

47/1980

HIGH COURT OF AUSTRALIA

WARD v R

Barwick CJ, Gibbs, Stephen, Mason, Murphy, Aickin and Wilson JJ

1 May 1980 — [1980] HCA 11; (1980) 142 CLR 308; (1980) 29 ALR 175; 54 ALJR 271

CONSTITUTIONAL LAW - STATES - BOUNDARY BETWEEN NEW SOUTH WALES AND VICTORIA - BOUNDARY FIXED BY IMPERIAL STATUTE - "WATER-COURSE" OF RIVER MURRAY - 13 & 14 VICT. C. 59 - 18 & 19 VICT. C. 54 S. V.

HELD: The northern boundary of Victoria is the top of the southern bank of the River Murray.

BARWICK CJ: I have had the advantage in this appeal of reading the reasons for judgment prepared by my brother Stephen. I agree with his conclusion that the northern boundary of Victoria is the top of the southern bank of the River Murray. I agree substantially with the reasons my brother gives for that conclusion. My brother's informative survey of colonial history affords no reason for reaching any other conclusion. On the contrary, in my opinion, it aids that conclusion.

2. The delineation, for electoral reasons, of the Port Phillip district of the colony of New South Wales effected by 5 & 6 Vict. c76 (1842) did not involve any alienation of territory. Consequently, when in 1850 a separation from the colony of New South Wales of what was to become the colony of Victoria was effected, the northern boundary of the new colony was fixed so far as it referred to the River Murray by reference to the course of that river. This was capable of being regarded as the southern bank of the river or the middle line of the river. It could scarce have been regarded as the water's edge on the river as it might be from time to time. I agree with what my brother Stephen has said as to the decision of the Supreme Court of Victoria sitting as a court of criminal appeal in this case on the relationship of the water to the inter-colonial boundary. None have suggested, nor could it properly be maintained, that by reference to "the Course of that River" (the Murray River), the indication of the northern bank of the river was intended as the inter-colonial boundary.

3. I would have thought myself that, bearing in mind the earlier delineation of the Port Phillip district, the specification of the course of the river as the northern boundary of the new colony pointed towards the adoption of the southern bank of the river as that boundary. But, as my brother recites, the administration of inter-colonial customs evidently gave rise to doubts and difficulties. Those doubts were intended to be laid to rest by the Act of 1855, 18 & 19 Vict. c54. This Imperial statute declared "that the whole Watercourse of the said River Murray" was within the colony of New South Wales. To my mind, bearing in mind the antecedent historical events, beginning with the erection of the Port Phillip district of the colony of New South Wales, the Imperial statement that the whole watercourse of the river was within the territory of New South Wales meant, and, in my opinion, unambiguously meant, that the colony of New South Wales extended territorially to the southern bank of the River Murray. Whatever ambiguity might remain in the description "Watercourse" when used alone, in my opinion "the whole Watercourse" of a river definitely means the area between the extremities of the banks of the river: they, except in times of flood, determine the course of the river. Indeed, even in times of flood, it might well be said that they, even then, determine the course of the river itself. I agree entirely with what my brother Stephen has written on the connotation and the denotation of the expression "Watercourse of the river". For my part, I derive somewhat more than my brother seems willing to take from the emphatic use of the word "whole", particularly bearing in mind the circumstances in which it was statutorily employed. The whole watercourse of a river must, in my opinion, include the territory which lies between its banks.

4. If, as is the case with English or some European continental streams, there is a seasonal flooding, the extremity of the stream's watercourse may extend to the seasonal flood bank. But no such question arises in this case. When this river bursts its banks in flood, so far as presently

relevant, it submerges adjacent lands without forming either a flood plain or a flood bank. Here, the southern bank of the river is clearly apparent and easily defined.

5. The absence of a pattern of seasonal flooding of a fairly regular nature contributed to the decision in quite early colonial days to vest flowing water in the Crown, thus avoiding arguments as to the use of flowing waters between proprietors on either bank, as well as between upper and lower riparian owners.

6. To my mind, the statutory assertion in 18 & 19 Vict. c54 that the whole watercourse of the river was within New South Wales was, as a matter of statement, unambiguous. When the antecedent history is taken into account, including the influential and cogent opinion of the law officers of the colony of New South Wales which is recited in my brother's reasons for judgment, I have no doubt that the meaning of the expression "the whole Watercourse" of the river was intended to ensure that all within the banks of the river was accepted as being within New South Wales.

7. I therefore agree that the appeal be allowed and the appellant's conviction set aside. The deceased, the victim of the appellant's gunfire, was killed not in Victoria but in New South Wales.

STEPHEN J: ... 54. My conclusions concerning s5 [of 18 & 19 Vict. c54] are, then, that it is expressed in language which refers not to the flowing waters of the Murray but, rather, to the contour feature within which those waters flow: that, although it was the product of problems relating to the collection of customs duty on Murray River traffic, it is expressed to be, and takes the form of, a measure for defining territorial boundaries: that in taking this form it gives effect to the proposals of its initiators in New South Wales: that, on its proper construction, it declares the whole of the contour feature, to the top of the southern bank, to be the territory of New South Wales. It follows that the boundary line between the States runs along the top of the southern bank of the Murray, all territory to the north being within New South Wales. In referring to the "bank" of the river I adopt the description given in *Howard v Ingersoll* (1851) 13 How, at p427 (14 Law Ed 209): "the banks of a river are those elevations of land which confine the waters when they rise out of the bed". In *Jones v Mersey River Board* (1958) 1 QB 143, Jenkins LJ, after citing with approval this passage from *Howard v Ingersoll* (1958) 1 QB, at p151, pointed out that the identification of the "bank" at any particular point along a river "must be a question very largely of fact to be decided in each particular case by reference to the size and habits of the river, the geological composition of the land, and the level of the land as compared with the river, and no doubt, other circumstances of that kind". The relevant topography at the site of the shooting in the present case leaves no room for doubt: the bank is well defined and its top can be instantly recognized. His Lordship, having regard to the statutory context there in question, would have included in "banks" rather more than "the slope or vertical face" which confines the waters when they rise out of the bed, extending its meaning to land adjoining the river (1958) 1 QB, at pp152-153. However in the present case it will be along the top or upper edge of "the slope or vertical face" of the southern bank that the boundary between the States is to be found. ...