THE RIVER MURRAY QUESTION: PART I—COLONIAL DAYS

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In this article, the first in a series of three, Mr Clark reviews the sequence of political and legal disputes that have dictated development of the River Murray up to the present day. The study provides a necessary background to consideration of the administrative controls over, and current legal problems existing with regard to inter-State rivers, the subject of subsequent articles.

INTRODUCTION

This is the first of three articles reviewing the development of existing administrative structures for the control of inter-state waters in Australia. The present political controversy concerning possible future storages on the Murray at Chowilla and Dartmouth has lent new poignancy to a debate which has, in one form or another, spanned some 120 years. Since the execution of the original River Murray Waters Agreement in 1914 the issue has been largely dormant, although there have been periodic disputes in the intervening years which have led to consequential amendments of the Agreement. The amending Agreement of February 1970, still awaiting ratification by South Australia, has sparked a controversy which constitutes the greatest political challenge to the River Murray Commission since its inception.

At the same time, the adequacy of present techniques of inter-governmental planning and water allocation has come under question from other sources. Historically, water management has been the sole preserve of the States. With the exception of the Snowy Mountains scheme, the Commonwealth, to this date, has not, except through its financial powers, attempted to influence the development of water resources by invoking superior legislative powers. In this respect, our situation is markedly different from that prevailing in comparable federal systems. Liberal interpretation of the federal power over trade and commerce in the United States has led to active federal interposition in water management. The Canadian government, too, is vitally involved. Until recently it has been content only to intervene to protect the considerable navigation and fisheries on its abundant water-ways. Last year, however, by invoking these powers together with the residual 'peace, order and good government' clause and

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its powers over criminal law, it acted not only to control pollution and the eutrophication of its inland waters, but also to provide for joint planning and management, particularly of inter-Provincial waters. As a spur to the Provinces to engage in meaningful co-operation, it arrogated to itself the right to act unilaterally should the need arise. Although both the constitutionality and political astuteness of this move by the Canadian government are open to debate, it demonstrated the government's dissatisfaction with existing techniques employed by the Provinces to plan and act, either separately or in co-operation, to preserve and control the country's waters.

Just such dissatisfaction lies behind the recommendations of the Senate Select Committee on Water Pollution in Australia. So disturbed were they by the proliferation of laws, the division of administrative powers and the lack of knowledge or cohesive planning relating to water pollution that they were led to transcend their terms of reference to propose bold new forms of national planning and co-operation across the whole field of water management. Their panacea is a National Water Commission, established at the federal level, with powers to establish and enforce a national water policy applicable to both intra- and inter-State waters. This body would be supported by a multi-disciplinary staff and consultative committees comprised of State representatives. The Inter-State Commission would be disinterred and re-vitalised to resolve those disputes between governments, or governments and citizens, which the Commission itself is unable to determine. In the interests of effective supra-State planning, they were prepared to suggest that the Commonwealth legislate unilaterally to establish such a regime if State co-operation could not be obtained.

These proposals have already attracted criticism, yet they indicate a willingness, by some at least, to question the very basis of our traditional decision-making processes. They raise fundamental issues of the potential future role of the Commonwealth in water management; the impact that such a role might have on State activities; and the adequacy of our present methods of allocating rights to use and administer inter-State resources.

The aim of these three papers is first, to set out the political and legal wrangles which have plagued the development of the River Murray from 1850 to the present day. This historical study is offered partly in the hope that present political jockeying will be thereby reduced to its proper, if unflattering, perspective. It will also serve as a necessary background to the second purpose, which is to examine current legal problems arising on inter-State rivers and the institutions for their administration.

DRAWING A BOUNDARY

The genesis of the controversy over the River Murray and of the disputed status of the Riverina lies in Imperial legislation separating the colonies of Victoria and New South Wales.

In 1840, Lord John Russell, then Secretary of State for the Colonies, divided New South Wales into three administrative districts. The Order in Council defining the Port Phillip District stated the boundary to be:

> the southern and south-eastern boundary of the county of Murray as far as the Murrumbidgee, and from thence by the said River Murrumbidgee and the River Murray until the same reaches the eastern boundary of the province of South Australia.

Lord Stanley succeeded Lord Russell and, in 1842, he established an elective Legislative Council for New South Wales, to take the place of the old nominee Council. The boundary under the new arrangement was stated to be a 'straight line drawn from Cape Howe to the nearest source of the River Murray' and all reference to the Murrumbidgee was omitted. This re-statement of the boundary was apparently made at the express request of the Legislative Council, although between 1844 and 1846, when Lord Stanley was preparing to grant separate colonial status to Victoria, he suggested that New South Wales should reconsider the boundary.[1] New South Wales was adamant, however, and despite a special visit to London by Dr Lang on behalf of Victoria, whilst the Separation Bill was in preparation, the Act adopted the 1842 formula.[2]

Questions rapidly arose concerning the relative jurisdiction of each colony over navigation and customs on the Murray. The New South Wales Law Officers, considering a proposal to establish a customs post at the South Australian border, saw considerable practical and legal difficulties in distinguishing dutiable goods from those destined for Victorian ports. In their opinion, dated 22 November 1853, it was

> highly desirable that simultaneous Acts should be passed by the Legislatures of N.S.W. and Victoria for putting this matter on a satisfactory footing. We have no doubt of the authority of the two legislatures to pass such Acts with proper words of comity.

This is perhaps the first suggestion of parallel legislation to by-pass questions of legislative competence which has become such an important tool of Australian federalism. In the event, however, the colonies did not choose to adopt such an independent line and the Governor of New South Wales eventually wrote to the Colonial Secretary suggesting further Imperial legislation to 'confer on the colonies of N.S.W. and Victoria concurrent jurisdiction in all matters civil and criminal occurring on the Murray' and to empower the respective legislatures 'to pass Local Acts in concert for regulating all such matters'.[3] An amending Act in 1855 consequently declared that:

[1] See the several despatches laid before the Victorian Legislative Council in 1854.
[2] 13 & 14 Vict. c. 59 (1850), s. 1.
[3] Despatch on 30 December 1853.

> 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.[4]

By proviso, the power to levy customs on goods imported *via* the river and the power to regulate navigation by vessels originating in each colony were reserved to the respective legislatures.

The terms of the Governor's request for clarifying legislation and of the provisos to the section both suggest that the purpose of the Act was to clarify residual legislative powers over navigation and police activities. This was strongly maintained by South Australia and Victoria[5] but New South Wales after the event would not accept the view that there was any implicit reservations attached to the explicit grant of territorial sovereignty. This difference of opinion first became of practical importance in relation to Pental Island.

THE PENTAL ISLAND DISPUTE

In 1845, squatters occupied the island as part of the Swan Hill and Lake Boga run, and were granted a licence in the Port Phillip District.[6] The occupiers later applied for a lease and the application described the land as being situated in the Wimmera division of the District of Port Phillip.[7] As no leases of land were issued within the Port Phillip District at this time the island continued to be occupied under annual licence.

After Victoria was separated from New South Wales, the occupiers paid their annual rents to the Victorian Government. This matter came to the attention of Mr Lockhart, Commissioner for Crown Lands in the Murrumbidgee District, who proved to be most assiduous in his defence of New South Wales revenue. He duly informed Sydney[8] and, in 1859, New South Wales approached Victoria with the request that revenues should be paid to New South Wales and the land placed under its regulation.[9] Subsequently they requested all revenues received since separation, or at least since the clarifying Act of 1855.[10]

Lockhart also wrote to the licensees, advising them where their fiscal allegiance lay[11] and apparently the occupiers sought to ride out the controversy by paying rent to both colonies,[12] at least until 1866. Under pressure

[4] 18 & 19 Vict. c. 54 (1855), s. 5.
[5] *E.g.* Memo. from the Victorian Assistant Commissioner of Lands and Survey to the President of Board of Lands, 21 May 1863; letter from the Victorian Chief Secretary to the N.S.W. Colonial Secretary, 22 November 1866.
[6] Port Phillip, *Gazette*, 29 October 1845.
[7] New South Wales, *Government Gazette*, 29 October 1848.
[8] Letter to the N.S.W. Chief Commissioner of Crown Lands, 8 April 1859.
[9] Letter from N.S.W. Colonial Secretary to the Victorian Chief Secretary, 21 October 1859.
[10] Letter from the N.S.W. Colonial Secretary to the Victorian Chief Secretary, 20 February 1861.
[11] Letter to Messrs Wood and Kirk, 20 June 1863.
[12] Departmental Memo. to the N.S.W. Under-Secretary of Lands, 15 January 1866.

of a revised appraisal of the land by New South Wales, the occupiers then wrote that they would respectfully decline to pay rates to Victoria, although they would give security to pay if and when Victoria established her rights.[13] A stern reply threatened forfeiture as 'Victoria will not admit the claim of the Government of New South Wales to any portions of the Country South of the Main course of the River Murray'.[14] The perplexed tenants thereupon suggested to New South Wales that they correspond with Victoria to have the matter 'settled decisively by say the Colonial Secretary'.[15]

This raised the difficult question of the appropriate forum for settling an inter-colonial dispute. In January 1864, Mr Martin, the Attorney-General of New South Wales, had advised that if the river was navigable with equal facility on either side of the island, it would belong to New South Wales, and the appropriate course would be to transmit the matter to the Colonial Secretary 'with a request that he will take such steps as may be necessary to enforce the just claims of this Colony by Parliamentary sanction if it can be done in no other manner'. In a subsequent opinion given after a surveyor's report was received, he suggested that, if Victoria refused to give up her claims, papers should be forwarded to the Colonial Secretary 'in order that he might be in a position to decide the dispute'. Whilst the Colonial Secretary could initiate Imperial legislation to clarify the matter, as he had done in 1855, there was no precedent for him deciding such a dispute personally and the Attorney-General's opinion was perhaps deliberately vague on this matter.

Another suggestion, which perhaps demonstrated more faith in the integrity of Victorians than his colleagues shared, was put forward by the New South Wales Commissioner of Crown Lands. As the question was, to his mind, of narrow compass, he suggested that the best means of solving the dispute 'would be to submit it to the Judges of Victoria by some proceeding upon which the respective Governments might agree'.[16]

Meanwhile, the beleaguered occupiers of Pental Island had problems aplenty. They were forced to isolate part of their stock on the island, which were stricken by disease, and thus unwittingly brought matters to a head. They were nabbed under the New South Wales Scab Act for importing diseased sheep into the colony and summonsed to appear at Balranald on 15 June 1866. The Victorian Government immediately protested that the proceedings could not be submitted to as 'it would virtually be an admission' that her rights to the island were questionable.[17]

[13] Letter from Broadribb, Crisp and Lewis, agents for Messrs. Wood and Kirk, to the President of the Victorian Board of Lands and Survey, 10 October 1866.
[14] Letters from Victorian Assistant Commissioner of Lands and Survey to Broadribb, Crisp and Lewis, 31 January 1866 and 9 February 1866.
[15] Letter from Broadribb, Crisp and Lewis to the N.S.W. Chief Commissioner of Crown Lands, 15 December 1866.
[16] Minute, 9 April 1866.
[17] Telegram from the Victorian Chief Secretary to the N.S.W. Colonial Secretary, 1 June 1866.

New South Wales was equally intransigent.

> The interference of the Victorian Government with any proceedings connected with any part of the Territory of New South Wales cannot be allowed. The Victorian Government has no claim whatever to Pental Island which is in this Colony.[18]

Mr R. M. Isaacs, Solicitor-General for New South Wales, was a moderating influence. He pointed out that the dispute over the island was 'not a question for opinion in point of law at its present shape but must be made the subject of negotiation between the Governments of Victoria and New South Wales'. Whether he was of the opinion that there was no competent forum, or that the dispute was not of a justiciable nature does not appear. Perhaps he agreed with an earlier opinion '[i]t is not wise to irritate when there may be an amicable adjustment of a dispute'.[19]

In the event, Henry Parkes wrote, enclosing the report of the New South Wales surveyors, and stating that unless Victoria withdrew immediately 'the aid of the Imperial Government may be at once invoked in settlement of the question'.[20] Victoria replied that, in their view, the Imperial Act of 1855 was intended primarily to define powers to control navigation, and the vesting of the watercourse could not be extended to auxiliary flood channels such as the southern anabranch of Pental Island.[21] The New South Wales Attorney-General indicated his dissent, and recommended that the matter be placed before the Imperial Government for legislative action.[22] Within three days, the Governor of New South Wales wrote to the Colonial Secretary seeking his opinion as to the proper mode of securing its intervention.[23]

The reply of the Duke of Buckingham is instructive as to the degree of autonomy which the Imperial Government was prepared to accord the colonies. He noted that there had been no concurrence by Victoria to the request by New South Wales for Imperial intervention.

> I have to inform you, therefore, that though Her Majesty's Govt., on being furnished with all the necessary information, would not refuse to accept the responsibility of deciding upon the conflicting claims of the two Colonies, if both Colonies desired such a decision and agreed to be finally bound by it, yet it can hardly be expected that Her Majesty's Govt. would take any steps towards deciding so grave a question at the request of one only of the contending parties. A decision so arrived at could not be enforced on the unwilling Colony, and being ex parte would carry little or no weight in that Colony in any future consideration of the question.

[18] Minute from the N.S.W. Minister for Lands to the Colonial Secretary, 8 June 1866. See also a telegram from the N.S.W. Colonial Secretary to the Victorian Chief Commissioner, 21 June 1866.

[19] Minute from the N.S.W. Chief Secretary of Lands, 24 April 1865.

[20] Letter from the N.S.W. Colonial Secretary to the Victorian Chief Secretary, 27 July 1866.

[21] Letter from the Victorian Chief Secretary to the N.S.W. Colonial Secretary, 22 November 1866.

[22] Opinion, 18 December 1866.

[23] Despatch, 21 December 1866.

> It certainly seems most desirable that this matter would be speedily settled, and by a judicial tribunal of high authority, and I would suggest that the Colonies should, if possible, concur in a statement of facts in the form of a special case, and also in a joint petition to Her Majesty, which will be presented through a Secretary of State, praying that the case may be referred to the Judicial Committee of Her Privy Council for their decision upon the whole matter, such decision to be final and binding upon both Colonies.
>
> I may add that if this course were taken Counsel should be instructed to argue the case before the Judicial Committee. In the event of the Governments of the two Colonies not being able to come to an agreement on a special case, founded on a statement of facts admitted by both of them, it should be open to each Colony to lodge a case in support of its own claim and to support that claim by such evidence as they may think necessary.
>
> It must of course be distinctly agreed by both Colonies, before Her Majesty can be advised to refer this question to the Judicial Committee of the Privy Council, that Her Majesty's decision or award upon the recommendation of their Lordships is to be held to be binding on both Colonies and final.[24]

It is apparent that the Imperial Government doubted its residual power to intervene in the internal affairs of a semi-autonomous colony and was hesitant to make an award which it had no power to enforce. This position lent a certain hollowness to South Australia's threats, which continued down to 1914, to seek redress of its grievances from the Imperial Government. Furthermore, the fact that both parties had to agree to accept the 'decision or award' casts doubt on whether the Judicial Committee viewed itself as exercising its judicial powers.

A copy of the despatch went to the Governor of Victoria who replied that his Government agreed in the proposal to submit the matter to the Judicial Committee 'in the form of a special case to be agreed upon by both colonies'.[25]

There matters rested, except for an apparently innocuous request from New South Wales later in 1867. As steamers experienced considerable danger from snags in the north channel, there was an enquiry whether Victoria would object to the removal of bridges erected by the occupiers between the south bank and Pental Island.[26] One can only speculate whether New South Wales was covertly jockeying for position. Victoria had earlier contended that navigation of the south channel was impossible because the

[24] Despatch to N.S.W. Governor, 29 March 1867.

[25] Despatch from the Victorian Governor to the Colonial Secretary, 27 June 1867.

[26] Letter from the N.S.W. Colonial Secretary to the Victorian Chief Secretary, 15 November 1867.

minimum flow was insufficient, and not because of the erection of an 'insignificant' bridge. They had further argued that 'the erection of such a temporary bridge affords in itself conclusive evidence of the insignificant character of the stream which it spans'.[27]

A search revealed that no permission had been given by Victoria for the erection of the bridge, but the file does not indicate whether any action was taken to remove it. There is an interesting comment on the fly leaf, dated 7 October 1868: '[c]ould not a joint order from both Governments be given'. Again, the possibility of concurrent colonial legislation or executive action was raised, but was not pursued.

No steps were taken to put the matter before the Judicial Committee until 1869. There was indecision on both sides whether it would be better for the colonies to co-operate in framing a special case, or to adopt the Duke of Buckingham's second alternative and submit separate claims. In fact, a third alternative was devised at the suggestion of New South Wales.[28] Each colony appointed a Commissioner and together they took evidence in both colonies. The evidence was to be forwarded together with a case stated by each colony in support of its claim.

At this delicate stage of negotiations, the New South Wales Lands Department inadvertently sold a portion of Pental Island to a Mr Wood.[29] The ardent Commissioner Lockhart had much earlier in the controversy recommended that a tender by a Mr McCormack for a lease of the island be accepted as it was 'neither held under, nor claimed, nor promised in lease' although it was 'from time to time occupied by Victorian graziers, who pay assesment [*sic*] to the Treasury of the Colony of Victoria, for agistment of stock within these portions of the territory of New South Wales'.[30] The New South Wales Government was wise enough not to aggravate the situation and undertook not to issue title deeds until the question of sovereignty had been determined.[31] Both colonies undertook to abide by the award and petitions were duly forwarded to the Secretary of State.[32] On 11 July 1872, the Judicial Committee heard counsel.

(a) *Arguments of the Colonies*[33]

New South Wales stood firm on what it considered to be the plain meaning of the Imperial Statute of 1855.[34] The whole watercourse of the Murray

[27] Letter from the Victorian Chief Secretary to the N.S.W. Colonial Secretary, 22 November 1866.

[28] Despatch from the N.S.W. Governor to the Victorian Governor, 21 April 1869.

[29] Letter from the N.S.W. Colonial Secretary to the Victorian Chief Secretary, 21 April 1869.

[30] Letter from Commissioner Lockhart to the Chief Commissioner of Lands, 28 January 1861.

[31] Letter from the N.S.W. Colonial Secretary to the Victorian Chief Secretary, 4 March 1870.

[32] The Victorian petition in fact foundered, but in the P. & O. Steamer 'Rangoon'. A duplicate was forwarded.

[33] No extant copies of the petitions have been discovered, and the propositions are drawn from the correspondence and files of the period.

[34] 18 & 19 Vict. c. 54 (1855), s. 5.

was vested in New South Wales, and there were no limitations implied on its sovereignty over the river except for the express reservation to Victoria of the power to regulate navigation by vessels originating in that colony. A New South Wales survey in 1864 had demonstrated that the mean sectional area of the anabranch was 43% of the main northern channel at that point, and was not merely an insignificant tributary, although the survey omitted to measure the mean velocities in each channel. Despite the fact that an earlier survey[35] had given the anabranch the separate name of the Marabout, it was, in their contention, still identifiably part of the 'watercourse' of the Murray.

Victoria, on the other hand, contended that:

(i) the wording of the Separation Act of 1850[36] clearly placed the island within the territory of Victoria and the subsequent Act showed no intention to divest Victoria of her existing territory;[37]

(ii) the island had, from the original licence granted in 1848, been described as falling within the Wimmera division of Port Phillip District and the Separation Act declared the latter District to be part of Victoria;

(iii) the true intention of the subsequent Act of 1855[38] had been to clarify the respective jurisdiction of Victoria and New South Wales in relation to regulatory and police powers on the River, as evidenced by the original petition of the Governor of New South Wales for Imperial intervention[39] and the express provisos to section 5 regarding customs and navigation;[40] and

(iv) it was a settled principle that, where there is more than one channel in a river, the thalweg, or deepest channel, is the mid-channel for the purpose of territorial demarcation; and the anabranch had never been used for, nor was susceptible to navigation.

During Sir Roundell Palmer's argument before the Board on behalf of Victoria, Mellish L.J. apparently supported the view that, under the 1850 Act, the territory of each colony extended *ad medium filum aquae* and the opinion has been advanced that the Act of 1855, notwithstanding its declaratory form, actually altered the boundary. The real reason for the award to Victoria remains obscure as no written judgment was handed down. Yet members of the Board apparently took the view that, to ascertain the boundaries set by the Act of 1850, they had to rely on geographical knowledge existing at the time the words were first used by Parliament. In 1842,

[35] By Mr Townsend of the N.S.W. Survey Department in 1851.
[36] 13 & 14 Vict. c. 59 (1850).
[37] Memorandum from the Victorian Assistant Commissioner of Lands and Survey to the President of the Victorian Board of Lands, 21 May 1863.
[38] 18 & 19 Vict. c. 54 (1855).
[39] Despatch from the N.S.W. Governor to the Colonial Secretary, 30 December 1853.
[40] Letter from the Victorian Chief Secretary to the N.S.W. Colonial Secretary, 22 November 1866.

it seems, no one knew that Pental Island was, in fact, an island and Parliament could therefore only have meant the main northern channel when referring to the course of the River Murray. Thus the island belonged to Victoria.

(b) *Issues raised by the Award*

The Judicial Committee advised Her Majesty to award the island to Victoria, and an Order-in-Council issued to that effect. The exact implications of the award are difficult. It has been stated that, had the issue been argued in the ordinary way, the result would have been a strong indication that Victoria possessed a riparian frontier.[41] But the proceedings were not 'ordinary' proceedings, although they were not without precedent, for boundary disputes had been settled between other colonies in a similar manner.

To begin with, the dispute was only heard on the condition that both parties agreed to abide by the award. The power to resolve such a dispute, whatever its source, would not be exercised *in invitos,* and the Colonial Secretary expressly adverted to the fact that the Imperial Government had no means of enforcing whatever award was made.

Secondly, the colonies were obviously bemused by the problem of how they were to appear before the Judicial Committee, and whether strict rules as to forms of documents and pleadings should be observed. Thus the Governor of Victoria was at pains to point out that the petition

> has been signed by me with the concurrence and on the recommendation of my Responsible Advisers. It is to be regarded as the Petition of the 'Governor of Victoria in Council'.

The original plan had been for both Governors to sign a joint request that the issue be submitted to Her Majesty in Council, but the New South Wales petition had already been despatched when the Victorian document arrived in Sydney for signature. The Governor also expressed the hope that the fact that the documents were not in the required form[42] would not be 'an impediment to the consideration of the Petition'.[43]

Thirdly, as had been its practice in other boundary disputes, the Judicial Committee gave no reasons for its award.

These factors combined to leave several questions vexing colonial lawyers. At the most general level, the problem was whether a more appropriate forum might not be created to hear appeals from the Australian colonies and disputes between the colonies themselves. Whilst the Pental

[41] Oliver, in Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence,* 225.

[42] In a despatch from the Colonial Secretary to the respective Colonial Governors on 4 April 1871, the form of the petition required by the Council had been prescribed.

[43] Despatch from the Victorian Governor to the Colonial Secretary, 15 July 1871.

Island dispute was pending, Victoria had, in fact, convened a Royal Commission to enquire into the desirability of creating a Supreme Appeal Court for the Australian colonies. The allegations of delays made against the Judicial Committee in its report brought a stinging rebuttal from Henry Reeve, Registrar of the Privy Council, who also pointed out that, although the appellate jurisdiction of the Council existed for the benefit of the colonies, 'it is impossible to overlook the fact that this jurisdiction is part of the Prerogative which has been exercised for the benefit of the colonies from the date of the earliest settlements of this country'. Amongst other arguments in favour of retaining appeals to the Privy Council he stated that 'it provides a remedy in certain cases not falling within the jurisdiction of ordinary Courts of Justice'.[44]

Unfortunately, this comprehensive report of the Registrar on the activities of the Privy Council in relation to the Australian colonies did nothing to resolve the more particular legal issues raised by the award. Was the Judicial Committee, in making the award, acting in a judicial capacity? If so, what law could it be said to have applied? The answers to these questions were to have far reaching consequences, especially upon the jurisdiction of the High Court of Australia after its creation in 1903. Although the present position of the High Court will be considered in further detail in a subsequent article it is wise briefly to explore the question of the nature of the Privy Council's jurisdiction at this point.

THE PROBLEM OF THE PRIVY COUNCIL'S JURISDICTION

At the time of the Pental Island dispute, another boundary dispute was already brewing between Victoria and South Australia. In 1869, it was discovered that, although the King-in-Council, under power deputed by Imperial Act [45] had fixed the boundary as the 141st meridian, this had been incorrectly surveyed, with the result that a strip of land extending from the River Murray to the coast, about two miles wide, had been wrongly included in Victoria. Within three years of the Privy Council adjudication on Pental Island, the Governor of Victoria wrote to the Colonial Secretary that:

> it has been finally agreed to by both Colonies to submit a case to the Judicial Committee of the Privy Council, and to abide by its decision. There is a precedent for this arrangement in the reference to the Privy Council which was made a few years ago, when a somewhat similar controversy had arisen between Victoria and New South Wales concerning Pental Island in the River Murray.[46]

[44] Printed Report of the Registrar of the Privy Council to the Assistant Colonial Under-Secretary, 20 July 1871. The Report was transmitted to the Governor of Victoria who, in turn, placed it before the Inter-Colonial Conference, then in session in Melbourne: see Despatch from the Victorian Governor to the Colonial Secretary 5 October 1871.

[45] 4 & 5 Will. IV c. 95 (1834).

[46] Despatch, 26 December 1874.

There were, in fact, nine other similar disputes which had been heard by the Privy Council between 1683 and 1846,[47] and in at least one of these cases, the Privy Council had acted without obtaining the prior consent of both the colonies.[48] In the Pental Island case, it will be remembered, the Colonial Secretary stated that the Privy Council would only act if the colonies undertook to be bound by the award[49] and the same procedure was adopted in the subsequent dispute between Manitoba and Ontario in 1886. In the Victoria-South Australia dispute, Lord Ripon went one step further. He indicated that he could not refer the matter to the Judicial Committee under 3 & 4 William IV c. 41 (1833) unless the prior consent of both colonies was obtained, but also stated that he could not request the Imperial Government to intervene by legislation, except at the request of both colonies, and after they had agreed on the type of legislation desired.[50] This not only marked another step in the reticence of the Imperial Government to intervene in the affairs of her colonies, but also gave rise to an argument that a convention had developed whereby the Prerogative to settle such disputes would not be exercised except at the request of the parties. This unwillingness to act *in invitos,* coupled with doubts as to the existence and nature of the law to be applied between semi-autonomous colonies, in turn raised the question whether the awards of the Privy Council in such cases could be regarded as judicial.

The dispute between South Australia and Victoria was not in fact placed before the Privy Council, but survived to become the first and only such dispute to be heard by the Australian High Court. Although section 75 of the Constitution conferred jurisdiction on the High Court to hear disputes between the States, this jurisdiction has been viewed as being confined to matters capable of judicial determination. It was therefore necessary to decide whether such a boundary dispute was capable of judicial determination and the capacity in which the Privy Council had entertained such matters in the past immediately became relevant.

Griffith C.J. argued that, at the time the boundary was drawn in 1847, the border could have been redrawn by an exercise of the Royal Prerogative. The award in the Pental Island case, too, had been an exercise of the Prerogative rather than the judicial power of the realm, for the consent of the colonies could not *per se* confer jurisdiction.[51] He concluded that, whilst the Prerogative still existed in 1871, by 1894, the time of Lord Ripon's

[47] Pennsylvania and Maryland, 1683-1709; Connecticut and Rhode Island, 1725-6; Virginia and North Carolina, 1726-7; Rhode Island and Massachusetts, 1734-46; Pennsylvania and Rhode Island (second case), 1734-69; Massachusetts and Connecticut, 1754; New Hampshire and New York, 1764; New York and Quebec, 1768; Cape Breton Case, 1846.

[48] Massachusetts and Connecticut, 1754.

[49] Despatch from the Colonial Secretary to the N.S.W. Governor, 29 March 1867.

[50] Despatch from the Colonial Secretary to the South Australian Governor, 19 September 1894.

[51] *South Australia v. Victoria* (1911) 12 C.L.R. 667, 703.

despatch to Governor Kintore, it must be regarded as having 'fallen into abeyance, and as no longer affording a practicable means of solution of such difficulties'.[52]

But there was a separate question whether the High Court had inherited that part of the Prerogative which had formerly been invoked by the Privy Council to hear inter-colonial matters. The old Committee for Trade and Planatations was not bound by rules of law, and in the exercise of his Prerogative, the Sovereign was

> guided by general rules of justice and good conscience, and not by any formal rules of law such as can be invoked by a suitor who has a right to redress recognized by law. It follows, in my judgment, that the jurisdiction exercised by the Sovereign was political and not judicial, and that the Dependency petitioning for redress did not invoke the exercise of the judicial power of the realm.[53]

His premise was that, insofar as a controversy required for its settlement the application of political rather than judicial considerations, it was not justiciable under the Constitution[54] and the High Court therefore had no power to determine the dispute.

O'Connor J. agreed and pointed to an important difference between the powers of the United States Supreme Court and the High Court in such matters. At the time of confederation, each of the participating units was a sovereign State. Disputes had to be settled as between independent nations. Sometimes 'principles of international law were appealed to, but much oftener considerations of fair dealing, public convenience, or political expediency were the bases of adjustment'.[55] The Confederation had power to settle disputes by applying all of these criteria and this power was passed, in turn, to the Supreme Court, which can thus decide both justiciable and non-justiciable matters.[56]

Isaacs J. agreed that the High Court was confined to hearing claims based on 'violation of some positive law to which the parties are alike subject', otherwise the Court might find itself hearing 'a controversy without any standard of right, but involving judicial interference with political and administrative action and discretion, a position unheard of, and altogether outside the pale of sober thought'.[57] Yet he was of the view that the Privy Council did not, in hearing a boundary dispute, necessarily act politically. Where a boundary had been declared by statute, it would be unconstitutional to assert a common law prerogative to treat the dispute as a mere political question, regardless of legal rights, and as a matter of the Sovereign's personal authority. It was therefore possible that such a dispute

[52] *Ibid.* 703.
[53] *Ibid.* 704-5.
[54] *Ibid.* 675.
[55] *Ibid.* 708.
[56] *Ibid.* 709, citing *Maryland v. West Virginia* (1909) 217 U.S.1.
[57] *Ibid.* 715.

might be capable of judicial determination and it was the job of the Court first to enquire whether there was any law applicable to the case. If it turned out to be dependent merely on political considerations, the Court must decline jurisdiction.[58]

In the event, the dispute was held to be justiciable on the grounds that statutory powers conferred on the respective Governors to fix the boundaries gave a legal basis for determining the matter. On appeal, the Privy Council chose not to enter into questions of the jurisdiction of the High Court and treated the matter as one of statutory interpretation. It thus gave no authoritative pointers as to the potential limits of the High Court's intervention in inter-State matters. The enduring importance of the decision is that it raised, but did not settle, the question of how the High Court would act on an inter-State dispute where there is doubt as to the existence of common law or statutory law to apply to the case.

NAVIGATE OR IRRIGATE?

During the early rounds of the Pental Island dispute, representatives from New South Wales, Victoria and South Australia met in Melbourne, in 1863, to discuss the future development of the country's water resources. They resolved that:

> the commerce, population and wealth of Australia can be largely increased by rendering navigable and otherwise utilizing the great rivers of the interior such as the Murray, Edward, Murrumbidgee and Darling; and that the obligation of carrying into effect the necessary works devolves primarily upon the respective Governments having jurisdiction over such rivers.

Yet the co-operative spirit which this resolution revealed was, at best, half-hearted. As time went on it emerged that the colonies had very different interests at stake and the resulting tussle for priorities over a scarce resource infected Australian politics until well after Federation.

By 1855, South Australia had already established herself in the River Murray with a blossoming river trade which extended throughout the Murray-Murrumbidgee-Darling network. A major impediment to the development of this trade was the fact that the Murray mouth was not navigable,[59] but goods were off-loaded at Goolwa or Mannum and transported to Victor Harbour and Port Adelaide. South Australia's primary interest was thus to maintain permanent navigation both in the

[58] *Ibid.* 721.

[59] This led to a debate in South Australia whether Victor Harbour, adjacent to the mouth, rather than Adelaide, should be the capital city. Numerous attempts were made to open the mouth for navigation and Sir John Jeffcott, the first Chief Justice of South Australia, lost his life in such an attempt in December 1837. 'The prevailing difficulty with most mouths is to keep them closed. With the Murray, the experience has been the reverse.' South Australian *Register,* 28 May 1902.

Murray and its navigable tributaries in New South Wales by snagging, locking and preventing diversions which might diminish the flow of water.

The other colonies were, understandably, less enthusiastic about navigation. When Victoria was approached in 1862 to reward Captain Cadell who had opened the Murray system to navigation, she firmly refused, saying that river navigation was injurious to revenue, detrimental to the commercial interests of Melbourne and an avenue for smuggling.[60] It is also doubtful whether New South Wales was really enthusiastic about navigation; or the Melbourne resolution of 1863, under which the primary financial obligation of keeping the system navigable would fall on her shoulders. Not surprisingly, the meeting of 1863 and a subsequent conference in 1865 failed to produce tangible co-operation and South Australia continued to bear the major cost of keeping the river open.[61]

Early opinions as to the potential for irrigation along the Murray were divided. Charles Sturt had been optimistic of the fertility of the valley. Others pointed out that 'that excellent man and judicious explorer' had he not been in a boat, might have discovered that the country below the junction of the Murrumbidgee was 'one vast, arid, African desert, totally useless for any purposes of colonization'.[62] Extravagant claims were made, especially in England, so much so that the colony may well have suffered in public estimation from the 'ridiculous and frequent panegyrics of some of its injudicious friends'.[63]

Numerous plans were, however, early formulated by both colonists and patricians.[64] One, appropriately enough, was penned from an armchair in the Reform Club, Pall Mall, suggesting that:

> before the Valley of the Murray shall have passed into private hands a survey should be made and plans adopted for damming the Murray and its tributaries at various points and of forming irrigating canals throughout the plains.[65]

Although this advice came before the dispute over Pental Island, the already existing tension between the colonies and the practical problems of colonial administration led the Governor of Victoria to remark that:

> I do not think there is any prospect of a work of such enormous magnitude and expense, attended too with many difficulties from the conflicting interests of the three colonies concerned, being undertaken for many years to come.[66]

[60] Despatch from the Victorian Governor to the Colonial Secretary, 26 August 1862.
[61] South Australia, *Parliamentary Papers*, 64/1857, 17/1860. By 1870, however, Victoria was contributing some £2,600 annually for snagging the Murray: Appropriation of Revenue Act 1870.
[62] Horton James, *Six Months in South Australia* (Facsimile ed. 1968), 14.
[63] *Ibid.* 129.
[64] See the report of Dr Imlay's visit to the Murray quoted by Horton James, *op cit.* 236.
[65] Letter from Mr J. Crawford to the Colonial Secretary, 28 April 1857.
[66] Despatch from the Victorian Governor to the Colonial Secretary 31 August 1857.

The possibilities of irrigation were not entirely neglected, however, and in the same year, 1857, the Victorian Surveyor General's Department reported to Parliament on the soil and prospective resources of the Murray River District. A proposal for joint colonial action to develop the Murray was mooted in the same year at the General Council of Australasia in London. In fact, limited irrigation commenced in the Murray basin in the early 1870s and an ambitious scheme was put forward by Benjamin Dodds in 1871 for a Great Victorian North-Western Canal which would be fed from the Murray. By 1880, irrigation had risen to a major domestic political issue in Victoria[67] and the interests of the different colonies were relatively well defined.

For Victoria, the problem was whether, under the terms of the Imperial Act of 1855 declaring the watercourse of the Murray to be within the territory of New South Wales, riparian landowners on the southern bank enjoyed the normal common law rights of a riparian to use water. A second problem was whether laws could be made by the Victorian Government granting Victorian residents the right to take and use water from the Murray. For South Australia, the problem was whether New South Wales could be restrained from diverting water from the Murray, the Darling and the Murrumbidgee, and whether the upstream colonies could be compelled to co-operate in keeping the river open for navigation.

DRUMS ALONG THE MURRAY

The original feud thus reflects three contentions:

(a) South Australia's claim to maintain navigability in the Murray itself and major tributaries in New South Wales, and to that end to prevent diversion by Victoria of non-navigable tributaries such as the Goulburn and Loddon;

(b) Victoria's claim, as the first colony to realise and exploit the advantages of irrigation, to a right to divert water from the upper Murray and all tributaries within its territory; and

(c) New South Wales' claim, based on territorial rights declared by the Imperial Parliament, to the exclusive use of waters in the Murray above the South Australian border and in its territorial tributaries, with no regard to the claims of Victoria and South Australia.

After the abortive conferences of 1857, 1863 and 1865, no concrete steps were made towards inter-colonial co-operation until 1881. Throughout that year and 1882, South Australia wrote regularly to the other colonies in an attempt to improve navigation, but her letters were only formally acknowledged.

[67] See the analysis of domestic irrigation development in Victoria in Clark and Renard, 'The Riparian Doctrine and Australian Legislation' (1970) 7 *M.U.L.R.* 479.

By 1885, both New South Wales and Victoria had appointed Royal Commissions to enquire into the future of irrigation development and were enthusiastically formulating extensive plans. Their common interest served to bring them together. Manifestly, if Victoria was to be able to develop the southern bank of the Murray, it was necessary to obtain some concession from New South Wales, which had previously adamantly affirmed her sole right to Murray water. To enable both colonies to develop tributary rivers, it was also important to lay to rest South Australia's contention that tributary supplies to the Murray must continue to flow. Thus Victoria suggested that, in view of proposed developments on the Murray, the three colonies should appoint a joint Royal Commission.[68] South Australia was adamant that any irrigation in either colony which detracted from navigation would be illegal, but sniffily agreed to join the proposed Commission for the sole purpose of self-protection.[69] It was perhaps her intransigence and apparent indifference to irrigation which led Victoria to drop the plan. Instead, the Victorian and New South Wales Commissioners met and passed resolutions that:

(a) waters of the tributaries of the Lower Murray may be diverted and used by the respective colonies through which they flow;

(b) the whole of the waters of the Lower Murray 'shall be deemed to be the common property of the Colonies of New South Wales and Victoria' and each of them was entitled to divert one half of the available water.

Both resolutions recited an intention to let compensation water flow, but it is not surprising that South Australia protested violently at being left high and potentially dry.[70] She threatened to petition the Imperial Government to disallow any bill seeking to ratify the agreement and to request Imperial legislation to prevent future action of this nature.[71]

Yet South Australia's anxiety was only beginning. Fortified by the agreement with New South Wales and undaunted by South Australia's rattling of sabres, the Governor of Victoria eight days later presented a message to Parliament on the proposed Irrigation Bill which, as the Irrigation Act 1886, would represent the fruits of Alfred Deakin's Royal Commission. The Bill was to lay the foundation for concerted irrigation development from both the Murray and Victorian tributaries. South Australia expressed alarm at the announcement of the proposed Bill[72] but Victoria sought to

[68] Letter from the Victorian Premier to the South Australian Premier, 18 July 1885.
[69] Letter from the South Australian Premier to the Victorian Premier, 28 July 1885.
[70] Letter from the South Australian Premier to the Victorian and N.S.W. Premiers, 26 May 1886.
[71] Letter from the South Australian Chief Secretary to the Victorian Premier, 14 June 1886.
[72] Telegram from the South Australian Premier to the Victorian Premier, 30 August 1886.

allay her fears by a bland assurance that the proposed legislation would be for water supply purposes only and not for irrigation.[73] The most charitable interpretation that can be placed on this response is that the Victorian Premier was ignorant of the manifest purpose of the most important Bill of that session.

Victoria had further tricks up her sleeve. Deakin had for some time been negotiating with the Chaffey brothers to come to Australia. After an early career of boatbuilding on the Great Lakes, they had established a highly advanced irrigation settlement at Ontario in Southern California. Deakin had been greatly impressed by them during his visit to the United States as a Royal Commissioner and was endeavouring to lure them to Victoria. On the strength of Victoria's new arrangements with New South Wales, the Waterworks Encouragement Act 1886 was passed, empowering the Governor in Council to grant tracts of land to private developers, together with a water right. Agreements were immediately signed with the Chaffeys in October 1886 and May 1887 to develop land for irrigation at Mildura.

An interesting legal sidelight to these agreements indicates that Victoria was still uncertain as to her rights to take Murray water. The arrangement between Victoria and New South Wales had not been ratified by the respective legislatures and the Victorian Government therefore qualified her grant to the Chaffeys. She only purported to act insofar as she had power to act.[74] The uncertainty of the legal position is further illustrated by the grant of a 'sufficient water-right', an interest unknown to common law, which was granted in the first instance to the Chaffeys and subsequently to the individual settlers. According to W. B. Chaffey, this particular way of transferring an interest in the waters of the Murray was adopted because 'the Government of the day did not see their way clear to state just what the right was'.[75]

South Australia's bitter protests reached screaming point with the signing of the first Chaffey agreement.[76] In an attempt to placate her growing ire, Victoria for the second time requested her to appoint a Royal Commission to confer with the Commissions of the other colonies,[77] and South Australia in fact reached an agreement with Deakin, Chairman of the Victorian Royal Commission, to hold a joint conference of the Commissions

[73] Telegram from the Victorian Premier to the South Australian Premier, 31 August 1886.

[74] Subsequent legal opinion was emphatic that this purported grant was *ultra vires* the Victorian Parliament. See the account of evidence before the Inter-State Royal Commission on the River Murray (1902) in the second article.

[75] W. B. Chaffey, Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence* 60.

[76] Telegram from the South Australian Premier to the Victorian Premier, 11 November 1886.

[77] Letter from the Victorian Premier to the South Australian Premier, 28 August 1886.

in Adelaide.[78] Early in 1887 the South Australian Royal Commission was appointed. Victoria remained willing to meet but New South Wales was aloof and refused even to acknowledge the persistent, querulous overtures from South Australia.

Despite the best endeavours of the South Australian Commission, they could not bring New South Wales to the conference table. The South Australian interest in the River had not changed substantially. She had given little indication of her intention to appropriate water or to use the River other than for navigation. Admittedly, hard on the heels of Victoria, she had signed an agreement with the Chaffeys 'to secure the application of private capital to the construction of irrigation works and the establishment of a system of instruction in practical irrigation',[79] but her chief concern had been to secure the navigability of the Murray by locking and by preventing diversions in the upper colonies.

Bearing this in mind, and her geographic impotence to do anything to affect the use of water by New South Wales, the eventual response of New South Wales is not without irony. In March 1890, Henry Parkes stirred. He referred to the fact that all the watercourse of the Murray to the border of South Australia was in New South Wales.

> This being the law of the constitution, I have only to express the desire of the Government to act in all things in the manner most calculated to promote and strengthen friendly relations and to serve the common interests of all concerned in the navigation and legitimate use of the river.

Having thus disarmingly propped South Australia against the ropes, the *coup de grâce* was delivered in the best traditions of forward defence.

> We are, of course, fully aware that the River Murray, from the point where it enters your territory belongs to South Australia. I desire, however, to intimate that it is held by this Government that South Australia cannot use the waters to such unreasonable extent as would interfere with the normal level of the river without committing a breach of intercolonial obligations.[80]

It is small wonder that P. M. Glynn mused whether someone 'unacquainted with the ways of politicians, which, like those of the Heathen Chinee, are peculiar' would understand the attitude of New South Wales.[81] Further disappointment followed. Reporting later that year, the Commission recorded that even the Victorian Royal Commission had recently declined to meet with the South Australians, even on an informal basis.[82] The next

[78] Exchange of telegrams between the South Australian Premier and Deakin, 11 October 1886.

[79] Agreement of 14 February 1887: see also Chaffey Brothers Irrigation Works Act 1887 (S.A.).

[80] Letter from the N.S.W. Premier to the South Australian Premier, 6 March 1890.

[81] Glynn, "A Review of the River Murray Question", pamphlet reprinted from South Australian *Register*, 1891.

[82] *Second Progress Report* (1890), South Australia, *Parliamentary Papers*, 34 A/1890.

two years bore no fruit and eventually the South Australian Commission asked to be relieved of its functions, with no clear recommendations as to the course of action to be pursued.[83]

Commissioner Hussey dissented from the majority. In his view, immediate action should be taken to obtain the repeal of the Imperial Act of 1855.[84] Commissioner Glynn, on the other hand, felt that such an appeal to the Imperial Government would be out of keeping with the spirit of constitutional liberty in the colonies, and saw the only possible solution as being a tripartite agreement to establish and define the mutual rights of the riparian colonies to the Murray and its tributaries. Such an agreement would establish the minimum amounts of compensation water which South Australia must receive, and establish the proportional shares of New South Wales and Victoria for irrigation.[85] This was the solution ultimately adopted some twenty-four years later, but the time was not yet ripe for negotiation.

TOWARDS FEDERATION

The planning for Federation had a considerable impact on the Murray controversy which, by this time, was an outstanding example of the type of issue advocates of Federation sought to overcome.

Undaunted by the failure of her Commission, South Australia continued to approach New South Wales, but introduced a new argument. Inter-colonial agreement over the Murray was a matter of 'Australian concern' and should be approached in a Federal spirit.[86] New urgency had been lent to South Australia's plea for agreement as the previous few years had seen a substantial diminution in her river trade. Railways snaking out from Sydney and Melbourne had reached the various river towns and were siphoning away trade from the rivers with vicious preferential tariffs.[87]

[83] *Final Report* (1893), South Australia, *Parliamentary Papers,* 34/1894.

[84] *Ibid.* and Hussey, 'The River Murray Question' South Australian *Register,* 29 October 1894.

[85] Addendum to South Australian Royal Commission, *Second Progress Report* (1890), South Australia, *Parliamentary Papers,* 34A/1890.

[86] Letter from the South Australian Premier to the N.S.W. Premier, 6 October 1894; Australasian Federation Conference (1890), *Proceedings,* 136-7, *per* Dr Cockburn.

[87] Victoria's attempt to gain her share of the trade was particularly enterprising. 'In order to maintain traffic above the Darling, Victoria had to sacrifice freights to such an extent that they had to carry goods for less than would pay for axle-grease. Wool was the principal freight, and in order to get it it was carried from Echuca to Melbourne for 2s.3d. per bale, as against a charge to the settlers in the neighbourhood of Echuca of 6s.6d. The Victorian Railways charged 2s.9d. per bale, and then returned 6d. to the agent who canvassed for the wool, and the same thing applied to other goods. Then they carried goods to Echuca from Melbourne, if for the Darling, sugar, for instance at 11s. per ton, as against 50s. to those this side of Echuca . . .'; W. T. Webb, Chairman, Campaspe Irrigation Trust and a former Victorian Minister for Agriculture, in Inter-State Royal Commission on the River Murray (1902), *Minutes of Evidence* 93.

Throughout the Convention Debates, the Murray question loomed large. The attitude with which New South Wales came to the Conventions is neatly expressed in a minute by Mr H. G. McKinney, then New South Wales Engineer, but subsequently Commissioner in Charge of the River Murray. Her contentions were that:

(a) New South Wales owned the water, but Victoria enjoyed co-equal rights of navigation to the South Australian border, by virtue of the Imperial Act of 1855;

(b) South Australia had no statutory claim to any rights in this portion of the Murray or its tributaries. Only by extending the private law concept of riparian rights could South Australia found a legal claim, but there was no competent tribunal to determine the issue and enforce its decision. More probably, the riparian doctrine did not apply between colonies, there being no precedent to support it in this context;

(c) both New South Wales and Victoria enjoyed moral rights, as water from their territories contributed to the flow of the Murray. Here again, South Australia, which made no noticeable contribution to the annual flow, was without rights;

(d) New South Wales, as the owner of the Murray watercourse, had certain rights in Victorian tributaries. This had apparently been conceded by Victoria at the joint meeting of Commissioners in 1886, but at that meeting New South Wales agreed to waive certain of these rights. It was later felt wise to make this waiver conditional upon Victoria allowing New South Wales to abut dams to the southern bank of the Murray and agreeing to bear a proportion of the cost;

(e) private landowners adjoining the Murray on both sides enjoyed normal riparian rights;

(f) she retained superior rights to the river, but would agree to treat the matter as a federal question provided that Victoria and South Australia agreed to submit all planned abstractions to New South Wales for approval. Such approval would only be given if New South Wales riparians would not be prejudiced.[88]

At the Adelaide session of the Convention in 1897, New South Wales conceded that navigation of inter-State rivers should be subject to joint control, but would not admit that the same regime should apply to intra-State streams like the Darling.[89] She argued that, just as there were international conventions protecting the right to navigate, so there were conventions which supported her claim to use her territorial tributaries for irrigation purposes. The formula finally settled on gave the Commonwealth power to make laws for—

[88] Memorandum from McKinney to Parkes, 28 October 1889, Correspondence of Sir Henry Parkes, xxvii, 134 (Mitchell Library).

[89] National Australasian Convention, *Debates*, Adelaide Session, 17 April 1897, 797, 819 *per* Reid.

> the control and regulation of the navigation of the River Murray, and the use of the waters thereof from where it first forms the boundary between Victoria and New South Wales to the sea.[90]

The South Australian desire was to ensure that the Commonwealth also had power over tributaries and Gordon strongly argued for this at the 1893 Session. He endeavoured to adduce authority for his contentions, but conceded there were 'the opinions of the old lawyers' against him, and inveighed the delegates not to 'shelter themselves behind parchment ghosts of this sort'.[91] This led to a discussion of the law applicable between the colonies. Symon avidly pressed the South Australian view that New South Wales could not divert water from tributary rivers to the detriment of South Australia.[92] Isaacs, on the other hand, stated that there was no legal right to protect South Australia,[93] which is in marked contrast to the view he took some years later when called upon to advise that State.[94] Deakin was more pragmatic. Whatever the legal rights, for all practical purposes the Darling was in the absolute control of New South Wales and South Australia could do nothing about it.[95] A remarkably frank interchange between South Australia's most vocal champion, Glynn, and Reid of New South Wales perhaps got to the heart of the problem.

> Reid: If there is any clear international law regulating these matters how is it that all the nations have had to agree by treaty as to the use of such rivers—take, for instance, the Rhine. In every case agreements as to the use of these rivers have been come to by treaty.
>
> Glynn: The honourable and learned member is a lawyer, and he is not such a political innocent as not to know that between States there is no such thing as law existing, except the right of the strongest.
>
> Reid: If you take it that way the question is settled, because we are stronger than you are.[96]

Doubtless this would grieve modern international lawyers who would be quick to lay at least two charges of heresy against the disputants. But the interchange admirably reflects the dilemma of the time. Yet there was an element of futility in debating existing legal rights, as Carruthers pointed out.

> We have here a totally new state of affairs, and to cope with it we must have some new laws. Our laws spring from customs, from convenience, and from experience. We have a river system that is totally different from that of other parts of the world. The law will spring from the system itself.[97]

[90] *Ibid.* 829.
[91] National Australasian Convention, *Debates,* Melbourne Session, 21 January 1898, 33.
[92] *Ibid.* 78 ff.
[93] National Australasian Convention, *op. cit.* 2 February 1898, 419.
[94] His opinion to the Government of South Australia dated 22 March 1906 is considered in a subsequent article.
[95] National Australasian Convention, *op. cit.* 21 January 1898, 43 *per* Deakin.
[96] *Ibid.* 51.
[97] *Ibid.* 53-4.

Such laws, however, do not spring up unaided, and the task of the Convention was to establish a mutually satisfactory future regime for the river. The problem was not to select a formula to confer power on the Commonwealth but to define its amplitude sufficiently precisely to prevent future courts from tinkering with the States' powers to control closer settlement policies and irrigation. It was pointed out that future development of the railways would have a direct effect on river navigation and that it would be irrational to leave one to the State whilst giving the other to the Commonwealth.[98] At the same time, to require the Commonwealth to keep the rivers open to navigation might shut out the possibility of using the water for new purposes, as yet unforeseen.[99]

By the time the navigation question was submitted to a full debate, the Convention had already agreed to confer power to make laws with respect to trade and commerce on the Commonwealth. This had been done with full cognizance of the plenary interpretation which the United States Supreme Court had given to the equivalent power in the American Constitution. The primary debate was whether the trade and commerce power required further elucidation or restriction with respect to the use of the River Murray.

Higgins supported South Australia's attempt to include tributaries under Commonwealth control. He went so far as to commend her as displaying 'the only true federal attitude'. She did not seek to deprive New South Wales of the use of such waters for irrigation, within reasonable limits, but sought to ensure that the Murray would not be deprived 'of such navigability as it would have by nature'. This end would be best served by leaving the question 'wholly and unreservedly' to the Commonwealth. But he felt that, if qualifications were added which specifically grappled with the problem of navigation, there was a danger that the ambit of the trade and commerce power 'will be considerably cut down'.[1]

Both O'Connor[2] and Holder[3] agreed, and elaborated the powers enjoyed by the United States Federal Government under an unfettered trade and commerce power. *Gibbons v. Ogden*[4] had held that 'commerce' comprehends navigation, and *The Daniel Ball*[5] had departed from the English test of navigability to establish a test of 'navigability in fact'. Federal power extended not only to inter-State rivers, but to any river which, for part of its length, was susceptible to navigation.[6] There was power to carry out acts on

[98] *Ibid.* 38-41, *per* Gordon and Deakin.
[99] *Ibid.* 59, *per* Fraser; *ibid.* 113, *per* Downer.
[1] *Ibid.* 60, 62.
[2] *Ibid.* 24 January 1898, 67; National Australasian Convention, *op. cit.* 1 February 1898, 386.
[3] *Ibid.* 407-16.
[4] (1824) 9 Wheat. 1.
[5] (1870) 10 Watt 557.
[6] *United States v. Rio Grande Dam and Irrigation Co.* (1899) 174 U.S. 690.

land ancillary to controlling the river,[7] to protect navigation from impediments, 'and beyond that there is also a right to improve channels and to make new channels'.[8] At an earlier session Deakin had pointed out that there was also power to construct conservation works and that water conservation and navigation were necessarily entwined in a country like Australia.[9] In their opinion, it was 'inconceivable that the High Court would deny the applicability of the American decisions'.[10] They therefore concluded with Higgins that it would be better to leave the trade and commerce power unqualified and they were supported in this by Lyne,[11] Barton,[12] and, inferentially, by Reid.[13]

Barton's argument was on slightly different grounds. He conceded that the trade and commerce power might receive a broad interpretation as in America, but he foresaw a diminishing interest in navigation. Unlike the American power, section 51(1) was really a derivative of section 92 and the Commonwealth was entrusted with securing uninterrupted and unfettered trade and commerce. The power over water is concurrent and State activities would be completely untouched until a Commonwealth act was demanded by the necessities of navigation. Yet navigation would undoubtedly diminish with the expansion of railways, and the use of water by the States for conservation and irrigation would meet with less and less interference from the Federal Government under section 52(1). In this, events proved him right. His conclusion was that:

> the safety which is secured first by a sufficiently definite provision in the Constitution, and is secured as time goes on by the elasticity of the Constitution, will be fortified by leaving the trade and commerce section untouched, and not encumbering it with limitations.[14]

Isaacs did not share the confidence that the High Court would necessarily follow American authority. In particular, he foresaw the possibility that they might adopt the Privy Council's definition of navigability, which extends purely to the limits of tidal waters in a river.[15] Glynn went one step further, and questioned whether the Darling, because of its intermittent flow, would even be caught by the American definition of navigability.[16] Because of this doubt, he pressed for an express provision giving the Commonwealth power

[7] *United States v. Coombs* (1838) 12 Pet. 72.
[8] National Australasian Convention, *op. cit.* 24 January 1898, 67, *per* O'Connor.
[9] National Australasian Convention, *Debates,* Sydney Session, 3 April 1891, 691. For an excellent summary of the development of the United States power see Morreale, 'Federal Power in Western Waters' (1963) 3 *Natural Resources Journal* 2-19.
[10] National Australasian Convention, *Debates,* Melbourne Session, 1 February 1898, 416, *per* Barton.
[11] *Ibid.* 381.
[12] National Australasian Convention, *op. cit.* 7 February 1898, 596 ff.
[13] National Australasian Convention, *op. cit.* 24 January 1898, 84.
[14] National Australasian Convention, *op. cit.* 3 February 1898, 503.
[15] National Australasian Convention, *op. cit.* 1 February 1898, 416; 2 February 1898, 426.
[16] National Australasian Convention, *op. cit.* 3 February 1898, 481.

over navigation and a further section which would define navigability in such a way as to leave no doubt that the New South Wales tributaries were subject to Commonwealth jurisdiction.

Despite all this discussion, the essential problem still remained. The Convention had early decided that water conservation and irrigation must remain matters for State control.[17] Yet even if Commonwealth power was to be restricted to navigation, it was still necessary to determine to what extent this power would 'override private rights or public rights in regard to irrigation which may be possessed in the different States'.[18]

One scheme was to leave the striking of the correct balance to the proposed Inter-State Commission. If it was to be given power over both navigation and railways it would be in a position to co-ordinate a national transportation policy. Yet even the exercise of these powers could incidentally affect irrigation by the States.[19] This, in turn, led to the notion of directing the Commission in its function. An amendment was proposed which gave the Commonwealth power to legislate to control navigation:

> But so that no state shall be prevented from using any of the waters of such rivers for the purposes of conservation and irrigation to such extent as in the opinion of the Inter-State Commission is not unjust or unreasonable, having regard to the needs and requirements of any other state for such purposes.[20]

Higgins, however, sought to avoid any statement in the Constitution that might be viewed as determining that irrigation was paramount to navigation, or *vice-versa.* He thus proposed that the Commonwealth be empowered to make laws for:

> the adjustment of riparian rights as between states as to all waters which in the course of their flow or after joining other waters touch more than one State.[21]

This formula had certain difficulties. Not only did it assume existing riparian rights of the various States—the nature and, indeed the very existence of which were hotly contested—but also, when elaborated upon by Turner,[22] raised questions as to the respective roles of Parliament and the courts.

> If disputes arise as to rights between states, those are matters of law, which ought to be determined by the Federal High Court. If you go outside that, and give Parliament any right by legislation to declare matters to be rights which at the time of federation were not rights, you are misprescribing

[17] National Australasian Convention, *Debates,* Sydney Session, 3 April 1891, 689 ff., when a move by Griffith to have water conservation made a federal matter was unanimously rejected.

[18] National Australasian Convention, *Debates,* Melbourne Session, 1 February 1898, 386 *per* O'Connor.

[19] National Australasian Convention, *op. cit.* 24 January 1898, 68 *per* O'Connor.

[20] National Australasian Convention, *op. cit.* 1 February 1898, 417.

[21] *Ibid.* 400.

[22] National Australasian Convention, *op. cit.* 3 February 1898, 520.

> the process of federal legislation, because you give the Parliament power to declare rights over property which rights did not exist at the time of federation.[23]

Reid, too, objected to this technique as being an attempt to by-pass the legitimate function of the High Court, and castigated Higgins.

> It is not remarkable for my dreaming equity friend to look at legal rights as a thing to jeer at, but I should be surprised if this Convention were prepared to follow the somewhat socialistic lead of the honourable member.[24]

All this legal jockeying proved exasperating to those not intimately involved. Forrest, in complaining of the dilatory debate, remarked whimsically that 'water is supposed to be refreshing, especially when diluted'.[25] In the event, a proposal originally hinted at by Wise[26] was adopted. Section 98 sought to remove from all doubt the width of the trade and commerce power. It was declared to cover navigation and shipping and railways the property of any State. This was a double *coup* for South Australia. Her flagging navigation interests might be revived if the Commonwealth, as benevolent protector, had power not only to ensure the maintenance of irrigation, but also to regulate the plundering railways.

At the same time the upper States were protected in their development by Section 100.

> The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Whether this final compromise was ultimately satisfactory to such as Higgins, Barton, Isaacs and O'Connor, it is difficult to tell. We can only muse with McMillan, who regarded the whole controversy as an omen.

> If amongst the ablest men in this Convention, we find absolutely divergent opinions, what will be the case in the High Court of the future?[27]

FOR BETTER, FOR WORSE?

The marriage of the colonies came and went with no notable progress on the part of politicians to lay the Murray question to rest. It is a salutary lesson in participatory democracy that it was the Murray River Main Canal League which finally coaxed unwilling statesmen from the three States and the Commonwealth to meet with members of the various River Murray Leagues at Corowa, early in 1902.[28] Barton, who, it will be remembered, had forecast little Commonwealth intervention in the interest of navigation,[29] was now Prime Minister. He called for 'wisdom, moderation and good sense' and expressed the view that irrigation and navigation could be reconciled, provided the parties did not continue to stand on their strict rights.

[23] *Ibid.* 521, *per* Barton.
[24] *Ibid.* 528.
[25] *Ibid.* 545.
[26] National Australasian Convention, *op. cit.* 24 January 1898, 105.
[27] National Australasian Convention, *op. cit.* 3 February 1898, 505.
[28] South Australian *Register,* 4 April 1902.
[29] *Supra* p. 34.

The Constitution had been framed to be worked out by reasonable men.[30]

The delegates were obviously apprehensive of South Australia's possible reactions[31] but Gordon declared on his return that he had 'never gone to a conference on behalf of South Australia with a greater amount of misgiving, nor returned from one with less'.[32] Together the Conference resolved:

> That a Royal Commission be appointed consisting of one representative from each State of New South Wales, Victoria, and South Australia, to report as to the just allotment of the waters of the Murray basin to the use of each of the said States, and as to the best methods, joint or otherwise, for their conservation and distribution, both for the purposes of irrigation and navigation, and in particular to report promptly upon the practicability and costs of schemes which included, *inter alia,* the locking of the Murray.

South Australia looked to the Commission with eager anticipation and immediately appointed Burchell as her representative.[33] She was still committed to navigation. Despite the fact that the river had been closed for several months in 1901, there were still eighty-seven vessels plying the Murray trade. Some eighty-eight boats had arrived at Morgan carrying 14,332 tons of cargo, and eighty-six had cleared, conveying 13,689 tons.[34] The *Register* placed weight on the fact that the Commissioners planned to travel upstream from the mouth and that a good part of the journey to Morgan and Renmark would be a trek through scrub and sandhills. This would surely impress upon them 'the imperative necessity' of permanent navigation. At the same time, it was pointed out that this was no longer South Australia's only interest:

> irrigation is already an important industrial factor in South Australia, and is likely to be more so in the near future.[35]

The *Register* in fact became more and more committed to water for conservation and irrigation and when the Commissioner for Public Works announced his conclusion that storages for irrigation were not feasible in the Murray, it became most acerbic.

> Hitherto the community has had no opportunity to laud a vigorous water policy, and it would seem that South Australia offers no scope for enerprising, up-to-date experts.[36]

Yet barely had South Australia thankfully resigned her fate to the good offices of the Inter-State Royal Commission on the River Murray than the battle was on again. In August, Victoria announced a scheme to make use of the Goulburn for irrigation.[37] Jenkins, then Premier of South Australia, protested by telegram that this was unwise as the matter was, so to speak, *sub judice,* but the most surprising response was from New South

[30] South Australian *Advertiser,* 5 April 1902.
[31] Victorian *Argus,* extracted in South Australian *Advertiser,* 5 April 1902.
[32] South Australian *Register,* 7 April 1902.
[33] Reported in South Australian *Register,* 15 April 1902.
[34] South Australian *Register,* 27 May 1902.
[35] *Ibid.*
[36] South Australian *Register,* 22 November 1902.
[37] Reported in South Australian *Register,* 12 September 1902.

Wales. Since 1886, they had connived at and co-operated with Victoria's irrigation plans, but on this occasion she protested violently in terms reminiscent of Parkes' memorable letter to South Australia.[38] Instead of appealing to the new regime of federation, she fell back on the Imperial Act of 1855 and asserted that the

> construction by any State without the permission of this Government of any works affecting the waters of the Murray within New South Wales would, therefore, be in derogation of the rights of this State and could not be allowed.[39]

The *Sydney Morning Herald* was quick to point out that this stand had overtones of the pot calling the kettle black,[40] and the *Register* reported that Victoria viewed her activities as quite within the spirit of section 100 of the Constitution.[41] Yet there was a flutter in the dovecote, as apparently impartial observers living in Victoria warned that Victoria, in asserting that she would only take 'surplus' waters from the Goulburn, was guilty of duplicity.

> If your State cannot stop Victoria under the riparian laws South Australia is done for as far as the Murray is concerned.[42]

Thus the South Australian Legislative Council sent a protest to Victoria[43] and a meeting of the River Murray League in Adelaide lamented that the Judiciary Bill to create the High Court had been shelved. It requested intervention by the Federal Parliament to preserve navigability and provide a forum where South Australia could protect her rights at law.[44] Undaunted, Victoria introduced her proposed bill despite further protests from New South Wales.[45]

The attitude of the Commonwealth at this stage is particularly interesting. Prior to Corowa, McColl had pointed to large stock losses in northern Victoria, the Riverina and South Australia and enquired whether the Commonwealth might promote joint action by the various Governments to appoint a board to gather information and formulate joint storage schemes. Lyne, Minister for Home Affairs, agreed to gather the necessary information and have the results put to Cabinet, but stated that, although he desired to promote water conservation and distribution, 'this subject can scarcely be dealt with under the present pressure of public business'.[46]

[38] *Supra* p. 29; letter from the N.S.W. Premier to the South Australian Premier, 6 March 1890.

[39] Letter from the N.S.W. Premier to the Victorian Premier, reported *verbatim* in the South Australian *Register*, 17 September 1902.

[40] Extract from the *Sydney Morning Herald*, reported *verbatim* in the South Australian *Register*, 10 October 1902.

[41] South Australian *Register*, 3 October 1902, 22 October 1902.

[42] Letters to the South Australian *Register*, 26 September 1902, and to the South Australian Commissioner for Public Works, reported in South Australian *Advertiser*, 3 January 1903.

[43] South Australian *Register*, 21 September 1902.

[44] Motion by S. J. Jacobs, reported in South Australian *Register*, 4 October 1902.

[45] *Ibid.*

[46] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 28 August 1901, 4205.

Shortly before the Corowa conference, Glynn again sought to bring the matter before the House but Barton asked him to await the results of that conference to determine 'whether the results of the conference will justify the giving up of time for the discussion of the question when public business is so urgent as it is now'.[47] After Corowa, Glynn renewed his attack by asking whether the Inter-State Royal Commission on the Murray would enquire into the conservation of water for navigation and equitable apportionment of all arterial rivers over which the Commonwealth had jurisdiction. Barton again fobbed him off by answering that the terms of reference extended only to the Murray and that it was, after all, a joint State Commission and not of concern to the Commonwealth.[48]

When Victoria announced her proposals for the Goulbourn, Thompson flushed out a more satisfactory response. The Commonwealth would only act if there was an interference with navigation and if the States asked for intervention. The proper forum for solving the dispute would be the Inter-State Commission provided for in the Constitution which, it was promised, would be constituted 'during the ensuing session'.[49] Within three weeks of this utterance, South Australia called the Commonwealth's bluff by asking for its active intervention against Victoria.[50] Lyne's response was less than satisfying. He would not enter any protest 'because by doing so he might only throw himself open to receive a snub from the [Victorian] State Government'. The Commonwealth could only act if interference with navigation was threatened.[51] Some New South Wales opinion, in fact, contested even this limited expression of Commonwealth power for, in their view, the Constitution made 'navigation subject to the reasonable use of waters for conservation, and if irrigation affected navigation, so much the worse for navigation'.[52]

Deakin, prompted by Glynn, nevertheless promised to consider lodging a protest against Victorian action, especially in view of the deliberations of the Inter-State Royal Commission on the River Murray.[53] Thompson, too, pursued his point. Was it not 'the right and duty of the Commonwealth' to approve or oppose State schemes to store or abstract water from the Murray or its tributaries? Lyne made the enigmatic response that:

> it is the constitutional right, and if navigability of the river was to be interfered with, it is the duty. But it may be that no action can be taken until a law is passed dealing with navigation or the High Court is established.

[47] *Parliamentary Debates, op. cit.* 2 April 1902, 11252.
[48] *Parliamentary Debates, op. cit.* 30 April 1902, 12088.
[49] *Parliamentary Debates, op. cit.* 10 September 1902, 15897.
[50] *Supra* p. 37.
[51] South Australian *Register,* 17 November 1902.
[52] South Australian *Register,* 18 November 1902, quoting Carruthers who had attended the Conventions.
[53] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 24 September 1902, 16021.

In answer to the question whether 'reasonable' in section 100 implied that there should be no undue abstraction to the disadvantage of other States interested in conservation or irrigation, he replied that the Commonwealth was powerless to take any action whatever unless there was interference with navigation.[54] When petitions were received from South Australian residents requesting Commonwealth intervention, Deakin remarked that:

> this is probably the most complex—I might also say the most obscure—part of the whole Constitution; and it will be extremely difficult to determine —first, what are our rights and powers; and next, the most tactful and effective way of asserting them.[55]

Yet the Commonwealth did not act. The Inter-State Commission, promised by Lyne as an immediate panacea, did not eventuate until nine years later, and a plea to invest State courts with federal jurisdiction, pending the Judiciary Act, so that the question might be settled, was ignored.[56]

Of all the pleas for Commonwealth intervention to solve the dispute and all the rhetoric which fanfared federation, the effort by W. H. Elsum, stalwart of the Australian Natives Association, stands supreme.

> O ye in the halls of power, who move the helm of the State,
> Who make the laws for the masses, in the speech and the swift debate;
> Ye have a mission to follow; a chapter of gold to write
> On a page that is smirched with failure, and fouled with a paltry spite.
> They flouted the wealth of Nature; they trifled with quarrel and strife;
> With a whole land sickened and withered, and men cursed God for their life.
> From out of their worthless wreckage, your privilege appears,
> On a basement of foiled desires, cemented by strong men's tears.
> Make laws for our mighty rivers, frame Acts which will turn their flow
> In ladders of life to the hilltops, and flood to the vales below.
> Pass motion and resolution, that shall steal from the greedy sea
> A tithe of its mighty plunder for the good of prosperity.
> And the dawn shall be bright with plenty in the light of the laughing day,
> And the fears of a frenzied people with the midnight shall fade away.
> The corridors of the Future will ring with your joyous shout
> As to regions of Death and Darkness glides, baffled, the Spectre Drought.

Not even the federal muse could lure the Commonwealth from her corner.

> The opportunist Commonwealth Ministry are too busily engaged in electioneering, imprisoning British citizens, prosecuting innocent traders, and preparing uncalled for schemes of litigation promoting conciliation to be able to spare energy even to avert a threatened tragedy of federal harmony.[57]

[54] *Ibid.* 16021-2; see also 25 September 1902, 16104 *per* Deakin.
[55] *Parliamentary Debates, op. cit.* 9 October 1902, 16677.
[56] *Parliamentary Debates, op. cit.* 10 April 1902, 11601.
[57] South Australian *Register,* 7 March 1903.