power to enact. In *Sankey v. Whitlam* the object was to bring former Commonwealth Cabinet Ministers to trial for conspiracy to commit an offence against the law of the Commonwealth, the alleged law being the Financial Agreement.

Of the three, the argument advanced in *Tasmanian Wilderness Society Inc. v. Fraser* was by some margin the weakest. The judgment was correspondingly clearest. The monumental confusion of the *AAP Case* was not repeated. But then again, there was only one judge in *Tasmanian Wilderness Inc. v. Fraser.*

COLIN HOWARD*

HAZLETT v. PRESNELL[1]

Constitutional Law — Location of boundary between New South Wales and Victoria — Applicability of accretion and erosion — Implied executive powers of demarcation — Effect of prescription and acquiescence on territorial sovereignty of States.

In a sense, this case arose from events in 1866, when Messrs Wood and Kirk, the occupiers of Pental Island in the River Murray, isolated diseased stock on the Island and were summonsed to appear at Balranald on 15 June to answer charges under the New South Wales Scab Act. This brought to a head differences between New South Wales and Victoria over the interpretation of two Imperial Acts, 13 & 14 Vict. c. 59 (1850) and 18 & 19 Vict. c.54 (1855), which together established the separate colony of Victoria and determined its boundary with New South Wales. To clarify alleged ambiguities, section 5 of the 1855 Act declared that

> the whole watercourse of the said River Murray, from its Source . . . to the Eastern Boundary of the Colony of South Australia, is and shall be within the Territory of New South Wales.

The question of Pental Island was jointly referred to the Privy Council for resolution. It was awarded to Victoria in 1872, by an exercise of the royal prerogative, not of the judicial power, and in accordance with practice, no reasons were given for the award.

Shortly thereafter the occupiers of Beveridge Island wrote to the Victorian Government to ask whether they also laid claim to that island. This time, the colonies sought to resolve the question amicably by each appointing a surveyor who would jointly determine 'the main channel of the Murray River at Beveridge Island'. It seems implicitly to have been assumed that the main channel must also constitute 'the whole watercourse' within the meaning of the 1855 Act. When the survey revealed that the northern channel was both larger, and discharged more water, than the southern channel, the Colonial Secretary for New South Wales wrote to the Chief Secretary for Victoria on 20 June 1876.

> With reference to my letter of the 14th September last and previous correspondence respecting the arrangement for determining the main channel of the Murray River at Beveridge Island, I have now the honour at the instance of my Colleague the Secretary for Lands to inform you that, as under the reports of Mr. District Surveyor Betts and the Surveyor-General of this Colony there is no question whatever that Beveridge Island belongs to Victoria, the Government of New South Wales lays no claim to it.

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[1] (1982) 43 A.L.R. 1.

This understanding was subsequently acted upon by both Colonies. Victoria passed legislation affecting the island and has granted Crown leases thereto, including a lease to the present occupier, Mr Hazlett. When, without authority, he took water from the southern branch of the river, he was prosecuted under section 378(1)(c) of the Victorian Water Act 1958. The magistrate, Mr Presnell, found against him, and Hazlett launched proceedings for injunctive and declaratory relief, asserting that Beveridge Island was not in Victoria, but New South Wales. Crockett J., in the Supreme Court, found that the island was in Victoria[2] and the plaintiff appealed.

As recently as 1980 the High Court first considered the meaning of the 1855 Act in *Ward v. R.*[3] It was there held that the phrase 'the whole watercourse' meant that 'the boundary line between the States runs along the top of the southern bank of the Murray, all territory to the north being within New South Wales'.[4] Such a top-of-the-bank test necessarily assumes that there is a clearly ascertainable southern 'bank' with a 'top' along the length of the river.[5] The test presents certain problems, because there are many reaches, particularly on the inside of bends, where there is no clearly definable southern bank. It then affords an insufficient guide to determine the precise boundary. Again, although Stephen J. carefully and cautiously explained why a balancing of convenience would be beyond the powers of the Court in the instant case,[6] the fact that there is a strip of New South Wales land between the water-line and the top of the bank on the Victorian side does present difficult management problems. Not only would it, presumably, be a good spot for a barbecue on a Total Fire Ban day in Victoria, but it also throws the ownership of wharves and other structures and the powers of local councils and statutory authorities into doubt.

The rule in *Ward v. R.* was not, however, raised for consideration in *Hazlett v. Presnell*, but in view of the judgment in the latter case, it is important to note one thing about that rule. *Ward's Case* assumes that the actual boundary is fixed *ministerio legis*. It is not to be determined by the demarcation of a line by survey, but by the application of a rule of law to the physical circumstances of the river at the place where the issue arises. This, indeed, is the important difference between a boundary fixed by reference to a river, as a geographic feature, and an astronomic boundary, fixed by reference to degrees of latitude or longitude. In the first case, all men can accurately discern the border zone by their own senses and the precise line is to be determined by a rule of law, be it the *medius filus*, the *thalweg*, a particular water-line or, least frequently, the top of a particular bank. In the second case, no man can be aware of the location of the border zone, or of the precise line, without physical demarcation of the border by an astronomical survey and the erection of cairns, the blazing of trees or the erection of a fence.

In so far as *Ward v. R.* implied that 'the whole watercourse' embraces the whole contour feature transporting water, Hazlett relied upon it in his argument that the southern and not the northern channel delimited the boundary. He also showed that, since 1850, siltation had reduced the carrying capacity of the northern channel, so that the southern channel now carried more water and must be regarded as the main channel. New South Wales intervened in support of this interpretation but, interestingly, argued that long use by Victoria and acquiescence by New South Wales meant that New South Wales could no longer assert that the island was her territory.[7]

The respondents argued that the main channel must be the 'whole watercourse'; that this was fixed in 1850, subject only to accretion and erosion; and that the Imperial

[2] [1982] V.R. 137.
[3] (1980) 142 C.L.R. 308.
[4] *Ibid.* 336.
[5] *Ibid.* 327.
[6] *Ibid.* 329.
[7] Transcript of Proceedings, 4 August 1982, 123 *per* M. Gaudron, Q.C.

Acts of 1850 and 1855 must be read as implicitly granting power to the two colonial executives to ascertain the precise boundary and to resolve any problems which arose in the process. The arrangements for a joint survey and the letter of 20 June 1876 were an appropriate exercise of that implied power.

The High Court unanimously found that the island was Victorian territory, primarily for the reasons advanced by the respondents and New South Wales. The following particular findings are worthy of comment.

(1) The 'ordinary common law principles of erosion and accretion are applicable' to the boundary, which was defined by reference to the identity of the River Murray in 1850 and 1855, subject only to accretion and imperceptible erosion.[8]

(2) A 'boundary described in general terms by reference to geographical features such as the course and whole watercourse of a named river must, for its practical application, be translated into at least a perceived line on the terrain'.[9]

(3) The Imperial Acts 'contained an implied grant of power and authority to the local administrations of the two colonies to delineate and determine the actual boundary line on the surface of the earth and to resolve, by accord or agreement reached in good faith for that purpose, any questions of the identification of the River Murray, its course and its whole watercourse which might arise in that delineation or determination'.[10] This power had been effectively exercised by the joint surveys and an 'accord' between the principal officers of the executive branch, witnessed by the letter of 20 June 1876.

(4) United States authority and *obiter dicta* of Griffith C.J. in *South Australia v. Victoria*[11] established that 'principles of prescription and acquiescence were, in an appropriate case, applicable to preclude effective challenge to the location on the terrain of a settled boundary line between contiguous colonies'. Such 'principles are analogous to the doctrine of adverse possession established in the common law' but require 'acquiescence by one side in the claims of the other as well as an assertion and exercise of sovereignty by the other for a long period'. By 1901, these principles would have precluded challenge to the settled boundary, so the island effectively had become Victorian territory.[12]

(5) It was unnecessary to decide whether a boundary 'which was not settled as at 1901' could be confirmed by prescription and acquiescence; or whether the executive powers implied in the Imperial Acts survived federation.[13]

Accretion and Erosion

The question of accretion and erosion was not really before the Court. It was argued that siltation of the northern channel had resulted in a switch southwards of the main channel. In so far as that might be the basis for an argument that territory had changed hands, the previous High Court decision of *Williams v. Booth*[14] determined that such a change was avulsive and not the result of an imperceptible process of accretion to land. This had, in fact, been clearly recognised by Crockett J. in the Supreme Court of Victoria.[15]

The finding that the watercourse, for the purpose of the Imperial Acts, was fixed in 1855 was important to the result. Obviously, there would have been some gradual

[8] (1982) 43 A.L.R. 1, 7.
[9] *Ibid.* 10.
[10] *Ibid.* 12.
[11] (1911) 12 C.L.R. 667, 706.
[12] (1982) 43 A.L.R. 1, 14-5.
[13] *Ibid.* 15.
[14] (1910) 10 C.L.R. 341, 350.
[15] [1982] V.R. 137, 142.

movement since then and it might therefore be argued that it was necessary for the Court to decide to take such gradual, natural processes into account. But it was unfortunate that the Court expressed the conclusion that the ordinary common law principles of erosion and accretion are applicable.[16] Such a result is barely supported by authority; appears to conflict with the rationale of the doctrine recently advanced by the Judicial Committee in *Southern Centre for Theosophy Inc. v. South Australia*;[17] and is apparently reached without reference to the Court's own decision in *Ward v. R.*

The latter case, it will be remembered, fixed the boundary at the top of the bank on the Victorian side. This is a land/land boundary and must be contrasted with a boundary at a particular water level (land/water) or the *medius filus* or *thalweg* (water/water). Unfortunately, the only case where the common law doctrine of accretion has been applied to a land/land boundary appears to be *Foster v. Wright*,[18] where a river, originally wholly contained within the plaintiff's land, gradually moved laterally across that land until it engulfed the original land/land boundary. Lindley L.J. decided that the plaintiff retained title to the bed, on the basis of accretion, and could have trespass against the defendant for fishing from the bed of the stream. The case must have attracted criticism, for Lindley L.J. in *Hindson v. Ashby*[19] subsequently, and with apparent ill-ease, sought to legitimise his earlier decision by representing that 'in that case the river was the boundary', which manifestly it was not.

In *Southern Centre of Theosophy Inc. v. South Australia*, Lord Wilberforce sought an underlying rationale for the doctrine. Having dismissed several historic explanations, he concluded that the doctrine was founded upon security and general convenience and was necessary for 'the permanent protection of property'.[20] Owners of land in lateral or vertical contact with the actual flow of water enjoy riparian rights which are natural incidents of riparian land and cannot be alienated from it. The exclusiveness of the riparian's correlative rights to enjoy those advantages are protected against non-riparians by the law of trespass. If, however, in-water or water/land boundaries failed to follow imperceptible movements in the course of the river, one or other riparian owner might eventually lose important natural incidents of title. Manifestly, the same reasoning does not apply to land/land boundaries, because one of the landowners will initially not own land in lateral or vertical contact with the stream. He will thus lack those additional natural incidents of riparian ownership which the doctrine exists to protect.

The top-of-the-bank test, of course, means that Victoria is not a riparian owner. It thus lacks the very status which the doctrine of accretion seeks to protect. As the appication of the doctrine to a land/land boundary is thus unsupported by precedent or principle, the Court's statement that it was, in fact, applying ordinary common law principles is unfortunate. It carries the implication that, quite apart from the unusual problem of a boundary between States, the common law rules of accretion and erosion are applicable to ordinary land/land boundaries. It would be less unsettling, and more in accordance with the recent views of the Judicial Committee, if the rule enunciated by the High Court were clearly confined to the particular circumstances of the River Murray border between States.

The duty of demarcation

The second finding of the Court also creates practical difficulties. In two places[21] it, in effect, decides that an executive act of physical demarcation is necessary to

[16] (1982) 43 A.L.R. 1, 7.
[17] [1982] A.C. 706.
[18] (1878) 4 C.P.D. 438.
[19] [1896] 2 Ch. D. 1, 12.
[20] [1982] A.C. 706, 721.
[21] (1982) 43 A.L.R. 1, 10, 12.

produce 'a perceived line on the terrain' before the boundary is properly fixed. Neither State has, alone or in concert, sought to mark such a line. Instead, both have assumed that the precise location of the river boundary is to be determined by a rule of law, and that the previously mentioned distinction between a river boundary and an astronomical boundary makes physical demarcation unnecessary in the former case.

To reach its conclusion, both on this point and on the subsequent finding of implied executive power, the Court drew heavily upon the High Court and Judicial Committee decisions in *South Australia v. Victoria*,[22] which involved the very different circumstances of an astronomical boundary. For such a boundary to have meaning for the ordinary man it must be translated into 'a perceived line on the terrain'. Indeed, no rule of law could operate to fix its precise location. Some executive act of demarcation is obviously necessary.

It seems that the High Court failed to appreciate the fundamental distinction between the two types of boundary. This conclusion is supported by the fact that passages cited from both the judgment of Isaacs J.[23] and from the Judicial Committee[24] in *South Australia v. Victoria* were both expressly confined to the circumstances of an astronomical boundary. In relying on those passages in *Hazlett's Case*, however, the High Court did not advert to their limited context and clearly assumed that they had general application.

Implied executive powers

It seems that the assumed authority of *South Australia v. Victoria* was also allowed to supplant analysis on the issue of implied executive power. As mentioned, such a power may well be implied in a legislative determination of an astronomic boundary. Indeed, the particular provisions of 4 & 5 Will. IV, c. 95 (1834) and Letters Patent of 19 February 1836 in establishing South Australia so clearly contemplated executive demarcation of the astronomical boundary that O'Connor J. held that the power was expressly conferred and not merely implied from necessity.[25]

The Imperial Acts of 1850 and 1855, separating New South Wales and Victoria were quite dissimilar, and purport to establish the boundary by their own force. No supplementary discretion was given to the executive branch to 'fix' the boundary, nor did the necessity of the case require that a power of physical demarcation be implied. Indeed, section 5 of the 1855 Act might arguably have necessarily prohibited such an implication, for it gave supplementary power 'to define in any different Manner the Boundary Line of the said Two Colonies along the Course of the River Murray' expressly to the colonial legislatures, acting in concert. The implication adverse to executive power is immeasurably strengthened when it is remembered that section 2 of the 1855 Act was the final resolution of a process which Barwick C.J. characterised as one of 'continued argument and protestation'[26] over the control and management of Crown lands. By it, the United Kingdom Parliament finally succumbed to the rebellious stance of both Colonies when drafting their own constitutions. They insisted that 'the entire Management and Control' of Crown lands be vested in the colonial legislature. The express intention was to wrest that control from the executive and to destroy the consequential fiscal autonomy of the Governor. In such a context, it is scarcely conceivable that the United Kingdom Parliament could have intended section 5 to confer implied powers on the executive branch independently to determine the extent of Crown lands for each Colony.

It should be noted, too, that the executive power which the High Court chose to

[22] (1911) 12 C.L.R. 667; (1914) 18 C.L.R. 115.
[23] (1982) 43 A.L.R. 1, 11.
[24] *Ibid.* 11-2.
[25] (1911) 12 C.L.R. 667, 713.
[26] *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337, 369.

imply seems to have been substantially wider than necessity would justify. As has previously been noted, the circumstances of a river boundary do not require an executive power to carry out demarcation of a precise line along the length of the river. They certainly do not require that such a power should be formulated, as it was, in terms of a positive duty. Indeed, to formulate such a duty invites immediate conflict with the Court's previous decision in *Ward v. R.* There it was held that the precise location of the boundary was to be determined by a rule of law — 'the top-of-the-bank' test — and there was no suggestion that there might be either an executive power or an executive duty to demarcate the border in a manner which either conformed to, or departed from, that rule of law.

The only way in which this apparent conflict can be satisfactorily resolved is to confine the executive power which the Court chose to imply to the task of determining the precise identity of the River Murray and what is, at any place where there is more than one contending channel, to be regarded as the 'whole watercourse' for the purpose of the 1855 Act. After all, on the facts of *Hazlett's Case*, this is all that the colonial executives jointly sought to do. The precise border is still to be determined by an application of the top-of-the-bank test, as the appropriate legal rule, which is thus supplementary to, but not in conflict with, the narrow executive power to determine the identity of the River Murray. In suggesting that there was a general executive duty to carry out a demarcation of the precise border, the High Court thus appears to have gone well beyond the practical requirements of the situation.

The exercise of implied executive powers

Even if some executive power was correctly implied in section 5 of the 1855 Act, there is doubt whether it was appropriately exercised. In *South Australia v. Victoria* the Judicial Committee observed that nothing could be more striking than the manner in which the survey was proclaimed. In the case of Beveridge Island, however, there were no mutual proclamations of the Governors-in-Council, nor antecedent or subsequent ratification of the Secretary of State for the Colonies. Instead the High Court held that:

> Accord was reached, between the senior Ministers of the two Colonies who were speaking for their respective Governments, that the watercourse of the river was the watercourse of the northern stream. That accord represented the resolution of what was essentially a question of fact.[27]

The existence and terms of the alleged accord were not proved and rest merely on implication from the letter from the Colonial Secretary of New South Wales. That letter renounced New South Wales claims, but was not a record of an agreement; nor is there evidence that either the renunciation or an 'accord' was approved by either Governor-in-Council. Rather, the letter of 20 June 1876 purports merely to be written at the instance of the New South Wales Minister of Lands. Furthermore, there is no evidence to support a conclusion that the senior Minister of Victoria, 'speaking for' that government, reached any 'accord' that the watercourse was to be defined by reference to the northern stream. Victoria's subsequent legislation may indicate an assumption that New South Wales made no claim to the island, but it does not prove the existence of a particular accord.

Given the sensitivities between the legislature and the executive in 1855 it is inherently unlikely that, if the United Kingdom Parliament did intend to create executive powers ancillary to section 5, it would have failed to designate who should exercise them. If it did not, normal constitutional practice would require action by the Governors-in-Council. The alleged 'accord' between the colonies, however, was not submitted to either Governor-in-Council and it is thus difficult to see how such an

[27] (1982) 43 A.L.R. 1, 9.

imprecise arrangement could be an effective exericse of executive power by either government.

Prescription and acquiescence

Perhaps the most enduring consequence of *Hazlett's Case* will be the doctrine of prescription and acquiescence adopted at the suggestion of New South Wales. The doctrine as stated has greater effect than the common law of adverse possession with which it was compared. Adverse possession may, indeed, have extinguished any right of action which New South Wales had to eject Victoria from Beveridge Island, for the unusual provisions concerning the Crown in sections 10(1) and 11(1) of the New South Wales Limitation Act, 1969 seem to carry the consequence that New South Wales title is extinguished under section 65(1), either by the direct effect of that Act or by virtue of section 64 of the Judiciary Act 1903 (Cth).[28] But the High Court's doctrine involves the further conclusion that New South Wales has lost territorial sovereignty over the island and would therefore lack the capacity to legislate to undo the results worked by the Limitation Act, 1969 (N.S.W.).

An important result of this doctrine which, presumably, was not foreseen by either New South Wales or the High Court, is that both the rule in *Ward v. R.* and the implication of executive power into the 1855 Act may have become redundant. Victorian occupation of the strip of riparian land between the water-line and the top of the bank has been similarly adverse to New South Wales title; and there has been implicit acquiescence in Victoria's legislative and executive capacity by New South Wales. The High Court's doctrine thus seems to require that the position of the present border can now only be determined, not by reference to the top of the southern bank, but to the actual limits of Victorian occupation at any place. This may be at one or other of the possible water-levels, or at some point further into the bed of the river where Victorian wharves, jetties or structures exist. The precise border consequently becomes much more difficult to identify and will depend upon proof as to the limits of Victorian occupation.

The doctrine is remarkable for reasons other than its unforeseen effect. No principles of English common law could have the result of extinguishing territorial sovereignty through prescription and acquiescence. Accordingly, the High Court draws directly upon federal common law developed by the United States Supreme Court and international law. In the absence of an appropriate common law rule, it seems that the Court has, in substance, adopted a clearly defined principle of customary international law by analogy, to govern relations between elements of the Australian federation. Such a result presumably fortifies those who argue for a discrete body of 'inter-State common law'.[29] Indeed, it may be better also to view the application of principles of accretion and erosion to the River Murray boundary as a rule of this type, rather than as a purported application of ordinary common law rules.

Re-defining the boundary

The inconvenient result of applying the doctrine of prescription and acquiescence to the rule in *Ward v. R.* can presumably only be resolved by political agreement between the States. It seems that most opinion would favour the middle line at a specified rate of discharge. The difficulty is how this may be achieved.

[28] *Maguire v. Simpson* (1977) 139 C.L.R. 362; *China Shipping Co. v. State of South Australia* (1979) 54 A.L.J.R. 57.

[29] Renard I. A., 'The River Murray Question: Part III — New Doctrines for Old Problems' (1972) 8 *M.U.L.R.* 625; Renard I. A., 'Australian Interstate Common Law' (1970) 4 *Federal Law Review* 87; Moore W. H., 'Suits between States within the British Empire' (1925) 7 *Journal of Comparitive Legislation and International Law* 155; Moore W. H., 'The Federations and Suits between Governments' (1935) 17 *Journal of Comparitive Legislation and International Law* 163.

Section 5 of the 1855 Act admitted the possibility of concurrent legislation 'to define in any different manner' the boundary, and it can be argued that the whole of that section, including the proviso mentioned, declares 'the limits' of the colonies. On this view, concurrent legislation would not seek to 'increase, diminish or otherwise alter the limits' of the States which, under section 123 of the Constitution, can only be done by Commonwealth legislation after successful referenda in each State. It is also possible that the Governors by a joint instrument, with the advice of their Executive Councils, may consensually 'determine' the common boundary pursuant to section 5 of the Imperial Queensland Government Act 1861, which unlike the Imperial Colonial Boundaries Act 1895 was not expressly amended or repealed by the Commonwealth of Australia Constitution Act 1900.

The difficulty is that the Court in *Hazlett's Case* refused to decide 'whether the principles of prescription may operate under the Constitution so as to confirm a boundary line which was not settled as at 1901';[30] or whether the executive powers implied in the 1855 Act survived that date. Apart from certain ambiguities in the former phrase, the Court's reluctance seems to signal the possibility that section 123 of the Constitution may be given overriding effect to the detriment of pre-existing powers. Such a possibility is purely speculative, however, and it is perhaps regrettable that the decision gives no clear indication to the States how they may now remedy the unfortunate results which it has produced.

SANDFORD D. CLARK*

MUNNA BEACH APARTMENTS PTY LTD v. KENNEDY AND OTHERS[1]

Investor protection — Interest — Investment contract — Offer for sale of home unit with undivided share in common property — Companies Act 1961 (Qld) ss 76, 81 — Building Units and Group Titles Act 1980 (Qld).

In several recent cases the Supreme Court of Queensland had to decide whether an offer for sale of a home unit, together with an undivided share in the common property of an apartment building was an offer of an 'interest' under the Companies Act 1961 (Qld). The matter came before McPherson J. His reasoning in one of the cases, *Munna Beach Apartments Pty Ltd v. Kennedy and Others*, led him to the view that an 'interest' had not been offered. That reasoning served also for the other cases[2] in which he reached a similar conclusion. When the matter was taken on appeal to the

[30] (1982) 43 A.L.R. 1, 15.

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[1] (1982) 7 A.C.L.R. 257.

[2] The cases additional to *Munna Beach Apartments Pty Ltd v. Kennedy and Others* were: —
Brisbane Unit Development Corporation Pty Ltd v. Deming No. 456 Pty Ltd and Others (1982) 7 A.C.L.R. 265;
Brisbane Unit Development Corporation Pty Ltd v. Sokala Pty Ltd and Another (1982) 7 A.C.L.R. 276;
Brisbane Unit Development Corporation Pty Ltd v. Sinum Nita Nominees Pty Ltd and Another (1982) 7 A.C.L.R. 282;
Brisbane Unit Development Corporation Pty Ltd v. Brisbane Townhouse & Unit Specialists Pty Ltd and Another (1982) 7 A.C.L.R. 286.