and conclusive.

But that is not, as I think, a complete analogy to this case, except on the point that settlement of boundaries is not an alienation.

The agreement was between private persons, and in respect of their own personal and private proprietary rights, and was given effect to as such. This clearly appears from the way Lord *Hardwicke* dealt with the case, and so Lord Chancellor *Selborne* understood it (see the Ontario and Manitoba proceedings before the Privy Council at pages 21 and 23.) The Crown's rights and the public duties enacted by the Charters were expressly saved by the Lord Chancellor. He drew a marked distinction as to the effect of the agreement between the parties in his Court, and between parties before the King in Council on the question of the original rights of the boundaries. There, says Lord *Hardwicke*, the agreement if fairly entered into and signed might be looked upon by the King in Council, and allowed as *evidence* of the original right—provided it was either an undisputed agreement, or previously established in Equity. In that connection it creates rather an admission than a binding obligation.

The private agreement of the parties could not, where the King's rights are concerned, that is in the government of his subjects, or his own proprietorship, in any way alter or affect the boundaries, and so, said the Lord Chancellor: "I shall express in

(1) 1 Ves., 444, at p. 448. (2) 1 Ves., 444, at p. 450.

the fullest words that this decree is entirely without prejudice to any prerogative right or interest in the Crown." The distinction between public and private rights in those proprietary Colonies is well shown by the opinion of *Holt* L.C.J. of 3rd June 1690 (*Chalmers' Opinions*, p. 65) where he said with reference to Maryland: "It being a case of necessity I think the King may by his Commission constitute a Governor, whose authority will be legal though he must be responsible to Lord Baltimore for the profits."

Consequently, if the arrangement contained or consummated in the proclamations here were to be looked upon as evidence only, on the direct question of the boundaries, as the King in Council according to Lord *Hardwicke* could have done in *Penn* v. *Lord Baltimore* (1), there would have been considerable force in the argument for South Australia, because alienation directly by agreement, or indirectly by acquiescence in acts done, in violation of the law, would not in my view be permissible. And in the final Order in Council of 11th January 1769 in *Penn* v. *Lord Baltimore* (1) it is to be noted that the King approved of the agreements only so far as concerned the disputes between the petitioners themselves, and not so as to affect any Crown prerogative power or interest, or any third person's interest in which, says the Order in Council (2), the petitioners "had not a right or power, by virtue of the respective charters or grants under which they claimed to bind or conclude."

The true and only ground therefore on which I feel at liberty to regard the ascertainment of the boundary as final and binding here is that it was carried out by legal authority, in the manner and circumstances designed by competent legislative and executive Imperial authority, and is in law in this case, and as between these two States, irrevocably to be deemed to be the 141st meridian within the meaning of the Letters Patent.

HIGGINS J. I regret to find that I cannot take the same view of this case as the majority of the Court.

If, indeed, the decision were based on the mere ground that, on the allegations of the statement of claim, the State of South Australia has no cause of action, I should probably be found in

(1) 1 Ves., 444. (2) 1 Ves., Suppl., p. 195.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Higgins J.

agreement with my learned colleagues as to the result—for reasons which I shall state hereafter. Meantime, I shall assume that the plaintiffs, as donee of the power "to regulate the sale and other disposal" of South Australian lands, is in the same position as the proprietor of the lands, and shall proceed to inquire what is the true boundary in the eyes of the law.

As I regard this question, the answer is very simple. We have merely to read attentively the relevant Acts of the British Parliament, and to apply the trite principle that even the King's Prerogative must yield supremacy to an Act of Parliament. It is admitted on all sides that the boundary as marked on the land between these two States is about two miles further to the West than the 141st degree of East longitude, as ascertained by modern observations. If the true 141st degree of East longitude was made the boundary by a British Act then nothing that the surveyors did, nothing that the Colonial Secretaries or Ministers did, nothing that the Governors did, nothing that the Secretaries of State did, nothing that the King did, altered—or could have altered—that boundary.

The history of the case has been so fully and clearly stated by the Chief Justice that it is unnecessary for me to repeat it. I propose to show my attitude in a series of propositions.

1. The Act 4 & 5 Wm. IV. c. 95 enabled the King by Letters Patent to create a new Province or Provinces within the territory of New South Wales as far East as "the 141st degree of East longitude."

2. By Letters Patent of 19th February 1836 the King created the Province of South Australia, fixing its boundary as "on the East the 141st degree of East longitude."

3. Whatever was the meaning of the words in the Act was the meaning in the Letters Patent.

4. Whatever was the meaning of the words in 1834 is their meaning still.

5. The boundary remains what it was in 1836, unless it has been changed by some Act of the British Parliament.

6. The words in question are technical words of science, and must be taken in their scientific meaning (*Shore* v. *Wilson* (1);

(1) 9 Cl. & F., 355, at p. 525.

per Blackburn J. *Reg.* v. *Castro* (1); *Maxwell on Statutes*, 2nd ed., p. 2).

7. The words meant—and mean—the line—invisible, as the equator is invisible—which would accurately represent 141 degrees East from the Greenwich meridian; as if one said so many miles East from that meridian.

8. The Act 1 & 2 Vict. c. 60 enabled the Queen to appoint persons to make Ordinances for the new Province; and in the recitals the boundary is again described as "on the East the 141st degree of East longitude."

9. In 1839, Mr. Tyers, under instructions from the Governor of New South Wales, marked near the coast a spot, which, as the result of chronometric and lunar observations, he thought would fairly represent the 141st degree. Subsequently, as the result of triangulation, he thought that the 141st degree was about two miles further to the West, and so reported. The original spot marked was in fact more nearly correct.

10. By an Act 5 & 6 Vict. c. 36 it was expressly provided that the waste lands of the Crown in the Australian Colonies should not, except as thereinafter provided, be conveyed or alienated by Her Majesty or by any person or persons acting on the behalf or under the authority of Her Majesty, either in fee simple or for any less estate or interest. All conveyances had to be made by way of sale.

11. In 1842, the Acts 4 & 5 Wm. IV. and 1 & 2 Vict. were repealed by 5 & 6 Vict. c. 61, which enabled the Queen to constitute a Legislative Council for South Australia. The repeal of the Acts was not to invalidate what had already been done thereunder (sec. 2); and no change was made in the boundary.

12. In the same year, by the Act 5 & 6 Vict. c. 76, the Queen was enabled to constitute a Legislative Council for New South Wales; and by sec. 2 the electoral district of Port Phillip (which afterwards became Victoria) was defined. The words are (sec. 2):—"The boundary of the district of Port Phillip on the North and North East shall be a straight line drawn from Cape How (*sic.*) to the nearest source of the River Murray, and thence (*sic.*) the course of that river to the eastern boundary of the Province

(1) L.R. 9 Q.B., 350, at p. 360.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Higgins J.

of South Australia." These words will reappear in a subsequent Act. In 1842, they must have referred to the 141st degree of East longitude.

13. In 1847, Messrs. Wade and White, under instructions from the New South Wales and the South Australian Governors, marked a boundary line for 123 miles from the coast; and this boundary line, so marked, was continued by White to the Murray in 1850. They made no transit observations, but took their starting point at the place where Tyers, after triangulation, had mistakenly located the 141st meridian. Wade's instructions were to take a mean between the 141st meridian as fixed by one Captain Stokes and the same meridian as fixed by Tyers; but Stokes' pamphlet did not reach Wade's hands in time.

14. Messrs. Wade and White reported to their respective Governments; the Governors sent the reports to Earl Grey, then one of Her Majesty's principal Secretaries of State; and Earl Grey wrote approving of what had been done, and advising that the marking should be continued to the Murray.

15. By proclamation published 16th December 1847 (corrected the 23rd December) after reciting the Act 4 & 5 Wm. IV. c. 95, and the Letters Patent thereunder, and that it had become necessary to mark out and ascertain the 141st degree of East longitude, and that for this purpose, "by an arrangement," the Government of New South Wales had, with the consent of the Government of South Australia, caused the position of the 141st meridian to be "correctly ascertained" at a spot on the sea coast near the mouth of the River Glenelg, and therefrom to be surveyed northward as far as the 36th parallel of South latitude and to be marked, Lieutenant-Governor Robe of South Australia notified and proclaimed that the line so marked as the meridian of the 141st degree should be "deemed and construed to be the eastern boundary of 'South Australia' to all intents and purposes."

16. By proclamation published 4th March 1849, after reciting that the eastern boundary of South Australia was fixed by the Letters Patent at the 141st degree of East longitude, and that, it having become necessary to mark out and ascertain the said degree, "an arrangement" had been entered into with the

Government of South Australia for that purpose, in consequence of which the position of the 141st degree had been "correctly ascertained" at a spot on the sea coast near the mouth of the River Glenelg, and therefrom northward as far as the 36th parallel of South latitude, Governor Fitzroy of New South Wales notified and proclaimed that the lines so marked should be deemed and construed to be the boundary line between New South Wales and South Australia "so far as the same extends."

17. Much argument—as I think unnecessary—has been directed to the question, was this marking by Wade and White "provisional"? Whatever may have been the mental reservations of their expert advisers, I am inclined to the view that the Governors personally meant the line of the 141st meridian to be accurately and finally determined and marked on the ground, if and so far as possible, though they hoped that some more natural boundary would be fixed by a British Act of Parliament. But what of it? It turns out that the marking was not accurate. The legal boundary is at one place, and the marked boundary is at two miles to the West. The Governors could not bind anyone by their marks.

18. The proclamations issued by the Governors are not in any way conclusive. There is no estoppel, whether by record or by judgment or otherwise. There is nothing to prevent any litigant from showing where the 141st meridian truly is, in any case in which the precise position becomes material.

19. The line as marked was marked (I may assume) under the executive powers of the Crown. But all executive powers are subordinate to laws made by Parliament. If Parliament says the 141st degree, the Executive cannot make the boundary two miles more to the West.

20. It is, to my mind, a mistake to say that there was any agreement between the Governors as to the boundary. There was merely co-operation between them in an effort to ascertain and mark the 141st meridian. The only agreement, if any, was as to the expenses of Wade and White. The Governors were not owners; but, even as between owners who employ a man to erect a boundary fence between them, a mistake made by him does not preclude the owner whose land is affected by the mistake

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Higgins J.

from claiming according to his title. The ascertainment of boundary by surveyors appointed by two owners would, no doubt, be evidence as between the owners: *Taylor* v. *Parry* (1); but even as between owners it would not be conclusive—the presumption may be rebutted: *Duke of Beaufort* v. *Mayor &c. of Swansea* (2).

21. But what the Governors did was by no means futile or useless. The line was marked by them with a view to dealing with criminals and for purposes of title; and in the law Courts, proof that Victoria administered the territory as far as the marked line would raise a presumption of law that all the territory so administered as part of Victoria was East of the 141st degree; just as proof of possession of land is presumptive evidence of title in fee simple (*Hunt Boundaries* 289). Moreover, admiralty charts and standard maps would—until discovery of the error—accept the official marking, and show the 141st degree as coincident with the boundary as marked and administered (see *per* Lord *Blackburn, Birrell* v. *Dryer* (3); *Phipson on Evidence*, 3rd ed., 313). It would be very hard indeed for any litigant to displace such a presumption or such evidence.

22. It next becomes necessary to consider the relevant British Acts after the proclamations, to see whether there is any trace of an intention to alter the description of the boundary in the Letters Patent, or to accept Wade's marking of the 141st degree as being conclusive.

23. By the Act 13 & 14 Vict. c. 59, which was passed in 1850, but which did not come into full operation till 1st July 1851, the district of Port Phillip was separated from New South Wales, and became the Colony of Victoria. In the Act the new Colony was described as . . . . "*the territories now comprised within the said district of Port Phillip* . . . . bounded on the North and North-East by a straight line drawn from Cape How (*sic*) to the nearest source of the River Murray and thence by the course of that river *to the eastern boundary of South Australia.*"

24. There is no possible ground for saying that these words do not mean, in the Act of 1850, what they meant in the Act 5 & 6

(1) 1 Man. & G., 604.
(2) 3 Ex., 413.
(3) 9 App. Cas., 345, at p. 352.

Vict. c. 76—which was passed before Wade and White's marking. To find what territories were comprised within the district of Port Phillip in 1850, we look at the Act 5 & 6 Vict. c. 76, which defines the district, an Act which is referred to in the very first recital of the Act of 1850. The recitals do not make any reference to Wade and White's marking. The Act of 1850 does not even say "the territories *reputed to be comprised*"—words used in sec. 51 of 5 & 6 Vict. c. 76. The words must mean the same thing in the later as in the earlier Act, and refer to the definite, certain, but invisible, boundary line of the 141st degree of East longitude.

25. The Governor and Council of New South Wales do not seem to have been aware in 1851 that a conventional 141st meridian had been substituted for the scientifically correct 141st meridian. For by the New South Wales Act 14 Vict. No. 47, Port Phillip was divided into electoral districts, for the purposes of the Separation Act: and Follett, the most western county, was described as "bounded on the west *by the* 141*st meridian, being the line dividing the Colony of New South Wales from South Australia.*" The words used are not "bounded on the West by the line marked by Wade and White" or even "bounded on the West by the 141st meridian as marked by Wade and White."

26. The same words are used in the British Act which conferred a Constitution on Victoria (18 & 19 Vict. c. 55). The electorate of Follett is defined as bounded "*on the west by the* 141*st meridian being the line dividing the Colony of Victoria from South Australia.*" The 141st meridian must mean in this Act what it meant in the Act of Wm. IV.—the true scientific meridian. Even if the two Governors had effectively transferred the legal boundary, in 1847-1849, to a line two miles West of the 141st meridian, it is very difficult to see how any British Court could refuse, after this *Constitution Act*, to treat the scientific 141st degree as being thereafter the true boundary.

27. Between 1857 and 1865 a geodetic survey was made of Victoria, and in the course thereof it was discovered by Victorian officers that the boundary as marked was West of the 141st meridian. In a map issued by the Victorian Lands Department in March 1865, two lines are shown—one is described as "the

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Higgins J.

141st meridian as defined by Mr. Edward White, and marked on the ground"; and the other—to the East—is described as "boundary line between Victoria and South Australia (being the 141st meridian as adopted by Arrowsmith)."

28. In 1868 Messrs. Todd and Smalley, acting for the Governments of South Australia and New South Wales, laid down boundaries between these two States North of the Murray; and, finding the error in the line of Wade and White, announced it to their Governments.

29. South Australia has repeatedly from 1869 onwards pressed her claims on Victoria for a rectification of the boundary so as to comply with the British Act. There is no evidence that South Australia knew of the error before 1869; and since 1869 South Australia has certainly not been guilty of acquiescence.

30. The cases in which the King in Council settled boundary lines between dependencies do not apply; for in those cases there was no Act of Parliament to check the action of the Prerogative. The King gave the charters to the settlers by virtue of his Prerogative; and by virtue of his Prerogative he decided where the boundary was when disputed. But the Prerogative is powerless against an Act of Parliament.

31. The case of *Buron* v. *Denman* (1) does not apply. The military operations of the defendants in that case were adopted and ratified by the Crown, and thereby became an Act of State. There was no Act of Parliament in the way.

32. The cases cited from the United States do not apply—the cases as to agreements between States, and as to long recognized boundaries. Apart from the facts of the cases, which in each case need the closest scrutiny, the States of the United States are (*sub modo*) independent and sovereign States. Except the Constitution, there is no higher law for a State than that of the State itself. Subject to the Constitution, the States can make any agreement as to boundaries that they like. This power is part of the general right of sovereignty. As *Story* J. said:—"It cannot be doubted, that it is a part of the general right of sovereignty belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boun-

(1) 2 Ex., 167.

daries, so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress" (*Poole* v. *Fleeger* (1)). In Australia, on the other hand, the States are, in the eyes of the law, dependent for everything upon the British Parliament. They are not sovereign. They are subject to the British law, so far as applicable to them. If a British Act prescribe the 141st degree as the boundary, that is the legal boundary, whatever the States may say or do.

33. I am unable to accept the view that the Act 4 & 5 Wm. IV. involved an authority to the Governors or others to ascertain and, if necessary, mark the boundary, or the location of the 141st meridian. [Of course, I take the authority alleged to be an authority by the exercise of which the public would be bound; for no one would say that the Governors or their agents were trespassers.] In the first place, there is not at common law any obligation resting even on an owner of land to define or to mark his boundary: *Lawrence* v. *Jenkins* (2). In the second place, there is not any indication of any intention to confer an authority to bind the public, or to enable a Governor by an executive act to pronounce what is in effect a judgment *in rem.* In the third place, the Act 4 & 5 Wm. IV. c. 95 had been repealed by the Act 5 & 6 Vict. c. 61, before the marking of the line; and any powers conferred on the Governors by the repealed Act, and not exercised, would seem to have been brought to an end.

34. The case of *Penn* v. *Lord Baltimore* (3) has been cited as an authority for the statement that settling a disputed boundary is to be treated as a finding of the former lost boundary. But this

(1) 11 Pet., 185, at p. 209.
(2) L.R. 8 Q.B., 274, at pp. 278, 9.
(3) 1 Ves., 444.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Higgins J.

is only "presumed"—it is a presumption of law which can be rebutted by evidence; it does not apply to a case where the boundary line has not been lost, is not disputed, is not indefinite, is not uncertain (as regards intention); and it cannot affect title except between persons who are competent to settle the boundary —such as private owners, or as the King in the case of prerogative Colonies.

35. It is evident that in the United States the Judges have used the word "acquiescence" in the loose, vague sense in which it is used by writers on international law. These writers have encouraged the idea, in the interests of peace, that arrangements long existing as between sovereign States should not be disturbed (see 23 *Harvard Law Review*, p. 555). But an Australian State, as it cannot give up territory by agreement, cannot give it up by acquiescence; and even if it could, there was here no acquiescence after knowledge of the facts.

My opinion, therefore, is that the true boundary between the two States is still the 141st degree of East longitude; and that if the plaintiffs have any cause of action which entitles them to any declaration, the declaration should be to that effect, and to the effect that the line as at present marked is wrong. I concur with my learned brothers in rejecting the argument that this Court has not power to entertain this action, and to give some judgment in favour of the plaintiffs, if the plaintiffs have a cause of action.

But have the plaintiffs any cause of action? The "lands of South Australia" do not belong to South Australia. That State has no right conferred on it with respect to the Crown lands except this —that its legislature has power "to regulate the sale and other disposal" thereof, and to dispose of the proceeds "for the public service of the said" State (18 & 19 Vict. c. 56, sec. 5). Even assuming that the State is to be regarded as being substantially the donee of the power, I know of no instance in any Court in which a donee of a power such as this—a power in gross—has obtained by action a declaration that he has the power. Under the Constitution, it is our duty to give relief as between States in cases where, if the facts had occurred as between private persons, we could give relief on principles of law; but not otherwise.

Now, the phrasing of this claim is that of an action of ejectment. It seeks possession and mesne profits. It is alleged (par. 55) and admitted, that the defendants are in possession of the land. To succeed in such an action, the plaintiffs must show a right to exclusive possession as against the defendants. The plaintiffs have no property in the land; and I can find no right to exclusive possession. Where is the injury to plaintiffs in their property—or person? Probably, if a surveyor or agent acting under the authority of the State, in execution of the power to sell, were molested or hindered, he would have a cause of action; but the present is not such a case. There has been no such molestation or hindrance, and the surveyor or agent is not the plaintiffs.

In popular phraseology, the lands within the limits of South Australia are commonly spoken of as the lands of South Australia; but when we get face to face with a claim of legal right, we must look at the position with legal precision. By the acquisition of this continent, the King became the owner of all the lands; and he still remains the owner except so far as he has alienated them—at first through his British Ministers or Colonization Commissioners, afterwards through his Australian Governments. If there be any unlawful occupation of Crown lands, the King can have a writ of intrusion. His Majesty, or his Attorney-General for him, is the plaintiff. His Majesty can select his own agent for purposes of litigation; and it has been held, both in New South Wales and in Victoria, that the Attorney-General for the Colony can sue on behalf of the King (*Attorney-General for Victoria* v. *Gee* (1); *Attorney-General for Victoria* v. *Belson* (2); *Attorney-General for N.S.W.* v. *Brown* (3). In the case of *Attorney-General* v. *Gee* (1), *Molesworth* J. said that the transfer of the control of the lands to the Colonial authorities did not transfer the remedies for encroachment on Crown property, and that these rights can only be enforced by the law officers. In *Attorney-General* v. *Belson* (2) the same learned Judge said, with regard to the section in the Victorian Constitution which corresponds with sec. 5 of 18 & 19 Vict. c. 56 for South Australia:—

(1) 2 W. & W. (Eq.), 122, at p. 131. (2) 4 W.W. & aB. (Eq.), 57, at p. 62.
(3) 2 S.C.R. (N.S.W.), App. 30.

H. C. OF A. 1911.

THE STATE OF SOUTH AUSTRALIA v. THE STATE OF VICTORIA.

Higgins J.

"This Act seems to me to have made no change in the estate of the lands, or the powers of the Crown to protect legal public interests in them, ... it simply transferred to the colonial," (legislature?) "a subordinate power of dealing with a subject previously controlled by the Imperial, Government."

Now, what is the position of the State of South Australia. It is not proprietor. It is the donee of a power with regard to the lands. The position resembles that of a manager or agent; and a manager or agent cannot sue for trespass to his principal's property: *Bertie* v. *Beaumont* (1), *White* v. *Bailey* (2). The possession of the servant is the possession of the master. It is true that, within its own limits, a State represents the Crown as against private persons; but it cannot represent the Crown in contests between itself and other States which equally represent the Crown. The "States" mean the late "Colonies" (*Constitution Act*, sec. 6). I may fitly adopt the phraseology used by this Court in *Sydney Municipal Council* v, *The Commonwealth* (3), and say that the Crown of Great Britain and Ireland is one juristic person, and that the Crown in its South Australian capacity is another juristic person; and that the lands belong to the Crown in its former capacity. As between themselves, each of the States seems to be equally an agency, created for defined purposes, by the British Parliament. The lands remain vested in the King, not as part of the South Australian Government, but as Sovereign of all the Dominions. The Acts of that Parliament which confer certain powers on the South Australian Parliament with regard to those lands do not confer all the King's rights, but some only of the rights. Whether this view is right or is wrong, it is idle to say that it involves a mere formal objection. The practical importance of the view becomes obvious when one reflects that the proprietor, the King, may be advised not to interfere by a writ of intrusion where, as in this case, an erroneous boundary has been marked and acted on for many years, and the error does no real harm to any of the inhabitants.

The American cases are no safe guide to us in this matter. It is true that the Supreme Court of the United States has entertained suits between States to settle boundaries, and has pro-

(1) 16 East., 33. (2) 30 L.J.C.P., 253. (3) 1 C.L.R., 208.

nounced judgments which are conclusive as between all persons, as in the nature of judgments *in rem*. But these judgments were all based on property in the lands. By the Revolution the States became successors to the King as to all his prerogatives and all his rights of property, within their respective areas. The judgment of the Supreme Court in *Rhode Island* v. *Massachusetts* (1) was explained in *State of Georgia* v. *Stanton* (2); and it was shown that for the exercise of the judicial power in determining boundaries, the rights involved must be rights of person or of property. "The right of property was undoubtedly involved" (in *Rhode Island* v. *Massachusetts* (1)); "and as in this country where feudal tenures are abolished, in cases of escheat the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction. See also *per Thompson* J. in *Cherokee Nation* v. *State of Georgia* (3). On the other hand, in an Australian State the King still retains both his prerogatives and his property, although to a certain defined extent the British Parliament has given to the States powers with regard to the King's lands.

But although counsel for Victoria raised at the bar—not in the defence—several objections to jurisdiction, they have not argued this point; and in view of this fact, and of the judgments given by the majority of the Court, I do not think it to be incumbent upon me to give a final opinion on the subject, but merely to express a strong doubt—a doubt which may have to be settled at some future day. It is sufficient for me to say that, in in my opinion, the boundary still remains, in the eyes of the law, the 141st degree of East longitude. I am unable to accept the view that "the 141st degree of East longitude" means such line as the Governors of the Colonies, or any one else, may treat, whether reasonably or not, as being the 141st degree of East longitude.

Suit dismissed.

Solicitor, for plaintiffs, *Dashwood*, Crown Solicitor for South Australia.

Solicitor, for defendants, *Guinness*, Crown Solicitor for Victoria.

(1) 12 Pet., 656. (2) 6 Wall., 50. (3) 5 Pet., 1.

B. L.