H. C. OF A. 1914.

THE FELT HATTERS' CASE.

Gavan Duffy J. Rich J.

The judgment of GAVAN DUFFY and RICH JJ. was read by

RICH J. We are precluded by the decision of the majority of the Court in *Merchant Service Guild* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1) from answering questions 1, 2, 3 and 4. As we are not at liberty to answer these questions, we consider it unnecessary and inexpedient to discuss any of the topics raised by them.

In deference to the decision to which we have referred, we confine ourselves to answering questions 1A and 5. These questions we answer in the affirmative.

Questions 1A *and* 5 *answered accordingly.*

Solicitors, for the claimants, *Brennan & Rundle.*

Solicitors, for the respondents, *Derham & Derham.*

B. L.

Appl *Hazlett* v *Presnell* 149 CLR 107

(1) 16 C.L.R., 591.

[PRIVY COUNCIL.]

THE STATE OF SOUTH AUSTRALIA . APPELLANTS; PLAINTIFFS,

AND

THE STATE OF VICTORIA . . . . RESPONDENTS. DEFENDANTS,

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1914.

Jan. 8.

Boundary between States — Boundary fixed by Statute—Degree of longitude—Authority of Executives to mark boundary on ground—Effect of marking—4 & 5 *Will. IV. c.* 95.

The Letters Patent of 19th February 1836, issued under the authority of 4 & 5 Will. IV. c. 95, must be taken to have contemplated that the boundary between the Colonies of New South Wales and South Australia, namely, the

* Present—Viscount Haldane L.C., Lord Moulton, Lord Parker of Waddington and Lord Sumner.

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141st degree of east longitude should be ascertained and represented on the surface of the earth so as to form a boundary line between the two Colonies, and to have impliedly given to the Executives of the two Colonies power to do such acts as were necessary for permanently fixing such boundary.

Held, therefore, that the line marked out partly in 1847 and partly in 1850 under the authority of the Executives of the two Colonies and with the intention that as so marked out it should be finally fixed as the statutable boundary between the two Colonies, was in point of law the statutable boundary, and is now the statutable boundary between the States of South Australia and Victoria.

Decision of the High Court: *State of South Australia* v. *State of Victoria*, 12 C.L.R., 667, affirmed.

APPEAL from the High Court.

This was an appeal by the plaintiffs to the Privy Council from the decision of the High Court: *State of South Australia* v. *State of Victoria* (1).

The judgment of their Lordships was delivered by

LORD MOULTON. This is an appeal by the State of South Australia from a judgment of the High Court of Australia, dated 22nd May 1911, in proceedings instituted by the State of South Australia against the State of Victoria substantially for the purpose of settling a disputed boundary between the two States. The portion of the boundary between the two States which is in question stretches northward from the coast to the Murray River.

The judgment of the majority of the High Court was in favour of the defendants, the State of Victoria, and accordingly on 22nd May 1911 the action was dismissed, and it is from this decision of the High Court that the present appeal is brought.

In the course of the proceedings before the High Court the history of the question of the boundary between South Australia and Victoria was minutely examined both in respect of law and of fact, and all relevant documentary and oral evidence was adduced and is now to be found in the record, and their Lordships feel that all the material that could be serviceable for deciding the question in dispute has been laid before them, and that in the argument of the appeal the legal effect of the various Acts of Parliament, docu-

(1) 12 C.L.R., 667.

ments, and acts of the parties has been fully and ably discussed. The result of the discussion has been to lead their Lordships to the conclusion that the important questions involved can be decided on broad general principles independent of much that has thus been brought before them. In giving the reasons for their judgment on this appeal their Lordships do not propose to refer to matter which does not bear directly upon those reasons, but their not referring to such matter must not be understood as meaning that in their opinion it was not relevant or that it was not such as was proper to be brought forward in the case. The nature and importance of the dispute made it one in which it was of the highest importance that the tribunal should feel assured that all relevant material had been fully brought forward.

The history begins with the Act 4 & 5 Will. IV. c. 95, which was passed on 15th August 1834. The title of this Act is : " An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide for the Colonization and Government thereof." The preamble of this Act is so important to the decision of the present case that it is advisable to cite it here in full. It reads as follows :—" Whereas that part of Australia which lies between the meridians of the one hundred and thirty-second and one hundred and forty-first degrees of east longitude, and between the Southern Ocean and twenty-six degrees of south latitude, together with the islands adjacent thereto, consists of waste and unoccupied lands which are supposed to be fit for the purposes of colonization : And whereas divers of His Majesty's subjects possessing amongst them considerable property are desirous to embark for the said part of Australia : And whereas it is highly expedient that His Majesty's said subjects should be enabled to carry their said laudable purpose into effect : And whereas the said persons are desirous that in the said intended Colony an uniform system in the mode of disposing of waste lands should be permanently established : Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for His Majesty, with the advice of his Privy Council, to erect within

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that part of Australia which lies between the meridians of the one hundred and thirty-second and one hundred and forty-first degrees of east longitude, and between the Southern Ocean and the twenty-six degrees of south latitude, together with all and every the islands adjacent thereto, and the bays and gulfs thereof, with the advice of his Privy Council, to establish one or more Provinces, and to fix the respective boundaries of such Provinces; and that all and every person who shall at any time hereafter inhabit or reside within His Majesty's said Province or Provinces shall be free, and shall not be subject to or bound by any laws, orders, Statutes, or Constitutions which have been heretofore made, or which hereafter shall be made, ordered, or enacted by, for, or as the laws, orders, Statutes, or Constitutions of any other part of Australia, but shall be subject to and bound to obey such laws, orders, Statutes, and Constitutions as shall from time to time, in the manner hereinafter directed, be made, ordered and enacted for the government of His Majesty's Province or Provinces of South Australia."

By clause II. power is given to His Majesty with the advice of his Privy Council to make or to authorize and empower any one or more persons resident and being within any one of the said Provinces to make, ordain, and establish all such laws and to constitute such Courts and to levy such rates, duties, and taxes as may be necessary for the peace, order and good government of His Majesty's subjects and others within the said Province subject to certain conditions set forth in such section.

The Act goes on to authorize His Majesty to appoint three or more fit persons to be Commissioners to carry certain parts of the Act into execution. It provides the Commissioners with a seal and empowers them to declare lands of the Province to be public lands open to purchase by British subjects and to make orders and regulations for the surveying and sale of such public lands; and finally by sec. 23 His Majesty is empowered by and with the advice of his Privy Council to frame, constitute and establish a Constitution of local government for any such Province.

While the above Act was in force, and acting under the powers given by the same, His Majesty William IV. proceeded to erect South Australia into a British Province. The Letters Patent

embodying and for the purposes of this case constituting the Order in Council effecting this are dated 19th February 1836, and read as follows:—

"Whereas by an Act of Parliament passed in the fifth year our reign, entitled 'An Act to empower His Majesty to erect South Australia into a British Province or Provinces, and to provide for the Colonization and Government thereof.' After reciting that that part of Australia which lies between the meridians of the 132nd and 141st degrees of east longitude, and between the Southern Ocean and 26 degrees of south latitude, together with the islands adjacent thereto, consists of waste and unoccupied lands, which are supposed to be fit for the purposes of colonization, and that divers of our subjects, possessing amongst them considerable property, are desirous to embark for the said part of Australia, and that it is highly expedient that our said subjects should be enabled to carry their said laudable purpose into effect, it is enacted that it shall be and may be lawful for us, with the advice of our Privy Council, to erect within that part of Australia which lies between the meridians of the 132nd and 141st degrees of east longitude, and between the Southern Ocean and the 26 degrees of south latitude, together with all and every the islands adjacent thereto, and the bays and gulfs thereof, with the advice of our Privy Council to establish one or more Provinces and to fix the respective boundaries of such Provinces, now know ye that with the advice of our Privy Council, and in pursuance and exercise of the powers in us in that behalf vested by the said recited Act of Parliament we do hereby erect and establish one Province to be called the Province of South Australia, 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 longitude, and on the east the 141st degree of east longitude including therein all and every the bays and gulfs thereof together with the island called Kangaroo Island, and all and every the islands adjacent to the said last mentioned island, or to that part of the mainland of the said Province provided always that nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any

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aboriginal native of the said Province to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any lands therein now actually occupied or enjoyed by such natives. In witness whereof we have caused these our Letters to be made Patent. Witness ourselves at Westminster the nineteenth day of February, in the sixth year of our reign.—By writ of Privy Seal."

It may be convenient in this connection to state what is the admitted position of the boundary contended for by Victoria. It is situated about two miles and a quarter to the west of the true meridian of 141 degrees of east longitude, so that it is common ground that the Province of South Australia so bounded would be within the area in which the Crown was authorized to erect a British Province or Provinces under the Statute 4 & 5 Will. IV. c. 95.

In 1838 the Act 1 & 2 Vict. c. 60 was passed to amend the Act 4 & 5 Will. IV. c. 95, by making certain alterations therein with regard to the powers of the Commissioners and other matters which are not relevant to the present appeal. Reliance was, however, put upon this Act by the appellants on the ground that in its preamble it refers to the erection of South Australia into a Colony under Letters Patent of the 19th February 1836, and describes the boundaries in the same language as is used in the Letters Patent themselves. The appellants contend that this is a statutory recognition that the eastern boundary of South Australia is the meridian of 141 degrees east longitude, and that even if the Letters Patent themselves had not the force of a Statute (which they contend such Letters Patent in fact possessed by virtue of their being based upon the Statute 4 & 5 Will. IV. c. 95, and being an Act of the Crown authorized thereby) the effect of this reference to the boundaries in 1 & 2 Vict. c. 60 would be to make the meridian of 141 degrees east longitude the statutable boundary between the Provinces. A similar type of argument is put forward by the respondents, based upon similar references in documents of authority in which the reference is to the eastern boundary of South Australia at dates when a recognized boundary existed which was the same as that now contended for by Victoria, and the respondents claim

that this is an authoritative recognition of it as the *de facto* boundary. Their Lordships are not disposed to give much weight to arguments of this kind. It is beyond contest that the boundary as fixed by Letters Patent was the meridian of 141 degrees east longitude, and that no one intentionally accepted or referred to any other line but this as the boundary, or that if anyone did so his so doing would have no effect whatever. The real question in the case in their Lordships' opinion lies much deeper and cannot be affected by such references however made during the time when it was not known that the *de facto* boundary did not coincide precisely with the exact position of the meridian of 141 degrees east longitude.

On 30th July 1842 the Act of 5 & 6 Vict. c. 61 was passed. It is entitled An Act to provide for the better government of South Australia. It repealed entirely the Acts 4 & 5 Will. IV. c. 95 and 1 & 2 Vict. c. 60 with the saving clause—"That all laws and ordinances heretofore passed under the authority and in pursuance of the said recited Acts or either of them and that all things heretofore lawfully done in virtue of the said Acts or of either of them shall hereafter be of the same validity as if the said Acts had not been repealed," with a reservation which is not relevant to the present appeal. The same may be said of the actual provisions of the Act which substantially amount to a re-enactment of the provisions of the repealed Acts with various changes of detail as to the number of the Commissioners, &c. The Act contains no specific reference to boundaries.

Reference was made in the argument to two Statutes relating to the sale of waste land belonging to the Crown in the Australian Colonies which were respectively passed in 1842 and 1846. They are 5 & 6 Vict. c. 36 and 9 & 10 Vict. c. 104. In their Lordships' opinion the sole relevance of these Statutes is that they show that the sale and leasing of public lands in the Colonies were preceding at this time, and were the subject of legislative regulation. The power of thus dealing with the lands of each Colony was in the hands of the Governor of the Colony in which they were situated subject to various rules and regulations made by the Crown. It is obvious, therefore, that it was a practical necessity that the

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boundaries of the various Colonies should be defined and known. But otherwise the provisions of these Acts do not bear upon the question before their Lordships.

By this time the practical difficulties arising from the uncertainty of the boundary between the two Colonies of South Australia and New South Wales were becoming manifest to the persons in authority in the Colonies themselves. On 30th September 1844 Governor Grey, of South Australia, writes a despatch to the Colonial Secretary calling his attention to the very imperfect manner in which the eastern and western boundaries of the Provinces were defined. He suggests that the boundary of the meridian of 141 degrees east longitude should be abandoned, and natural landmarks arising from the features of the country itself (mainly rivers and lakes) substituted therefor. Such an admitted departure from the boundary as fixed by the Letters Patent would certainly have required either Imperial legislation or an exercise of the Prerogative of the Crown, if indeed the latter mode would have sufficed, a question which it is not necessary to decide. No proposal of this kind would be practicable without the assent of both Colonies, and therefore the Colonial Secretary submits the proposition to the Governor of New South Wales, who, although, agreeing with Governor Grey's view of the necessity of determining and clearly defining the boundary, does not accept his solution, and the suggestion was therefore abandoned.

From about this date commence the important steps that were taken by the two Colonies to put an end to the inconvenience arising from the uncertainty of the boundary between them. It is evident that the difficulty with regard to the administration of the law was making itself felt. The lands near the boundary were being taken up. In a letter of 15th July 1846, from one of the Commissioners of the Crown Lands Office to the Colonial Secretary, is to be found the following passage, which vividly illustrates this :—"I would beg leave to call His Excellency's" (*i.e.*, the Lieutenant-Governor's) "attention to the necessity of having the eastern boundary of the Province at least approximately defined as soon as possible. The country through which it passes is now occupied for 70 miles from the coast, and there are at least 12 or

14 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."

That this description is not exaggerated is evident from a letter written about the same date by the Lieutenant-Governor of South Australia to the Governor of New South Wales, referring to murders in the vicinity of the undefined boundary.

The outcome of this state of things was that communications passed between the Governors of South Australia and New South Wales on the subject of the determination of the boundary by a joint survey. The exact nature of the steps taken is clearly seen from the documents before their Lordships.

On 26th October 1846 the Lieutenant-Governor of South Australia wrote to the Governor of New South Wales a letter enclosing a copy of a letter which he had received from Captain Frome, the Surveyor-General of South Australia. In such last-mentioned letter Captain Frome concludes as follows :—" With regard to the second question —that of the method of marking out this meridian line—I would also recommend the adoption of the first plan proposed by Mr. Latrobe—that of confiding the duty to a surveyor selected by the Government of New South Wales, as no possible good can result from the employment of two surveyors with their respective parties upon work which cannot be divided, and I have no surveyor in the department available for such duty except a serjeant of the Royal Sappers and Miners, who is at present fully employed in the triangulation. It would, however, I think be desirable that some person on the part of this Government should accompany the survey party, not as a surveyor or with any power to interfere with the details of the work, but to report, for the information of the Lieutenant-Governor, upon the progress of the work and the nature of the country through which the line may run. If His Excellency approves of this arrangement it would be advisable that rations, and such camp equipment as may be required, should be provided

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for this gentleman by the Government of New South Wales, as forming part of the cost of the survey."

And the enclosing letter concludes thus :—" The difference of a few seconds of longitude one way or other does not appear to me to be of any other importance than that, as the Imperial Parliament has decided that the boundary shall lie on the 141st meridian of east longitude, it remains for us to ascertain that meridian by the best means in our power to prevent future litigation among the occupiers of the soil."

To this letter the Governor of New South Wales replied on 30th December 1846. The relevant part of the letter in this connection reads as follows :—" I have now the honour to inform your Excellency that in compliance with Captain Frome's suggestion that the work should be performed under the superintendence of this Government at the joint expense of both, I have directed a competent surveyor with a sufficient party to proceed to the mouth of the Glenelg and I have instructed the acting superintendent of Port Phillip to communicate to your Excellency the period at which the party may be expected to reach their destination, and I have further directed that the gentleman whom you propose to attach to this party on the part of the Government of South Australia shall be provided with food and camp equipage during the time he may be employed."

The person instructed by the Governor of New South Wales to make this survey was Mr. Wade, and the person instructed to accompany him on behalf of South Australia was Mr. White. Both appointments were made in January 1847. Their Lordships have no doubt that under the difficulties of the situation Mr. Wade carried out his work in a very commendable way. He sent full reports of his progress, and there is abundant evidence that what he did met with approval on all sides. When his survey reached the 36th parallel of south latitude he was obliged to suspend it for a while. The reports of Mr. White, who accompanied him on behalf of South Australia, show that he was in complete agreement with Mr. Wade in the matter of the survey.

It is now necessary to refer to the materials which Mr. Wade possessed for the purpose of his guidance in the survey. To trace

the 141st meridian east longitude it was sufficient to ascertain the point where that meridian struck the south coast and to proceed from that point in a due northerly direction. The position of this point could even at that date be obtained by two or three independent methods, all depending on astronomical observations. Of these, the method of lunar observations would be direct, *i.e.*, independent of the accuracy of the determination of the longitude of any other place. The two other methods in use at the time, *i.e.*, triangulation and chronometric observations, resulted only in determinations of the difference of longitude of the place of observation and of some known point with respect to which the triangulation and the chronometric observations were made. Observations of all three kinds had already been made, the most important being those of Mr. C. J. Tyers in 1839. In these observations Fort Macquarie, Sydney, was taken by Mr. Tyers as his point of departure, and he assumed its longitude to be 151° 15′ 14″, which was the accepted value at the time. Other observations had been made by Captain Stokes by chronometric observations. These two determinations were in the hands of Mr. Wade for his guidance, either at or shortly after the commencement of his labours, and must equally have been known to Mr. White, who was throughout in possession of complete knowledge of all the steps taken by Mr. Wade.

It will be necessary later to point out more in detail the impossibility of ascertaining with absolute certainty the position on the surface of the earth of an astronomical line such as a meridian. It is sufficient here to say that all these determinations differed slightly. One element which vitiated their accuracy was that the assumed longitude of Fort Macquarie was slightly incorrect, as was shown many years afterwards by a series of lunar observations made in the Sydney Observatory. But although this error was unknown at the time, it is quite clear that the Governors of both States were aware of the differences that existed in the determination of the starting point of the survey and realized that the existence of such differences must necessarily be anticipated. It is evident, therefore, that their action was consciously based on these considerations. In the letter of 30th

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December 1846 already referred to, the Governor of New South Wales, writing to the Lieutenant-Governor of South Australia, expresses himself on this subject 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."

Instructions to this effect were formally given to Mr. Wade by the Superintendent Surveyor for New South Wales in a letter of 28th January 1847, in the following terms :—" 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, so 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. But should the gentleman who is to join you from South Australia have been provided with similar directions this circumstance you will, of course, consider as the confirmation of the present instructions on this subject. I shall be glad to be informed when your party has reached its destination at the Glenelg, and when you are about to commence the survey, and any other particulars connected with it you may think requisite to communicate."

Although it was originally intended to take the mean of the determinations of Mr. Tyers and Captain Stokes, the results of Captain Stokes were, unfortunately, not sent to Mr. Wade in time, and he was compelled to adopt the determination of Mr. Tyers as his basis. Their Lordships are unable to say whether this in any way increased the error of the actual determination, but it is quite evident that the

action of Mr. Wade was communicated to and approved of by the Governors of both States. For example, in his letter to the Colonial Secretary, Adelaide, Mr. White on 15th April 1847, says :—" I do not consider myself entitled to offer an opinion ; yet, 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."

On 20th October 1847 the Colonial Secretary for New South Wales transmitted to the Colonial Secretary for South Australia the reports made by Mr. Wade upon the boundary line so far as he had surveyed it before being compelled to desist, *i.e.*, to the 36th degree of latitude. The letter concludes as follows :—" In forwarding these documents, I am also directed to inform you that Sir Charles Augustus Fitzroy concurs with his Honor 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 lines 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."

In the following December the Lieutenant-Governor of South Australia proclaimed the boundary so marked out. This proclamation is so important that it is necessary to cite it in full :—

" Proclamation.

" By His Excellency Frederick Holt Robe, Esq., Lieutenant-Colonel in the Army, Lieutenant-Governor of Her Majesty's Province of South Australia and Vice-Admiral of the same.

" Whereas by an Act of the Imperial Parliament, passed in the fourth and fifth years of the reign of His late Majesty King William the Fourth, intituled, ' An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide

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for the Colonization and Government thereof' His Majesty was empowered, with the advice of his Privy Council, to erect and establish within that part of Australia which lies between the meridians of 132nd and 141st degrees of east longitude, and between the Southern Ocean and the 26th degree of south latitude, together with the islands adjacent thereto, and the bays and gulfs thereof, one or more Provinces, and to fix the respective boundaries of such Provinces.

"And whereas His said late Majesty, on or about the nineteenth day of February, one thousand eight hundred and thirty-six, by letters patent under the great seal of Great Britain, with the advice of his Privy Council, and in pursuance of the powers in that behalf vested in his said Majesty by the said recited Act of Parliament, did erect and establish one Province, to be called the 'Province of South Australia,' and did thereby fix the boundaries of the same 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 therein all and every the bays and gulfs thereof, together with the island called Kangaroo Island, or any part of the mainland of the said Province.

"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 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.

"Given under my hand and the public seal of the said Province, at Adelaide, this eleventh day of December one thousand eight hundred and forty-seven, in the eleventh year of Her Majesty's reign.

"By His Excellency's Command,

"A. M. Mundy, Colonial Secretary."

In the schedule there was a clerical error whereby "one quarter of a mile east" appeared instead of "one and a quarter mile west." Their Lordships attach no importance to this, because it is evident that the rest of the schedule would show that the error was a clerical one and would enable it to be corrected. For instance, it gives the physical marks by which the boundary was marked out, commencing with the statement: "At about half a mile due north from the starting point a pyramid of stones is erected with a post in the centre marking the line of boundary." This would at once enable the erroneous description of the point from which the boundary line started on the coast to be recognized as a misdescription and corrected. But on learning of the existence of this clerical error within two or three days after the Proclamation, the Governor of South Australia *ex abundanti cautela* issued a Proclamation correcting the error, a precaution which, though in their Lordships' opinion unnecessary, was very proper under the circumstances. Both these Proclamations were forwarded to the Governor of New South

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Wales, and on 2nd March 1849 the said boundary was proclaimed by the Governor of New South Wales in the following Proclamation :—

"Proclamation.

"By His Excellency Sir Charles Augustus Fitzroy, Knight Companion of the Royal Hanoverian Guelphic Order, Captain-General and Governor-in-Chief of the Territory of New South Wales, &c.

"Whereas by Letters Patent, under the Great Seal of Great Britain, bearing date the twentieth day of February, in the ninth year of the reign of Her Majesty Queen Victoria, I, Sir Charles Augustus Fitzroy, am constituted and appointed Captain-General and Governor-in-Chief in and over the territory of New South Wales and its Dependencies, within the limits therein described, save and except that part of the said territory called and known by the name of the Province of South Australia ; and whereas the eastern boundary line of the said Province, which separates it from this Colony, was by Letters Patent, bearing date the nineteenth day of February, One thousand eight hundred and thirty-six, issued by His late Majesty King William the Fourth, fixed at the one hundred and forty-first degree of east longitude, reckoning from the meridian of Greenwich ; and whereas it having become necessary to mark out and ascertain the said one hundred and forty-first 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 one hundred and forty-first 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 thirty-sixth 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 lines 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.

"Given under my Hand and Seal, at Government House, Sydney, this twenty-eighth day of February, in the year of Our Lord one thousand eight hundred and forty-nine, and in the twelfth year of Her Majesty's reign.

"Chas. A. Fitzroy."

It is common ground that the schedules, though couched in slightly different language, are for all practical purposes identical.

Information of the establishment of a boundary line between the Colonies of New South Wales and South Australia, together with a copy of the Proclamation of that line by the Lieutenant-Governor of South Australia above referred to, was sent by the Governor of New South Wales to Her Majesty's Secretary of State for the Colonies, who acknowledged it by a letter of 17th May 1848 in the following terms:—

"Downing Street,

"17th May 1848.

"Sir,—I have to acknowledge the receipt of your despatch, No. 7, of the 8th January last, announcing that the establishment of a boundary line between the Colonies of New South Wales and South Australia, and enclosing the copy of a Proclamation of the Lieutenant-Governor of that Colony upon the subject.

"In reply I have to signify to you my approval of the care with which this work appears to have been accomplished.

"(Signed) Grey."

This was followed up by another letter from Her Majesty's Secretary of State for the Colonies, dated 30th June 1848, which reads as follows:—

"Downing Street,

"31st June 1848.

"Sir,—With reference to my despatch of the 17th ultimo, No. 80, relative to the boundary which has been established between New South Wales and South Australia, I have now to acquaint you that in intimating to Sir Henry Young my approval of the manner in which this work has been performed, as reported in a despatch which has been received from his predecessor, I have

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informed him that I consider it very desirable that no time should be lost in carrying on the survey to the River Murray.

"(Signed) Grey."

The suggestion of the Colonial Secretary contained in this letter was followed by the Governors of the two States, and the continuation of the demarcation of the line was entrusted to Mr. White and completed by him up to the Murray River on 7th December 1850. It is common ground that this was marked out on the basis of being a continuation of the portion of the boundary marked out by Mr. Wade, and that it was done at the joint desire of the Governors of the two Colonies. The arrangements were actually carried out under the management of the New South Wales Government, but this was by the express wish of the Lieutenant-Governor of South Australia.

To conclude the history of this completion of the survey their Lordships find that in February 1850 the Governor of New South Wales makes a claim on the Colony of South Australia for the moiety of the expenses of Mr. White, amounting to £419 4s. 7d. This sum (with a slight increase in respect of a premium which made it amount to £425 10s. 4d.) was reported to Earl Grey, who was then Her Majesty's Secretary for the Colonies, and he passed it on to the Lords Commissioners to the Treasury in the following letter dated 17th October 1850 :—

"Sir,—I am directed by Earl Grey to transmit to you, for the consideration of the Lords Commissioners of the Treasury, the enclosed copy of a despatch from the Governor of South Australia, reporting the expenditure of the sum of £425 10s. 4d. in liquidating the debt due to the Government of New South Wales, on account of one-half of the charge of surveying the boundary line between the two Colonies. That service, which was necessary in itself, had already been sanctioned, so far as the undertaking was concerned, and Lord Grey proposes, with their Lordships' concurrence, to sanction the expenditure now reported.—I am," &c.

To which, on 22nd November 1850, he received the following reply :—

"Sir,—In reply to your letter of the 6th inst., respecting a joint expenditure incurred by the Government of South Australia and New

South Wales in surveying the boundary line between those Colonies, I have it in command to acquaint you, for the information of Earl Grey, that the Lords Commissioners of Her Majesty's Treasury concur in the opinion expressed by his Lordship, regarding the necessity for this service, and approve, therefore, of the payment by the Government of South Australia of the sum of £425 10s. 4d. in liquidation of the debt due to the Government of New South Wales on account of one-half of the expense incurred for the survey in question.—I am, &c., C. E. Trevelyan."

The expenses thus approved of on behalf of the Treasury and the Secretary of State for the Colonies were accordingly discharged out of the revenues of South Australia. The correspondence which passed at the time between the parties interested shows that there was the same feeling as in the case of the earlier surveys that the work had been carried out with exemplary care and diligence.

From this time forward the boundary thus marked out from the coast to the Murray River was accepted and acted upon by both Colonies as the boundary between them. It would seem however, that in the early sixties the Government of South Australia began to suspect that the Wade and White boundary lay somewhat to the west of the meridian of 141 degrees east longitude, or in other words had been fixed in a position unfavourable to that Colony in that it diminished its area. Early in 1865 the question of marking out the boundary line northward from the Murray River came forward, and it was proposed that this should be done by extending the Wade and White boundary line northwards. To this latter proposition South Australia declined to accede, and finally instructions were given on behalf of New South Wales to Mr. Smalley, the Government Astronomer, and by South Australia to Mr. Charles Todd, the Superintendent of Telegraphs, to determine this part of the boundary line. They completed their work by December 1868, as is evidenced by their report of that date. Their determination of the boundary line was entirely independent of the Wade and White line, and the point at which it starts northward from the Murray River is about two miles nineteen chains east of the point where the Wade and White line strikes that river. At the date when the Smalley and Todd boundary was fixed it was possible to use the very exact

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method of time signalling by electric telegraphy, and there is no doubt that the later determination of the point where the 141st meridian strikes the Murray River is much more accurate than the earlier one. No one can, however, predicate even of it that it is exactly correct. It is important to notice that the acceptance of this line was, as before, treated as a matter of agreement between the two Colonies, as is evidenced by the concluding paragraph of the report above mentioned, which reads as follows :—" And we hereby agree on behalf of our respective Governments to accept the line hereinbefore described as the common boundary of the two Colonies."

It is on this combined action of the two Colonies that the whole of the boundary between New South Wales and Victoria on the one hand and South Australia on the other as marked out on the ground has always rested.

There remains little further in the history of the question that is relevant to the decision of the matters in issue. In the year 1850 the large and important district of New South Wales as then constituted, known as Port Phillip, was erected into the independent Colony of Victoria. The River Murray forms the northern boundary of this Colony, and therefore Victoria alone is directly interested in the question of the validity of the Wade and White boundary. The present Colony of New South Wales has no interest in it. Acts have since been passed as to the formation of electoral districts in Victoria, and as to the jurisdiction of public officers and magistrates. In all this legislation, as well as in the civil and criminal administration in the frontier lands, the existence of a boundary line has been recognized, and that boundary line has always been in practice the Wade and White line. But since the actual inaccuracy in the position of the Wade and White line has been a matter of general knowledge South Australia has again and again tried to induce Victoria to consent to a redetermination of the boundary. Such an attempt commenced in 1869, and at one time appeared likely to succeed, but in the year 1876 the Government of Victoria finally refused its consent and the matter fell through, and a like fate has attended subsequent attempts of the same kind on the part of South Australia. Their Lordships, however, are of opinion that entering

upon such negotiations does not imply any abandonment on its part of its contention that the original settlement is binding.

In the year 1861 the *Queensland Government Act*, 24 & 25 Vict. c. 44, was passed, which contained in clause 5 a provision relating to all the Australian Colonies. This clause reads as follows :—

" Whereas the boundaries of certain of Her Majesty's Colonies on the Continent of Australia may be found to have been imperfectly or inconveniently defined, and it may be expedient, from time to time, to determine or alter such boundaries : Be it therefore enacted as follows :—

> " It shall be lawful from time to time for the Governors of any contiguous Colonies on the said Continent, and with the advice of their respective Executive Councils, by any instrument under their joint hands and seals, to determine or alter the common boundary of such Colonies ; and the boundary described in any such instrument shall be deemed to be, within the limits there laid down, the true boundary of the Colonies, so soon as Her Majesty's approval of such instrument shall have been proclaimed in either of such Colonies by the Governor thereof."

It was therefore competent to the Colonies of Victoria and South Australia after the passing of this Act to readjust their common boundary by observing the formalities prescribed by the Act and without any appeal to Imperial legislation, but their Lordships are of opinion that (excepting as explaining the later negotiations above-mentioned) this Act has no relevance to any of the matters in issue in this appeal, because on the one hand it is common ground that nothing has been done which would constitute a compliance with the conditions of the section, and on the other hand their Lordships have no doubt that the passing of this Act did not take away from the Governments of the Colonies interested any rights or powers which they previously possessed. Its sole effect was to enable them, if they complied with its provisions, authoritatively to fix a common boundary line whether or no it agreed with that previously fixed by Imperial legislation or by Orders in Council.

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This was an additional power given by the Statute which was not previously possessed by those Colonies.

Having thus recapitulated the relevant material it remains to consider the argument based thereon by the appellants. It is clearly and forcibly expressed in the dissenting judgment of *Higgins* J. in the High Court. It may be stated thus: The Act of 1834 (4 & 5 Will. IV. c. 95), under which South Australia was created a Colony, enacted that His Majesty, with the advice of his Privy Council, might erect within a defined part of Australia (which includes the present Colony of South Australia) one or more Provinces and fix the respective boundaries of such Provinces, and that the inhabitants of such Provinces should be free from the laws, orders, Statutes, and Constitutions of other parts of Australia, but should be subject to and bound to obey such as were from time to time made for such Province or Provinces. They further say that by the Order in Council of 19th February 1836 the Crown, acting under the powers given by that Act, created the Colony of South Australia and fixed its eastern boundary at the meridian of 141 degrees east longitude; that the boundary so fixed has the same legal status as if it had been fixed in and by the Imperial Statute, and that therefore nothing less than an Imperial Statute can alter it. Finally, they say that no Imperial Act has been passed which either specifically alters it or gives powers of alteration to any other individual or legislature which have been exercised in that behalf, and that therefore the boundary between the two States remains as it was fixed by the Order in Council.

Counsel for the appellants did not in any wise shrink from putting forward in the plainest terms the consequences which he contended must follow from the above legal argument. He admitted that neither at the date of the Order in Council nor at any subsequent time was it possible to fix with accuracy a line on the surface of the earth representing the meridian; he also admitted that the degree of accuracy with which this could be done had increased with the progress of knowledge and would probably increase still further in the future, and that therefore the boundary, however carefully fixed, could never be said to be the legal boundary or to warrant the claim of either Colony to exercise jurisdiction up to it in view of

the possibility that a redetermination of greater accuracy might shift its position.

With much, if not all, the legal argument for the appellants stated as above their Lordships find themselves in agreement. They are of opinion that, so far as fixing the boundary of South Australia is concerned, the Letters Patent of 19th February 1836 have the authority and force of an Imperial Statute, and that no subsequent legislation has modified them so far as is relevant to the present appeal. The interpretation and validity of the provisions of these Letters Patent stand to-day just as they stood at the time when they were issued. But their Lordships find themselves unable to accept the interpretation of those provisions which is contended for by the appellants.

In order to make clear the decision of their Lordships on this point and the reasons upon which it is based it will be necessary shortly to consider what is implied in taking an astronomical line such as a meridian as the boundary of a State. The position and course of such a line on the actual surface of the earth can only be obtained by means of elaborate astronomical observations. At the date of the Letters Patent the possible observations for this purpose were of three kinds. The first was by lunar observations, which would give by means of a comparison of the position of the moon as observed locally with the computed position of the moon as recorded in the Nautical Almanack a means of ascertaining the difference between local time and Greenwich time and, therefore, of determining the longitude of the place. This method, though probably the most accurate then available, was liable to errors of observation and further to errors in the computation of the moon's future position contained in the Nautical Almanack, which, especially at so early a date, were not inconsiderable. Another method was by chronometrical observations. A considerable number of chronometers of known rate are compared with the local time at a place whose longitude is known, and then brought to some place of observation near to the position of the meridian and compared with the local time there, and in this way the difference of the local time at the place of observation and at the place selected as a basis of comparison is ascertained and the difference of their longi-

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tudes arrived at. This method was liable to a double error. The longitude of the starting point might not have been correctly ascertained and any error in such longitude must necessarily appear in the final result. But there was the further source of error arising from the difficulty of making chronometrical observations with accuracy. The third method was by direct triangulation, that is to say, by making a complete survey starting from some point of departure whose longitude was supposed to be known, and reaching to and including the place of observation near the desired meridian. This was liable to error due to inaccuracy in the determination of the longitude as a point of departure in exactly the same way and to the same extent as the preceding method. But in addition it had its own special sources of error. Although no doubt a complete and careful geodetic survey conducted with all the modern precautions against error is a very satisfactory way of determining the position of any point in a country, the cumulative effect of errors of observation in such a triangulation as was practicably possible in a sparsely occupied country at that date would necessarily be considerable.

The critical fact for the decision of the question in this case is that, although care on the part of the observers and excellence in the instruments used by them are able to reduce the effect of these sources of error to an amount which appears to be negligible in angular measurement, the practical consequences of such an error on the face of a globe of the size of the earth are by no means capable of being neglected. A degree, which is the ninetieth part of a right angle, seems to be a very small angle, and when it is borne in mind that a second is the three thousand six hundredth part of that small angle it would seem to be meticulous particularity to trouble about a few seconds in the determination of an angle. But in the latitude in question the distance corresponding to one second of arc (which is passed over by the sun in the fifteenth part of a second of time) is about 80 feet, so that the inevitable inaccuracy of these determinations represents considerable distances on the surface of the earth. The expert astronomical witnesses that were called in this case estimated the probable error of such a determination if made in or about the year 1847 at amounts varying from one

mile to three miles, so that it may safely be assumed that at the date of the Letters Patent it was impracticable to determine the position of the meridian without a probable error of, say, two miles.

The fact that no astronomical determination can be accurate is not a reflection on the position of astronomy among the sciences. Throughout the whole world of observations the inevitable presence of inaccuracies is recognized, and the dominant idea is to determine the probable error of each set of observations, that is to say, the margin of inaccuracy which must be allowed to it and within which it cannot be trusted. As the means and instruments of observation improve, this probable error grows smaller, but it can never disappear. A striking example of improved methods is given in the present case. The Letters Patent date before the introduction of electric telegraphy, and Wade and White made their determination before it was available for their purpose. The consequence is that they had to base their survey on results obtained from the comparison of chronometers, whereas far more accurate determinations of time can be made by electric signals which are instantaneous in transmission. But even with the use of such improved methods there remains a probable error, and it would appear that the determination of the boundary of New South Wales and South Australia north of the Murray River, which was made with the aid of telegraphic signals, is probably a hundred yards to the east of the meridian which it purports to mark out.

Bearing these considerations in mind, let us consider what is the meaning of fixing the boundaries of two Provinces by an astronomical line such as the meridian. This boundary is to separate not only civil but criminal jurisdiction. The inhabitants of the country on the one side are to be subject to one set of laws and authorities, and those that inhabit the country on the other side of the line are to be subject to another. It is essential that the given boundary should be such as fixes the rights and duties of the people and their rulers, and this can only be done by its fixing a boundary on the surface of the earth which divides the two. To hold in favour of the appellants would be to say that the provisions of the Letters Patent contemplated the continued existence of a No Man's Land of finite breadth over which the authorities of neither Colony could legiti-

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mately assert authority and which, although no doubt its breadth might be reduced as the advance of science diminished the probable error of the observations, could never be wholly extinguished.

It is impossible, in their Lordships' opinion, to hold that this is the true and complete interpretation of the provisions of the Letters Patent taken in connection with the Statute under which they were issued, which is expressly directed to the defining of a Province or Provinces the inhabitants of which "shall be free and shall not be subject to or bound by any laws, orders, Statutes or Constitutions" of any other part of Australia, but shall be subject to and bound by their own only. To define a boundary for such purposes it is necessary that the boundary line should be described or ascertainable on the actual surface of the earth. In the case of such a boundary as that defined by the Letters Patent it was necessary in order to accomplish this that there should be an Executive act so defining and representing the enacted boundary; and seeing that such an Executive act was and must have been known to be essential to render the provision in the Letters Patent a boundary such as was needful for the purposes of the Act, their Lordships have no doubt that on well-known principles of the interpretation of Statutes the Letters Patent must be taken to have implied and authorized the delineation and determination of the effective boundary by such an Executive act.

Counsel for the appellants would have us take the view that it only contemplated laying out from time to time a provisional boundary differing from the legal boundary, which, though growing more and more accurate, would never possess the status of finality. But in so doing he entirely overlooked the difficulties of the case. It is impossible for authorities to settle provisionally between themselves what area of jurisdiction they will take. The rights and liberties of the inhabitants of the country are expressly settled by the Statute, and such a suggestion would imply that the legislature contemplated that the authorities should without any warrant suspend as they might find most convenient its express provisions. But furthermore, can it be supposed that it was the intention of the legislature and of the King in Council that the authorities should expose themselves *ex necessitate* to actions by persons over whom

they have exercised jurisdiction prior to some redetermination of the boundary line in places where it has been ascertained that their jurisdiction did not legally extend? The only alternative is that they should on both sides abstain from exercising jurisdiction over any part of the doubtful territory, and this would be to permit the creation of an Alsatia in which criminals would enjoy full protection. And we are asked to accept an interpretation which entails all these grave difficulties, in lieu of holding that the legislation carries with it an implied power to the Executive to do such acts as are and are known to be necessary to translate the directions of the Letters Patent into an actual boundary in the practical sense of the word.

Their Lordships therefore hold that on the true construction of the Letters Patent it was contemplated that the boundary line of the 141st meridian of east longitude should be ascertained and represented on the surface of the earth so as to form a boundary line dividing the two Colonies, and that it therefore implicitly gave to the Executives of the two Colonies power to do such acts as were necessary for permanently fixing such boundary. This being so, the only question is whether the acts of the Executive fixing the Wade and White line as the boundary were acts such as were so contemplated and empowered. As to this their Lordships feel no difficulty. The facts set out above show that the two Governments made with all care a sincere effort to represent as closely as was possible the theoretical boundary assigned by the Letters Patent by a practical line of demarcation on the earth's surface. There is no trace of any intention to depart from the boundary assigned, but only to reproduce it, and as in its nature it was to have the solemn status of a boundary of jurisdiction, their Lordships have no doubt that it was intended by the two Executives to be fixed finally as the statutable boundary and that in point of law it was so fixed. Nothing could be more striking than the open and formal way in which the Wade line to the 23rd degree of south latitude was proclaimed and acknowledged by both Colonies with the sanction of the Secretary of State for the Colonies, and though the northern part of the boundary which was laid out by Mr. White did not receive such a formal and public recognition inasmuch as it was not proclaimed, yet it was ordered, carried out, and accepted in

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precisely the same way as the earlier survey, and there is not in their Lordships' opinion any difference between the two portions of the boundary in respect of their authority and finality.

It is unnecessary, therefore, for their Lordships to consider that portion of the respondents' case which rests upon the length of time during which the boundary line has been in fact accepted in practice by both Colonies. Similarly they do not think it necessary to deal with the somewhat refined considerations arising from the fact that the Victorian electoral districts have been statutably mapped out on the basis of this boundary line in the Statutes creating them, nor to consider whether the Royal Prerogative to fix boundaries can be treated as being in abeyance so far as these Colonies are concerned. They therefore express no opinion on these points.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

[HIGH COURT OF AUSTRALIA.]

CLARKE . . . . . APPELLANT;
PLAINTIFF,

AND

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM A COUNTY COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *April* 21, 22, 23, 24; *May* 12.

Griffith C.J., Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

Ship—Application of Commonwealth Acts to—Ship whose first port of clearance and port of destination are in Commonwealth—Seaman—Personal injuries—Claim for compensation—Commonwealth of Australia Constitution Act 1900 (63 & 64 *Vict. c.* 12), *sec. V.—Seamen's Compensation Act* 1911 (*No.* 13 *of* 1911), *sec.* 5.