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No. 38 of 1980

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

SOUTHERN CENTRE OF THEOSOPHY INCORPORATED

(Plaintiff) Appellant

- and -

THE STATE OF SOUTH AUSTRALIA

Defendant (Respondent)

RECORD OF PROCEEDINGS

HEMPSONS,
33 Henrietta Street,
London W.C.2.

Solicitors for the Appellant

EGERTON SANDLER, SUMMER & CO.
17-18 Dover Street,
London W.1.

Solicitors for the Respondent

No. 38 of 1980

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

SOUTHERN CENTRE OF THEOSOPHY INCORPORATED — (Plaintiff) Appellant

- and -

THE STATE OF SOUTH AUSTRALIA — (Defendant) Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I

E X H I B I T S

(separately reproduced)

No.	Exhibit Mark	Description of Document	Date
1.	P1	Crown Lease Perpetual No. 1187 Register Book Volume 584 Folio 12	27th September 1911
2.	P2	Hundred Plan No. 162 deposited in Land Office 28th March 1906	undated
3.	P3	Crown Lease Right of Purchase No. 198 Register Book Volume 82 Folio 30	December 1889
4.	P4	Hundred Plan No. 162 deposited in Land Office 27th May 1879	undated
5.	P5	Pages 7, 16 and 17 of the Diagram Book of the Hundred of Lake George and those pages from Field Book 1576 mentioned at the top of each of the pages mentioned in the Diagram Book	undated
6.	P6	Frontispiece of Field Book 1576 and so many of the pages of that Field Book as are referred to in the pages tendered in P5	23rd December 1887
7.	P7	Plan prepared by Mr. Chalklen in June 1977	10th August 1977
8.	P8	Colour aerial photograph of Lake George taken 18th February 1978	undated
9.	P11	Lake George Geological Report of Professor Von Der Borch	28th April 1978
10.	D10	Report of Donald Armstrong pp. 1-21 together with plates 1-8 and figures 8, 9 and 15	undated
11.	D12	Three colour photographs (a) looking toward tide gauge (b) looking toward Rivoli Bay (c) looking northwards	undated

DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT REPRODUCED

Description of Document	Date
In the Supreme Court of South Australia	
Appearance of defendant	5th May 1975
Defence	24th October 1975
Summons for Directions	22nd January 1976
Memorandum of Particulars	22nd January 1976
Consent endorsed on Summons for Directions	22nd January 1976
Affidavit of Nikolaj Dyki	27th April 1976
Praecipe to set Down	30th April 1976
Associates Certificate	7th August 1978
In the Full Court of the Supreme Court of South Australia	
Praecipe to set down appeal for hearing by the Full Court	9th March 1979
List of Authorities for the Respondent	4th April 1979
Associates Certificate	29th May 1979
Affidavit of Leslie William Baohm	20th June 1979
Affidavit of Raymond John Taylor	20th June 1979
Advice of Australian equivalent of the pound sterling	6th December 1979
Masters Certificate as to payment into Court of security	6th December 1979
Associate's Certificate	6th December 1979.

EXHIBITS NOT INCLUDED IN THE RECORD OF PROCEEDINGS

No.	Exhibit Mark	Description of Document
1.	P9	Document described as figure 1 referred to in report of witness Von der Borch
2.	P10	Document described as figure 2 referred to in report of Von der Borch
3.	P12	Buff coloured sand sample
4.	P13	Grey coloured sand sample
5.	P14	Sand sample labelled 10 mile dune (toe) (5" depth)
6.	P15	Sand sample taken from vegetated dune landward from star dropper (12" depth)
7.	P16	Traverse 1 near marker peg (8" depth)
8.	P17	Traverse 1 near marker peg (4" depth)
9.	P18	Soil sample traverse 1 very close to star dropper (12" depth).
10.	P19	Photograph taken in the vicinity of traverse 1
11.	P20	Photograph taken in the vicinity of traverse 3
12.	P21	Chalklen's Field Book
13.	P22	Graph relating to 3 samples taken from hole A
14.	P23	Sample taken 100 metres north of the 10 mile drift and sand flats
15.	D1	Colour photograph taken at 5 mile drift
16.	D2	Graph of sand samples taken from middle auger at traverse 1
17.	D3	Graph of sand samples taken from middle auger at traverse 1 below 60 centimetres
18.	D4	Graph of sand samples taken from nearest auger at traverse 1 and from northern end of 10 mile drift
19.	D5	Graph of sand sample taken from auger on vegetated dune at traverse 1

No.	Exhibit Mark	Description of Document
20.	D6	Composite photograph of northern end of 10 mile dune
21.	D7	Composite photograph showing shore line at traverse 1
22.	D8	Composite photograph of area north of 5 mile dune
23.	D9	13 grain sizing analysis sheets
24.	D10	Portion of report of Donald Armstrong not referred to in Part II
25.	D13	Diagram of levels in area of drain and golf course
26.	D14	Series of aerial photographs
27.	D15	Composite map of lake
28.	D16	Ortho-photo
29.	D17	Armstrong's drawing at the location of Von der Borch's traverse 1 and extended to the west.

THIS INDEX OF REFERENCE is prepared by FISHER JEFFRIES & CO. of Epworth Building, 33 Pirie Street, Adelaide. Solicitors for the Appellant.

No. 38 of 1980

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

SOUTHERN CENTRE OF THEOSOPHY INCORPORATED (Plaintiff) Appellant

- and -

THE STATE OF SOUTH AUSTRALIA Defendant (Respondent)

RECORD OF PROCEEDINGS

In the Supreme Court

No. 1
Writ of Summons
17th April 1975

No. 1

Writ of Summons - 17th April 1975

Amended pursuant to the order of Mr. Justice Walters made the 8th day of May 1978.
(Illegible) 12.5.78

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1975.

BETWEEN

Southern Centre of Theosophy Incorporated Plaintiff

- and -

The State of South Australia Defendant

~~ELIZABETH the Second by the Grace of God of The United Kingdom, Australia and Her other Realms and Territories, Queen Head of the Commonwealth Defender of the Faith~~

ELIZABETH the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth

TO - THE STATE OF SOUTH AUSTRALIA
of - C/- L.K. Gordon, Crown Solicitor, 33 Franklin Street, Adelaide

We command you, That within eight (8) days

In the Supreme Court

No. 1
Writ of Summons
17th April 1975.
(cont'd)

after the Service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered to you in the Supreme Court of South Australia in an action at the suit of the SOUTHERN CENTRE OF THEOSOPHY INCORPORATED of 8 Dryden Street, Tranmere AND take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, THE HONOURABLE JOHN JEFFERSON BRAY Chief Justice of our said Supreme Court of Adelaide, the 17th day of April 1975.

DATE STAMPED
SUPREME COURT 17 APR 1975

N.B. This Writ is to be served within twelve calendar months from the date hereof, or if renewed, within the period for which the same is renewed and not afterwards.

A defendant may appear to this writ by entering an appearance either personally or by Solicitor at the Master's Office, Supreme Court House, Victoria Square, Adelaide.

The Plaintiff's claim is for:-

1. A declaration that:

   (a) Certain land being accretions to the south of the land comprised and described in Perpetual Crown Lease No. 11887 Register Book Volume 584 Folio 12 now forms part of the land comprised and described in the aforesaid Perpetual Crown Lease No. 11887 Register Book Volume 584 Folio 12 of which land the plaintiff is the registered proprietor of an estate as lessee.

   (b) The ~~southern~~ eastern boundary of the land comprised and described in Perpetual Crown Lease No. 11887 Register Book Volume 584 Folio 12 is constituted by Lake George.

2. An injunction restraining the defendant, its officers and employees from infringing the rights of the plaintiff as registered proprietor of an estate as lessee in the land comprised and described in Perpetual Crown Lease No. 11887 Register Book Volume 584 Folio 12.

3. Such further or other relief as to the court may seem just and appropriate.

4. Costs.

In the Supreme Court

No. 1
Writ of Summons
17th April 1975.
(cont'd)

THIS WRIT was issued by FISHER JEFFRIES & CO. of and whose address for service is Epworth Building, 33 Pirie Street, Adelaide. Solicitors for the said Plaintiff, who resides at 8 Dryden Street, Tranmere in the State of South Australia.

This Writ was served by me at on the defendant on day the day of 1975.

Indorsed the day of 1975.
(Signed)

No. 2

Amended Statement of Claim - 30th September 1975

No.2
Amended Statement of Claim - 30th September 1975

Amended pursuant to the order of Mr.Justice Walters made the 8th day of May 1978
(Illegible)
12.5.78

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1975

BETWEEN

Southern Centre of Theosophy Incorporated — Plaintiff

- and -

The State of South Australia — Defendant

STATEMENT OF CLAIM

(Writ issued 17th day of April, 1975)

1. The plaintiff was incorporated under the Associations Incorporation Act on the 3rd day of August 1972.

2. The plaintiff is the registered proprietor of an estate as lessee of that piece of land situated in the Hundred of Lake George County of Grey being Section 16 SW containing five hundred acres or thereabouts and being the whole of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12 (which land is hereinafter referred to as the said land).

3. The ~~southern~~ eastern boundary of the said land adjoins Lake George. Since the said land was first leased there has been a gradual accretion

In the Supreme Court

No. 2
Amended Statement of Claim - 30th September 1975. (cont'd)

of land to the east of the original boundary by reason of windswept sand, and/or longshore sanddrift and/or the change in the level of the lake.

AND the plaintiff claims:

(i) A declaration that,

(a) the high water mark of Lake George forms the eastern boundary of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Register Book Volume 584 Folio 12, and

(b) the area of accretions forms part of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12.

(ii) An injunction restraining the defendant by its officers and employees from infringing the rights of the plaintiff as registered proprietor of an estate as lessee in the land comprised and described in Crown Lease Perpetual No. 11887 Register Book Volume 584 Folio 12.

(iii) Such further or other relief as to the Court may seem just and proper.

(iv) Costs.

No. 3
Amended Defence 12th May 1978

No. 3

Amended Defence - 12th May 1978

(Amended this 8th day of May 1978 pursuant to the order of His Honour Mr. Justice Walters
Sgd.
Solicitor for Defendant)

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1875 (sic)

BETWEEN

Southern Centre of Theosophy Incorporated — Plaintiff

and

The State of South Australia — Defendant

D E F E N C E

1. The defendant admits the facts alleged in paragraph 1 of the Statement of Claim.

2. As to paragraph 2 of the Statement of Claim the defendant admits that the plaintiff is the lessee of the piece of land therein described (hereinafter referred to as "the said land") but does not admit that Crown Lease Perpetual No. 11887 creates an estate as alleged in the said paragraph.

3. As to paragraph 3 of the Statement of Claim

(a) the defendant admits that the eastern boundary of the said land is proximate to Lake George but does not admit that the said land adjoins the said lake,

(b) the defendant admits that as to a portion of the eastern boundary of the said land there has been a build up of sand by reason of windswept sand on the edge of the land but denies that the said build up constitutes a gradual accretion or that there is any accretion as a result of windswept sand or long-shore drift or change in level of the lake or otherwise.

4. In the alternative the defendant

(a) denies that the doctrine of accretion may apply to land proximate to or adjoining Lake George,

(b) denies that the doctrine of accretion may apply to land held pursuant to a perpetual lease,

(c) says that if there has been a gradual accretion of land (which is denied) such accretion has not been to the boundary of the plaintiff's land,

(d) says that if there has been a gradual accretion of land to the said land (which is denied) such accretion occurred prior to the grant of Crown Lease Perpetual No. 11887 or any other crown Lease of the said land preceding the Crown Lease Perpetual No. 11887.

THIS DEFENCE is filed and delivered this 12th day of May, 1978 by Graham Clifton Prior of 33 Franklin Street Adelaide 5000 Crown Solicitor and Solicitor for the Defendant.

In the Supreme Court

No. 4
Reply
12th May 1978

No. 4

Reply - 12th May 1978

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1975

BETWEEN

Southern Centre of Theosophy Incorporated — Plaintiff

- and -

The State of South Australia — Defendant

R E P L Y

Save in so far as it consists of admissions, the plaintiff joins issue with the defendant's defence.

THIS REPLY is filed and delivered this 12th day of May 1978 by Fisher Jeffries & Co., 33 Pirie Street, Adelaide, S.A. Solicitors for the Plaintiff.

No. 5
Defendant's Evidence
A.G. Chambers
Examination

No. 5

Evidence of A. G. Chambers

MR. CRAMOND INTERPOSES BY CONSENT

ALFRED GORDON CHAMBERS,
Beachport
Pensioner — SWORN.

EXAMINATION BY MR. CRAMOND

Q. How old are you. A. 73.

Q. When were you born. A. 1904.

Q. Where were you born. A. In Mt. Gambier.

Q. I think that you gave your address as Beachport. A. Yes.

Q. How long have you lived there. A. All my life.

HIS HONOUR

Q. When did you move from Beachport to Mt. Gambier.

A. Naturally, I wasn't born.

XN

Q. I think that you have owned land in the Beachport area.

A. That's correct.

Q. Is that land north of Beachport and between Lake George and the seacoast.

A. That's correct. One section also on the north-eastern side of the lake, section 105.

Q. Looking at Exhibit P2, can you indicate any section on there that you owned in the past.

A. We owned section 41.

Q. And you have since sold that.

A. Yes, we disposed of that to Theosophy.

Q. Did you own any other land, or still own any other land in the area.

A. Yes, it would be section 30 - but I am not sure - is this a recent map? That is the section.

Q. As a young man did you spend very much time in the vicinity of Lake George.

A. Yes, I have spent practically all my life around the lake, the fringes of the lake, Lake George, first as a rabbit trapper and then as a fisherman. That occurred in the year - let me see - 1913 I think that would be.

HIS HONOUR

Q. You were 9 years of age.

A. Yes. No, that would not be, that was not accurate. No, I left school at the age of 14 and went trapping rabbits around the fringes of Lake George, and at that age of 15 I was down there trapping rabbits and we discovered a lot of fish in Lake George and then I took over fishing.

Q. Netting.

A. Yes, and I fished in Lake George until I was 28. I then took up fishing in the cray fishing and shark industry, and took up land at a later date.

XN

Q. There is a drain between the southern end of Lake George and Rivoli Bay. A. That's right.

Q. Has that always been there.

A. No they put that there in 1913.

Q. Was it in the same form in 1913 as it is now in.

A. No, it was only half the width it is today approximately.

Q. Do you recall it being built there in 1913.

A. I have a faint recollection, yes.

Q. When the drain was established in 1913, and in the years immediately following that, did water flow regularly between the lake and the sea. A. Covering what period?

Q. From 1913 onwards.

Q. From 1913 to 1963, I think it was 1963 when the drain was widened, during that period, that is a period of approximately 50 years, and it was blocked each year and every year. It was opened in 1913, the lake level was at a high level and it flowed very freely, and 1914 was a drought - and is still regarded as the 1914 drought - and it blocked and remained blocked for four years. And then there was a good rainfall again and it opened again, but each and every year it blocked after the emptied the water from Lake George to a certain level.

HIS HONOUR

Q. This drain ran from Lake George into Rivoli Bay.

A. Yes, and from then on since the drain has been widened --

XN

Q. Before you go into that, when you say the original drain built in 1913 blocked, do you mean someone closed it.

A. No it naturally closed, the water draining to the sea had become sluggish and then there was - the flow would be naturally accounted for by the incoming tide - tidal

flow, and it had a tendency to cause it to silt which would build up and finally block, and it would block each year.

Q. At which end did the drain block.

A. The end closest to the sea mainly, it was caused by wet sand and mixture and what-not.

Q. You told the court that it was closed I think you said four years before it was re-opened, from 1913 onwards.

A. Yes from 1914 until 1918.

HIS HONOUR

Q. You would then be about 14 years of age, in 1918.

A. Yes I was 14. I don't quite get your question there.

Q. You were about 14 years of age in 1914.

A. I was born in 1904 so I would be 14, that's correct.

XN

Q. After the drain was re-opened in 1918 did it remain open or close again after that.

A. It closed each year.

Q. And then in 1963 you said the drain was widened. A. Yes.

Q. Did it then take on approximately its current form, with the same type of drain as it is now.

A. Same type, just merely widened.

Q. Since 1963 has there been water flowing regularly from the lake to the sea and vice versa.

A. Not necessarily. Most years. I would say it is subject - it became tidal.

HIS HONOUR

Q. The drain has become tidal.

A. Yes it became tidal to this effect - even before the waters came down the drain, that is the flow or rain water from inland, the

lake would be rising to a reasonable level or almost to full capacity before the rain waters came down, and it would keep open through the tide and again during high tide there would be an in-flow of water and at low tide an out-flow, and that kept it flushed, and I put it this way - because of the fact that the drain has been widened it was capable of admitting more water into the top basin on the lake on the southern end, and it was sufficient in quantity to fill the basin to over-flowing the bar that exists there on the northern end of the top section and allow the water to flow into the lower part of the lake, this again being repeated from time to time during the high tides, and weather conditions suited, and it naturally filled the lake. That is going on all the time.

XN

Q. Does the drain at the moment have water in it or is it dry.

A. Its dry.

Q. How long has it been dry.

A. For about - we are going through a period of drought in the past three years and I suppose these last three years it has been closed for roughly seven months of each year.

Q. You said that was during the last three years.

A. That has happened only in the last three years.

Q. During the period prior to that, prior to this last period of three years and since 1963, has there been a regular communication between the sea and the lake.

A. There is no regular pattern, it is controlled by the tide and weather conditions. It becomes sluggish and may almost cease to run and then you get a period when there is a high tide and you get an in-flow of water and it is right again and it is a sort of flushing and then it partly blocks and there is a flushing and partly blocks and so on, but nevertheless there isa connection there.

Cross-Examination

CROSS EXAMINED

CROSS-EXAMINATION BY MR. MATHESON

Q. When the drain was blocked during the period from 1913 to 1963, as it was from time to time, how was it cleared.

A. The Drainage Department usually put barrages at the mouth of the outlet to stop the build up of the water from coming too far up into the channel, and then when the lake got to high enough level the barrage was removed and the sand and silt and weed was removed and it would flush itself.

Q. When you say during that period it blocked every year, you didn't mean it blocked for more than a few months at a time did you.

A. It blocked and stayed put, but not like it does now. It drained the lake, it blocked and stayed blocked until the winter provided sufficient water to fill the lake and put it at a high enough level to re-open it, and at that particular time the Drainage Department had a water gauge there, and when it got to a certain level they would consider re-opening it, and if they didnt of course there would be a cry from the land owner because it would flood back into the lake fringes.

Q. What I was trying to establish was the fact that even if the drain blocked every year, there would be a period during each year when the water did flow.

A. That's correct. No. Wait on. No I beg your pardon. No, it was closed, as I already stated from 1914 for four years and then it went on - and I can't remember, but there would be irregular intervals according to the seasonal conditions. If the lake got high enough it was opened.

HIS HONOUR

Q. If the rainfall was high enough.

A. Yes. If it started to wear formations around the fringes of Lake George the Department would let the water go and if it wasn't sufficiently high enough there was no point in opening it. After all it was just merely a dump for the water in the early days, it contained the water that came down, but with the widening of the drain it was insufficient to hold it and they let it out.

XXN

Q. Notwithstanding that, you say it blocked every year during that period 1918 to 1963. Am I not right in saying in each year for some period, shorter in some periods and

In the Supreme Court

No. 5
Defendant's Evidence
A.G. Chambers
Cross-Examination
(cont'd)

longer in some period, but it did flow, or don't you know.

A. In some of the years - again apart from 1914 to 1918 - some years it was never opened.

Q. Which years.

A. I just can't remember. That happened, well it happened reasonably - it's reasonable to say quite a few times during that period.

Q. In some years it did flow for months and particularly in the winter.

A. When I say months, it was open around about June and it did flow until about the end of October, into November I suppose, but that would be about the extent.

Q. In most of those years during 1918 to 1963.

A. That's correct.

NO FURTHER QUESTIONS

WITNESS RELEASED

ADJOURNED 9.40 A.M. TO TAKE VIEW

VIEW TAKEN BETWEEN 10.20 A.M. AND 12.45P.M.
(SEE SEPARATE NOTES)

ADJOURNED TO WEDNESDAY 10 MAY, 1978 AT 10.30 A.M.

No. 6
Plaintiff's Evidence
R.J. Todd
Examination

No. 6

EVIDENCE OF R. J. TODD

MR. MATHESON CALLS:

RAYMOND JAMES TODD,
2 Douglas Street,
Millswood.
Surveying and planning consultant. SWORN

EXAMINATION BY MR. MATHESON

Q. I think you are a licensed surveyor in South Australia, Victoria and the Northern Territory. A. That is so.

Q. Did you obtain your licence in South Australia in 1945. A. Yes.

Q. Thereafter did you spend four years in the Engineering and Water Supply Department. A. Yes.

Q. As a surveyor. A. Yes.

Q. Nine years in the Adelaide City Corporation as a surveyor. A. That is so.

Q. Have you been in private practice continually since 1958. A. Yes.

Q. Have you had extensive experience in survey work in all parts of South Australia and the Northern Territory. A. That is so.

Q. I think you have frequently been called to give evidence in the Planning Appeal Board.

A. Yes.

Q. And also in this court. A. Yes.

Q. I think you have got in front of you the sheets from field book, exhibit P6 and also diagram sheets, P5. A. Yes.

Q. Perhaps you could just take his Honour through the sequence from your experience as a surveyor from the time the notes are made in the field book.

A. The field notes represent what the surveyor King measured on the ground together with a description of the topographical features of the land that he observed while he was carrying out that field survey. From the field notes and in particular in relation to Section 16SW, a closure would be made of his outside traverse to see that there were no gross inaccuracies and the measurements and angles recorded on the field notes would then be plotted on the diagram sheet and the diagram sheet would represent the field survey defining the boundaries of Section 16 SW.

Q. I notice that on each of the pages in exhibit P5, that is the diagram sheet, Mr. King has signed diagram sheets.

A. Yes. The diagram sheets have been signed by Steven King as surveyor, that he has personally examined the sections and found them to be properly pegged and marked.

Q. What is the next step after that.

A. When the diagram sheet has been certified by the surveyor it would be sent to the chief draftsman of the Lands Department for examination and acceptance, filed in the diagram book and -

Q. That is the diagram book for the Hundred of Lake George.

A. Yes, then it would be forwarded to the section of the Lands Department who would be responsible for plotting the information on the diagram sheet on the Hundred plan of the Hundred of Lake George.

HIS HONOUR

Q. Does it appear to you that in the present case those procedures were followed.

A. Yes, there is nothing I have seen to suggest they were not followed.

XN

Q. Looking at the Hundred plan, exhibit P4,does that appear to be a Hundred plan of the Hundred of Lake George.

A. Yes, that to me is the Hundred plan of the Hundred of Lake George.

Q. Does that bear the then surveyor General's signature and a date May 1879.

A. Yes, this is the plan deposited under the signature of the then Surveyor General in May 1879.

Q. The fact that there is an endorsement of some date in 1906 indicates that that was the Hundred plan for Lake George over that period. A. Yes.

Q. Would somebody in the Department of lands plot and note on that Hundred plan the boundaries of Section 16sw from the information in the diagram sheet.

A. Yes, I am satisfied that is where it would have come from.

Q. Do both the field notes and the diagram sheets actually show the high water mark of Lake George as a boundary of Section 16SW. A. Yes.

Q. How is a high water mark in a situation

such as this, at the north of Lake George usually established by a surveyor.

A. If the high water mark was to be fixed purely for the purpose of being a boundary of a section it would be established by what the surveyor observed on the ground to be where the water would normally reach its highest point.

Q. Did you find anything in the pages in King's field book contained in exhibit P6 to indicate that he had any difficulty in fixing the high water mark.

A. No, I see nothing to suggest that he would not have adopted the procedure from what I have seen in the field book and had no difficulty whatsoever in establishing his opinion as to where the normal high water mark was at that time.

Q. Can you find anything in the book to show that one high water mark has been used as the traverse line to fix another by off-set.

A. No. Of the pages I have examined in exhibit P6 there is nothing to show that a traverse line of a high water mark has been used to fix another high water mark.

Q. Just to clarify the use of terms, when a surveyor talks about traversing in relation to fixing a high water mark, what does he mean.

A. He means using a line which is part of a closed traverse and from that line he would measure off-sets to fix in this particular instance another line being the high water mark at the time.

HIS HONOUR

Q. What then is the specific meaning of the term "traverse line" for traverse.

A. Traverse line is usually a line which forms part of a figure which can be mathematically closed to check his accuracy, some times an off-set line. The term 'off-set' line is used if that line doesn't form part of a closed figure.

(continued)

XN

Q. To fix a position such as a high water mark what would a surveyor normally do from his traverse line.

A. He would measure at certain distances along the traverse line at right angles of that line, the distance to where in his opinion, the high water mark was.

Q. You have examined Mr. Chalklen's plan exhibit P7, have you not. A. Yes.

Q. And you also were at the scene yesterday when his Honour had a view. A. Yes.

Q. As a surveyor where would you have fixed the eastern boundary of, or what was section 16SW, I think it has now got another number but it is not material for present purposes, at the time Chalklen did his survey.

A. I would have fixed that boundary in the same position as Mr. Chalklen shows on his plan, the thick black line with the words 'high water mark'.

Q. Is there any evidence in the sheets in that exhibit P6, that is the field book exhibit, is there any evidence in either of those field book sheets or the relevant pages of the diamgram book, that have been tendered, to suggest that surveyor King levelled the surface of the lake.

A. No, I can find nothing to show that Mr. King in any way fixed any levels in regard to the land or the lake.

Q. Would it be usual for a surveyor in doing a survey such as that, to be interested in vertical elevations.

A. No, not when he was creating new sections.

Q. Does it follow from that that you would normally only be interested in marking and surveying in the horizontal plane. A. Yes.

Q. What do you mean by marking and surveying in the horizontal plane.

A. Well, preparing a plan to show boundary measurements reduced to a horizontal plane and marking on the ground the position of those lines to define land boundaries.

HIS HONOUR

Q. So that if there were lines in existence he would not be concerned with their vertical elevation.

A. No, not normally.

XN

Q. I think you have sought to link up the point shown on page 66 in exhibit P6 with points shown in Mr. Chalklen's survey P7.

A. Yes, it is possible to allocate to the points on Mr. King's survey distinct numbers given to the re-established points on Mr. Chalklen's survey.

Q. I think you did that on my copy of that exhibit.

A. That is so.

MR. MATHESON:

I wonder if your Honour would have a look at my copy and what I am going to ask the witness to do, with your Honour's permission, is to mark on the court copy in blue biro - does your Honour follow what I mean?

HIS HONOUR: Yes.

XN

Q. Opposite these numbers - remember we talked about numbers - with his Honour's permission would you mark the corresponding numbers.

HIS HONOUR: Have you any objection Mr. Cramond?

MR. CRAMOND: I have no objection. I would like to show it to my surveyor later for accuracy, but to the marks being made, no.

(WITNESS MARKS DOCUMENT)

XN

Q. From an examination of Mr. Chalklen's plan P7, did he appear to find any of the original marks or figures placed by King.

A. No, it appears from his plan he found no original marks placed by King.

Q. How would that be shown by a surveyor such as Mr. Chalklen if they had been found.

A. If they had been found the points would have been marked with either the word 'found' or (FD).

Q. And there were some points closer to the top of that exhibit, P7, with the letters FD after them, weren't there. A. Yes.

Q. What were they.

A. They were marks placed by another surveyor called Dickens who previously had found some of Kings marks and he had re-established at that part of the survey the points originally marked by King but the marks were not King's actual marks, they were a re-establishment of Kings marks by Dickens.

Q. Incidentally, part of P7 contains what is called a misclosure drawing does it not.

A. Yes.

Q. Perhaps you could just indicate that to his Honour.

(WITNESS INDICATES ON MAP EX. P7)

HIS HONOUR:

Q. Does that misclosure drawing represent the true site of the misclosure, or is it related to some other area on P7.

A. What it means is that Mr. Chalklen, when he checked the closure of King's measurements and angles, found that mathematically there was an error. He then laid out King's survey. In this particular instance he defined the correct measurement from point 10 to point 8. He then used King's distance and angles right through boundaries of section 16 SW and finished at a point right near the circle 8 of which of course did not coincide with the same point that you arrive at by using King's measurement along the boundary of section 26.

(continued)

Q. That is the northern most boundary.

A. Yes of section 16SW and the dotted line between points 8 and 24 show in the visual form the misclosure in King's survey.

xn.

Q. What was the distance.

A. In a straight distance it is 2.44 metres.

HIS HONOUR

Q. On P7 there is shown a road on the western boundary of the section. A. Yes.

Q. Is that the same road which is shown on the plan P4.

A. Yes, that represents the position of the same road shown on Exhibit P4.

XN

Q. Is that distance you mentioned of the 2.44 metres, does that have any significance to the line shown by Mr. Chalklen as the thin continuous line on P7.

A. It has this significance, that the fact that Mr. Chalklen was unable to find any of King's old marks, meant there was no way he could distribute his misclosure in a proper sense so it had to be shown somewhere. He could have shown misclosure down near .16, but chose to show it near .24 which there is no reason at all why it should not be shown there. Another surveyor perhaps would have shown the misclosure at a different point.

Q. I was trying to elicit from you whether King's high water mark which is depicted in Ex. P7 as the thin continuous line, in fact goes through. His P7 shows it going through the motel units under construction.

A. It is possible another surveyor would have shown the thin line between sections 16SW and Lake George up to not more than 2.44 metres closer to the lake.

HIS HONOUR

Q. King's line as is shown on P7 does in fact run through the site of the motel units presently under construction.

A. It runs close to them, not through them.

XN

Q. Well, I share his Honour's difficulty about that, what is the explanation, it looks like it is going through.

A. I am referring to the dotted tie line and not the one representing the high water mark. I am not too sure how Mr. Chalklen plotted this line of the high water mark, because by looking at page 66 of the Field Book, King has shown his high water mark as running close to his tie line with no off-sets to it, and what Mr. Chalklen has done is try to scale and represent what King has shown on page 66 on P7, but there are no off-sets to show exactly where King fixed that thin black line.

Q. Looking at P4, one aspect of the sequence of these Field Book entries that I did not get

from you, that plan is dated 1879. A. Yes.

Q. It was in existence or part was in existence obviously before Mr. King went on his survey.

A. I would think so, yes.

Q. Is this the position that until his survey had been done, the boundaries of section 16SW were not completed on that Hundred plan.

A. No, not until his survey had been completed and checked and it would be my opinion the Hundred plan of Lake George would be brought up to date as more information came in from the field.

Q. You have spoken from time to time in your evidence about a tie line. From your examination of the Field Book sheets P6, can you say that Mr. King had used a tie line.

A. I would have called the tie lines the tie lines shown in the field book and the diagram sheet near the boundary between section 16SW and Lake George. The reason why I refer to those as tie lines and not as boundary traverse lines is because those lines would not represent the fixed boundary of the section, but would be lines used to close the figure and from which the boundary of the section was fixed.

Q. Why are they actually called tie lines.

A. I think just to differentiate from the fact that they would not be boundary lines, adopted as boundaries of the section, but used for the purpose of fixing the boundary, tie lines in the nature of more or less temporary lines.

Q. Did it mean the surveyor would join the various pegs with rope or string.

A. No, they would be run in the same way as a boundary line from a surveyors point of view.

HIS HONOUR

Q. You were present at the view yesterday, were you not. A. Yes.

Q. Is any portion of the road which is shown on P7 now been covered by sand dunes which we observed.

A. Yes a considerable portion of the road has been covered by sand dunes.

Q. Looking at those sand dunes yesterday, were you able to form some opinion as to the vertical elevation of them, the highest vertical elevation.

(continued)

A. No I did not attempt while I was there to try and form an opinion as to that.

CROSS-EXAMINED

CROSS-EXAMINATION BY MR. CRAMOND

Q. You have told his Honour of the basic procedures that would have been followed by King, his notes in his field book, followed by plotting of that, on to the diagram book and so on, this work at that time in 1888 would have been the first plotting of the section boundary, would have been done through the Surveyor General's Office, would it not. A. Yes.

Q. He would have been subject to directions by the Surveyor General. A. Yes.

Q. And when all these procedures were complete, those sections would have been gazetted in the Government Gazette. A. Yes.

Q. And then offered for people to take them up.

A. That is the normal practice.

Q. And in the case of the land in this area, most of the land as shown by the plans, was taken up as Crown lease land. A. Yes.

Q. Perpetual lease or right of purchase lease.

A. That is what the land Crown Office plan shows.

Q. You told his Honour that looking at the diagram book, page 17, part of P5, that first of all you could notice no off-sets. You mean there, don't you, that there are no off-sets directly opposite section 16. You were referring there to the fact there were no off-sets marked on the actual boundary of 16 south west.

A. Yes, I was referring to section 16 south west only.

Q. There are off-sets marked further along the coast to the lake, opposite the next section.

A. Yes, and most of the other sections near the lake.

Q. And in that area, the tie line is further removed from what is marked as the high water mark.

A. Yes, that is why I would feel he would have taken off-sets there and near section 16.

Q. Would it not be likely he has not shown any off-sets on the boundary of section 16 south west because there would have been, only been a few feet or a few yards between the tie line and the line he drew as the high water mark.

A. Yes, I feel that he would have considered the tie line was .....
.....
.....

No. 7

Evidence of C.C. Von Der Borch

.....
accretion, I think you now say between 10 and 45 cm. per annum, is that right. A. Yes.

Q. Did you at some time say it was between 10 and 30 cm. per annum. A. Yes.

Q. How have you arrived at the figure 10 to 45 cm. per annum.

A. That was arrived at by looking at the width of the area, the maximum width between the two surveys and assuming that amount of material has been deposited in the time since the 1888 survey, measuring the distance and dividing it accordingly.

Q. Didn't you tell his Honour that you didn't know what the depth of the material was.

A. I am talking about the width, not the depth - in the horiztonal plane.

Q. And that is purely an arithmetical calculation of dividing what you say to be the accreted width by the number of years. A. Yes.

Q. What have you used as your divisor.

A. In other words, the number of years you are saying? Q. Yes.

A. Yes, roughly 100 - well we have used 100 as a round figure.

Q. But there is no actual evidence on the site to suggest that the material is increasing in width at the rate of 10 to 45 cm. per annum.

A. No, I think one would have to have pegs put in and observe this over several years before you could come up with what is happening today in that - right near the present high water mark.

Q. I think you have seen the report prepared by a Mr. Armstrong relating to the rate of movement of the active dune. A. Yes.

Q. And what you have read there, you don't dispute. A. No dispute, no.

Q. I don't have his file of conclusions right at hand, but he has given figures for the movement of the dune along the shore I think, has he not. A. Yes.

Q. And also out into the lake. A. Yes.

Q. I suppose there is no dispute that the rate of movement will vary from day to day and from week to week according to the strengths of the winds that are then blowing, is that right.

A. No dispute about that.

Q. And primarily it would be the strength of the wind on any particular day which would determine how much sand would blow.

A. Yes, and the direction.

Q. And the fact whether it had reasonable rain to consolidate the surface would be relevant too, would it.

A. Most certainly, yes.

Q. Say a sand dune could be shown to have moved say - or the nose of it could be shown to have moved say 8 metres in one year, would you expect that that 8 metres of movement would not - it would not be evenly spaced so far that year would it.

A. Not necessarily, no. It would be in jumps.

Q. Indeed, during a period of say strong south-westerly winds it might move very rapidly for a day or a week or even for a few hours.

A. Yes.

Q. And then very little again for perhaps a couple of weeks. A. Yes.

Q. Do you agree that with the rate of movement of those dunes, if one were to place a peg in the nose of such a dune, there would be occasions where within perhaps even an hour you could detect a forward movement of the sand dune. A. Yes you could.

Q. I used the word 'detect' or measurement.

A. Yes.

Q. And say in the course of a day, would it be conceivable that it might have moved forward what, say a yard or even more.

A. That would be an upper figure I think, but it certainly would be noticeable, you could say that.

(Continued)

Q. You say it would be an upper figure.

A. I think it would be. I have never measured these so I don't know. I have never measured the rate of movement of a drift but I have observed time and time again what has happened and so what I am saying is purely based on hearsay, but certainly you would notice it within a day in some exceptional cases with certain wind directions and velocities.

Q. And sometimes within an hour.

A. You may certainly see sand moving in a slip pace within an hour which means if slowly moving they would move a millimetre or centimetre or something like that, yes.

M.F.I. D6 Composite photograph, marked D6 for identification.

Q. Do you recognize that as being a photograph of the scene at the northern end of the ten mile dune and continuing, showing the vegetation to the north of the dune. (PRODUCED) A. Yes.

Q. I think it is fairly close to where his Honour went on the view yesterday. A. Yes.

Q. Do you agree there that on that photograph can be seen two level of vegetation.

A. Yes.

Q. Which is a somewhat similar pattern continuing right along the lakeward boundary of Section 16SW.

A. I can see a little trunkation running along there, yes.

Q. The foliage in the foreground appears to be younger than the trees at the back or smaller, at least.

A. Certainly smaller, yes.

Q. And that is similar, is it not, to the situation at your Traverse 1. A. Yes.

Q. You would agree, would you not, that the active dune overlays both of those two levels.

A. The active dune is overlaying the vegetated older dunes, right, I can see that. I am not so sure from the photograph there but I cannot say for the other part.

Q. Ignoring the photograph for the moment, is not your own recollection that the level of smaller vegetation also appears to disappear under the end of the ten mile dune.

A. It looks like it, yes.

Q. But even apart from the photograph, isn't that your recollection from having been there. A. Yes.

Q. And that in turn suggests, does it not, that the level of younger vegetation is older than the sand dune. .....
.....

No. 8

Evidence of D. Armstrong

.....

that is 8 feet of water impounded there, the level of water at the barrage would be somewhat over 34 metres. I think Mr. Chalklen has the precise figure. This is the level of parts of the terrace at the northern end of the lake so that in conditions of extreme inflow through the service drain M into the lake -

Q. Will you point, on your photograph, to what you mean by service drain M.

WITNESS INDICATES THE OUTLET OF THE DRAIN REFERRED TO PREVIOUSLY IN THE SOUTHERN BASIN OF LAKE GEORGE AS BEING THE SOUTHEASTERN BORE DRAINAGE BOARD.

A. If in a time of flood that drain carried a great deal of water into the lake and the lake was full to the top of the stop lock, the effect would be to produce something of a large pile or hummock of water in the lake which could raise the level, perhaps sufficiently to inundate all the terraces.

Q. What effect would that be likely to have on the location of the motel units so described.

A. I think it would certainly lap around the foundation of the motel units.

Q. Would you imagine for a moment the water of the lake to be at a level, so that it's edge came up to the present high water mark as determined by Mr. Chalklen. A. Yes.

Q. If there was then say a fall of 10 cm in the level of the lake are you able to say how far the edge of the water would recede.

A. Yes, roughly 20 to 30 metres. We have in fact, measured the slope as of the order of 13 minutes or less than a quarter of a degree so that a very small drop in the vertical interval would produce a very great recession of the edge of the water.

Q. And the angle you refer to, is that the angle of the lake bottom at that point.

A. It would be the lake bottom if the water came up to the high level mark.

Q. If I can just briefly refer back to the question of the active 10 mile sand drift.

If a peg was placed at the leading edge of that dune, or one of those series of dunes, if that is a more accurate expression, and a strong south-westerly wind was blowing, would it in your opinion be possible to detect a forward movement of the sand dune.

OBJECTION MR. MATHESON objects as that is not the sort of evidence which the witness has been shown to be qualified to give.

QUESTION ALLOWED

QUESTION READ BY REPORTER

Q. Within a period of say one hour.

A. If a strong wind was blowing I would say yes.

Q. What would you expect to be the upper limit of any such movement.

A. Within a period of one hour?

Q. Yes. A. Of the order of one or two inches perhaps.

Q. And what would you expect to be the limit of movement, of forward movement in say a one day period when strong winds were blowing.

A. Provided the winds were blowing continually of the order of two to three feet perhaps.

CROSS-EXAMINED

CROSS-EXAMINATION BY MR. MATHESON

Cross-Examination

Q. You told his Honour that you had been to the scene on four occasions.

A. That is correct.

Q. When was the first. A. At the end of June 1977.

Q. Were you present when Mr. Chalklen's party was doing the survey. A. I was.

Q. How long were you there at the scene then.

A. We spent I think two days.

Q. When was the next occasion you went.

A. January 1978, the last week of January on which I was holidaying at Beachport and spent four days boating on Lake George.

Q. So you didn't do any work on that occasion.

A. Other than make observations.

Q. Did you make any notes of your observations on that occasion. A. I did not.

Q. Did you make any notes concerning your observations in June of 1977. A. I made a photographic record.

Q. You are not suggesting a photographic record is a note are you? Did you make any notes of your observations.

A. I am trying to recall whether I used a field book. I think not but I had at that time in my possession several air photographs of the area.

Q. Well I want to be quite clear about this, you are not saying .....
.....
.....

A. The land upon which the motel units are being built lies on the Lakeward side or just about on the high water mark, not on the high sand hummocks,; it lies on the beach or terrace.

Q. So if Mr. King's party had been minded to describe the topographical features in the vicinity of the place where the motel units are being erected, he should have described it as open flat, liable to inundation, should he.

A. I think he would have described it as a sandy beach, probably, but he wasn't prone to describing beaches, unfortunately.

Q. You don't suggest that King's survey indicates that he took any lake levels, do you. A. On that occasion, no.

Q. Looking at page five of your report, D10 and the second last sentence on that page, you say:

> 'The South-Eastern Drainage Board has in fact .... possible entry of sand carried on the High tide.'

Surely you mean 'probable' entry of sand carried on the high tide. A. Could mean, yes. That means the possibility exists for

sand to enter. If I may say, this report was a Mines Department report intended for multi-use and was not intended as a legal document in the first instance.

Q. Not wishing to criticise the initial choice of the word 'possible', Mr. Armstrong, what I am putting to you is this; is it not a fact that as a result of the open channel, the lower reaches of Lake George have been subject to tidal influence and probable entry of sand carried on the high tide. A. Yes.

Q. You go on to say:

> 'The effects of the tides at the northern end of the lake .... much greaterthan the normal period between high and low tides.'

Do you adhere to all that. A. Yes.

Q. So is this the position; that although you can't specify the extent of the influence of tides at the northern end of the lake, you do concede that there is some influence.

A. Yes.

Q. Looking at page 6, the last line, I don't know whether this has been corrected because I have one of the original copies, but does that still read 'Section 37'. A. Yes.

Q. That is wrong, isn't it. Would you like to look at the hundred plan. A. Certainly.

(Continued)

A. That must be 31 - it is 37, sorry.

Q. Section 37 is right is it. A. Yes.

HIS HONOUR:

Q. Would you have a look at figure 12 of your report, more particularly to the page, 66 of the King's field book. A. Yes.

Q. Can you give me the explanation of the rectangular symbol appearing there, below which there are the letters WH (27).

A. Yes, those are the planned dimensions of a water hole.

Q. 78 feet by 18 feet.

A. Yes, and 4 feet deep at one end. The shaded area is a cross-section of it.

Q. That is the water hole shown near the link measurement 2400.

A. That is correct.

XXN

Q. Page 9 is the next passage, page 9, 6 lines up from the bottom of the page, I don't know whether my copy has not been corrected, but it reads 3 metres.

A. Typographical error.

Q. What should that be.

A. 300 metres.

Q. Page 10 is a reference to a personal comment by Mr. T. McCourt, do you see, just over half way down. A. Yes.

Q. To whom was that personal comment made.

A. To the young lady, the field assistant who drove one of the four wheel drive vehicles.

HIS HONOUR:

Q. Is that one of the McCourt's from Beachport.

A. A Mr. Tom McCourt.

Q. You didn't speak with him.

A. We were unable to speak with him after our field assistant spoke to him.

XXN.

Q. Who is he. A. Mrs. Jan Aslin.

Q. Who is Mr. McCourt. A. Mr. T. McCourt.

Q. Do you know who he is, what he does.

A. He lives -

HIS HONOUR:

Q. Tom McCourt is he.

A. Tom McCourt, yes. I think he is a local farmer but at the time I went to try and interview him, he was in Coober Pedy or Darwin. Again this is an acceptable Mines Department form of reference for non-written -

XXN

Q. Would you look at the observation at the bottom of page 18, were you present when that observation was made. A. Yes, I was.

Q. Did you make any note in relation to that.

A. We took a photograph, that is all.

Q. There are a series of loads of advancing sand aren't there. A. There are.

Q. And that observation may not have represented the average advance of the whole front.

A. Indeed it is not intended to. In fact I think we located it on an air photo which may be on the set of our photos which are stuck together.

Q. You don't know how often floods occurred in the period between 1888 and 1977 do you.

A. No.

Q. And if they were merely episodic, they would not prevent vegetation from growing on the subject land would they.

A. That depends very much upon how long they were in contact with the vegetation, and seeping into the ground, water, they could do a very great amount of damage to a very small amount of vegetation.

HIS HONOUR:

Q. Did you observe any channels leading into the upper basin. A. No.

Q. So that any flooding coming from the shores of the land adjacent to the shores around the upper basin would have been floods of natural water.

A. I am assuming that interconnection exists between all three basins, floods draining from as far away as Naracoorte via drain M, the drain which enters the lake at the southern end.

Q. The lower basin would fill first and then flow to the middle basin and then to the northern basin.

A. Something like that.

XXN

Q. In other words although you didn't make any precise observation of channels connecting the top basin from the middle basin, you are aware that flood waters and tidal waters can enter the northern basin from the south.

A. Yes.

Q. You mentioned before the luncheon adjournment the freshness of water found close to the beach at the auger holes that you dug.

A. Yes.

Q. I put it to you that the only significance of that is that it indicates that vegetation would more easily grow in that area.

A. That it would - fresh water - vegetation which normally requires fresh water as its source of water rather than salt water, yes.

HIS HONOUR:

Q. I imagine it was all fresh water vegetation which we observed in the areas in which we were on Tuesday, and through which we walked to inspect the auger holes, would that be so.

A. I think so, yes.

(Continued)

.....
.....
.....

A. It did, indeed on the same day, the outlet structure, as p.2 shows.

Q. But you are not suggesting that that was on a day of flooding, are you.

A. That was a day, I suspect, of a very high tide.

Q. But you are not suggesting it was a day of flooding.

A. I didn't examine drain M in order to verify that, I wouldn't suggest - it was a moderately rainy period, that is all.

HIS HONOUR

Q. What gave rise to the tide on that day.

A. Just part of the normal tide cycle, which, are various times of the year, oscillates about - the tide oscillates about an oscillating mean, but the mean oscillates very much more slowly than the tide, so there are periods when you have a series of high tides, all of which may enter the lake, and long periods when the high tide might not enter.

Q. Is there a tide entering the lake through that channel.

A. I think there is a tide that - the tide is entering the lake through the channel.

XXN

Q. And although tidal effects may not be apparent on many days of the year, it was certainly apparent at the time that photograph was taken.

A. Well, that was a combination, yes, of a series of high tides, I suspect that the lake builds up as a series of high tides.

Q. There was a tidal effect - A. Of some sort, yes.

Q. - in the vicinity of the subject land when that photograph was taken. A. Yes.

Q. I think you said that your inspections around the lake had shown that wherever there were terraces, they were made of wind-blown sand from one of two old dunes - one between Lake St. Clair and Lake George and the other in the vicinity of the spit dividing the north basin from the middle basin of Lake George.

A. In the area, certainly, although I did mention an accreted area to the north-eastern shore of Lake George.

.....
.....
.....

XXN

Q. Would you not agree that a marker pipe covered by dune drift could be subsequently unearthed due to wind from a different direction.

A. I would agree, yes.

Q. I want you to have a look at Mr. Chalklen's plan; I want you to assume for a moment, contrary to what I suppose my learned friend

will submit that his Honour finds, that the ten mile sand dune is accreting, or is moving, slowly and imperceptibly. In other words, that in the vicinity of movement of the ten mile sand dune into the lake, there was an accretion within legal principles, acceptable legal principles. Do you understand the assumption.

A. Yes, I think so.

Q. It necessarily follows, does it not, that there has been some accretion since 1888 to the plaintiff's land. A. Yes.

Q. I am not asking you to put the boundary at the moment. It follows does it not, there has been some accretion to the plaintiff's land, although not necessarily as far as the northern end of the beach, northern end of section 16 SW.

A. In my understanding of the legal situation, yes.

Q. On the assumption then that there has been an accretion in the vicinity of the 10 mile sand dune eastwards of Mr. King's high water mark, how would you fix the perimeters of that accretion. How would you in that event, fix the perimeter, or the boundary.

HIS HONOUR: The eastern boundary.

MR. MATHESON: Yes.

OBJECTION MR. CRAMOND objects to the question.

QUESTION ALLOWED

XXN

Q. Before you answer, you are quite clear about the question are you.

A. Assuming that - may I repeat it in order that you can tell me if I have it clear? Q. Yes.

(Continued)

.....

Re-Examination

RE-EXAMINED

Q. Is tidal effect existent all the year round in the lake.

A. There are times during the year when there is no connection with the sea, therefore

there would be no tidal effect other than the minute lunar tide - all bodies of water have a tidal effect of some sort though it is very minute; but the marine tides would certainly not affect it for those periods of the year when it has not any connection with the sea.

FURTHER CROSS-EXAMINATION

FURTHER CROSS-EXAMINATION BY LEAVE BY MR. MATHESON

Q. I take it from what you said (looking at figure 19), that you do accept that the high water mark as shown by King in respect of S16 SW was fixed in the way Mr. Todd and Mr. Chalklen have described, at the highest point to which water normally came. A. Yes.

NO FURTHER QUESTIONS

WITNESS RELEASED

WITNESS R.A. CHALKLEN RELEASED

CASE FOR THE DEFENCE

NO CASE IN REBUTTAL

ADJOURNED 4.30 P.m. UNTIL MONDAY, 29 MAY 1978 AT 10.45 A.M.

No. 9

Reasons for Judgment of The Honourable Mr. Justice Walters - 7th August 1978

DELIVERED 7TH AUGUST 1978

SOUTHERN CENTRE OF THEOSOPHY INCORPORATED v. THE STATE OF SOUTH AUSTRALIA

No. 686 of 1975

Dates of hearing: 8th, 9th, 10th, 11th, 12th, 29th May 1978

J U D G M E N T of the Honourable Mr. Justice Walters

(Crown Lease Perpetual: construction of lease: ambulatory boundary bordering on

tidal and navigable lake: alluvion: doctrine of accretion: whether doctrine binds the Crown and applies to land under The Real Property Act and to land held in perpetuity under Crown lease: whether doctrine of accretion can be extended to a navigable lake: factors operating to cause slow, gradual and imperceptible change to foreshore of lake: alluvion held to be accreted land: apportionment of alluvial land)

Counsel for the plaintiff: Mr. R.G. Matheson Q.C. and Mr. N. Dyki

Solicitors for the plaintiff: Fisher, Jeffries & Co.

Counsel for the defendant: Mr. J.M.A. Cramond and Mr. P.J. Winter

Solicitor for the defendant: Mr. G.C. Prior Q.C., Crown Solicitor for South Australia

Judgment No. 3922

SOUTHERN CENTRE OF THEOSOPHY INCORPORATED
v. THE STATE OF SOUTH AUSTRALIA

Walters J.

This is an action brought by the plaintiff, a body incorporated on 3rd August 1972 under the Associations Incorporation Act 1956 as amended, against the State of South Australia, representing the Crown in right of the State, in which the plaintiff seeks a declaration of its title to certain land appurtenant to the eastern boundary of Section No. 16 SW in the Hundred of Lake George, County of Grey. The plaintiff is the registered proprietor, as lessee under Crown Lease Perpetual No. 11887, Register Book Volume 584 Folio 12, of five hundred acres or thereabouts, being the said Section No. 16 SW, as the same as delineated in the public maps deposited in the Land Office at Adelaide. The lease was granted in perpetuity to the plaintiff's predecessors in title on 1st April 1910, upon the rent and subject to the reservations covenants and conditions therein stated. The plaintiff took a transfer of the lease on 19th December 1972, and it is not disputed that it holds a valid estate or interest, as perpetual lessee, in the subject land.

It seems to me to be unnecessary to investigate in any great detail the plaintiff's title to the land comprised in the relevant

perpetual Crown Lease. This lease was issued in lieu of a surrendered Right of Purchase Crown Lease No. 198, by which the Crown had granted to the lessee therein named, for a term of twenty-one years from 1st April 1889 (with a right of renewal for a further term of twenty-one years), a demise of five hundred acres or thereabouts, being Section No 16 SW in the Hundred of Lake George, County of Grey. The delineation of the boundaries of the original Section No. 16 SW was shown in the hundred plan prepared under the direction of, and officially certified by, the Surveyor-General, and deposited in the Land Office at Adelaide. I find that to all intents and purposes, the hundred plan that delineated the boundaries of Section No. 16 SW demised by the Right of Purchase Lease corresponds to the current hundred plan that delineates the boundaries of Section No. 16 SW leased to the plaintiff's predecessors in title.

When the perpetual lease was granted to the plaintiff's predecessors in title, I think the parties intended that on its eastern boundary, Section No. 16 SW should have a lake frontage extending as near to the edge or shore-line of Lake George as the high water mark. Upon the oral and documentary evidence placed before me, I find that at the date of the grant of the perpetual lease, the subject land must be taken as being bounded on its eastern side by the high water mark of Lake George; that that high water mark was the high water mark fixed by the Government Surveyor, Stephen King, when the Section was first surveyed by him in 1888, and that his high water mark was a true high water mark. In other words, I find that Section No. 16 SW leased in 1910 to the plaintiff's predecessors in title is the same Section of land as that which had, as its eastern boundary, the high water mark fixed by King in 1888. I also find that the existing true high water mark is that fixed by the Government Surveyor, Robert Andrew Chalklen, in 1977. The respective high water marks are depicted in the exhibit P7. For the purpose of my decision, I take high water mark to mean the furthest level at which the water in the body of the water of Lake George has been held for a sufficient period to leave a water mark along the edge or shore-line of the lake.

Lake George is a large inland lake. There is an abundance of evidence to shew, and I am satisfied, that it is a salt or brackish body of water which is navigable by small craft, such as boats used by fishermen who catch fish in the open sea and in the lake itself. I also find that the lake is affected by tidal influence arising from

currents on the lake and by the inflow of tides which ebb and flow into the lake from the shores of Rivoli Bay, by means of channels of communication from Lake George to Rivoli Bay which have been constructed by the South Eastern Drainage Board since about 1913. Between 1913 and 1963, the waters of the lake were exposed intermittently to tidal influences of the sea, but since a new channel was constructed by the Board in 1963, that channel has been maintained as an open channel and, in consequence, the water of the lake, as well as being affected by tidal influences arising from currents on the lake, has been subject almost constantly to tidal sea-waters, varying over periods in volume of inflow, according to high and low tides and the force of the tides and ocean currents.

The dispute between the parties concerns the strip of land between the high water mark fixed by King in 1888 and the high water mark fixed by Chalklen in 1977. The plaintiff claims that this strip of land adjoins Lake George and that since the grant of the lease of Section No. 16 SW was first made, there has been a gradual accretion of land to the east of the original boundary, by reason of windswept sand, longshore sanddrift or change in the level of the lake. The defendant admits that the land is "proximate" to Lake George, but does not admit that the land adjoins the lake. Additionally, the defendant admits that as to a portion of the eastern boundary of the land, there has been a build-up of sand by reason of windswept sand on the edge of the boundary, but it denies that the sand so built up constitutes a gradual accretion, or that there is any accretion at all as a result of windswept sand, longshore sanddrift, or change in the level of the lake or otherwise. In the alternative, by its pleading the defendant:

(a) denies that the doctrine of accretion may apply to land proximate to or adjoining Lake George,

(b) denies that the doctrine of accretion may apply to land held pursuant to a perpetual lease,

(c) says that if there has been a gradual accretion of the land, such accretion has not been to the boundary of the plaintiff's land,

(d) says that if there has been a gradual accretion of land to the said land, such accretion occurred prior to the grant of Crown Lease Perpetual No. 11887 or any

other Crown Lease of the said land preceding the Crown Lease Perpetual No. 11887.

In the first place, however, as a matter of construction and after a consideration of all the surrounding circumstances, I am satisfied, as I have already said, that the eastern boundary of Section No. 16 SW was originally constituted by the true high water mark of Lake George, as it was fixed by King in 1888. Nevertheless, I cannot conceive that it was other than the intention of the parties to the grant that no matter what may have been the actual circumstances of the level of the high water mark in 1888, the land should be bounded by the actual high water mark of Lake George, as it varied from time to time, so that the grantee should at all times have a lake frontage. It is my view that when the eastern boundary was fixed, it was intended that the land should be bounded at all times by the high water mark of the lake and not by the high water mark at the level at which it happened to be at the time of the grant. In that sense, the eastern boundary of Section No. 16 SW has always been ambulatory. In Verrall v. Nott (1939) 39 S.R. (N.S.W.) 89, Nicholas J. held that the high water mark, which bounded allotments of land described in the grants in a Torrens system certificate of title, did not refer to the mark at the time the certificate of title was issued, but to the mark as it existed in fact from time to time. If, in the instant case, I were to hold that the eastern boundary of Section No. 16 SW is not ambulatory, it could mean that there might be one strip of land, or indeed several strips of land, on a line extending along the margin of the lake and lying between the high water marks respectively fixed by King and Chalklen, which would be retained by the Crown and which would be capable of being alienated to one, or indeed several persons, other than the grantees of the lease or their successors in title. If this were the position, then to use the words of Lord Shaw of Dunfermline in Attorney-General of Southern Nigeria v. John Holt and Company (Liverpool) Limited /1915/ A.C. 599, at p.612, it "would be followed by grotesque and wellnigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage." I do not think the operation of the grant, or the extent of the eastern boundary of Section No. 16 sw, has been affected by showing that the high water mark of Lake George has imperceptibly receded from the high water mark fixed by King to the permanent level fixed by Chalklen in 1977. In my

view, it is impermissible for the defendant, while relying on the circumstances that the level of the high water mark has now changed, to assert that the plaintiff is disentitled to the benefit of an eastern boundary of the section extending to the level to which the high water mark has permanently changed, over the years from 1888 to 1977, to that designated by Chalklen.

But upon the footing that I err in holding that the Crown, in making the grant, could not have intended that the high water mark fixed by Chalklen should ever be the eastern boundary of Section No. 16SW, I shall go on to consider the alleged accretion.

However, before I proceed to any discussion of the doctrine of accretion, there are certain preliminary matters that I should dispose of. First, it cannot be doubted that the doctrine of accretion is double-sided in its application; it operates as against both the Crown and the Crown's grantee (In re Hull and Selby Railway Co. (1839) 5 M. & W. 328; 151 E.R. 139). Secondly, there can be no less doubt that the doctrine applies to land held under The Real Property Act 1886 as amended (Auty v. Thompson (1903) 5 N.Z.G.L.R. 541; Humphrey v. Burrell [1951] N.Z.L.R. 541; Verrall v. Nott (supra). Thirdly, it is my opinion that there can be no exception to the proposition secondly stated merely because of the nature of the tenure granted by a Crown lease. By virtue of Part IX of The Real Property Act, a Crown lease is placed in a different position from that occupied by an ordinary lease. An examination of the sections contained in Part IX of the Act shews that they are enacted as a special extension of the provisions controlling the alienation and administration of Crown lands of the State. I take the view that the doctrine of accretion is not confined to freehold land and that it extends to a leasehold estate in Crown land held in perpetuity. Apart from the interpretation that I place on the provisions of Part IX of the Act, I think that support for the view I adopt may be derived from Tilbury v. Silva (1890) 43 Ch.D. 98, per Kay J. at p.108, and Auty v. Thompson (supra), per Edwards J. at p.544. I hold, therefore, that accretions may follow the legal title of a person in possession of land under a registered Crown Lease Perpetual.

The doctrine of accretion to land is a well known one, and its origin may be traced to Roman Civil Law - Institutes of Justinian, Book 2, 20; Institutes of Gaius, Book 2, 70. The relevant text of Gaius is translated by Professor Zulueta (Oxford University Press, 1946) in this form:

> "Alluvial accretions to our land become ours, again by natural law. That is held to be an accretion by alluvion which a river adds to our land so gradually that it is impossible to estimate how much is being added at any particular moment; whence the common saying, that an addition is by alluvion if it is so gradual as to be invisible."

Generally, alluvion is the increase made to land by the washing of the sea or rivers. Land formed by alluvion, or gradual and imperceptible accretion from the sea, and land gained by dereliction, or gradual and imperceptible retreat of the sea, or change of the bed of a river, belongs to the adjoining owner. The principle was succinctly stated by Lindly J. (as he then was) in Foster v. Wright (1878) 4 C.P.D. 438. Applying the law laid down in the early cases of Rex v. Yarborough (1824) 3 B. & C. 91; 107 E.R. 668 and In Re Hull and Selby Railway Co. (supra), his Lordship observed (at pp.446-447):

> "Gradual accretions of land from water belong to the owner of the land gradually added to: Rex v. Yarborough (supra); and conversely, land gradually encroached upon by water, ceases to belong to the former owner: In re Hull and Selby Ry. Co. (supra). The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shews this to be the case".

The essential characteristic of alluvion is the gradual and imperceptible increase - "not from hour to hour, from day to day, from week to week, nor in fact at all, /but/ by comparing its position of late years with its position many years before" (Foster v. Wright (supra), per Lindley J. at p.446). Likewise, the judgment of Lord Tenterden in Rex v. Yarborough (supra) defines the word "imperceptible" as meaning imperceptible in progress, and not in result - that is to say, where the increase cannot be observed as actually going on, though a visible increase is observable every year. In deciding whether an accretion to land might be considered as imperceptible, one might well ask - to use the words of Callis, in his Reading on the Statute of Sewers (23 H.8, cap.5), (2nd ed. 1685) - whether "if one had fixed his eye a whole day thereon, it could not be perceived". Thus, an accretion becomes gradual if it cannot be traced from day to day, though it may be possible to trace it after an

interval of time. It seems to me that it makes no difference, even though it may be possible to shew by maps and plans exactly where the accretion began.

The law, as I have stated it, would appear to hold good, whether the accretion is caused by natural or artificial causes, provided it does not arise from acts done with a view to the acquisition of the land alleged to be accreted (Attorney-General v. Chambers (1859) 4 De. G. & J. 55, per Lord Chelmsford L.C. at pp.68, 69; 45 E.R. 22, 27. It seems to me, therefore, that the fact that the South Eastern Drainage Board constructed channels allowing an inflow of tidal waters from Rivoli Bay into Lake George does not preclude the plaintiff from setting up against the defendant the doctrine of accretion.

The question that next arises is how the alluvion deposits may be formed into what is called alluvial land. I think I can best answer this question by quoting from Livingston's National Cyclopaedia, Volume 1, tit., "Alluvion", cited with approval by Angell in his Treatise on the Law of Watercourses (6th ed., 1869, at p.56):

> "There are three successive stages in the formation of alluvium; viz., the crumbling of the mineral crust of the earth, by the action of tides, currents, streams, and atmospheric agency; the transportation of the loosened fragments; and their deposition in the form of alluvium at the bottom of rivers, lakes, aestuaries, and the ocean". (sic)

I therefore think that alluvion may result not only where a shore-line has definitely and identifiably receded - where the retreat of that shore-line has been imperceptible - but also where there have been accumulations of sand as a result of sand being shifted, gradually and imperceptibly, by the operation of nature and being likewise carried to a lake bed in consequence of the continuous removal of sand to the shore-line.

It was contended by Mr. Cramond, of counsel for the defendant, that the doctrine of accretion cannot be extended to lakes, and that it is limited to the sea-shore and land abutting on rivers. The only decided English case that would appear to support this argument is Trafford v. Thrower (1929) 45 T.L.R. 502, where Eve J. is reported (at p.503) as saying that "he was satisfied that the doctrine of accretion has no application to a non-tidal sheet of more or less stagnant water such as a broad; it was limited to the sea-shore and land

abutting on rivers of running water and did not extend to canals, lakes or ponds". I do not question the decision of the learned judge on the facts of the case, since his Lordship found that the alleged accretion had not been wholly natural; that "nature had been liberally assisted" in the process of accretion, an excavation having disclosed "a subterranean wealth of boughs of trees, of tins, sticks, lumber, glass and other filling-in materials". I venture to say that on his Lordship's findings of fact, his dicta with respect to the application of the doctrine of accretion "to canals, lakes and ponds" were obiter. But, even so, I think that Trafford's case is distinguishable from the case at bar on the facts; in that case, there was a mere standing water of one of the Norfolk Broads, with no current at all; and the waters of the broad were not tidal. By contrast, Lake George is a large lake, which is both navigable and tidal - a lake in which tides ebb and flow from currents in the lake itself and from the shores of Rivoli Bay.

I am unable to see any valid reason why the doctrine of accretion, the right of alluvion in speaking of the sea-shore and rivers, should not apply in the case of a large navigable tidal lake. At all events, I am not persuaded that I am wrong in this conclusion, especially since in Williams v. Booth (1910) 10 C.L.R. 341, the members of the High Court seem to have left open the question whether the doctrine of accretion applied to the margins of a lagoon that had imperceptibly receded. The observations of Griffith C.J. (at p.351) plainly indicate "that a title by accretion might be set up, successfully or not, by the plaintiff in respect of the dry land so left by the salt water" - where "the area covered by water /was/ now much less than at the dates of the grants". Moreover, in Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool) Ltd. (supra), the Privy Council applied the doctrine of accretion to land described as "facing a lagoon".

The application of the doctrine to land bordering on a navigable lake finds support in Angell on the Law of Watercourses (supra) and in an American authority cited by the learned author in Chap.2, para. 59 of his treatise. The relevant passage reads as follows:

> "If a navigable lake recede gradually and insensibly, the derelict land belongs to the adjacent riparian proprietors. In a case in North Carolina, the defendant claimed title to the land which was the subject of the suit

under a patent, in which the boundaries were desribed as follows: 'Beginning at a poplar on the south side of Mattamuskeet Lake; thence running west with the lake, to a corner; thence different courses and distances to a corner on the lake again; and thence with the lake to the beginning'. The lessor of the plaintiff had obtained a grant of late date, covering lands, as he alleged, between defendant's lines and the lake, which had become dry by the recession of the lake since the patent to the defendant was issued, as stated by the plaintiff. Both sides gave evidence of what had been actually run for the lines of the defendant's land; and it was proved that the lake was a navigable water. By Hall J., in delivering the opinion of the Court: 'If the recession of the lake was sudden and sensible, the land which it had covered, and which, by its dereliction, became dry, would not be, and ought not to be included in the defendant's grant. But, if the water receded gradually and insensibly, the lake ought to be considered one of the defendant's boundaries. It is, therefore, necessary that the fact be found, whether the waters of the lake receded imperceptibly, or not, from the land in dispute; because on that question the rights of the parties depend'".

(Murray v. Sermon 1 Hawks (N.C.) 56)

And if additional support were needed for the application of the doctrine of accretion to lakes, one may turn to Chitty's (1833) edition of De Vattel's Law of Nations, in which the following passages appear (Chitty, at p.124):

"If some of the lands bordering on the lake are only overflowed at high water, this transient accident cannot produce any change in their dependence. The reason why the soil which the lake invades by little and little belongs to the owner of the lake, and is lost to its former proprietor, is, because the proprietor has no other boundary than the lake, nor any other marks than its banks, to ascertain how far his possessions extend. If the water advances insensibly, he loses; if it retires in like manner, he gains: such must have been the intention of the nations who have respectively appropriated to themselves the lake and the adjacent lands:- it can scarcely be supposed that they had any other intention. But a territory overflowed for a time is not confounded with the rest of the lake: it can still be recognised; and the owner may still retain his right of

property in it. Were it otherwise, a town overflowed by a lake would become subject to a different government during the inundation, and return to its former sovereign as soon as the waters were dried up" (Italics added)

.....

"The same principles shew, that, if the lake insensibly forms an accession of land on its banks, either by retiring or in any other manner, this increase of land belongs to the country which it joins, when that country has no other boundary than the lake. It is the same thing as alluvion on the banks of the river". (Italics added)

I have come to the conclusion that the doctrine of accretion may be applied to the shores of Lake George. Where upon the evidence it may reasonably be found, as a matter of fact, that by reason of the formation of alluvion, there has been a slow and gradual, but also an imperceptible, increase to the land bordering upon the shore-line of a navigable tidal lake - in the sense in which the word "imperceptible" ought to be understood - then that increase may be held to be alluvial land belonging to the proprietor of the land whose boundary adjoins and is appurtenant to it. For the foregoing reasons, I reject the defendant's plea that the doctrine of accretion has no application "to land proximate to or adjoining Lake George".

No good purpose would be served if I were to attempt to go through the evidence called on either side. There was much expert evidence as to what could or could not have occurred in causing the high water mark fixed by King in 1888 - a true water mark as I have found it to be - to retreat to the high water mark fixed by Chalklen in 1977. Over and above that, I had before me documentary evidence in the nature of King's field notes of topographical features observed by him on his survey and his plottings on his diagram sheets, that were the basis of the original hundred plan from which the boundaries of Section No. 16 SW are established. There were, as well, numerous maps and photographs showing the panorama of the environs of the Section. Additionally, I had the advantage of viewing relevant portions of the subject land, the alluvion said to be deposited by longshore drifts and sanddrifts and to be exposed by retreat of the margins of the lake. I took particular notice of the various heights, levels and terraces of the alleged accreted land. It seems to me that the very nature of King's field

notes and his plottings militate against the theory that the alluvion was deposited, below King's high water mark, prior to the grant of both the Right of Purchase Crown Lease and the existing perpetual Crown Lease. Further, the evidence of the vegetation - vegetation which I saw for myself on the view - points strongly to the probability that part of the alluvion from the line of the present margin of the lake up to the line of King's high water mark has not been inundated for a considerable period.

Despite the quality of the expert evidence called on behalf of the defendant, I am constrained to reject the theory that prior to 1888, wave action of the lake had, over a prolonged period, gradually undercut or bevelled an old hummock to the west of the lake, and that as a result, sandy materials had been distributed, leaving exposed the strip of land now said to be alluvion. I prefer the evidence of the marine geologist called for the plaintiff that longshore drift, created by actions of wind and current in the lake, has tended to build up the alluvion on the fringes of the lake, and that this has occurred since 1888. On the whole of the evidence, I find that the alluvion now existing below King's high water mark has been created since 1888, partly by longshore drift, partly by the action of the wind on sandhills in the environs of Section No. 16 SW and the transport of that sand to the body of water in the lake, and partly by retreat of waters from the body of the lake resulting from the construction of channels from the lake to the shores of Rivoli Bay. The operation of these factors on the foreshore of the lake where it adjoins the eastern boundary of the plaintiff's land has created, in my opinion, a natural change in that foreshore, and I find that that change, in a practical sense, has been slow, gradual and imperceptible in its progress. Although there is no witness who has testified that the accretion "could be perceived either in progress, or at the end of a week or a month, /or a year/", on the other side, there is no witness who testifies to any sudden change. In the final result, the decision rests upon questions of fact that fall for my decision in the same way as a juryman might reasonably decide such questions. On the balance of probability, I find that the alluvion on the eastern boundary of Section No. 16 SW has become subject to the doctrine of accretion, and that that land has been gained, gradually, insensibly and imperceptibly, from Lake George, not at any particular moment, but in the same way "as the motion of the palm of a horologe is insensible at any instant, though it be very perceivable when put together in less than the

quarter of an hour" (Lord Stair's Institutions of the Law of Scotland (1681), Vol. 2, p.201).

Leaving aside the construction of the grant made to the plaintiff's predecessors in title in virtue of the Crown Lease Perpetual, on the evidence before me, I am unable to exclude the application of the doctrine of accretion in the present case. I find that the plaintiff, as existing grantee under the lease, is entitled to the additional alluvial land appurtenant to the eastern boundary of Section No. 16 SW. I therefore hold that the alluvial land requires no further release from the Crown, and that the eastern boundary of the Section extends as far as the high water mark fixed by Chalklen in 1977. In my opinion, the plaintiff's action succeeds, and it is entitled to the declaration sought in the prayer in its statement of claim. I declare that the high water mark fixed in 1977 by the Government Surveyor, Robert Andrew Chalklen, forms the eastern boundary of the land comprised in Crown Lease Perpetual no. 11887, and that the accreted land forms part of the land comprised in that lease, and I order and adjudge accordingly.

Though I make the declaration claimed by the plaintiff, a question will arise as to the apportionment of the alluvial land between the adjoining sections. Clearly, a new southern boundary of Section No. 16 SW will have to be fixed. It would seem that no positive rule may be laid down with respect to any apportionment. In the final result, one must attempt to do justice to each of the contiguous proprietors concerned. Leaving aside the evidence given on this aspect of the case, it may be that guidance will be obtained from the judgment of Stout C.J. in Riddiford v. Feist (1902) 5 N.Z.G.L.R. 43. And I add, by way of further guidance, a reference to the rules of apportionment set out in Angell's Law of Watercourses (supra) at pp.60-64. The diagrams shown at pp.62-63 of that treatise may be helpful in achieving an equitable division. At this stage, however, I think I should adjourn further consideration of the question to enable the parties to take up the suggestion of Mr. Matheson Q.C., of counsel for the plaintiff, that negotiation could well resolve the appropriate mode of dealing with the alluvial land and of apportioning it. Accordingly, I formally reserve for consideration in Chambers the question of apportionment generally.

In the Supreme Court

No. 10
Judgment and declaration of The Honourable Mr. Justice Walters - 7th August 1978

No. 10

Judgment and declaration of The Honourable Mr. Justice Walters
7th August 1978

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1975

B E T W E E N :

Southern Centre of Theosophy Incorporated — Plaintiff

- and -

The State of South Australia — Defendant

BEFORE THE HONOURABLE MR. JUSTICE WALTERS
MONDAY THE 7TH DAY OF AUGUST 1978

Stamped Supreme Court

THIS ACTION coming on for trial before the Honourable Mr. Justice Walters on the 8th, 9th, 10th, 11th, 12th and 29th days of May 1978 in the presence of Mr. Matheson Q.C. and Mr. Dyki of counsel for the plaintiff and Mr. Cramond and Mr. Winter of counsel for the defendant, the Court did reserve judgment AND the same standing for judgment this day THIS COURT DOTH DECLARE:

1. That the high water mark of Lake George (fixed in 1977 by the Government Surveyor Robert Andrew Chalklen) forms the eastern boundary of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12.

2. That the area of accretions forms part of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12.

AND DOTH ORDER AND ADJUDGE the same accordingly AND THIS COURT DOTH FURTHER ORDER:

3. That the question of the apportionment of the alluvial land between the adjoining sections be reserved for consideration in chambers.

4. That the defendant pay to the plaintiff its costs of action to be taxed up to and including the date of entry of judgment.

5. That the question of the costs of and incidental to the application in chambers for apportionment be adjourned for further consideration.

AND the parties may be at liberty to apply.

Fit for senior counsel.

BY THE COURT
MASTER p.p.
Sgd. B. E. Greger
CHIEF CLERK

THIS JUDGMENT is filed by FISHER JEFFRIES & CO. of Epworth Building, 33 Pirie Street, Adelaide. Solicitors for the Plaintiff.

No. 11

Notice of Motion for Appeal to the Full Court by defendant - 21st August 1978

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1975

B E T W E E N :

The State of South Australia — Appellant

and

Southern Centre of Theosoph (sic) Incorporated — Respondent

TAKE NOTICE that the Full Court of this Honourable Court will be moved by way of appeal at its first sitting to be held after the expiration of twenty one (21) days from the date on which this appeal has been set down for hearing or so soon thereafter as counsel may be heard on behalf of the abovenamed Appellant THE STATE OF SOUTH AUSTRALIA

1. For an order that the judgment and order of the Honourable Mr. Justice Walters made on the 7th day of August 1978 in this action WHEREBY it was declared that the high water mark fixed in 1977 by the Government Surveyor Robert Andrew Chalklen, forms the eastern boundary of the land described in Crown Lease Perpetual No. 11887, AND WHEREBY the Appellant

was ordered to pay the Respondent's costs of the action to the date of entry of judgment, be set aside as being wrong in law and in fact and in lieu thereof an order refusing the relief sought by the Respondent.

2. For an order that the Respondent do pay the Appellant's costs and disbursements of this appeal.

The Appellant complains of the whole of the said judgment and order upon the following grounds

1. That the learned trial Judge erred in finding that it was the intention of the parties to the Crown Lease Perpetual No. 11887 when the said lease was granted "that no matter what may have been the actual circumstances of the level of the high water mark in 1888, the land should be bounded by the actual high water mark of Lake George, as it varied from time to time, so that the grantee should at all times have a lake frontage".

2. The finding of the learned trial Judge that Lake George is a tidal lake and has since 1963 "been subject almost constantly to tidal sea waters" was against the evidence and the weight of the evidence.

3. The learned trial Judge erred in law in finding that the doctrine of accretion extends to a leasehold estate in Crown Land held in perpetuity.

4. The learned trial Judge erred in finding that the doctrine of accretion extends to land bordering Lake George in that the evidence established that the said lake is an inland lake to which the doctrine of accretion does not apply.

5. The learned trial Judge erred in failing to distinguish land built up at or near part of the boundary of the said section 16 SW by reason of moving sand dunes from land built up at or near other parts of the boundary by other causes in considering whether the doctrine of accretion was applicable to the said land.

6. The learned trial Judge erred in finding that that part of the land built up at or near the boundary of the said Section 16 SW which the evidence established was built up by the movement of sand dunes constituted

alluvion or was formed slowly and imperceptibly as the finding was against the evidence and the weight of evidence.

7. The learned trial Judge erred in having regard to the build up of alluvion on the fringes of Lake George since the year 1888 in view of the fact that the Crown Lease Perpetual No. 11887 was first granted in 1910.

8. The finding of the learned trial Judge that "longshore drift, created by actions of wind and current in the lake has tended to build up the alluvion on the fringes of the lake" was against the evidence and the weight of the evidence.

DATED this 21st day of August 1978.

Sgd. Illegible

for Graham Clifton Prior
33 Franklin Street
ADELAIDE 5000

Crown Solicitor and Solicitor for the Appellant

TO: The Master
Supreme Court
ADELAIDE 5000

AND TO: The Respondent's Solicitors,
Messrs. Fisher Jeffries& Co.
Epworth Building
33 Pirie Street
ADELAIDE 5000

THIS NOTICE OF MOTION is filed by Graham Clifton Prior of 33 Franklin Street Adelaide Crown Solicitor and Solicitor for the Appellant.

No. 12

Reasons for Judgment of the Honourable The Chief Justice - 29th May, 1979

DELIVERED 29TH MAY 1979

THE STATE OF SOUTH AUSTRALIA v. SOUTHERN CENTRE OF THEOSOPHY INCORPORATED

No. 686 of 1975

Dates of Hearing: 5th and 6th April, 1979.

In the Supreme Court

No. 12
Reasons for Judgment of the Honourable The Chief Justice - 29th May 1979. (cont'd)

IN THE FULL COURT

Coram: King C.J., Zelling and Wells JJ.

J U D G M E N T of the Honourable the Chief Justice

(On appeal from the Honourable Mr. Justice Walters)

Counsel for the Appellant: Mr. J.M.A. Cramond

Solicitor for the Appellant: Mr. G.C. Prior, Q.C. Crown Solicitor

Counsel for the Respondent: Mr. R.G. Matheson, Q.C., with Mr. N. Dyki

Solicitors for the Respondent: Fisher, Jeffries & Co.

Judgment No. 4292

THE STATE OF SOUTH AUSTRALIA v. SOUTHERN CENTRE OF THEOSOPHY INCORPORATED

Full Court

King C.J.

The issues on this appeal have been dealt with fully in the judgments of Zelling J. and Wells J. which I have had the advantage of reading. I content myself with stating shortly the view which I take of the case.

The authorities satisfy me that the doctrine by which a landholder acquires additional land which has been added by imperceptible accretion to his original holding applies only where the relevant boundary of the original holding is the water's edge, however that may be described; that is to say, what is called a water boundary. Even where the boundary of the original holding is described or shown as a water boundary, the application of the rule is doubtful if there are certain means of identifying the original bounds of the property, vide Lopez v. Muddun Mohun Thakoor 13 MOO. Ind. App. 467 at p.474; Williams v. Booth (1910) 10 C.L.R. 34 per Isaacs J. at p. 361. I am unable to find any authority for the application of the doctrine to a property whose boundary is delineated in the documents of title by a line on a plan which line is not expressed to be the water's edge.

The land demised by the Crown Lease Perpetual which is the respondent's title, is described in the lease as "five hundred acres or thereabouts being the section 16 SW in the Hundred of Lake George County of Grey as the same is delineated in the public maps deposited in the Land Office in the City of Adelaide". The public map referred

to, which is Exhibit P2, delineates the section by means of a line. This line coincides with the high water mark as it existed in 1888 and the surveyor at that time fixed the eastern boundary of the land by following the high water mark at that time. The boundary of the section, however, on the eastern side as shown in the public map was not the high water mark as such, but the line fixed by the surveyor, and the section of land demised by the Crown lease was that delineated by the line shown on that map.

The learned trial judge considered that "it was the intention of the parties to the grant that no matter what may have been the actual circumstances of the level of the high water mark in 1888, the land should be bounded by the actual high water mark of Lake George, as it varied from time to time, so that the grantee should at all times have a lake frontage". I do not think that the subjective intention of the parties to the lease of 1888, whatever it might have been, assists in determining the boundaries of the section demised by the lease of 1910 under which the respondent holds the land. Those boundaries must be ascertained from the lease document itself and the public map therein referred to. The eastern boundary so ascertained is, in my opinion, not the high water mark from time to time, but the boundary which is delineated by the line appearing on the public map. In my view, therefore, there is no room for the application of the doctrine of accretion.

In my opinion the appeal should be allowed and the action dismissed.

No. 13

Reasons for Judgment of the Honourable Mr. Justice Zelling - 29th May 1979

DELIVERED 29TH MAY 1979

J U D G M E N T of the Honourable Mr. Justice Zelling

(on appeal from the Honourable Mr. Justice Walters).

/Alluvial accretion : construction of Crown Lease : "as the same is delineated in the public maps : sand accretion not within doctrine : application of doctrine to leasehold land : application to inland lakes/

Counsel for the Appellant: Mr. J.M.A. Cramond

Solicitor for the Appellant: Mr. G.C. Prior, Q.C., Crown Solicitor.

Counsel for the Respondent: Mr. R.G. Matheson, Q.C., with Mr. N. Dyki

Solicitors for the Respondent: Fisher, Jeffries & Co.

Judgment No. 4293

THE STATE OF SOUTH AUSTRALIA v. SOUTHERN CENTRE OF THEOSOPHY INCORPORATED

Full Court

Judgment of Zelling J.:

The respondent to this appeal, the plaintiff in the Court below, is the registered proprietor of an estate as lessee from Her Majesty the Queen in that piece of land situate in the Hundred of Lake George County of Grey, being Section 16SW containing five hundred acres or thereabouts, and being the whole of the land comprised and described in Crown Lease Perpetual No. 11887 Crown Lease Register Book Volume 584 Folio 12.

The respondent's claim was for a declaration that the high water mark of Lake George formed the eastern boundary of the land comprised and described in that Crown Lease and that accretions of land east of the original boundary formed part of the land comprised and described in that Crown Lease, and for consequential relief.

The trial Judge found in favour of the plaintiff respondent's contention and the defendant State of South Australia has appealed to this Court from that judgment.

The state of the title to the land is as follows:- Section 16SW in the Hundred of Lake George County of Grey was originally the subject of a crown lease with right of purchase number 198: Crown Lease Register Book Volume LXXXII Folio 30. This was a lease from Her Majesty Queen Victoria to George Wilson of Robe Stockholder of a piece or parcel of land containing by admeasurement five hundred acres or thereabouts and being the Section number 16SW in that hundred and county "as the same is delineated in the public maps deposited in the Land Office in the City of Adelaide". The lease ran for twenty-one years from the 1st of April 1889 with a right of renewal for a further term of twenty-one years. The last proviso of this lease is as follows:-

"PROVIDED LASTLY that the Lessee shall have the right to purchase the lands hereby leased at any time during the original term of twenty-one years after the first six years thereof at or for the price or sum of Five hundred pounds (£500.0.0) being One pound (£1.0.0) per acre and at any time during the renewed term of twenty-one years at or for such price or sum being not less than Five Shillings per acre as shall have been fixed by the said Land Board."

This title descended by intermediate steps to Cornelius Patrick Kealey, Peter Neil Sinclair and Alexander McRostie all of Millicent Farmers who became registered as lessees on 19th September, 1908. They surrendered the lease by Memorandum of Surrender produced for registration in the Lands Titles Office at Adelaide on 25th April, 1911. In lieu of the surrendered lease the present Crown Lease Perpetual No. 11887 was issued to them with different covenants and no right of purchase on 27th September, 1911, but the lease by its terms ran from 1st April, 1910. The description was the same as before "being Section number 16SW in the Hundred of Lake George County of Grey as the same is delineated in the public maps deposited in the Land Office in the City of Adelaide to be held in perpetuity at the yearly rental of nine pounds seven shillings and six pence (£9.7.6.)....". Amongst the covenants of the lease are:-

"I. That the lessee must enclose the land with a cattle-proof fence before the end of the fifth year of the lease"

and the lease was liable for forfeiture if notice of non-performance of covenant was served on the lessees and default was made for three months thereafter. That lease, after a large number of intermediate transactions, came into the hands of the respondent as lessee by transfer registered in the Lands Titles Office on 19th December, 1972 and it has continued as lessee ever since.

When the 1888 lease was surrendered, the first lease came to an end by being merged in the allodial estate of the Crown. If authority is required for that proposition it can be found in Co. Litt. 337b. In any case surrender applied by operation of law when the three tenants accepted a fresh lease from their immediate reversioner on different terms: see The Law of Real Property by Megarry and Wade 1st Edition (1957) page 611. The suggestions of the learned Judge that Part IX of the Real Property Act 1886 provides a special code for the operation of crown leases overlooks, at least in this regard, the effect of Section 95, the last section in that part.

The learned Judge found as to the boundaries of the section:-

> "The delineation of the boundaries of the original Section No. 16 SW was shown in the hundred plan prepared under the direction of, and officially certified by, the Surveyor-General, and deposited in the Land Office at Adelaide. I find that to all intents and purposes, the hundred plan that delineated the boundaries of Section No. 16 SW demised by the Right of Purchase Lease corresponds to the current hundred plan that delineates the boundaries of Section No. 16 SW leased to the plaintiff's predecessors in title."

Passing over some matters which are in dispute in this appeal, the learned Judge found that the high water mark of Lake George was fixed by the Government Surveyor, Stephen King, when the section was first surveyed by him in 1888, and that his high water mark was a true high water mark. The Judge further found that the Section No. 16SW leased in 1910 (in fact in 1911 but with effect from 1910) to the plaintiff respondent's predecessor in title is the same section of land as that which had as its eastern boundary the high water mark fixed by King in 1888. The Judge also found the existing true high water mark as that fixed by the Government Surveyor Chalklen in 1977. The learned Judge found with regard to Lake George itself as follows:-

> "Lake George is a large inland lake. There is an abundance of evidence to shew, and I am satisfied, that it is a salt or brackish body of water which is navigable by small craft, such as boats used by fishermen who catch fish in the open sea and in the lake itself. I also find that the lake is affected by tidal influence arising from currents on the lake and by the inflow of tides which ebb and flow into the lake from the shores of Rivoli Bay, by means of channels of communication from Lake George to Rivoli Bay which have been constructed by the South Eastern Drainage Board since about 1913. Between 1913 and 1963, the waters of the lake were exposed intermittently to tidal influences of the sea, but since a new channel was constructed by the Board in 1963, that channel has been maintained as an open channel and, in consequence, the water of the lake, as well as being affected by tidal influences arising from currents on the lake, has been subject almost constantly to tidal sea-waters, varying over periods in volume of inflow, according to high and low

tides and the force of the tides and ocean currents."

Mr. Cramond, who appeared for the Crown on the appeal, challenged the word "constantly" in the Judge's description and I think his challenge was well founded. The evidence is that although there has been since 1913 or 1914 an outlet to the sea which has been improved since works were done in 1963, the channel between the lake and the sea still silts up for several months in the year, and it is correct to say that the lake is subject to tidal sea waters when the channel is open, but not otherwise.

The dispute between the parties, as the learned Judge said, is in consequence of the increased land which is now dry at high tides between the high water mark fixed by King in 1888 and the high water mark fixed by Chalklen in 1977. We were told by Mr. Cramond that the amount of land in question is in excess of twenty acres. Mr. Matheson did not admit this as he alleged it did not appear in the evidence but it is quite simply deduced from the evidence. All that happened was that I was put to the trouble of doing the calculation for myself from Exhibit P.5, which is drawn to scale, using the normal rules of mensuration to ascertain the approximate area of an irregularly shaped piece of land. The figure is in fact in excess of twenty acres so that if I use twenty acres as the figure during this judgment I shall do the respondent no injustice. It is a figure which could have been similarly ascertained by the learned trial Judge had he desired to do so and I am in no different position on appeal.

The learned Judge then went on to indicate what he thought was the intention of the parties to the 1888 grant, which finding was challenged by counsel for the appellant, but which, in any case, is not really the relevant intention for the purpose of this matter. The relevant intention is that of the parties to the lease of 1910/1911. In this regard I should point out that the original channel to the sea was not constructed until either 1913 on the evidence of the witness Chambers, or 1914 on the matters stated in exhibit D.10, and in either case after the 1910/1911 lease so that the opening to the sea was not in contemplation of the parties when that lease was drawn up and executed. He went on to say that the eastern boundary of Section 16SW had always been ambulatory, a matter which is in dispute in this appeal. He then said that if he was wrong in holding that, as the Crown contended, the high water mark fixed by Chalklen was not in any event the present boundary

of Section 16SW, he went on to consider the argument founded on accretion. To this I shall return as His Honour's findings on the law are in dispute in this appeal. The Judge rejected a theory of undercutting and bevelling happening prior to 1888 as the explanation for the sand getting into the lake, on which nothing turns in this appeal. He then found that the doctrine of accretion did apply and that on both grounds the plaintiff was entitled to the declarations sought in the prayer of the statement of claim.

The learned Judge pointed out that questions would arise as to the apportionment of the alluvial land between Section 16SW and its adjoining section and adjourned further consideration of the matter for the parties to discuss negotiations to endeavour to settle this unascertained area.

As it was possible that, on one view at least of His Honour's order, the order was interlocutory and not final, we gave leave to Mr. Cramond at the commencement of the appeal, pursuant to Section 50 of the Supreme Court Act, insofar as leave might be necessary, to render the appeal to this Court competent.

I accept that the doctrine of accretion applies to land under the provisions of the Real Property Act: see Francis: Torrens Title in Australasia (1973) Volume 2 page 159 and in particular the case of Humphrey v. Burrell 1951 N.Z.L.R. 262 there cited.

Before dealing with the matters on which the parties expended a large amount of time on the hearing of the appeal, I should deal with three short grounds on one or more of which in my opinion the appeal must succeed either wholly or in part.

The first ground deals with the matter left open by the High Court of Australia and in particular by Isaacs J. in Williams v. Booth (1910) 10 C.L.R. 341 at 361-362 and that is: were there certain means of identifying the original bounds of the property from the maps and were those the true boundaries of the land leased. In other words let us assume for this purpose that the respondent is right on everything else: that the accretion took place, that it was imperceptible, that the doctrine of accretion applies to fresh water inland lakes not continuously connected to the sea, and that the alluvium is in fact the result of either tidal action, or the cycloidal movement of the lake water. Nevertheless on the true construction of this lease, even though the Crown may have obtained

allodial property to twenty acres of land as an addition to Section 16SW, it does not follow that the Crown lease passed that land on to the respondent as lessee. The land to which the respondent obtained a lease under the 1910/1911 document was a lease of "five hundred acres or thereabouts being the Section 16SW in the Hundred of Lake George County of Grey as the same is delineated in the public maps deposited in the Land Office in the City of Adelaide". The public map referred to is the Exhibit P.2. The respondent's contention must be that that document in fact gives a lease of five hundred and twenty acres not five hundred acres, and not as delineated in the public maps deposited in the Land Office but as delineated in the survey of Chalklen in 1977. That on the face of it is a most unusual construction of a legal document. The respondent's difficulties are not helped by the presumption of law which Wells J. pointed out arguendo, that if there is an ambiguity in a crown grant, it is construed in favour of the Crown and not in favour of the grantee, contrary to the normal rules: see Comyn's Digest 427; Chitty on the Prerogatives of the Crown (1820) 391-392. I do not think that much help can be obtained from the 1888 document because the present respondent has neither privity of estate or privity of contract in relation to that lease. However, insofar as it may be of some use and it certainly was alludedto both by the learned Judge and by the parties to this appeal, the right of purchase clause at the end of the 1888 lease shows a right of purchase of five hundred acres at one pound per acre, which does not indicate an intention on the Crown's part to hand over five hundred and ten acres or however many had accreted between 1888 and 1910 for the price of five hundred acres. Returning to the current lease which is the one to be construed, the lease is a lease of "five hundred acres or thereabouts". I do not think the words "or thereabouts" can extend to a matter of some twenty acres. It is really a shorthand expression for the words used by the older conveyancers: "be the same a little more or less by admeasurement". Similarly, there is no doubt that the eastern boundary of the land leased as shown in the public maps of the State is the 1888 boundary of the lake. Mr. Matheson, for the respondent, sought to counter this by saying that one could not, from the public map itself Exhibit P2., ascertain the exact boundary on the surface of the earth but one would have to have reference to the working papers and maps which were also tendered on the hearing. I accept that that is so, but that is not something peculiar to a lake boundary. In every case where a surveyor is working from boundaries laid down in maps many years ago, a boundary has to be re-established from time to time

as required on the surface of the earth, and that is so whether the boundary is a straight boundary or a meandering boundary. The only difference is that a meandering boundary is a more difficult one to establish, but for practical purposes this exercise can be done and is done as often as circumstances require it. Accordingly the fact that there is not sufficient detail for a surveyor to use P.2 and P.2 only in re-establishing the boundary on the surface of the earth is a matter not peculiar to this type of boundary and a fortiori does not of itself suggest that the boundary is going to be something which varies from time to time according to the high tide limit of Lake George or any other piece of water for that matter. All that it does mean is that the boundary is difficult to restore on the earth's surface but that does not make it other than a fixed boundary. It is simply one which has to be re-established, as many boundaries irrespective of margins of lakes have to be re-established, as best as the surveyor's skill will allow it.

I accept as the cases show, that if a freehold boundary is fixed on the documents as a boundary expressed as a water boundary, whatever expression may be used to denote this, then the water boundary is movable by alluvium or encroachment of water: see Smart v. The Town Board of Suva 1893 A.C. 301; Attorney-General v. Findlay 1919 N.Z.L.R. 513 and Verrall v. Nott (1939) 39 S.R. N.S.W. 89, but that is not the problem in question in this case. The problem is: what did the lessee take under a lease which says that the boundaries are delineated on the public maps deposited in the Land Office in the City of Adelaide. Mr. Matheson urged that the word "delineated" did not mean "defined" but only meant a line of general import drawn on the map itself. I do not think that is so. The words "delineated in the public maps" appear both in the Crown Lands Act 1888, and in the Crown Lands Act 1903 which is the Crown Lands Act by virtue of which the 1910/1911 document was granted. Under Section 28 of the Act of 1903 it is provided as follows:-

> "28. All Crown lands (except town lands) mentioned in part 1 of the Fourth Schedule to this Act may be offered on perpetual lease or agreement, provided such lands have been -
>
> I. Previously surveyed; or
>
> II. The boundaries thereof delineated in the public maps."

This shows that either the lands in question had to

be surveyed or the equivalent was to be the boundaries delineated in the public maps and by Section 29 the Commissioner had to approve the area price and rent before declaring that lands could be applied for on perpetual lease. By Section 41 of that Act "perpetual leases shall vest the land leased in the lessee in perpetuity, and shall contain the provisions for rent and the reservations, covenants, and conditions set forth in the Fifth Schedule, subject to such modifications thereof or additions thereto and such other provisions as the Governor shall think fit, together with a right of re-entry, and shall be read and construed as if any reservations, covenants and conditions in the form in the Fifth Schedule had been expressed in the extended form in the Sixth Schedule, and the lessee and all persons entitled to any benefit of the lease shall be bound thereby."

One of the conditions of the Fifth and Sixth Schedule is the covenant to fence. As I pointed out to Mr. Matheson, the eastern fence on his argument would have been on a continually shifting boundary. It is no answer to say that the lateral fences could be shifted down to the new water boundary. Cattle can swim and a property fenced on three sides does not comply with the above condition. Reverting to the question of the word "delineated", the use of it appears to have come, as is perhaps not unexpected, from Section IV of the Imperial Waste Lands of the Crown Act 1842 5 & 6 Vict. c.36 which in effect provides that blocks of land of less than twenty thousand acres in the waste lands of the Crown in New South Wales, Van Diemen's Land, Western Australia, South Australia and New Zealand are not to be conveyed or alienated until they have been surveyed and "shall have been delineated in the public charts of such colony". If further evidence is required that "delineated" is a word with a specific meaning, reference may be made to Jessup: Lands Titles Office Forms and Practice 4th Edition (1963) page 2, relating to applications to bring land under the Act, where the same phrase is used. In my opinion the respondent's predecessor in title, from the grant made in 1911, received a lease of five hundred acres or thereabouts of Section 16SW as delineated in the public maps of the State. That and no more. If that be so, then as I have said, even though the allodial title of the Crown in the additional twenty acres be conceded, the fact is that no leasehold estate in the additional twenty acres passed to the respondent. Mr. Matheson argued that where a boundary is not clearly marked out, extrinsic evidence can be admitted to say where

the boundary was: see the judgment of Foster J. in Willson v. Greene, Moss Third Party [1971] 1 All E.R. 1098. I accept that the principle is as stated but in my opinion the eastern boundary of this section is not either vague or ambiguous but is as delineated on the public maps of the State and therefore the principle has no application. I do not think that the case of Tilbury v. Silva [1890] 45 Ch.D. 98 at 109 supports his position even by analogy.

The second point on which the respondent in my opinion must fail is that there is no evidence as to where the boundaries of the alluvium stood either in 1910 or in 1975. It is common ground that the Crown Lands map of 1906 was merely a reissue of the map of 1888 and showed the 1888 boundaries. There is absolutely no evidence to show the eastern or lake boundary of the land in 1910, which must be taken for the purpose of this argument to have passed under the 1910/1911 lease. This assumes, contrary to my opinion, that the alluvium did pass under the lease to the lessee. Similarly there is no evidence as to what the position was in 1975. The plaintiff's writ was issued on 17th April, 1975 so that that is the date at which the plaintiff's claim must be measured for the purpose of these proceedings: See Eshelby v. Federated European Bank Limited [1932] 1 K.B. 423. The only evidence is as to what the position was in 1977. It would appear from the evidence of the experts von der Borch on the one side and Armstrong on the other that the process of accretion is not evenly spread over the whole period but may differ in rate from one time to another, particularly in a time of high winds. There is simply no evidence upon which findings could be made as to how much the plaintiff got under the present lease, assuming that the lease passed the alluvium, nor what the boundary was in 1975 at the time of the issue of the writ. If this were the only ground on which the appellant succeeded, I would be in favour of doing what was done by the High Court in not dissimilar circumstances in Williams v. Booth (supra) at page 362, and sending the matter back for an enquiry as to the position in 1910 and in 1975, rather than subject the parties to the cost of a completely new set of proceedings.

The third point on which I think the appellant must succeed, although in this case it would be a success only in part, is in relation to the area of increase which is not due to the waters of the lake but to the encroachment of the sandhill, due to the force of the winds. First, I do not think that the drifting of material by wind is within the doctrine of alluvium. The Roman law doctrine of alluvio appears to have applied only to

accessions to land from fluviatile action: see D. XLI: 1.7.1. This, as appears from the judgment of that great master of the common law Palles C.B. in Attorney-General v. McCarthy (1911) 2 I.R. 260 at 277, was still the position in England at the time Bracton wrote in the thirteenth century. Nevertheless as the learned Judge says:-

> "Although Bracton's statement of it (sc. alluvial accession) refers to the action of rivers only, it is undoubted that so far as it exists in the law of this country, it is applicable to the action of the waters of the ocean on the sea shore."

The cases which Palles C.B. cites at pages 279-280 from the mediaeval Latin court records all have the same allegation in varying forms that the land was situate against or on the sea coast. Apart from the action of rivers and the action of the seas, I can find no case in the books which carries the doctrine as far as windblown sand. I do not think that the passage cited by the learned Judge from Angell in his Treatise on the Law of Water Courses 6th Edition (1869) at page 56 bears out the proposition for which the Judge cites it. Indeed there is some doubt as to whether it goes as far as alluvium in inland lakes; a matter which I will return to later in this judgment. However there is a second reason why, even if the doctrine did apply to windblown sand, the appellant must succeed on this branch of the appeal and that is that the advance of the sand is not gradual and imperceptible within the rules governing the doctrine of alluvial accession. The evidence on the matter is all one way. Von der Borch whose evidence the Judge preferred said at page 92:-

> "Q. I suppose there is no dispute that the rate of movement will vary from day to day and from week to week according to the strengths of the winds that are then blowing, is that right.
>
> A. No dispute about that.
>
> Q. And primarily it would be the strength of the wind on any particular day which would determine how much sand would blow.
>
> A. Yes, and the direction.
>
> Q. And the fact whether it had reasonable rain to consolidate the surface would be relevant too, would it.

A. Most certainly, yes.

Q. Say a sand dune could be shown to have moved say - or the nose of it could be shown to have moved say 8 metres in one year, would you expect that that 8 metres of movement would not - it would not be evenly spaced so far that year would it.

A. Not necessarily, no. It would be in jumps.

Q. Indeed, during a period of say strong south-westerly winds it might move very rapdily for a day or a week or even for a few hours. A. Yes.

Q. And then very little again for perhaps a couple of weeks. A. Yes.

Q. Do you agree that with the rate of movement of those dunes, if one were to place a peg in the nose of such a dune, there would be occasions where within perhaps even an hour you could detect a forward movement of the sand dune.

A. Yes you could.

Q. I used the word "detect", or measurement.

A. Yes.

Q. And say in the course of a day, would it be conceivable that it might have moved forward what, say a yard or even more.

A. That would be an upper figure I think, but it certainly would be noticeable, you could say that.

Q. You say it would be an upper figure.

A. I think it would be. I have never measured these so I don't know. I have never measured the rate of movement of a drift but I have observed time and time again what has happened and so what I am saying is purely based on hearsay, but certainly you would notice it within a day in some exceptional cases with certain wind directions and velocities.

Q. And sometimes within an hour.

A. You may certainly see sand moving in a slip face within an hour which means if slowly moving they would move a millimetre

or centimetre or something like that, yes."

Armstrong said much the same thing at pages 189-190:-

"Q. If I can just briefly refer back to the question of the active 10 mile sand drift. If a peg was placed at the leading edge of that dune, or one of those series of dunes, if that is a more accurate expression, and a strong south-westerly wind was blowing, would it in your opinion be possible to detect a forward movement of the sand dune.

OBJECTION Mr. Matheson objects as that is not the sort of evidence which the witness has been shown to be qualified to give.

QUESTION ALLOWED

QUESTION READ BY REPORTER.

Q. Within a period of say one hour.

A. If a strong wind was blowing I would say yes.

Q. What would you expect to be the upper limit of any such movement?

A. Within a period of one hour?

Q. Yes. A. Of the order of one or two inches perhaps.

Q. And what would you expect to be the limit of movement of forward movement in say a one day period when strong winds were blowing.

A. Provided the winds were blowing continually of the order of two to three feet perhaps."

Indeed the process can actually be seen going on in the plates 3, 6 and 7 attached to exhibit D.10. Accordingly whatever view may be taken of the rest of the judgment appealed from, the appeal must succeed so far as this area is concerned which is a substantial area of the total claim. Again, if this was the only point on which the appellant succeeded, I would be disposed to order an enquiry as to the limits of windblown sand deposit as distinct from alluvial deposit, and send the matter back for that to be done.

I turn now to the second ground of appeal which reads as follows:-

> "The finding of the learned trial Judge that Lake George is a tidal lake and has since 1963 'been subject almost constantly to tidal sea-waters' was against the evidence and the weight of the evidence."

As I have already commented, the evidence of Chambers at page 23 is that the outlet to the sea which was made in 1963 is closed for roughly seven months in every twelve, so that the words "almost constantly" are not borne out by the evidence. However tidal sea waters must reach the lake from time to time, because of the sea fish that are caught there and which could not reach the lake in any other way. I do not think that the lake has tides in the sense that the lake itself is subject to the influence of the sun and moon, but I think that when sea tides go through the channel into the lake they must of necessity effect the lake to that extent. That would not make the lake a tidal arm of the sea for this purpose however, as is clear from two New South Wales decisions: The Attorney-General v. Merewether (1905) 5 S.R. N.S.W. 157 and Attorney-General v. Swan (1921) 21 S.R. N.S.W. 408. I think that the appellant makes out its second group of complaint but that is not of itself, without the addition of other matters, a reason for allowing the appeal.

I turn now to ground 3 which reads:-

> "The learned trial Judge erred in law in finding that the doctrine of accretion extends to a leasehold estate in Crown Land held in perpetuity."

There is no English or Australian authority that I have been able to find which indicates that the doctrine of accretion extends to a leasehold estate. The only authority which appears to deal with the problem is contained in 49 American Jurist 2d. s.v. Landlord and Tenant paragraph 209 and in the case of Cobb v. LaValle 89 Ill. 331 therein referred to, which holds that it does so extend. However, I do not see on general principles why the doctrine of accretion should not apply to a leasehold estate provided that the freehold estate obtains the accretion and the terms of the lease are such as to convey the accretion from the lessor to the lessee. My difficulty, as I have said, stems from the terms of this lease. I am prepared to assume, without so deciding, that the doctrine can apply in a proper case as between lessor and lessee, but I cannot see that, under the wording of this Crown Lease, the lessee took title to the additional

twenty acres or thereabouts under the terms of its lease.

Ground 4 is as follows:-

"The learned trial Judge erred in finding that the doctrine of accretion extends to land bordering Lake George in that the evidence established that the said lake is an inland lake to which the doctrine of accretion does not apply."

This raises the question of whether the doctrine of accretion applies to an inland lake. This question was discussed before the High Court of Australia in Williams v. Booth (supra) but as was said by Griffith C.J. at page 346, it was not necessary to express any opinion on the point which is almost entirely free of authority.

I think that this lake is an inland lake as those words are used because of the two New South Wales decisions which I have referred to, which indicate that it is not in the eyes of the law an arm of the sea, notwithstanding that the channel to the sea is operative at certain times of the year. There is Canadian and American authority for extending the doctrine to lakes. On the other hand there is the positive assertion of Eve J. in Trafford v. Thrower (1925) 45 T.L.R. 502 at 503 that the doctrine of accretion has no application to a non-tidal sheet of more or less stagnant water, such as one of the Norfolk Broads, but that the doctrine was limited to the seashore and to land abutting on rivers of running water and did not extend to canals, lakes or ponds. His statement of the law is accepted in Coulson and Forbes on Waters and Land Drainage 6th Edition (1952) pages 42-43 as correctly stating the law. Eve J. does not state any authority for the proposition which he states so flatly, so it is necessary to consider the matter on general principle.

Lord MacNaghten thought in Johnston v. O'Neill 1911 A.C. 552 at 577 that the Crown was not as of common right entitled to the soil or waters of an inland non-tidal lake. That may well be true in relation to Ireland which has a long history of private proprietorship. I would doubt whether, even if Lord MacNaghten was right, that it was a doctrine to be imported as part of the inherited law of this country where the Crown has been, ever since the first foundation of the various Australian colonies, the ultimate proprietor of all the waste lands of the colony. In dealing with lakes and lagoons Mr. Matheson placed great weight on Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool)

Limited and Others /1915/ A.C. 599. It should be said at the outset that although the tract of water there referred to is called a lagoon or lake, it is what we would call part of the sea with marshy islands. The Spanish word "laguna" is the same word as our "lacuna" and applies to any substantial hiatus in the land boundary due to water. Mr. Matheson particularly founded on the assertion that anything other than a judgment for his client would as Lord Shaw of Dunfermline said in Holt's case at page 612 "be followed by grotesque and well nigh impossible results, and violate the doctrine which is founded upon the general security of landholders and upon the general advantage". As the Chief Justice pointed out arguendo, purple passages of that kind rarely help in the elucidation of disputed questions of law and indeed His Lordship's views run counter to accepted ideas of public policy in this country, whatever the position may be in England, Scotland or Nigeria. In this country, far from thinking that there ought to be exclusive rights to sea-frontages vested in private persons, the view for many years, in this State at least, has been that there ought to be a substantial area set back from the actual seafront or waterfront vested in the Crown for public purposes and I refer to Section 53 of the Planning and Development Act 1966 (as amended) and to Sections 8, 31 and 44(2) of the Harbours Act 1936 (as amended). Indeed this philosophy, with regard to harbours and water-fronts, goes back to a time prior to the pronouncement of His Lordship in 1915 to which I have referred.

If the property in a large fresh water lake extends to the middle thread of the lake then of course the matter would be of little importance in the instant case because the change in boundary of usable land would not change the true boundary of the land. It would merely alter the area above water and the area below water.

Even this point however does not seem to be settled: see Halsbury Laws of England 3rd Edition Volume 39 s.v. Waters and Watercourses paragraph 674 and note (d) on pages 513 and 514. I would have thought, unencumbered by authority, that the property in the land under any large sheet of water in this country was in the Crown as the universal occupant but I cannot find any authority to say either that that is the law or that is not the law. I doubt however whether it is really necessary to elucidate this point in this judgment, and I will assume, without deciding, that the Canadian and American decisions referred to above do correctly state the law. If the Crown owns the whole of the land under the lake bed as universal occupant it cannot matter whether it has more or less land above or under

water, except as a matter of useability but not of title, and the same must apply here if the Crown owns ad medium filum aquae. In either case the relevant land is the Crown's land and the accretion simply puts more the Crown's land above water than it previously had. That then draws one back to the question to which I have referred over and over again in this judgment: does the lease carry the Crown's land which is now above water to the lessee or does it not do so.

The fifth and sixth grounds of appeal are as follows:-

"5. The learned trial Judge erred in failing to distinguish land built up at or near part of the boundary of the said Section 16 SW by reason of moving sand dunes from land built up at or near other parts of the boundary by other causes in considering whether the doctrine of accretion was applicable to the said land.

6. The learned trial Judge erred in finding that that part of the land built up at or near the boundary of the said Section 16 SW which the evidence established was built up by the movement of sand dunes constituted alluvion or was formed slowly and imperceptibly as the finding was against the evidence and the weight of evidence."

I have already dealt with this earlier in my judgment. I am of opinion that, in relation to this part of the land in question, the appellant must succeed in any event.

Ground 7:-

"The learned trial Judge erred in having regard to the build up of alluvion on the fringes of Lake George since the year 1888 in view of the fact that the Crown Lease Perpetual No. 11887 was first granted in 1910."

I have already dealt with this ground earlier. I think that there is no evidence as to what the state of the alluvium was in 1910 but as I have said if necessary this matter can be sent back for enquiry if a Court should, contrary to my views, hold that the lease did convey the additional land to the lessee under its lease.

Ground 8 is as follows:-

"The finding of the learned trial Judge that 'longshore drift, created by actions of wind and current in the lake has tended to build up the alluvion on the fringes of the lake' was against the evidence and the weight of the evidence."

We did not call upon Mr. Matheson to reply to this ground. Mr. Cramond's criticisms of the finding were substantial and were strongly made but there was evidence upon which the learned Judge could come to the finding which he made and consistent with the normal practice of appeal courts on findings of fact of this kind where there is some evidence to support the Judge's finding, I do not think that we can interfere.

In my opinion the appeal succeeds and judgment should be entered for the appellant.

I think we should hear the parties as to costs.

No. 14
Reasons for Judgment of the Honourable Mr. Justice Wells - 29th May 1979.

No. 14

Reasons for Judgment of the Honourable Mr. Justice Wells - 29th May, 1979

DELIVERED 29 MAY 1979

J U D G M E N T of the Honourable Mr. Justice Wells

(On appeal from the Honourable Mr. Justice Walters)

Property - perpetual lease - applicability of doctrine of accretion - implications of having boundary of subject land "delineated" on a "public map".

Counsel for the Appellant: Mr. J.M.A. Crammond

Solicitor for the Appellant: Mr. G.C. Prior, Q.C., Crown Solicitor

Counsel for the Respondent: Mr. R.G. Matheson, Q.C.. with Mr. N. Dyki

Solicitors for the Respondent: Fisher Jeffries & Co.

Judgment No. 4294

THE STATE OF SOUTH AUSTRALIA v. SOUTHERN CENTRE OF THEOSOPHY INCORPORATED

Full Court

Wells J.

I have had the advantage of reading the judgment of Zelling J., and, in general, I agree with it. But out of respect for the learned trial judge, from whom we are differing, I shall add a few brief observations of my own on the arguments addressed to us.

I think it right to state at the outset that, as far as I can judge, the structure and emphasis of the argument presented to us differed in important respects from what seems to have been presented to the learned trial judge. In particular, closer attention was paid by counsel on appeal to the strictly conveyancing issues than was paid by them to the same issues at the trial. Moreover, I gather from counsel that, at the trial, concessions were made by the Crown that changed the centre of gravity of the argument addressed to the learned trial judge.

The chain of title to the perpetual lease has been analysed by Zelling J. and there is no need for me to repeat what he has done. The first task in this case is to construe the description of the parcel of land in virtue of which the first lessee received his title - "as the same is delineated in the public maps deposited in the Land Office in the City of Adelaide", and to set a limit to the expression "or thereabouts" in the context of stated area of the land demised - "five hundred acres or thereabouts."

For the purposes of this case, the crucial word in the description to be assigned its meaning is the word "delineated". The core of the meaning of that word is, to my mind, to trace the outline of something as on a map or plan. To say that a parcel of land has been delineated on a map or plan signifies that its limits are shown thereon by a line or lines; but it does not necessarily imply that those limits are drawn with the utmost degree of precision of which the professional surveyor is capable. The line or lines may be drawn well or ill according to the circumstances. Sometimes the representation under examination is executed so badly that it cannot be called a delineation at all. Whether it is a delineation is a question of fact: see Protheroe v. Tottenham and Forest Gate Railway Company [1891] 3 Ch. 278. But given that there is a delineation, certain inferences may, I believe, be safely drawn: that the purpose of the instrument - in this case the Crown lease - is, inter alia, to fix the boundaries of the land

demised by representation and not by verbal description; that wherever the traced outline of the land appears on the map or plan the intention - by which I mean the expressed intention gathered from the instrument as a whole - of the parties is that the limits of the demised land is to be determined from the outline with as great a degree of accuracy as circumstances permit; and that, in particular, wherever delineation occurs, it imparts its character to the boundary it represents, disengaged from any natural features of the land by reference to which that boundary was, or may have been, settled.

The public map referred to presents a delineation that is considerably less than perfect. The line by which the demarcation of the demised land is effected is thick. The natural and, in my view, reasonable use to which that line should be put is to treat its outside limits as representing the delineated limits of the demised land. No doubt the professional surveyor would look askance at the map if he was asked to go away and fix on the ground a line that represents, as nearly as may be, the actual boundary of the demised land on the surface of the earth. He would, understandably enough, point out the room for error that such a survey would carry. In particular, he would emphasise the lack of sufficient points of reference by which to guide himself with complete safety. But, I apprehend, given that where matters of doubt arise they are to be resolved in favour of the Crown, I can see no reason why the delineation shown should not be translated into a boundary in fact.

On viewing the line without artificial aids to vision, it appears that the delineation followed the then limits of the land. Let it, indeed, be assumed that it was the intention of all concerned that the delineation should be determined by reference to those limits. The fact remains that a delineation was used; the seaward boundary was not left to appear as the then natural limits of the land.

In my opinion, therefore, the terms of the conveyancing instrument upon which the plaintiff's title depends excludes, by necessary implication, the operation of the doctrine of accretion.

The conclusion above stated is, in my opinion, strengthened by the reference in the lease to "five hundred acres or thereabouts". The authorities show a wide variety of interpretations of the expression "or thereabouts". It would be of little use to discuss those authorities because the most that they show is that the expression may receive

a wide or a narrow construction according both to the context in which it appears and to the subject matter to which it relates. In all the circumstances of the present case, although the question seems to me more debateable than the meaning of the word "delineate", I incline to the view that 520 acres is not correctly described by the expression "500 acres or thereabouts", though I should not wish to found my judgment on that conclusion if there were nothing else in the appeal.

A further difficulty is encountered when a Court attempts to apply the doctrine of accretion to the facts of this case. I am ready to assume on principle that, in favourable circumstances, the doctrine of accretion may operate, through the reversionary title, so as to confer its benefits on the lessee. But it would ordinarily do so, I apprehend, where the respective titles to the fee simple estates in the land were held by different persons - I leave out of account accretion to littoral land. But in this case, both the land covered by the lake and the land from which the lease was taken have, at all material times, been held by the Crown as allodial property. As at present advised, therefore - although counsel have not so far closely focussed their arguments on this facet of the case, it would seem to me that the subject lands can not, whatever has happened since the root of title to the lease was created, and whatever is the purview of the doctrine of accretion, be affected by rules derived from that doctrine.

Then there is the important question of the sand drifts and their relevance for the doctrine of accretion. I agree with Zelling J. that they cannot be brought within the compass of that doctrine in its traditional form. I was, for a time, attracted to a possible argument that, by reason of the very different geographical conditions that apply in Australia, the common law rules governing the process of accretion could be regarded as having been modified by custom (compare Cardozo's "The Growth of the Law" Chapter V notes (12) to (15), but no argument was mounted to that effect; and, in any event, sufficient material upon which to found it is lacking.

For the rest, I agree with Zelling J.'s judgment and in the order he proposes.

In the Supreme Court

No. 15
Judgment of the Full Court allowing the Appeal - 29th May 1979.

No. 15

Judgment of the Full Court allowing the Appeal - 29th May 1979

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1975

B E T W E E N :

Southern Centre of Theosophy Incorporated — Plaintiff

- and -

The State of South Australia — Defendant

BEFORE THE HONOURABLE THE CHIEF JUSTICE (MR. JUSTICE KING)
THE HONOURABLE MR. JUSTICE ZELLING AND
THE HONOURABLE MR. JUSTICE WELLS
TUESDAY THE 29TH DAY OF MAY 1979

THIS APPEAL by the abovenamed defendant from the judgment of the Honourable Mr. Justice Walters given and pronounced on the 7th day of August 1978 coming on for hearing before the Full Court of this Court on the 5th and 6th days of April 1979 UPON READING the Notice of Appeal herein dated the 21st day of August 1978 AND UPON HEARING Mr. Cramond of counsel for the defendant and Mr. Matheson Q.C. and Mr. Dyki of counsel for the plaintiff THE COURT DID RESERVE JUDGMENT and the same standing for judgment this day THIS COURT DOTH ORDER that the said appeal be allowed and that the said judgment of the Honourable Mr. Justice Walters be set aside and that in lieu thereof the plaintiff's action be dismissed and judgment be entered for the defendant AND DOTH ADJUDGE the same accordingly AND IT IS ORDERED that the question of costs be adjourned until 10.00 a.m. on the 30th day of May 1979.

BY THE COURT

Sgd. R.E. Greger
CHIEF CLERK

STAMPED SUPREME COURT

THIS JUDGMENT is filed by FISHER JEFFRIES & CO. of Epworth Building, 33 Pirie Street, Adelaide. S.A. 5000 Solicitors for the Plaintiff.

No. 16

Order of the Full Court for costs
30th May, 1979

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1975

B E T W E E N :

Southern Centre of Theosophy Incorporated — Plaintiff

- and -

The State of South Australia — Defendant

BEFORE THE HONOURABLE THE CHIEF JUSTICE (MR. JUSTICE KING)
THE HONOURABLE MR. JUSTICE ZELLING AND
THE HONOURABLE MR. JUSTICE WELLS
WEDNESDAY THE 30TH DAY OF MAY 1979

THIS APPEAL by the abovenamed defendant from the judgment of the Honourable Mr. Justice Walters given and pronounced on the 7th day of August 1978 coming on for further hearing before the Full Court this day on the question of costs AND UPON HEARING Mr. Cramond of counsel for the defendant and Mr. Matheson Q.C. and Mr. Dyki of Counsel for the plaintiff THIS COURT DOTH ORDER that the plaintiff pay to the defendant 75% of its costs including the costs of the trial and this appeal to be taxed.

BY THE COURT

Sgd. R.E. Greger
CHIEF CLERK

STAMPED SUPREME COURT SOUTH AUSTRALIA

THIS ORDER is filed by FISHER JEFFRIES & CO. of Epworth Building, 33 Pirie Street, Adelaide, S.A. 5000 Solicitors for the Plaintiff.

In the Supreme Court

No. 17
Notice of Motion for Leave to Appeal to Her Majesty in Council 19th June 1979

No. 17

Notice of Motion for Leave to Appeal to Her Majesty in Council - 19th June 1979

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1975

B E T W E E N :

Southern Centre of Theosophy Incorporated — Appellant

- and -

The State of South Australia — Respondent

TAKE NOTICE that the Full Court will be moved on Monday the 25th day of June 1979 at 10.30 o'clock in the forenoon or so soon thereafter as Counsel can be heard by Counsel on behalf of the abovenamed Southern Centre of Theosophy Incorporated for orders:

1. That pursuant to Rule 2 of the Order in Council made on the 15th day of February 1909 the Southern Centre of Theosophy Incorporated be granted leave to appeal on such conditions as the Court shall impose to Her Majesty in Council from the judgment of the Full Court comprising the Honourable the Chief Justice, the Honourable Mr. Justice Zelling and the Honourable Mr. Justice Wells given in the abovenamed action on the 29th and 30th days of May 1979 whereby the Full Court allowed an appeal from the judgment of the Honourable Mr. Justice Walters given and pronounced on the 7th day of August 1978 and did order that the said judgment be set aside and that in lieu thereof the appellant's action be dismissed and judgment be entered for the respondent and did order that the appellant pay to the respondent 75% of its costs.

2. That upon proof of the compliance by the Southern Centre of Theosophy Incorporated with such conditions as the Court shall impose the Southern Centre of Theosophy Incorporated be granted final leave to appeal to Her Majesty in Council from the aforesaid judgment of the Full Court.

3. Such further or other order as to the Court may seem fit.

DATED the 19th day of June 1979.

FISHER JEFFRIES & CO.

Per: N. Dyki

33 Pirie Street,
Adelaide.
Solicitors for the Southern Centre of Theosophy Incorporated

To: Graham Clifton Prior,
Crown Solicitor,
33 Franklin Street,
Adelaide.

THIS NOTICE OF MOTION is filed by FISHER JEFFRIES & CO. of Epworth Building, 33 Pirie Street, Adelaide. Solicitors for the Appellant.

No. 18

Order granting conditional leave to appeal to Her Majesty in Council - 6th December 1979

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1975

B E T W E E N :

Southern Centre of Theosophy Incorporated — Plaintiff

- and -

The State of South Australia — Defendant

BEFORE THE HONOURABLE THE CHIEF JUSTICE (MR. JUSTICE KING)
THE HONOURABLE MR. JUSTICE ZELLING AND
THE HONOURABLE MR. JUSTICE WELLS
THURSDAY THE 6TH DAY OF DECEMBER 1979

UPON MOTION made unto this Court this day on behalf of the abovenamed plaintiff for leave to appeal to Her Majesty in Council from the judgments herein of the Full Court of this Court dated the 29th and 30th days of May 1979 pursuant to notice of motion dated the 19th day of June 1979 AND UPON HEARING Mr. Dyki of Counsel for the plaintiff and Mr. Cramond of Counsel for the defendant THIS COURT DOTH ORDER that the plaintiff be and it is hereby granted conditional leave to appeal to Her Majesty in Council

upon condition that the plaintiff do within 21 days from this date enter into good and sufficient security to the satisfaction of the Court in the sum of £500 (sterling) for the due prosecution of the appeal and the payment of all such costs as may become payable to the defendant in the event of the plaintiff not obtaining an order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or of Her Majesty in Council ordering the plaintiff to pay the costs of the appeal (as the case may be).

BY THE COURT

Sgd. R.E. Greger

CHIEF CLERK

STAMPED SUPREME COURT SOUTH AUSTRALIA

THIS ORDER was filed by FISHER JEFFRIES & CO. of Epworth Building,33 Pirie Street, Adelaide. Solicitors for the Southern Centre of Theosophy Incorporated.

No. 19

Order granting final leave to appeal to Her Majesty in Council - 6th December 1979.

No. 19

Order granting final leave to appeal to Her Majesty in Council - 6th December 1979

SOUTH AUSTRALIA

IN THE SUPREME COURT

No. 686 of 1975

B E T W E E N :

Southern Centre of Theosophy Incorporated — Plaintiff

- and -

The State of South Australia — Defendant

BEFORE THE HONOURABLE THE CHIEF JUSTICE (MR. JUSTICE KING)
THE HONOURABLE MR. JUSTICE ZELLING AND
THE HONOURABLE MR. JUSTICE WELLS
THURSDAY THE 6TH DAY OF DECEMBER 1979

UPON MOTION made unto this Court this day on behalf of the abovenamed plaintiff for final leave to appeal to Her Majesty in Council from the judgments herein of the Full Court dated the 29th and 30th day of May 1979 pursuant to notice of motion dated the 19th day of June 1979

AND UPON HEARING Mr. Dyki of Counsel for the plaintiff and Mr. Cramond of Counsel for the defendant AND this Court being satisfied that the condition upon which conditional leave to appeal was granted by order dated the 27th day of June 1979 has been complied with THIS COURT DOTH ORDER that the plaintiff be and is hereby granted leave to appeal to Her Majesty in Council.

BY THE COURT

10 Sgd. R.E. Greger

CHIEF CLERK

STAMPED SUPREME COURT SOUTH AUSTRALIA

THIS ORDER was filed by FISHER JEFFRIES & CO. of Epworth Building, 33 Pirie Street, Adelaide. Solicitors for the Southern Centre of Theosophy Incorporated.

No. 38 of 1980

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

B E T W E E N :

SOUTHERN CENTRE OF THEOSOPHY INCORPORATED

(Plaintiff) Appellant

- and -

THE STATE OF SOUTH AUSTRALIA

Defendant (Respondent)

RECORD OF PROCEEDINGS

HEMPSONS,
33 Henrietta Street,
London W.C.2.

Solicitors for the Appellant

EGERTON SANDLER, SUMMER & CO.
17-18 Dover Street,
London W.1.

Solicitors for the Respondent