TECHNICAL NOTE

A REVIEW OF THE VICTORIA - NEW SOUTH WALES BORDER

It is the serendipitous reward of the researcher to happen upon material unrelated to the current research being undertaken but which is of more than passing interest. Unfortunately, the exigencies of the current research require its temporary abandonment coupled with intent to return and further explore this peripheral material at a more convenient time. Thus it was my experience to be investigating the views of the Victorian Solicitors General regarding the jurisdiction over the River Murray in the tri-state area where the states of Victoria, South Australia, and New South Wales abut (that is, the Mildura-Renmark area). The search engine identified this particular pamphlet that had only recently been included in the University of Melbourne Library catalogue after its acquisition in 2004:

Opinion of the Solicitor-General regarding the Claim of the Government of Victoria to the Territory (known as the Riverina) lying between the Murray and Murrumbidgee Rivers, together with Maps showing the course of the River Murray, William Applegate Gullick, Government Printer, Sydney, 1912, 18 pp and including an Appendix of 17 fold-out maps of south-eastern Australia showing the history of discovery of the course of the River Murray, 7 s.6d. at the time of publication (1912), and *several hundred dollars* at the time of acquisition (2004) by the Education Resource Centre Library of the University of Melbourne.

In 1911 the Acting Premier of Victoria wrote to his New South Wales counterpart asserting Victorian sovereignty over the land lying to the south of the Murrumbidgee River and a straight line from the source of that river (near Nimmitabel in NSW) to Cape Howe (the present coastal boundary point). If correct, the Australian Alps, most of the Australian Capital Territory (but not the City of Canberra) and Cooma would be within Victoria and the towns of Balranald, Hay, Narrandera, Wagga Wagga, and Gundagai would be border towns.

This was the third time Victoria had raised the issue: in 1906 the legal advice to the Victorian Government concluded that *Victoria has not any valid claim to insist now that the proper boundary between Victoria and NSW is a line drawn from Cape Howe to the source of the Murrumbidgee*. The subject was dropped until the Premier of Victoria, Sir Thomas Bent, took it up again in 1908 initiating discussions between the states which petered out and remained dormant until the most recent claim by the Acting Premier in 1911. It was a time of state assertion of disputed territory as South Australia was part way through its (ultimately unsuccessful) claim in the High Court of Australia (12 CLR 667, 1911) and thereafter on appeal to the Privy Council (18 CLR 115, 1914; [1914] AC 283) that its present border with Victoria should be *shifted* some two and a quarter miles (or 3.6 km) eastward — see for example Middleton, Vol. 48(1) *Australian Surveyor* 21 (2003) and Schedlich, 5 *TransTasman Surveyor* 41 (2002).

The genesis of the Victorian claim lay in an 1851 letter written by Sir Thomas Mitchell pointing out that the boundary described by the 1850 Imperial Act (establishing the Colony of Victoria) ran from Cape Howe to the Murrumbidgee source of the Murray and thence along the Murrumbidgee to the Murray, and thence along the Murray to the SA border. As Surveyor-General of NSW both before and after the establishment of the Port Phillip District of the Colony of New South Wales as the independent Colony of Victoria (in 1851) surely Sir Thomas Mitchell was in a position to know!

In response the NSW Solicitor-General, Walter Bevan, prepared an opinion which was ordered by the NSW Legislative Assembly to be printed and published.

The NSW Solicitor's opinion was reliant upon four threads which, in apparently decreasing importance, included an analysis of the 1850 statute defining the

proposed border (...a line drawn from Cape Howe to the nearest source of the River Murray and thence by the course of that river to the eastern boundary of the Colony of South Australia — the Solicitor's conclusion being that the phrase *that river* could only be referenced to the preceding nominated river, that is, the River Murray).

Bevan then sought to show that Mitchell's 1851 interpretation was in error. In the course of exploration of the new colony westward from Sydney, the River Murrumbidgee was fully known while knowledge of the Murray upstream from the confluence of the two rivers was scant (it being known then as the Upper Murray or the River Hume). Mitchell's interpretation was founded upon the Murrumbidgee being a known source (one of several) of the Murray whereas the source of the Murray proper was yet to be found. However, at the time of the 1850 statute this was no longer the case as was demonstrated by the appendix of maps dating from the 1820s through the 1850s, many from the office of the Surveyor-General and bearing Mitchell's initials indicating that he was aware of their import, and demonstrating that the course of the upper reaches of the Murray was sufficiently known at this time.

Further, the Solicitor traced the history of the proposed border and the Port Phillip District. Whereas the 1850 border was in terms of westwards from Cape Howe, the earlier manifestations were eastward from the SA border. It is possible to construe the 1850 definition as a straight line from Cape Howe to the nearest source of the Murray (being the Murrumbidgee) and thence along that river (the Murrumbidgee) to where the Murrumbidgee ceases (where it enters the Murray) and thence (along the Murray) to the SA border. In the opposite direction, from the SA border along the Murray to its source and thence to Cape Howe leaves little room for an interpretation utilizing the course of the Murrumbidgee and its source.

A contemporary history of the political lobbying for a Murrumbidgee border (premised upon the Riverina being better governed from Melbourne than Sydney because of the closer proximity of the former) also supported the Solicitor's opinion. Had the Imperial Parliament legislated for a Murrumbidgee border it is

difficult to reconcile this intended border with the rueful disappointment at the failure of their lobbying efforts by its proponents.

The relevance of this pamphlet lies in its rebuttal of the thesis alluded to by the late Peter Curnow in this journal's forerunner (*The boundaries of Victoria*,³² *Australian Surveyor* 193-201, 1984) and in his contribution to *The Victorian Survey Practice Handbook* (vol ii, Part 3, pp 187-195, 1994) that the Port Phillip District extended as far north as Bateman's Bay then due West to the Murrumbidgee and included all that land between the Murrumbidgee and Murray Rivers (the Riverina). This reviewer does not propose to dispute Curnow's conclusion — he merely tenders this 1911 opinion of the NSW Solicitor-General as providing an alternative credible explanation of why a possibly erroneous interpretation suggesting such a northern border may have been arrived at.

The value of the NSW Solicitor's opinion and the decision of the NSW parliament to print (and widely publish) that opinion is demonstrated by the fact that the claim of Victoria was not proceeded with although Cumbræ-Stewart, in a 1930s lecture and republished in the *University of Queensland Law Journal* (1965), refers to a civil libel action, *Ogier v Norton* (ca 1903), where it was contended that the Murrumbidgee and not the Murray was the true boundary between NSW and Victoria.

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