1874.

VICTORIA.

PAPERS

RELATING TO

THE BOUNDARY LINE BETWEEN SOUTH AUSTRALIA AND VICTORIA.

PRESENTED TO BOTH HOUSES OF PARLIAMENT BY HIS EXCELLENCY'S COMMAND.

By Authority:
JOHN FERRES, GOVERNMENT PRINTER, MELBOURNE.

No. 92.

CORRESPONDENCE BETWEEN THE GOVERNMENTS OF SOUTH AUSTRALIA AND VICTORIA RELATING TO THE DETERMINATION OF THE BOUNDARY LINE.

SOUTH AUSTRALIA.

SIR, Chief Secretary's Office, Adelaide, 8th November 1869.

I have the honor, by desire of His Excellency Sir James Fergusson, to inform you that by a letter from the Lands and Survey Department, Melbourne, to the Surveyor-General of South Australia, dated the 11th August last (S.G.O. 534/69), there appears to be an intention to lay out roads on the Victorian side of the boundary line, as at present recognized, to meet those of South Australia.

I would suggest that before any such steps are taken, or the new map of Victoria is published as projected, it might be well for your Government to consider the fact of the line referred to being about two and a quarter miles to the west of the 141st meridian, which degree was fixed by Imperial Statute 4 and 5 of William IV., cap. 95, as the boundary of the new colony of South Australia.

Under the circumstances it would appear desirable that the Government Astronomers of the two colonies should at an early date make a voltaic determination of the difference of longitude between the south end of the boundary line and the Melbourne Observatory, following a similar course to that pursued in determining the true boundary north of the Murray.

I have, &c.,
JOHN T. BAGOT,
Chief Secretary.

The Honorable the Chief Secretary, Victoria.

Approved—JOHN A. MACPHERSON.—19/11/69.

No. 3294.

VICTORIA.

SIR, Chief Secretary's Office, Melbourne, 26th November 1869.

I have the honor to acknowledge the receipt of your letter of the 8th instant, suggesting that the Government Astronomers of the two colonies should determine the difference of longitude between the south end of the boundary line of your colony and the Melbourne Observatory, and in reply to inform you that, approving of such a step being taken, I shall issue instructions for its being carried into effect at as early a date as possible.

I have, &c.,
JOHN A. MACPHERSON.

No. 3331.

SIR, Chief Secretary's Office, Melbourne, 30th November 1869.

I have the honor to forward for your information copy of a letter received from the Government of South Australia on the subject of deciding the boundary line between that colony and Victoria.

You will observe by Mr. Macpherson's reply that he has adopted the suggestion that the Government Astronomers should make a voltaic determination of the difference of longitude, and I am therefore directed by the Chief Secretary to request you will be good enough to give the necessary instructions to this end.

I have, &c.,
W. H. ODGERS.

To the Honorable the Commissioner of Crown Lands and Survey.

SOUTH AUSTRALIA.

1137/69.

SIR, Chief Secretary's Office, Adelaide, 6th December 1869.

I have the honor, by desire of His Excellency Sir James Fergusson, to acknowledge receipt of your letter of the 26th ultimo (1744/69), informing that you will issue instructions for the determination of the longitude between the south end of the boundary line of this province and the Melbourne Observatory; and, in reply, to state that Mr. Todd, the Superintendent of Telegraphs in South Australia, has been directed to proceed on the above service and to communicate with Mr. Ellery with a view to combined action.

I have, &c.,
JOHN T. BAGOT,
Chief Secretary.

To the Honorable the Chief Secretary, Victoria.

Memorandum on the Boundary Line between South Australia and Victoria.

The geographical position of the boundary line between South Australia and Victoria, which was marked in 1847 and proclaimed in the *South Australian Government Gazette*, 23rd December 1847, has now become known with as much accuracy as the geographical position of the Melbourne Observatory by means of the primary triangulation of the geodetic survey, but is subject to further correction at any time if, by any improved means, the geographical position of Melbourne can be ascertained within closer limits.

The position of the boundary line marked and proclaimed in 1847 is 140° 58′ 7·3″, and every precaution, possible at the time, appears to have been taken to obtain the position of the 141st meridian correctly; yet the difference between the marked line and the 141st meridian, as determined by the geodetic survey, amounts to 136·63 chains, showing the line to be that distance west of the 141st meridian as obtained by reference to the Melbourne Observatory.

The course suggested in the letter of the Honorable the Chief Secretary of South Australia, viz., that a voltaic determination of the position should be made is, I think, quite unnecessary in so far as the question of the boundary line is concerned, for the closest approximation to be obtained by such a method could not in any way reach the same accuracy as a careful triangulation.

A voltaic determination, however, would be extremely valuable on other grounds, namely, in the determination of the length of an arc of a parallel of latitude, for the actual distance in feet between Melbourne and the boundary is now known precisely; an astronomical and voltaic measure would, therefore, give the measure of the parallel which will be of the highest scientific value in adding to our knowledge of the figure of the earth, more especially, as no such measures have ever been obtained in this portion of the globe.

The primary triangulation is now nearly complete to Cape Howe, and, if it were possible to extend it from the boundary to Adelaide, a very large arc would be available. All boundaries having their positions defined as certain parallels or meridians and once marked are always adopted finally, and not subject to the results of any future geographical determination; for re-opening the question of accurate geographical position would give rise to constantly recurring doubts, as fresh values from different observers, different methods, or more advanced astronomical knowledge, might be obtained. As an instance of this, I would refer to portions of the boundary between the United States of America and Canada, where a certain parallel of latitude was adopted and the line marked; the *line* is finally adopted, not the *parallel of latitude*, which may never be ascertained with the precision requisite for a boundary between two countries. In the United States also many of the boundaries between the States come under the same category.

I am, therefore, of opinion that, for the determination of the position of the boundary line only, the voltaic method is far inferior to trigonometrical measurements already made; that any alteration of a boundary line, originally defined to be a certain degree of longitude, which was marked, proclaimed, and adopted twenty-three years ago (and where large tracts of land have been alienated on either side up to the marked line), on the ground of erroneous geographical position would be very undesirable.

Melbourne Observatory, 8th March 1870. ROBERT L. J. ELLERY.

SOUTH AUSTRALIA.

SIR, Chief Secretary's Office, Adelaide, 19th August 1873.

Referring to the correspondence which took place in November and December 1869, and to your predecessor's letter of the 21st November of that year, stating that instructions would be issued for the determination of the longitude between the south end of the boundary line of this province and the Melbourne Observatory in conjunction with Mr. Todd, Observer for South Australia, I have the honor, by desire of His Excellency Governor Musgrave, to inform you that the pressure of business, which, as you are aware, has hitherto prevented that officer from attending to the matter, has now ceased; and this Government will be glad if you will instruct Mr. Ellery to communicate with Mr. Todd, in order that the necessary arrangements for definitely fixing the boundary may be completed as early as possible.

I have, &c.,

ARTHUR BLYTH.

The Honorable the Chief Secretary, Victoria.

Will the Honorable the Commissioner of Lands and Survey consider this matter, and advise as to the reply to be sent to the Government of South Australia.

27/8/73. J. G. F.

SOUTH AUSTRALIA.

SIR, Chief Secretary's Office, Adelaide, 18th November 1873.

I have the honor, by desire of His Excellency Governor Musgrave, to draw your attention to my letter of 19th August last, having reference to the determination of the boundary line between Victoria and South Australia, to which I have not yet been favored with any reply.

I have, &c.,

ARTHUR BLYTH.

The Honorable the Chief Secretary, Victoria.

(*Immediate.*)

Will the Honorable the President of the Board of Land and Works be so good as to place the Chief Secretary in a position to reply to the Chief Secretary of South Australia.

25/11/73. W. H. ODGERS.

The boundary line between South Australia and that part of New South Wales, now the colony of Victoria, was fixed and determined, and marked on the ground, in 1847. *See* Proclamation in *South Australian Gazette*, page 411, 16th December 1847. That line, so far as it is the boundary line, cannot be disturbed, as both colonies have acted upon it since. There will be no objection to determine as nearly as can be the precise position of the 141st degree of east longitude, on the express understanding that such is for scientific purposes only, and that it will in no way affect the boundary of the two colonies as fixed in 1847.

16/12/73. J. J. CASEY.

Reply conformably to memo. of Honorable Minister of Lands.

19/12/73. J. G. F.

Acknowledge as forwarded to Minister of Lands for enquiry.

In forwarding this to Mr. Casey I must say that in forwarding his former communication on this subject I was struck by the point herein made, as however inconvenient, unless there exist some overriding covenant, the boundary given by law and geographical lines must, I assume be adhered to.

4/2/74. J. G. F.

Would Mr. Ellery be so good as to state his views on the point as now raised by the South Australian Government.

10/2/74. A. J. SKENE.

I cannot add any fresh views on this question beyond those given in my memo. of 8th March 1870.

A geographical line on the position of such a line with reference to any position is not determinable within certain limits, and cannot be taken as a definite thing. No limits, within which the determinations of such positions shall be deemed correct are assigned. Consequently, in cases of this kind, when once the geographical position is assigned to a line (whether meridian or parallel) the line is marked and adopted, irrespective of any modification of true geographical position which may result from after or more refined astronomical observation. This is the case in the boundary between the United States and Canada, where many portions are parts of a parallel. Admitting alterations every time there was reason to believe that the geographical position had been more accurately obtained would lead to perpetual shifting of a line—first from miles to chains, chains to feet, and so on.

Although we know the South Australian boundary differs from the 141st meridian, it is by no means certain how much it does so within at least three-quarters of a mile.

3rd March 1874. ROBERT L. J. ELLERY.

No. 5679. VICTORIA.

SIR, Chief Secretary's Office, Melbourne, 24th December 1873.

In reply to your letter of the 18th ultimo and previous correspondence, proposing that the boundary line between South Australia and Victoria should be more accurately defined than it is at present, I have the honor to inform you that the existing line having been, as is well known, determined and marked on the ground in the year 1847, proclaimed as the boundary in the *South Australian Government Gazette* of the 16th of December of that year, and universally accepted ever since as the established line of demarcation between the two colonies for all purposes, this Government cannot now give its consent to any course of action which might tend in any way to disturb so well recognized a line as it is, or that could be capable hereafter of being construed into any kind of admission that it regarded at the present time with favor a proposition for amending or altering what has served for many years to define the territorial limits of the two colonies.

Having now guarded against the risk of any future misunderstandings occurring on the subject, I have only further to state that there is no objection on the part of the Goverement of Victoria to unite with the Government of South Australia in determining as nearly as can be the position of the 141st degree of east longitude, subject to the express condition mentioned above—that in engaging in the investigation both Governments do so distinctly in the interests of science only—and that they agree beforehand that the result arrived at, whatever it be, is in no degree to affect the boundary of the two colonies as fixed in the year 1847.

I have, &c.,

The Honorable the Chief Secretary, &c., Adelaide. J. G. FRANCIS.

SOUTH AUSTRALIA.

SIR, Chief Secretary's Office, Adelaide, 29th January 1874.

I have the honor, by desire of His Excellency Governor Musgrave, to acknowledge the receipt of your letter of the 24th ultimo, in which, referring to former correspondence on the subject of a more accurate determination of the boundary line between Victoria and this province, you state that your Government is not disposed to take any action which might possibly lead to a disturbance of the line surveyed in 1847, and universally accepted ever since, as the established line of demarcation between the two colonies for all purposes, but will have no objection to unite with South Australia in determining as nearly as possible the precise position of the 141st degree of east longitude, on the express condition that it is in the interests of science only, and in no degree to affect the boundary question.

Before replying, I must express the surprise of this Government that, although the subject has been under consideration for many years, this is the first intimation that you question the propriety of this Government's proposition that the boundary should be accurately fixed.

On the 8th November 1869, this Government addressed your predecessor, pointing out that the line surveyed in 1847 was about 2¼ miles to the west of the 141st meridian, which degree of longitude was fixed by Imperial Statute 4 and 5 of William the Fourth, cap. 95, as the boundary of the new colony of South Australia, and requesting that the astronomers of the two colonies should accurately fix the exact position of the 141st degree, by voltaic signals, as had been done in determining the true boundary north of the River Murray.

On the 26th of the same month the Chief Secretary of Victoria informed me that, approving of such a step being taken, he would issue instructions for its being carried into effect as early as possible; and on the 6th December 1869, we replied that Mr. Todd had been directed to proceed on the above service, and to communicate with Mr. Ellery, with a view to combined action.

Unfortunately Mr. Todd was unable at once to enter upon the work, as the construction of the overland telegraph occupied the whole of his time, and the matter was left in abeyance until the 19th August 1873, when I requested that the instructions referred to in your predecessor's letter of 26th November 1869, might be given to Mr. Ellery to proceed with the service.

With reference to the view now taken by your Government, I think it only necessary to point out that the issue of the proclamation of the 16th December 1847, declaring as the boundary a certain line, erroneously surveyed, and which was not the 141st degree of east longitude, cannot but be void as against the Imperial Statute above quoted, which distinctly names that degree as the boundary between the two colonies.

As means are now available for exactly defining the boundary in accordance with the Imperial Statute which determined it, and as the more the country becomes peopled the more likelihood there is of crimes affecting life and property being committed upon the strip of land in question, which might lead to grave legal difficulties, this Government would strongly urge upon you to unite with it in setting this important matter finally at rest in the manner formerly arranged.

I have, &c.,

The Honorable the Chief Secretary of Victoria. ARTHUR BLYTH.

No. 434. VICTORIA.

SIR, Chief Secretary's Office, Melbourne, 5th February 1874.

I have the honor to acknowledge the receipt of your letter of the 29th ultimo, No. 186, on the subject of the determination of the boundary line between South Australia and Victoria, and in reply to inform you that I have brought it under the consideration of my colleague the Honorable the Minister of Lands.

I have, &c.,

The Honorable the Chief Secretary, South Australia. J. G. FRANCIS.

Sir A. Blyth, of South Australia, called and said he had to leave by the "Aldinga," at 5 o'clock, but would be at Menzies' until 4.30, if Chief Secretary wished to see him.

He wishes very much for reply to the letter about adjustment of boundary.

24/2/74. THOS. WEBB WARE.

Memo for Mr. Casey.—Will you mind to speak to me *re* boundary line?

24/2/74. J. G. F.

I shall be happy to discuss this question with the Honorable the Chief Secretary.

Had the line not been agreed upon, I quite agree that it should now be determined.

If the line fixed in 1847 be now disturbed, will the new fixing be final? What guarantee is there it may not be re-opened when a fresh set of tables is published?

Mr. Ellery's memorandum shows that though the line has been fixed it is only approximate, and that it is impossible to lay it down accurately on the ground within three-quarters of a mile.

What is to be done with the lands sold within the boundary fixed in 1847, but now claimed by South Australia?

J. J. C.

Cabinet, 6/3/74.

Cabinet, 16th March, 1874.

Return to Mr. Casey for his further consideration.

16/3/74. J. G. F.

Urgent.—Surveyor-General to submit a memorandum as suggested.

17/4/74. J. J. C.

SOUTH AUSTRALIA.

SIR, Chief Secretary's Office, Adelaide, 30th March 1874.

I have the honor to draw your attention to my letter of the 29th January last, on the subject of a more accurate determination of the boundary line between Victoria and this province, and to state that, as our Parliament will shortly re-assemble, I shall feel obliged if you will communicate to me at your earliest convenience the steps your Government propose taking in the matter.

I have, &c.,

The Honorable the Chief Secretary, Victoria. ARTHUR BLYTH.

No. 3360. VICTORIA.

SIR, Chief Secretary's Office, Melbourne, 10th April 1874.

I have the honor to acknowledge the receipt of your letter of the 30th March, asking an early intimation of the steps which this Government may propose taking with a view to the more accurate determination of the boundary line between South Australia and Victoria.

I have, &c.

THOS. WEBB WARE,

Acting Under Secretary.

The Honorable the Chief Secretary of South Australia, Adelaide.

SOUTH AUSTRALIA.

SIR, Chief Secretary's Office, Adelaide, 26th May 1874.

I have the honor again to draw your attention to my letter of the 29th January last, and to my subsequent communication of the 30th March, the receipt of which was acknowledged by you on the 10th April.

The question of the boundary line is one which this Government is most anxious should be set at rest, and I shall be glad therefore if you will bring the matter before your colleagues with a view to my being placed as early as practicable in possession of the steps proposed to be taken by your Government.

I have, &c.,

The Honorable the Chief Secretary, Victoria. ARTHUR BLYTH.

Will the Honorable the Commissioner of Lands hasten the furnishing of the report (on this question) which he promised some time since ?

30/5/74. J. G. F.

No. 4716. Chief Secretary's Office, Melbourne, 19th June, 1874.

SIR,

I am directed by the Chief Secretary to inform you he is exceedingly anxious to be placed in a position to forward the reply of this Government, without further delay, to the Government of South Australia, on their proposal to alter the existing boundary line between the two colonies.

I have the honor to be, Sir,

Your most obedient servant,

(Signed) THOS. WEBB WARE,

The Honorable the Commissioner of Crown Lands and Survey. Acting Under Secretary.

Report forwarded herewith.

(Signed) J. A. LEVEY,

25/7/74. Private Secretary to Minister of Lands.

No. 5171. VICTORIA.

SIR, Chief Secretary's Office, Melbourne, 27th July 1874.

In reply to your letter of the 26th of May last, No. 713, and previous communications on the question of altering the boundary line between South Australia and this colony, in accordance with recent observations, I have now the honor to forward a memorandum prepared by my colleague, the Honorable the Minister of Lands, accompanied by a report from the Surveyor-General, stating the obstacles that stand in the way of acceding to the application of your Government.

I regret the delay that has occurred in transmitting this reply, but the papers have only just now reached my hands from the Lands Department, though repeatedly and urgently called for before.

I have the honor, &c.,

The Honorable the Chief Secretary, South Australia. J. G. FRANCIS.

Memorandum by the Minister of Lands for the Honorable the Chief Secretary.

1. In returning the papers in connection with correspondence on the subject of the boundary line between the colonies of South Australia and Victoria, and forwarding to you a memorandum by the Surveyor-General, I must take the opportunity of expressing my regret that the intervening general election and the pressure of departmental business generally have prevented me until now from devoting the necessary attention to this question.

2. Before, however, entering upon any consideration of the general question or of the particular points involved therein, there are some remarks which I desire to premise.

First—So far as concerns the actual territory under notice—one cannot say in dispute, for Victoria has as yet recognised no ground of dispute—this department has no desire to claim one inch of ground beyond that to which this colony is not only fairly but lawfully entitled.

Secondly—Fully five-sixths of the land that would be affected are valueless mallee scrub, and of the remainder (if the value given to it by the settlement of our population along the border be excluded) scarcely an acre can be considered as of special value.

In the third place—The boundary line was proclaimed in 1847, while this colony had not a separate existence until 1851. Victoria, therefore, found the line separating South Australia from itself fixed, marked on the ground, and authoritatively adopted and proclaimed in the *Government Gazette*, and has always felt itself concluded by these acts so far as that boundary was concerned.

3. The material facts of the case are as follow:—In 1834 an Act [4 and 5 Wm. IV., c 95] of the Imperial Parliament was passed by which 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 the 132nd and 141st degrees of east longitude one or more provinces, and to fix the respective boundaries of such provinces. In February 1836, letters patent were issued, by which His Majesty, in pursuance of the powers of the above Act [See Preamble 1 and 2 Vict., c. 60] and with the advice of his Privy Council, did erect and establish one province, to be called the province of South Australia, and did thereby fix the boundaries of the said province in manner following, that is to say, on the east the 141st degree of east longitude.

About the year 1846 the progress of pastoral settlement from Portland and the Glenelg on the one side, and from the eastern parts of South Australia on the other, was such that the settlers from the two colonies had begun to encounter each other. It therefore became (*South Australian Government Gazette*, 16th December, 1847), "necessary to mark out and ascertain the 141st degree of east longitude so fixed as the boundary of South Australia on the east. For this purpose, by an arrangement previously entered into, the Government of New South Wales, 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." The line was surveyed in its whole length, and marked by Mr. Wade, the surveyor appointed for the purpose. In December, 1847, by a proclamation, from the recitals of which the above quotations have been taken, the Governor of South Australia "authoritatively adopted" the line so marked and described in the maps of the colony as the meridian of 141° east longitude, and declared that that line should "be deemed and construed to be the eastern boundary of the province of South Australia, to all intents and purposes." From that time up to the present that line has been regarded by the Governments of both colonies as the common boundary. In this belief survey operations have been conducted, lands have been alienated, and justice has been administered on both sides of the line; and, in some places, a considerable population has been settled.

On the 8th November 1869, the then Chief Secretary of South Australia wrote to the Chief Secretary of Victoria, intimating that the boundary line was about 2¾ miles to the west of the 141st meridian, and suggesting that the astronomers of the two colonies should make a voltaic determination of the difference of longitude between the south end of the boundary line and the Melbourne Observatory. The Government Astronomer, upon this proposal, advised that a voltaic measurement, although it was useless for determining the true position of the boundary line—for which purpose other and better materials were available—would be of the highest scientific value in adding to our knowledge of the figure of the earth, more especially as no such measurements have been obtained in this portion of the globe. In accordance with this opinion, an answer was returned [26th Nov. 1869] agreeing that the difference in longitude between the south end of the boundary line and the Melbourne Observatory should be ascertained as proposed. Upwards of three years elapsed without any further action in the matter.

On the 19th August 1873, the present Chief Secretary of South Australia renewed the correspondence, and requested that instructions should be given to Mr. Ellery to communicate with Mr. Todd "in order that the necessary arrangements for definitely fixing the boundary line may be completed as early as possible." This proposition was altogether different from the proposal to determine the difference of longitude; and as soon as the object of this undertaking was thus formally stated, this Government was careful—while it adhered to the consent of the former Chief Secretary to make the desired measurements for scientific purposes—to guard itself against any attempt to unsettle the boundary. The present state of the question, therefore, is, that the Government of South Australia alleges that the boundary line is inexact, and claims to have it rectified.

4. The Honorable the Chief Secretary of South Australia contends "that the issue of the Proclamation of the 16th December 1847, declaring as the boundary a certain line erroneously surveyed, and which was not the 141st degree of east longitude cannot but be void as against the Imperial Statute of 19th February 1836, which distinctly names that degree as the boundary between the two colonies."

5. The reply to this contention is, that the Proclamation does not contradict the Imperial Act, or more correctly, the Order in Council, but is in aid of it. It was not the intention of the Parliament or of the Crown that the neighboring colonies should be continually engaged in attempts more or less unsuccessful to solve an astronomical problem, but that they should have a convenient and practicable line of separation. No human being can at this moment determine with perfect precision the position on the earth's surface of a meridian. The law, when it assigns a meridian as a boundary, does not compel any person to do what is impossible, nor does it love certainty so little as to leave questions of territory and of government to depend upon the improvements of astronomical instruments, or upon the advance of astronomical knowledge. Until it is marked upon the surface of the earth a line of meridian is not a boundary, but a direction for a boundary. This direction in the present case was *bonâ fide* carried out by both parties acting in concert with a full knowledge of all the facts, and with the best means at that time available. The boundary so obtained has been for more than a quarter of a century recognised by both parties. Both parties have, during that long time, acted upon the agreement as though it were absolutely binding, and important interests have grown up under it. The result, therefore, is that, whatever it may be for astronomical purposes, for legal purposes, and as between the two colonies, this boundary line is the 141° east longitude within the meaning of the Act and the Order in Council.

The proceedings of the two colonies, and the marking of the boundary line, were duly reported to the Home Government, and were communicated in the usual course by that Government to the Imperial Parliament. In 1850 the Act of Parliament (13 & 14 Vict., cap. 59, s. 1) was passed by which the colony of Victoria was established. That Act, in describing the boundaries of the new colony, used the following words:—"And thence by the course of that river to the eastern boundary of South Australia," not to the 141st degree of longitude, but to the eastern boundary. The question therefore arises on the construction of this Act. What is the eastern boundary of South Australia here meant? Is it the 141st meridian?—or are not these words a Parliamentary recognition of the line marked upon the ground by the agreement of the two colonies, authoritatively adopted in the name and on behalf of Her Majesty by the Governor of South Australia, in his Proclamation, practically used as the boundary during the three preceding years, and acquiesced in during that time by both the Crown and Parliament.

6. It must not be forgotten that this agreement, which it is now sought to set aside, was not a mere voluntary courtesy, but was made for valuable consideration. "Although nothing valuable," says Lord Hardwicke (Penn *v.* Lord Baltimore, 1 Ves. 444.) "is given on the face of the articles as a consideration, the settling boundaries and peace and quiet is a mutual consideration on each side, and in all cases make a consideration to support a suit in this Court for performance of agreement for settling the boundaries." Nor is this all: When the boundary line was marked, a distinct advantage was deliberately given to South Australia. Mr. Wade's survey was based upon the determination of the mouth of the Glenelg. For this determination three special sets of observations had been taken in different years, by different observers. The first set was by Mr. Tyers, R.N., an officer commissioned for the purpose in 1839. The second was that by Captain Stanley, R.N., of the *Britomart*. The third was in 1845, by Captain Stokes, R.N., of the *Beagle*. Both Captain Stanley and Captain Stokes differed considerably from Mr. Tyers, in favor of New South Wales. Yet, with a full knowledge of all these facts, the determination of Mr. Tyers was accepted, and the initial point of the boundary line was calculated accordingly. Thus not only was the exact position of that line determined with great care, and after much enquiry, but South Australia was treated in the matter with conspicuous liberality.

7. If such a claim were made as between private persons it is almost superfluous to say that, whatever might have been the original rights of the parties, a solemn and deliberate agreement *bonâ fide* carried into effect, with full knowledge of all the facts upon both sides, made for valuable consideration, and accepted and acted upon without question for twenty-seven years, would be conclusive, and that no attempt to set it aside on the sole ground that the parties were alike in error upon a matter of fact when the agreement was made would be entertained. "Where parties," says a learned judge (see "Broom's Maxims," p. 172, and the authorities there cited), "have agreed to act upon an assumed state of facts their rights between themselves depend on the conventional state of facts and not on the truth, and it is not competent to either party afterwards to deny the truth of such statement."

8. As between Sovereign States, boundary treaties are always regarded with peculiar respect. Unlike most other treaties, they continue in force notwithstanding that the parties to them become engaged in mutual war. They are considered not so much as treaties, in the ordinary sense of the term, but rather as reciprocal declarations and recognitions of rights ("Twiss on the Law of Nations," vol. 1, p. 356). "When a nation has once recognised another nation to be in lawful possession of a territory, the right of possession of the latter is thereby established against the former, whatever change may subsequently arise in their mutual relations as friends or foes. The common law of nations maintains the latter nation in its state of possession whenever such possession has had a lawful origin; and the former nation is by that law for ever precluded from challenging the lawful origin of a state of possession which it has once solemnly recognised."

9. It can hardly be supposed that principles which guide the ordinary administration of justice, and to which independent nations in their mutual dealings habitually conform their conduct, should be inapplicable to colonies alone. Whether we regard colonies as exercising certain high rights of sovereignty, and thus, for certain purposes, as ranking with Sovereign States, or whether we regard them as corporate communities under a common Sovereign, there appear, on general principles, no grounds to assume that claims which would be untenable between two States, or between two fellow-subjects, are just and reasonable as between two colonies.

The Honorable the Chief Secretary of South Australia has, doubtless, reasons in support of this exceptional character of colonies which he has not yet disclosed. In anticipation of them, however, one case at least may be cited where it has been judicially decided—and that by a judge of no mean authority—that the boundaries of colonies are determined, not by astronomical lines, but by visible marks made on the surface of the earth in pursuance of a definite agreement.

The province of Maryland was granted by Charles I. to Lord Baltimore in fee. The province of Pennsylvania was in like manner granted by Charles II. to William Penn, who also acquired by derivative title from the then Duke of York three counties adjacent to Maryland.

In these charters or deeds of grant the boundary line between the two provinces was fixed on the 43rd parallel of north latitude. In course of time disputes as to the precise position of this boundary arose. At length, in 1732, articles of agreement were made between Mr. Penn and Lord Baltimore providing for the determination of the boundary. Lord Baltimore failed to carry out his agreement; and in 1750, both parties being then resident in England, Mr. Penn filed a bill in Chancery (Penn *v.* Lord Baltimore, 1 Ves., 44) against Lord Baltimore for the specific performance of the articles. Lord Hardwicke (the Lord Chancellor) gave great consideration to the case, "it being," as he said, "for the determination of the rights and boundaries of two great provincial governments and three counties." It was urged, among other things, on behalf of the defendant, that as these provinces were grants from the Crown, "the parties had no power to vary or settle the boundaries by their own act."

The following extract from Lord Hardwicke's judgment shows how he dealt with this objection: "To consider the points in dispute: and, first, upon the defendant's charter, in which it is insisted the whole 40th degree of north latitude is included, and if so, that it is not to be limited by any recital in the preamble. There is great foundation to say the computations of latitude at the time of the grant vary much from what they are at present; and that they were set much lower anciently than they are now, as appears by Mr. Smith's book, which is of reputation; but I do not rely on that, for the fact is certainly so. * * * * But the result of all the evidence, taking it in the most favorable light for the defendant, amounts to make the boundaries of these countries and rights of the parties doubtful. Senex, who was a good geographer, says that the degrees of latitude cannot be computed with the exactness of two or three miles; and another geographer says, that with the best instruments it is impossible to fix the degrees of latitude without the uncertainty of seventeen miles; which is near the whole extent between the two capes. It is, therefore doubtful, and the most proper case for an agreement, which being entered into, the parties could not resort back to the original rights between them, for if so, no agreements can stand; whereas an agreement entered into fairly and without surprise ought to be encouraged by a court of justice."

It will be seen that the present case is much stronger than that of Penn *v.* Lord Baltimore. In the first place the difficulty in ascertaining a meridian of longitude is much greater than that of fixing a parallel of latitude. The latter can be determined with tolerable accuracy; with the former nothing beyond an approximation is at present possible. In the second place, between Penn and Lord Baltimore, a repudiated and unexecuted agreement to mark out boundaries was specifically enforced, and that too after the time for performance had long elapsed. In the present case the proposal is to disturb a settlement, which in pursuance of a similar agreement had actually been made, and had been accepted, recognised, and acted upon during twenty-seven years. If Lord Baltimore was compelled specifically to perform his agreement to define his boundaries, is it reasonable to believe that, supposing that his agreement had been duly performed in 1732, he would, in 1750, have been heard to contend that that agreement ought to be set aside, because a more exact calculation of the latitude had subsequently been made?

10. It is obvious that the gravest inconveniences must arise in the administration of the Criminal Law of both colonies if any doubt be thrown upon the legality of the old and recognised boundary line. These inconveniences will not be attended with any compensatory advantages. We should only have lost one line, and not have secured with any certainty another. The objection taken in 1874 to the agreement of 1847 may, with at least equal force, be taken in 1901 to the agreement of 1874. It was suggested in the opening letter, to which reference has already been made, that the same course should be adopted in revising the Victorian boundary as that followed in fixing the boundary between South Australia and New South Wales, north of the Murray. Yet in that very case the surveyor commenced with an acknowledged uncertainty of nearly half a mile. Nor is this all. One of the elements in calculating the initial point of that survey is the assumed position of Melbourne. That position has been determined with greater care than the position of any other place in these colonies. The determination of the longitude of Melbourne rests upon 142 moon culminations. The determination of the longitude of Washington rests upon 800 moon culminations. Yet, when electric communication was established between Europe and America, it was found that the longitude of Washington, notwithstanding all the pains that had been taken to fix it, had not been accurately determined. We cannot expect that a better fortune should attend the less extended and less laborious calculations that have hitherto been made respecting Melbourne. It is therefore not merely possible, but highly probable, that in some few years a new determination of the 141st meridian will take place, and that if the boundary line be now disturbed, a new rectification of the boundary line will be thereupon required.

See Appendix.

There is still more serious objection to alter the present boundary. Large quantities of land have been sold by this colony up to the very line, and in some places a comparatively dense population has been settled upon the land which it is now proposed to annex to South Australia. It is no great concession to part with a few thousand acres of valueless land, but it is a very different matter to transfer, without their consent, a large number of people, who, in reliance upon the legality and the permanence of the boundary line, elected to settle upon Victorian soil, and to live under Victorian laws. It seems that the claims of good faith towards these people are not less weighty than those of theoretical accuracy in determining a meridian. If the whole of the land along the line were unsettled, like the land along the upper parts of it, and like the land along the line that divides New South Wales from South Australia, the question might be considered in a different light. But when a settled population has become established the interests and the rights of private persons demand attention. Even if there were no other objection to disturb the present line, this difficulty appears insuperable. Both on this occasion, and on all other occasions, it is the anxious desire of Victoria to maintain the most friendly relations with the sister colonies. But in the present circumstances, the Honorable the Chief Secretary of South Australia, when his attention has been thus called to all the facts of the case, will not fail to appreciate the obstacles that deprive this Government of the satisfaction of complying with his request.

J. J. CASEY,
Minister of Lands and Agriculture, and President of the Board of Land and Works.

Department of Lands and Agriculture, Melbourne, 25th July 1874.

Memorandum by the Surveyor-General of Victoria.

Boundary line between the provinces of Victoria and South Australia.

The boundary line between Victoria and South Australia is part of that established by Imperial Statute in 1836 between South Australia and New South Wales—Victoria at that time forming a portion of the latter colony.

The line of demarcation is defined therein as the 141° meridian of longitude east of Greenwich.

In the year 1836 Major Mitchell, the Surveyor-General of New South Wales, in his exploration of that portion of New South Wales which he named Australia Felix, struck the river Glenelg in latitude 37° 22′ south, and traced its downward course to the Southern Ocean in latitude 38° 4′ 18″.

The longitude assigned by Major Mitchell to the mouth of the river Glenelg, however, places Portland Bay considerably to the east of the position of that important anchorage according to Captain Flinders and other competent authorities.

Major Mitchell, however, justifies the accuracy of his determination by the result of the close of his exploration with the settled districts of New South Wales, which showed a discrepancy less than one and a half miles. [Major Mitchell's Explorations, vol. 2, see page 230.]

In the year 1834, prior to the visit of Major Mitchell to Portland Bay, Messrs. Henty, from Tasmania, had formed a settlement there, established a whale fishery, and were importing stock with a view of occupying the country for grazing purposes.

In the year 1839 the attention of the Government of New South Wales was drawn to Portland Bay [Despatch from Sir G. Gipps to Lord John Russell, 20th September 1840. Sessional papers printed by order of House of Lords, vol. 5, 841, page 7, par. 2], and the necessity of forming a permanent settlement there was apparent as pastoral stations had been established in the fine country lying to the north of the bay on either bank of the Glenelg and its affluents.

In September of that year (1839), Mr. C. J. Tyers, R.N., was despatched by the Governor of New South Wales [Despatch as before, paragraph 4] to ascertain on which side of the river Glenelg the meridian line of 141° east of Greenwich was situated, a point of considerable importance, as the same had been differently placed by different authorities, particularly Flinders, Arrowsmith, and Mitchell.

Mr. Tyers, an officer in the Royal Navy [Despatch as before, paragraph 4], was appointed to this duty, as, in addition to much experience in practical astronomy, he possessed a thorough knowledge of the principles on which geodetic operations on a large scale should be carried out.

At the date of his operations the Government Observatory at Parramatta was the only station in the two colonies of New South Wales and South Australia at which the longitude had been determined with any degree of accuracy, and this determination was therefore used by him as that from which the position of the meridian, 141° east of Greenwich, should be differentially deduced.

Mr. Tyers, by chronometric measurement from Sydney determined the longitude of Batman's Hill, Melbourne, to be 144° 59′ 10″, being the mean of two separate determinations. [From Sydney to Melbourne, 144° 59′ 0″; Melbourne to Sydney, 144° 59′ 20″; mean, 144° 59′ 10″. Appendix D to Despatch from Sir G. Gipps to Lord John Russell, 20th September 1840. Sessional papers as before, vol. 5, 1841, page 29, par. 1.]

From Melbourne to the east point of the entrance to the river Glenelg the chronometric measurements were continued, and the longitude of that point was determined by this mode of measurement as 141° 1′ 43″. [Appendix D as before, page 29, par. 10.]

By a series of lunar observations, conducted at Portland Bay, the longitude of the mouth of the Glenelg was deduced as 141° 1′ 58·8″. and by triangulation from Melbourne at 141° 0′ 28″. [Appendix D as before, page 32, result of lunar observations.]

Mr. Tyers thereon closes his survey by adopting the mean of the three different modes of measurement, and fixed the east point of the entrance of the Glenelg at 141° 1′ 23″ longitude east of Greenwich. [Lunar observation, 141° 1′ 59″; chronometer, 141° 1′ 43″; triangulation, 141° 0′ 28″; mean, 141° 1′ 23″. Appendix D as before, page 32.]

Captain Owen Stanley, F.R.S.A., Commander of H.M.S. *Britomart*, revised the computations of Mr. Tyers, and assigns a longitude of 141° 1′ 39·5″ to the entrance to the Glenelg. [Appendix D as before, pages 32 and 33. Stanley, 141° 1′ 39·5″.]

A report and detailed statement of the operations condensed by Mr. Tyers is forwarded 28th September 1840; by the Governor of New South Wales to the Secretary of State for the Colonies, and is presented by Royal command to the British Parliament, and is printed by order of the House of Lords. [Despatch from Sir G. Gipps to Lord John Russell, 28th September 1840, Appendix D, Sessional papers printed by order of House of Lords, vol. 5, 1841, page 7.]

The Governor of New South Wales also caused this report [Despatch as above, page 7, paragraph 4] and details of operations to be printed and circulated among the officers of the Survey Department to serve as a model for operations of the same nature.

In the year 1845 Captain Stokes, of Her Majesty's surveying ship *Beagle*, fixes the entrance to the Glenelg at 141° 2′ 9″. (Stokes, vol. 2, page 405, says—" Preferring Mr. Tyers's difference of longitude by triangulation to the east entrance point of the Glenelg 37′ 29″, which is 1′ 27″ more than his chronometric measurement, the mouth of the Glenelg will be 10° 13′ 51″ west of Sydney. By Tyers's triangulation, calculated by Captain Owen Stanley from Batman's Hill, Melbourne, with my longitude of the latter—6° 16′ 17″ west of Sydney—the Glenelg is west of Sydney 10° 14′ 2″, which is 57″ less than Tyers's calculation. The longitude of Sydney by different observers ranges between 151° 12′ and 151° 17′; but as I myself believe 151° 16′ to be within one minute of the truth, the Glenelg will, according to my observations, be in 141° 2′ 9″."

About the year 1846 the progress of pastoral settlement on the Glenelg and country lying to the westward—flowing on the one side from Portland, and on the other from South Australia—rendered it essential that the boundary line between the two colonies of South Australia and New South Wales should be ascertained and marked. The Government of New South Wales, with the consent and concurrence of the Government of South Australia, and at the joint expense of the two governments, undertook the task of defining 141° east longitude; and Mr. Henry Wade, surveyor, was appointed, with the concurrence of the Government of South Australia to execute the survey. [Proclamation of the Governor of South Australia, 11th December 1847. See *Government Gazette* of that year, page 412.]

During the years of 1846 and 1847 the meridian line of 141° east was accordingly marked on the ground from latitude 38° 4′ 3″ south on the shore of the ocean northward to latitude 36°—the determination of the initial point of that line being deduced by Mr. Tyers's determination of the position of the mouth of the Glenelg. New South Wales taking no advantage of the subsequent determinations by Captains Stanley and Stokes; which were in her favor as regards the position of the mouth of the Glenelg—Tyers's, 141° 1′ 23″; Stanley, 141° 1′ 39″; Stokes, 141° 2′ 9″.

On the completion of Mr. Wade's survey, the Government of South Australia, by proclamation in the *Government Gazette* (*South Australian Government Gazette*, 1847, page 411), 11th December 1847, formerly adopts the line so marked, after reciting the powers, &c., in the following terms :—" And whereas, &c., it has become necessary to mark out and ascertain the 141° 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 141° 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 as far as the 36° parallel of south latitude, by Henry Wade, Esq., surveyor, and to be marked on 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 behalf of Her Most Gracious Majesty, do hereby notify and proclaim that the line so marked as aforesaid, and particularly described in the schedule hereunto annexed, and delineated on the public maps at the Survey Office at Adelaide, as the meridian of 141 degrees 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, &c., &c."

From the date of this proclamation in December 1847, up to November 1869, the line so marked was acknowledged as the line of territorial division between the two colonies, and survey operations and consequent alienation of land by the Executive of either colony have been governed by such lines, which was, as before stated, determined with the greatest accuracy attainable at the period of survey and on data that were precisely known by and agreed to by both Governments. [See Parliamentary papers before referred to. Despatch Sir G. Gipps to Lord J. Russell.]

All boundaries having their position defined as certain meridians or parallels, and once marked on the ground are not subject to the results of any future geographical determination when more advanced astronomical knowledge can be applied and more perfect instruments may be available for more refined astronomical observations.

That such is the case may be proved by reference to the treaties and conventions of the United States of America with the British Government with respect to their boundaries along the Canadian frontier, and that of British Columbia.

In treaty of 3rd September 1783, the boundary between the United States and Canada is described as under :—

From the north-west angle of Nova Scotia (that angle formed by a line drawn due north from the source of the San Croix River to the Highlands) along the said Highlands to the north-west head of the Connecticut river, thence along the middle of that river to the 45° north latitude, thence a line due west on that latitude till it strikes the river Iroquois, or St. Lawrence, &c., &c.

By treaty again of 9th August, 1842, this line is again described :—Beginning at the monument at the source of the river San Croix, agreed to in treaty of 1794, thence north by this line (run and marked by the surveyors of the two Governments in 1817, 1818) to the intersection of the river St. John, &c., thence down middle of said stream till line thus run intersects the old line of boundary surveyed and marked by Valentine and Collins previously to the year 1774 as the 45° of north latitude, and which has been known and understood to be the line of actual division between the States of New York and Vermont on the one side, and Canada on the other, and from said point of intersection west along said dividing line as heretofore known and understood to the Iroquois, or St. Lawrence river."

Again by treaty of the Cession of the Floridas, the boundary is described thus :—" Commencing at the mouth of the Sabine river, north along the west bank of the said river to the 32nd degree of north latitude ; thence by a line due north to the degree of latitude where it strikes the Rio Roxo, thence west by the course of that river to the degree of longitude 100° west of London, and 23° from Washington ; then crossing said Rio Roxo by a line due north to the river Arkansas ; thence along the southern bank of that river to its source, in latitude 42° north ; and thence by that parallel of latitude to the sea.

Each party to appoint commissioner and surveyor to run and mark said line, make plans and journals, the result agreed to be considered part of the treaty and to have the same force as if inserted therein. (This case is identical with the proceedings taken in marking the boundary line between New South Wales and South Australia.)

It is to be noted that up to present time there is an outstanding difference in the longitude of Fort Macquarie, Sydney, as accepted by the Hydrographical Department of the Admiralty (see Admiralty Directory Australia, vol. 1 :— Fort Macquarie—Scott and Russell, 151° 12′ 3″ ; Ellery, 13′ 12″ ; Admiralty, 14′ ; Scott and Stone, 12′ 23″. The important meridian of Fort Macquarie, is still open to further investigation :—P. King, 151° 15′ 25″ ; Blackwood and Stanley, 14′ 50″ ; Denham, 14′ 40″ ; Stokes, 15′ 30″. An analysis of documents in the Hydrographic Office, between 1788 and 1851 by numerous navigators and astronomers, places Fort Macquarie, 151° 15′ 5″), and that as determined at the observatory, Sydney, amounting nearly to two minutes of space ; and the difference between the determinations of the two observatories of Sydney and Melbourne for the same meridian of longitude on the north bank of the river Murray, amounts to 4,160 feet. (Parliamentary papers, South Australia, 1869, No. 182, page 4.)

The Government astronomers of Victoria report that a geographical line, or the position of such a line with reference to any one position is not determinable within any certain limits, and cannot be accepted as definite. No limits within which the determination of such position shall be deemed correct, have yet been assigned, and at the present time absolute longitude cannot be determined, within at least three quarters of a mile. Even taking into account the great progress made in practical astronomy since the date that the line with South Australia was fixed, there is no prospect, after a similar period will have elapsed, of our being able to determine the true position of that line within one second of time, which, in the latitude of the Glenelg, would represent a space little less than one quarter of a mile.

There can be no better instance stated of the acknowledged uncertainty of absolute longitudinal determinations than that afforded in the recent determination of the position of the 141st meridian on the north of the Murray.

Parliamentary Papers, South Australia, No. 182, 1869, par. 7.

Messrs. Todd and Smalley, acting severally on behalf of the Governments of South Australia and Sydney, with the assent of their respective Governments, agreed to adopt a certain assumed longitude of Sydney Observatory, from which the boundary line north of the Murray should be measured, viz., the arithmetical mean of the longitude deduced from the present assumed longitude of Melbourne (the difference of longitudes having been ascertained), and that deduced by Mr. Stone, First Assistant Astronomer at the Royal Observatory, Greenwich, from observations of the moon at Sydney in 1859-60.

See Appendix.

Parliamentary Papers as before, page 4.

This difference, as before stated, amounts to 4,160 feet, and by taking the mean there is an acknowledged uncertainty of position to the extent of 2,080 feet—not much short of half a mile. Yet this determination is accepted by the Government of South Australia as the position of the 141st meridian, and consequently the future common boundary of the two colonies north of the Murray.

Parliamentary Papers as before, page 12, concluding paragraph.

A similar agreement was made in 1847 (see Proclamation of the Governor of South Australia, as before) to accept an approximate line as the boundary between South Australia and that portion of New South Wales now known as Victoria.

The determination then made, with all the accuracy at that time attainable, and based on data recognised by both governments (Despatch of Sir G. Gipps, with Mr. Tyers's report appended), is now sought to be annulled, on the sole ground that the line so marked with the assent of both parties is not the actual 141st degree of east longitude mentioned in the Statute constituting South Australia as a separate colony.

The international law sanctioned by the practice of the United States and Great Britain in determining their mutual boundaries seems to bear directly on the question at issue between South Australia and Victoria, and appears to be the only course that can be adopted to prevent ever-recurring disputes as to determination of longitudinal lines, which, as before stated, are all subject to variation in position as more refined astronomical observations are obtained through the use of improved instruments and the progressive advance of astronomical knowledge.

25th July 1874.

A. J. SKENE, Surveyor-General.

SOUTH AUSTRALIA.

Endorsements on above.

Referred to Cabinet.

31/7/74. A. B., C.S.

In Cabinet.—To be sent round to each member of Cabinet, and then the opinion of the Law Officers of the Crown to be taken upon the matter.

31/7/74. A. B., C.S.

Acted on—returned.

31/8/74.

Referred to Cabinet.

1/9/74. A.B., C.S.

In Cabinet.—Cabinet desires the report hereon and opinion of the Law Officers of the Crown.

4/9/74. A. B., C.S.

Memorandum for the Hon. the Chief Secretary.

In returning the papers on this subject, I may say that I have very attentively considered the elaborate memo. of the Hon. the Minister of Lands in Victoria, Mr. Casey, which at first sight seems to make out a strong case against any attempt being made to alter the boundary line between South Australia and Victoria as now marked out on the ground. A little consideration, however, will show that there is a fallacy underlying the whole of Mr. Casey's argument, which, when pointed out, places the matter in an entirely different light, and seems to me to settle most effectually the claim, now for the first time put forward by the Victorian Government, to take advantage of the admitted mistake which was made in 1847 in defining

SURVEY
of the lower part of the
RIVER GLENELG.

Scale of Miles.

0 ¼ ½ 1 1½ 2

Crown Lands Office, Melbourne, 18th Nov.r 1874. W.N lith.

Longitude 140° 58' 07".3 Line marked as Boundary between Victoria & South Australia by Messrs Wade & White 1848-1852.

Longitude 141° E from Melbourne Observatory

Line commenced by Mr Surveyor Tyers as approximate Boundary—not continued

NELSON

Pile No 3 Mt Ruskin

136.63 Chs.

70 Chains to O.T

DISCOVERY BAY

the supposed position of the boundary line. I refer to the fact that throughout his memo. Mr. Casey argues on the assumption, that the same rules which govern transactions between Sovereign States or private persons are applicable to the present case. If this contention is admitted, Mr. Casey's argument is unanswerable; if not, it entirely fails. Now, is this contention correct? I think it will not be very difficult to show that it is not. A Sovereign State has unquestionably power to enter into a treaty to define the common boundary between itself and any adjoining state. Nay, it can unquestionably cede any portion of its territory to any other state either in exchange for other territory or for any other sufficient or insufficient consideration. It will, I think, hardly be contended for a moment that (except in so far as expressly authorized by Imperial legislation, to which I shall hereafter refer) colonies, constituted as Victoria and South Australia are, can possibly have any such power of acquiring or ceding territory; in fact the mere suggestion of such an idea seems to me to carry refutation with it. If they cannot do this it is clear that they have not the same power, as Sovereign States. The quotation from Twiss on "The Law of Nations," vol. 1, p. 356, although undoubtedly correct, is inapplicable. Mr. Casey seems to have felt that this was the weak point in his case, for in paragraph 9 he anticipates the objection and endeavors to meet it by quoting the case of Penn *v.* Lord Baltimore, 1 Ves., 444. This case, however, was simply a suit instituted by one private person against another, to compel specific performance of an agreement which had been entered into for ascertaining their respective rights of property under certain charters which had been granted to them. To my mind this case in no way touches the point here involved, but it leads me naturally to the second point above mentioned, viz., whether, in the consideration of this question, we ought to be bound by rules similar to those by which private persons are governed; and on that point I am decidedly of opinion that we ought not to be so bound. The question from Broom's Legal Maxims, page 172, no doubt correctly states the law as between private persons; but can the same rule be applied to the point in issue in this case? I should say not, because I take it that the powers conferred on the Government of a colony must be gathered from the Acts of the Imperial Government constituting such colony. Now the Letters Patent issued under the authority of the Act 4 and 5 Wm. IV., c. 95, established the colony of South Australia, and defined its eastern boundary as being the 141st degree of east longitude. Various Statutes of the Imperial Parliament from time to time prescribed the mode of Government in the colony, and at length the Constitution Act, as it at present exists was passed, which invests the Legislature of the province with full powers to make laws for the peace, order, and good government thereof. All the waste lands of the Crown within the said province have also, by Imperial Acts, been vested in the Government of this colony. The effect of this is that, by Imperial Statutes, all the land up to the 141st degree of east longitude belongs to South Australia, and persons residing to the west of that line are living under South Australian laws. It is, in my opinion, an altogether untenable position to take up, to say that, by the mere publication of a Proclamation in the *Government Gazette*, this colony can divest itself of duties and responsibilities imposed upon it by Imperial legislation. If it had been competent for South Australia, by her own act alone, to divest herself of two and a half miles of her territory, it would have been equally competent for her to cede the whole of it. I suppose it would hardly be necessary to cite instances to show that no colony can possibly possess such a power; but, if it were, it would be sufficient to mention the latest instance in which a federation of various colonies took place, viz., the present Dominion of Canada, in which case, although all the parties were agreed, it was necessary to pass an Imperial Act to carry out that agreement.

I agree with much that Mr. Casey says in paragraph 5. I certainly do not think it ever was "the intention of Parliament or the Crown that neighbouring colonies should be continually engaged in attempts more or less unsuccessful to solve an astronomical problem;" nor do I suppose that "any human being can define with perfect precision the position on the earth's surface of a meridian." I fail, however, to see that, because perfect precision cannot be hoped for we are, therefore, to be content with a definition which is confessedly inaccurate to the extent of some two and a half miles.

I agree, however, with Mr. Casey when he says, that "until it is marked upon the surface of the earth, a line of meridian is not a boundary, but a direction for a boundary." The question however, is, "how is that boundary to be defined, or, rather, by what authority must the boundary when so defined be authoritatively and finally fixed?" And it seems to me to be clear that (in the absence of express power conferred by Imperial legislation of which hereafter) the only authority possessing the necessary power is the authority which "gave the direction for fixing the boundary," as Mr. Casey has it, *i.e.*, the Imperial Government.

The Imperial Act, or rather the Letters Patent issued in pursuance of that Act, fixes the 141st degree of east longitude as the eastern boundary of South Australia, and no authority that I am aware of, except the Imperial Parliament, can alter it, or say that, in the construction of that Act, or of the Letters Patent, the 141st degree of east longitude means a line marked out two and a-half miles to the west of such degree. The fact is, that when the agreement was come to between the two colonies, an Imperial Act should have been passed to ratify it. This has never been done, though, as Mr. Casey says, the proceedings were duly communicated to the Home Government. It is evident that Mr. Casey feels himself pressed by this point, for he goes on to contend that this new boundary was by implication validated by the Imperial Act 13 and 14 Vict., c. 59, constituting the colony of Victoria, which, as he says, uses the words "and thence by the course of that river to the eastern boundary of South Australia," not to the 141st degree of longitude, but to the eastern boundary. I need hardly say that the *express* provisions of an Act of Parliament (especially when the rights of property are concerned) will never be held to be varied by *implication* from the words used in a subsequent Act. But these words do not seem to me, even by *implication*, to bear the construction contended for, inasmuch as the eastern boundary of South Australia, being fixed by the Letter Patent as the 141st degree, the "eastern boundary," as used in a subsequent Act, must be taken to mean that degree. Certainly the Act 13 and 14 Vict. does not in any way confirm the alleged agreement; but the fact of Mr. Casey citing it, speaks volumes as to his opinion of that agreement requiring confirmation.

Hitherto I have discussed the question on the general principles, because I was anxious to show that the arguments used by Mr. Casey, although exceedingly specious, would not bear a critical examination. The fact is, however, that so far as the *legal* aspect of the question is concerned, it is absolutely set at rest by express Imperial legislation. Section V. of the Act 24 and 25 Vict., c. 44, is 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 further enacted as follows:—It shall be lawful from time to time for the Governors of any contiguous colonies on the said continent, 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 said colonies, so soon as Her Majesty's approval of such instrument shall have been proclaimed in either of such colonies by the Governor thereof." The recital clearly contemplated the ratification of mistakes which *had* been made; and the fact of its being necessary by an Imperial Act to confer on the Governors of contiguous colonies, "with the advice of their respective Executive Councils," the power to enter into a formal agreement to determine or alter the common boundaries of such colonies, conclusively shows that, prior to the passing of that Act—*i. e.*, 1861—such Governors had *not* the power to enter into any such agreement. It will be observed, too, that even if an agreement is formally entered into under the provisions of the Imperial Act, still the boundary described in such agreement is only to be deemed the true boundary of the said colonies "so soon as Her Majesty's approval of such instrument shall have been proclaimed." This provision seems to me to place beyond doubt the proposition for which I have heretofore contended on general principles—viz., that the colonies themselves are absolutely powerless without Imperial sanction to alter in the smallest degree their boundaries as fixed by the Imperial Acts constituting such colonies. The Act 24 and 25 Vict., c. 44, provides an easy and convenient method for settling all questions of disputed boundary and obtaining the requisite Imperial sanction. Before the passing of that Act, I take it, the only means of making an alteration in such boundaries would have been the passing of an Imperial Act for that special purpose. If, even now, with all the enabling powers conferred by the Act 24 and 25 Vict., c. 44, it is necessary for the Governors of contiguous colonies to enter into a formal agreement under their hands and seals, and "with the advice of their respective Executive Councils," and if, moreover, such an agreement when so entered into is to be of no force or effect until Her Majesty's approval has been obtained, it does not, I think, require much argument to show that the proclamation issued by the Governor of this colony in 1847 was altogether in excess of his powers, and that, from a legal point of view, it is altogether void and inoperative.

The fact of the arrangement which was come to between the two colonies being communicated to the Imperial Government cannot affect the question. The proclamation was altogether *ultra vires*, and nothing short of an Imperial Act could have made it of any effect whatever.

It seems to me, for very many reasons—some of which have been pointed out by Mr. Casey, in section 10—that it is the imperative duty of both Governments to have this vexed question speedily and finally determined. The question is one of such grave moment that it ought to be discussed, and, if possible, settled—not only without delay, but without considering too closely the material results which may flow from authoritatively adopting the true boundary line.

Whether, looking at all the circumstances, it can be considered as against good faith for South Australia to take advantage of her legal rights to disturb the arrangement come to in 1847, and to now claim to have the boundary line ascertained as accurately as possible—and when so ascertained, to have it authoritatively and finally fixed—depends upon altogether different considerations.

The position is simply this—In pursuance of some arrangement (for it is not contended that an "agreement" was ever formally drawn up and signed), the Governor of this colony, in 1847, issued a proclamation fixing the eastern boundary of this colony. That proclamation was altogether beyond his powers, and consequently void. Some considerable time ago it was discovered that the line marked out on the ground, and which at the time of the issue of such proclamation was supposed to represent the actual position on the earth's surface of the 141st degree of east longitude was incorrectly laid down to the extent of at least two and a half miles; and a correspondence (to which I shall subsequently refer at greater length) was opened with the Victorian Government for the purpose of having such mistake rectified, and the real boundary line between the two colonies fixed. I think I have shown tolerably clearly that we are not legally concluded by the issue of that proclamation. But although not legally, are we now, that we have obtained a more correct knowledge of the facts, equitably bound to carry out an arrangement which was entered into in error? In my opinion, we are not. I may here call attention to a discrepancy in Mr. Casey's memo. In section 2 he says, "fully five-sixths of the lands that would be affected are valueless." In section 10 he says, "Large quantities of land have been sold by this colony up to the very line; and in some places a comparatively dense population has been settled upon the land which it is now proposed to annex to South Australia." It is clear that one or the other of these statements is erroneous. I also demur to the statement, "that from that time (1847) up to the present this line has been regarded by the Government of both colonies as the common boundary." It is clear from the letter of the then Chief Secretary of this colony (Mr. Bagot), dated 8th November, 1869, that it was not so regarded here; and the whole tenor of that letter, and the request with which it concludes, can only lead to one conclusion, viz., that it was desirable to make certain observations for the purpose of fixing the boundary between the two colonies, thereby, as Mr. Bagot observes,—"following a similar course to that pursued in determining the *true boundary* north of the Murray"—*i.e.*, between South Australia and New South Wales. It will be observed that the then Chief Secretary of Victoria (Mr. McPherson), accedes to the request made by this colony, and says he will issue the necessary instructions as soon as possible; and it is a very remarkable fact, that he does not for a moment think it necessary to do as his successor (Mr. Francis) does, and guard himself by saying the observations are to be made "in the interests of science only." In fact, I think no impartial person reading the two letters which open this correspondence, can doubt, that the whole and sole object of the proposed survey was to fix the "*real boundary line*, between Victoria and South Australia"—that the South Australian Government disputed the correctness of the reputed boundary, and that the necessity for fixing the true boundary was not then disputed by the Victorian Government. I may also point out that, in reality, there was no mutuality in the alleged agreement or arrangement of 1847. Suppose for a moment the mistake had been the other way, and we had sought to resist the ratification of that mistake on the ground that a proclamation by the Governor of South Australia had authoritatively fixed the boundary, I question very much, indeed, if Victoria would in such a case have admitted that that proclamation could possibly be of any effect, and she would, no doubt, have declined to be in any way bound by it. Under these circumstances I think we may fairly claim to have the mistake rectified; and that steps should at once be taken to mark out the true boundary, as has been done north of the River Murray.

We ought, I think, to try and settle this question as quickly as possible, without paying too much regard as to the effect of such a settlement as to the acquisition or loss of territory in consequence thereof. The fact of the Victorian Government having sold land up to the reputed boundary no doubt makes the settlement of the question more difficult; but the longer such settlement is delayed, the greater this difficulty will become. Taking all the circumstances into consideration, I would suggest that the Victorian Government should be asked to reconsider its determination, and to consent to an agreement being entered into under section 5 of the Act 24 and 25 Vict., c 44, for the purpose of at once and for ever ascertaining (as nearly as practicable) and marking out on the earth's surface the exact position of the 141st meridian of east longitude; and upon such position being ascertained for "authoritatively agreeing" that the line when so marked out shall be the "true boundary" between the two colonies, and provision might be made in such agreement for validating any titles granted by Victoria upon terms to be agreed upon, as to which I should suppose no difficulty is likely to arise. Should the Victorian Government refuse to enter into such an agreement (which I can hardly bring myself to believe it would do on a review of all circumstances), the only other practicable means of solving the difficulty seems to be an appeal to the Imperial Government. Some settlement of the question must be arrived at, for at present Victorian laws are being administered over a strip of country two and a-half miles in width which is unquestionably a portion of South Australia, and, as such, amenable to South Australian laws. Very serious difficulties might arise in the prosecution of criminals, and in various other ways. Moreover, any titles granted by Victoria of any of the land comprised in this strip of country are not worth the parchments they are written on, and consequently in the interest of the people referred to in the concluding paragraph of Mr. Casey's memo., it seems imperatively necessary that this vexed question should be speedily and finally set at rest.

5/10/74. C. MANN, Attorney-General.

Returned to the Hon. Attorney-General. I have read the documents forwarded by the Government of Victoria, but I do not concur in the view attempted to be supported by references to occurrences in America and elsewhere, because I do not think they are in all respects similar to this question of boundary. I do not know whence a former Governor derived his authority for concluding a contract in 1847, by which any boundary between the two colonies could be fixed. This having been done by Order in Council and after by Act. The Minister of Lands in Victoria, says that "a line of meridian is not a boundary, but a direction for a boundary." This appears to be a distinction without a difference, as in following the "direction" to ascertain the boundary, the meridian must be fixed. The colonies can respectively only have jurisdiction within the habitable limits of each; and neither Government can transfer a part to another Government so as to make the laws of the one to which it is transferred valid therein. If I am right, it follows that in transactions in Customs, in arrest for debt and for crime, very serious difficulty may arise, in fact, life may be sacrificed possibly without the offender being punished. I concur in the maxim quoted by the Minister of Lands, in Victoria, that "Where parties have agreed to act on an assumed state of facts, *their* rights *between themselves* depend on the conventional state of facts and not on the truth, and it is not competent to either party afterwards to deny the truth of such statement;" but I contend that each party to such an act must have power and authority to act even for themselves; but they cannot bind third parties or their rights, much less can such a compact alter the laws and jurisdiction of land given up by one province to the other.

The quotation from Twiss, on the Law of Nations, vol. 1, p. 356, might apply to the contract in 1847, if the two colonies had been Sovereign States; but as they derive their existence from Imperial Acts, the acts of the Governor of each is confined within the boundary of each, and so far as the execution of the law goes, cannot extend by contract such boundaries.

Whether the Government determines to adopt the contract of 1847, or enter into a new one, it will be necessary to obtain Imperial Legislative assistance, if it be true as stated by the Minister of Lands in Victoria, that "no human being can at this moment determine, with perfect precision, the position on the earth's surface of a meridian."

23/9/74. R. B. A.

VICTORIA.

Memorandum by the Minister of Lands for the Hon. the Premier.

In reply to the report of the Honorable the Attorney-General of South Australia, I have but a few observations to offer. My contention was that, if we are to apply to colonies the same principles which, in such cases as the present, govern the relations of Sovereign States and of individuals, South Australia is excluded, both by the agreement of 1847 and by the time that has subsequently elapsed; that the burthen of proof rests with those who deny the applicability of these principles; and that a judicial decision of the very highest authority expressly recognises the application of such principles to the colonies.* The first of these propositions Mr. Mann admits. He denies, however, but without stating any distinct reason, that the principles I have referred to apply to colonies; and he disputes the authority of the case I cited, because, as he alleges, it was between private persons only, claiming certain rights under their respective grants, and not between the Governments of the two colonies. It is impossible to argue in reply to a mere assertion, and, therefore, until I am shown some valid reason to the contrary, I shall continue to believe that the colonial relation does not necessarily exclude the general principles of justice. As to the case of Penn *v.* Lord Baltimore, I will only observe that Lord Hardwicke entertained a different opinion from that now stated by Mr. Mann, for, in his judgment, he expressly refers to the interest and importance of the case as being "for the determination of the rights and boundaries of two great provincial governments." It is true that Pennsylvania and Maryland were, as Lord Hardwicke well knew, proprietary colonies, but I do not suppose that their particular form of government or their establishment by prerogative and not by Act of Parliament affects the legal principles involved in the decision.

The case now made for South Australia briefly is: that the boundary line ought to have been confirmed by Act of Parliament. This view proceeds upon the assumption that there has been an alteration of the boundary. I deny that the eastern boundary of South Australia has ever been altered. It has only been ascertained. That boundary has always been, and still is, the 141st meridian. The ascertainment of this meridian, or the marking upon the earth's surface a line corresponding or meant to correspond as nearly

* *See* also Phillips *v.* Eyre, L.R. IV., Q.B. 255, when the Court of Queen's Bench decided that the same comity which exists between independent nations applies as between the United Kingdom and her colonies.

as was then practicable with the meridian, that is to say, with the boundary fixed by the Letters Patent, was an administrative act and required no legislation to confirm it. Nor am I aware of any Imperial Statute at any time passed to confirm any such boundary line in any part of the Queen's dominions. The difference between the functions of the Legislature and the functions of the Executive, in such cases as the present, seems clear. The Legislature fixes the boundaries of the colony by reference to meridians and parallels. The Executive marks out on the earth lines that are taken, for practical purposes, sufficiently to represent these meridians and parallels. Thus the present question is not one of an alteration of boundaries fixed by Act of Parliament, but of a disavowal by an Executive of its own deliberate agreement.

This distinction disposes of Mr. Mann's reference to the Act of the Imperial Parliament, 24 and 25 Vict., c. 44, s. 5. He appears to think that the present case was directly contemplated by the recital of that section, namely, that the boundaries of certain colonies may be found "to have been imperfectly or inconveniently defined." Whatever allusion may have been here intended, it is certain that the eastern boundary of South Australia cannot have been meant, because this Act was passed in 1861, and the South Australian Government did not awake to a sense of its wrongs until 1869. But this Act provides for the alteration of boundaries, a proceeding which, as I conceive, is not in the present case desired. I presume that South Australia does not, and I am sure that Victoria does not, seek to have any other common boundary than the 141st meridian. The only question at present raised is what actual line corresponds to that meridian. It is true that, prior to this Act of 1861, the colonies had no power to alter their boundaries. But the agreement and proclamation of 1847 neither contemplated nor effected any such alteration. They merely gave practical effect to the expressed desire of Her Majesty and the Imperial Parliament. Should any future Government of South Australia desire to annex the whole western district of Victoria, recourse can be had to this Act. But while the 141st meridian is accepted as the fixed boundary under the Letters Patent, no assistance in determining the position of that meridian can be obtained from a Statute that gives authority to discontinue its use.

It follows, from this view of the matter, that we cannot accede to Mr. Mann's proposal that "the Government of Victoria should consent to an agreement being entered into under the above Act to ascertain, at once and for ever, as nearly as practicable, the position of the 141st meridian." If this suggestion were carried into effect, we should probably be told on some future occasion that such an agreement was made under an Act that did not apply to the case, and was consequently "altogether *ultra vires*." We should be reminded that "the express provisions of an Act of Parliament (especially when the rights of property are concerned) will not be held to be varied by implication from the words used in subsequent Acts"; that consequently the 141st meridian still continued as the boundary; that that boundary was not altered within the meaning of the Act of 1861; that any line marked to represent it did not come within the provisions of that Act; and that every such line must be regarded as tentative only, and as subject to be rectified with every improvement in practical astronomy. After such a warning as we now have of the value of the most solemn intercolonial agreements, it would be indeed rash if, in the hope of "at once and for ever" settling the dispute, this colony were for an instant to seem to admit the shadow of a doubt as to the validity of its title to all the land included within its boundaries.

It is scarcely worth while, since it does not in the least affect the argument, to notice the inconsistency which Mr. Mann imputes to a portion of my memorandum. When I said that fully five-sixths of the land that would be affected was valueless, I meant, as the context sufficiently shows, the lands yet unsold, and which would thus pass from the Government of our country to that of the other. There are, however, some other expressions in Mr. Mann's report that are of more serious importance. He alludes to "the claim, now for the first time put forward by the Victorian Government, to take advantage of the admitted mistake which was made in 1847." He must know that Victoria has made no claim, seeks no advantage, and admits no mistake. This colony was not a party to the arrangement of 1847, but, on its establishment as a separate colony, found its present boundaries universally acknowledged. It has never heard the whisper of a doubt as to these boundaries prior to 1869, and then only in a vague manner and with absolute silence as to the existence of the settlement of 1847. It merely declines, in the face of that settlement, which it knows to have been adopted with great liberality towards South Australian interests as they were then understood, to abandon a portion of its territory which it has possessed during the whole period of its political existence. Mr. Mann further volunteers his opinion that, if her position in this matter were reversed, Victoria would not have admitted the validity of any such proclamation as that of 1847, and would have refused to be bound by it. How far Mr. Mann should be accepted as an authority upon what this colony would do or would not do in any hypothetical circumstances it is unnecessary to enquire; but there is absolutely nothing in its history that warrants the insinuation that this colony would repudiate any solemn act of its Government, made in pursuance of a distinct and lawful agreement, and in which it had acquiesced for twenty-seven years.

Since, however, the Government of South Australia, after its attention has been directed to all the facts of the case, considers that it is not bound by its proclamation of 1847, it must adopt such remedies for enforcing its pretensions as its legal advisers may think proper. Arbitration is obviously impossible, because there is nothing on which any person can arbitrate. There is no dispute about the facts, and the sole question is the simple issue of law: whether the settlement of 1847 is or is not conclusive. Such a question seems to come properly within the original jurisdiction of the Privy Council. The Government of Victoria has never hesitated to facilitate, so far as it was in its power, the amicable adjustment of questions of this character. When Pental Island was claimed to belong to New South Wales, the Government of this colony readily agreed to submit a jointly prepared case for the opinion of the Privy Council. If South Australia will agree to submit a case for the opinion of Her Majesty in Council, Victoria will readily concur.

J. J. CASEY,
Minister of Lands and Agriculture.

Department of Lands and Agriculture,
Melbourne, 16th November 1874.