

HAGUE'S HISTORY
OF THE LAW
IN
SOUTH AUSTRALIA
1837 – 1867

Ralph M. Hague

With a foreword
by the Honourable Justice John Perry

With a foreword to the 2019 Hardback edition
by the Honourable Justice Martin Hinton

And a biography of the author
by Helen Whittington

Illustrations compiled and captioned
by Bruce Greenhalgh



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Contents

Acknowledgments v

Preface vii

Foreword ix

Foreword to the 2019 Hardback Edition xi

Chapter

- 1 Historical Background
 - 1.1 'It is unique' 1
 - 1.2 'that part of Australia' 17
 - 1.3 Quarter deck government 22
 - 1.4 'most romantic and beautiful' 34
- 2 Sir John Jeffcott
 - 2.1 A duel 51
 - 2.2 'impossible to respect' 58
 - 2.3 'a gentleman by birth' 68
 - 2.4 In the absence of the Judge 78
 - 2.5 of anarchy and confusion' 92
- 3 Henry Jickling
 - 3.1 Centipedes and spectacles 107
 - 3.2 More squabbling 111
 - 3.3 'the gentle Jickling' 121
 - 3.4 'The Southern Australian' 129
 - 3.5 'an inglorious end' 143
- 4 Sir Charles Cooper
 - 4.1 'The Mildew Estate' 152
 - 4.2 A second judge 167
 - 4.3 'Titles, salaries and pensions' 183
 - 4.4 English law, Australian gums 194
- 5 Mr Justice Boothby
 - 5.1 'Twelve hungry men' 219
 - 5.2 'the Torrens on fire' 253
 - 5.3 'the ablest man' 320
 - 5.4 'one of the blackest spots' 342
 - 5.5 'grave questions' 354
 - 5.6 'A most horrible stew' 362
 - 5.7 Contested copper and stolen sheep 392
 - 5.8 'invalidity trouble' 400
 - 5.9 Stow v Boothby 426
 - 5.10 Referred to the Privy Council 461

Chapter

5	5.11	‘the desert rose’	475
	5.12	‘The Hinde and the Panther’	509
6	The Supreme Court		
	6.1	The Jurisdiction of the Supreme Court	530
	6.2	The Procedure of the Supreme Court	542
	6.3	The Officers of the Supreme Court	562
	6.4	The Site of the Supreme Court	575
	6.5	The Supreme Court Library	589
	6.6	Circuit Courts	596
7	The Court of Appeals 605		
8	Courts of Inferior Jurisdiction 670		
9	The Law Officers of the Crown 709		
10	The Legal Profession 727		
11	The Aborigines and the Law 751		
12	Registration of Deeds and the Real Property Act 779		
13	The Gaol 798		
Biography of the author – Ralph Meyrick Hague 811			
List of illustrations 883			
Endnotes 893			
Index 925			

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The abbreviations listed above are used to acknowledge the source of the illustrations in the main text. A full list of illustrations is included – see contents.

It is not unusual for a long time to elapse between an author finishing a work and that work being published. But the nearly seventy years it has taken for Ralph Meyrick Hague's *History of the Law in South Australia 1837 – 1867* to be published is notable and begs some explanation. That explanation is even more warranted when it is considered that this is a posthumous publication of a work that failed in its initial goal of gaining a doctorate for its author.

When Hague submitted his *History* to the University of Adelaide for the Bonython Prize (which was the Law Faculty's de facto doctorate) in 1936 he did so as somebody accustomed to academic success and with designs on a career in academia. The rejection of his work, which had less to do with its merit than with the narrow thinking of the time, thwarted that career and might have consigned the *History* to oblivion. But Hague understood the value of his work for he not only deposited a copy with what became the State Library but also continued to research the subject using the *History* as a basis for further monographs.

Over time others discovered the value of Hague's work and slowly it became recognized for what it was; a pioneering work born of meticulous and original research and delivered in an elegant and sometimes witty style. It became one of the foundations of a growing appreciation and study of Australian legal history.

Until this publication, however, the *History* remained in the form that Hague deposited it with the State Library; namely some 1500 pages of typewritten manuscript. In this form the *History* is a daunting work with a bare table of contents as its only navigational tool. The *History* was worthy of publication in a more attractive and accessible form. The decision, then, by the John Bray Law Chapter and, in particular Justice Gray, was more overdue than surprising. This publication aims to honour Hague, preserve his work and to take it to a wider audience.

The publication is distinguished from the usual mode of history presentation in a number of ways. Firstly, very little editing of Hague's manuscript has been done. Discrepancies between sections of the typescript, reflecting preparation over several years, have been rendered consistent throughout. Typographical errors have been corrected and the punctuation around Hague's interpolations into quoted texts has been simplified. Apart from these small changes the publication is faithful to Hague's typescript.

Preface

Performing a fuller edit was considered but rejected because of a desire to honour the author and preserve his unique style. The endnotes presented are essentially those listed in the typescript, which were incomplete and less than detailed. It was not practical to produce a full and detailed set of references although some amendments were made. Accordingly, the endnotes are not of a standard that would normally be expected. They are reproduced, however, for the possible benefit they may give to researchers. Illustrations and marginal notes were included to give the book a visual dimension, and to assist the reader. Images and reproductions of documents are used to convey an understanding of the times Hague described in words alone

Hague originally titled his work *The Early History of Law in South Australia*. It was retitled, possibly when deposited at the State Library, as *History of the Law in South Australia 1837 – 1867*. This second title is the one the work is commonly known by and is the title used in most (if not all) references to the *History* and because of this the decision was made to use the latter title.

Helen Whittington's biography of Hague was produced to satisfy the anticipated desire of readers to know something of the man who wrote the *History*. It also recognises that the story of the *History* and Hague's life are themselves part of South Australian legal history. It was not written as an authoritative biography but as a means of understanding the man not only through his work and career but also through his interests and relationships.

This publication is, in some ways, an imperfect work. The only real alternative to this, though, was not to publish the *History* at all and therefore to continue the neglect of this important work and to deny the benefits its publication creates. The publication should not be judged on its imperfections but on how well it educates, entertains and fosters a greater understanding and study of South Australian legal history.

Bruce Greenhalgh
Historical Collection Librarian
Supreme Court Library South Australia

Ralph Hague's *History of the Law in South Australia 1837-1867* is a fascinating and perceptive narrative of the early legal history of South Australia

Completed in about 1936, the work remained unpublished at the time of his death in March 1997.

Hague begins with an account of the establishment of the province of South Australia. This was the culmination of the earnest endeavours of a group of idealists, who, as he reminds us, were dubbed disparagingly by James Stephen, as the Wakefield Theorists.

In the early chapters, he lays bare the intricate obscurities of the Foundation Act, no doubt a product in part of the unedifying wrangles between the promoters and the Colonial Office. His description of this is brought into sharp relief by a series of graphic pen portraits of the major protagonists such as Gilles, Wakefield, Gouger, Lord Howick and Lord Stanley.

He is equally graphic in his portrayal of the first Governors, beginning with Hindmarsh. He depicts Hindmarsh in a cruelly unflattering light, presiding over what he describes as "administrative pandemonium", marked by endless bickering between public officials.

But it is in his description of the judges and court officials, and their dealings with each other and with the Commissioners, wherein lies the strength of this work.

Hague's brush darts across the canvas, painting pictures of eccentric, larger than life characters. His description of their personalities and their lives causes me to reflect on the staid, carefully correct existence which most judges lead today.

It is hard to imagine such an adventurous and impetuous figure as Sir John Jeffcott, the province's first judge, who killed a man in a duel and stood in the dock on a charge of murder, taking up a position on today's Supreme Court bench.

Jeffcott's dramatic and untimely death by drowning while navigating the swirling breakers of the Murray mouth, left acting Justice Henry Jickling marooned on the Supreme Court bench. Hague quotes the description of Jickling which appeared in *The South Australian* as a man "inebriated with the exuberance of his own verbosity".

Foreword

In his treatment of Jeffcott's successors in office, it is Hague's description of Mr Justice Boothby which is perhaps the most illuminating. The reader is left in no doubt about the extent of the havoc wrought by Boothby's eccentric ways and stubborn adherence to his bizarre views as to the application of English law to the Colonies.

Replete with quotations from contemporary journals, embellished by his own sharply perceptive writing, this book is a testimony to the dedicated scholarship of a man I knew as a quiet, unassuming lawyer whose talents are only now being recognised.

The book makes an invaluable contribution to our appreciation of the early legal history of the State.

Full credit is due to the John Bray Law Chapter of the Alumni Association of the University of Adelaide, more particularly to its former President, Justice Tom Gray, whose idea it was to publish the book; to Bruce Greenhalgh of the Supreme Court Library staff who prepared the manuscript for publication and selected the illustrations; and to Helen Whittington who wrote the biography of the author which is incorporated in the book.

The Honourable Justice John Perry
Supreme Court Chambers
Adelaide

Foreword to the 2019 Hardback Edition

I was very pleased to be asked to write a brief foreword to the second edition of *Hague's History of the Law in South Australia 1837-1867*.

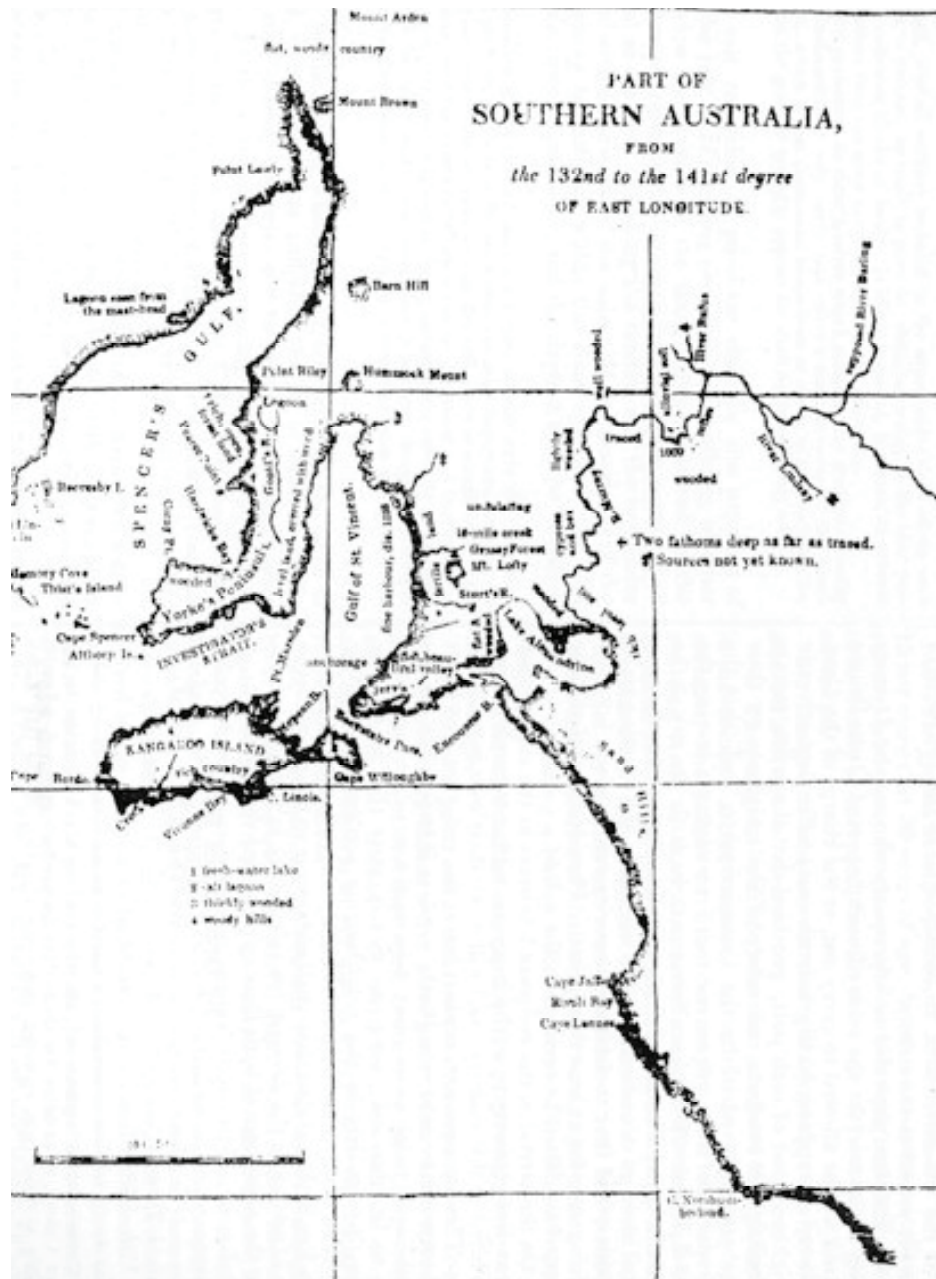
I recall first diving into *Hague's History* when as Solicitor-General I was required to trace the origins and content of the executive power of the State in order to understand the power that a contemporary Governor may wield on the advice of his or her Ministers.

On another occasion I turned to Hague for his treatment of the establishment of the Supreme Court for the purpose of tracing the scope and content of the Court's jurisdiction.

More recently it was the work Hague had done on the first petit and grand juries that assisted in an analysis of the protection afforded by trial by jury.

In each case the origins of important legal institutions were critical to understanding the structure and purpose of contemporary equivalents. From its very beginning, the Province-cum-State has enjoyed a constitutional structure intended to allow for its people to grow and flourish. When change is proposed, as it is from time to time, we are fortunate to have *Hague's History* on hand so we can comfortably plot the course from where we have come and better pilot our way forward.

The Honourable Justice Martin Hinton
Supreme Court Chambers
Adelaide



Part of Southern Australia, from the 132nd to the 141st degree of east longitude, (detail) from a pamphlet published by the Colonization Commissioners in 1835 addressed to "small farmers and others" promoting the merits of emigration to South Australia (SLSA)

The Province of South Australia was created pursuant to the provisions of an Act of the Imperial Parliament, passed in 1834.¹ By universal consent this Act has been condemned — by some as an obscure and misshapen blunder, by others as "a document of masterly ambiguity, if not of deep guile" — and to the pernicious influence of its dubious drafting have been traced many of the troubles which threatened to ruin the colony at its outset. "The chief and original error" — reported the Select Committee of the House of Commons which in 1841 inquired into the turbid affairs of South Australia — "was committed in the Act itself."²

George Fife Angas called it "a dead letter on the Statute Book, an order of the Imperial Government to make bricks without straw"—expressions which sufficiently show his opinion of it, although in truth the Act was far from being a mere inert and stillborn legislative corpse.³ Sir Charles Cooper declared it to have been the cause of the virulent ill-feeling which racked the colony during the governorship of Captain John Hindmarsh. The Act, he said, in the tone of mild expostulation which was almost the severest form of disapprobation of which he was constitutionally capable: "... was constructed in England, whose legislators are famed for their wisdom, but when it was opened it created surprise".⁴

Nearly a century later, when it came under the critical scrutiny of the High Court, the Act was still creating surprise. "It seems very singular to me," said Sir Samuel Griffith as he puzzled over it. "It is unique," he was assured by Sir Josiah Symon.⁵

When an attempt was made to put the Foundation Act into operation, its construction was discovered to be to the last degree difficult and obscure. Its twenty-six sections formed a series of trous-de-loup upon the spikes of which those whose duty it was to expound the statutes became successively impaled. The well-known method of dealing with loose acts of Parliament is to drive a coach and six through them. Adopting this metaphor, it may be said that there was for some years a steady stream of traffic through the Foundation Act; nor was it one-way traffic only. The coaches frequently went in different directions. They all drove into the labyrinth at the same entrance; they did not all emerge at the same exit. Some did not emerge at all, but went round and round in a "circulus inextricabilis", seeking in vain a practicable way out. "An Act of Parliament can do no wrong," loyally said Lord Holt, but honesty compelled him to add that "it may do several things that look pretty odd", and the Foundation Act illustrated the second half of his dictum.

Why was the Act such a broad highway to doubts and difficulties? Why was Coke's admirable precept neglected, that Acts of Parliament should be plainly and clearly, and not cunningly and darkly, penned? Dr Grenfell Price half-heartedly hints at a sinister plot by Edward Gibbon Wakefield and his brother Daniel, who prepared the first draft of the Act, deliberately to produce ambiguity, presumably in order to give a wider scope for the unfettered development of their schemes.⁶ This seems an opinion which is unsupported by fact, unjust to the Wakefields and quite unnecessary for the solution of the question. Successful ambiguity would be even harder to attain than honest precision. No doubt Edward Gibbon Wakefield was not a man to have scrupled to stoop to such a course had he thought it would further his purposes, but his heart was set on the success of his work, and he was too great a statesman not to foresee the disasters which would attend a colony whose constitutional foundations were laid in uncertainty.

The shortcomings of the Act can be fully and reasonably explained without resorting to any such theory.

In the first place, notwithstanding the copious resources of legal verbiage, it is almost impossible to prepare an act that will meet all exigencies and will be impervious to attack. Every day's experience teaches us that the most reasonable expectations may be baffled by events which could not be anticipated. That there would be sins of omission in the Act was inevitable. No-one in his right senses could contend that there should have been compressed into a two-page statute the whole of a complicated scheme for the establishment of a colony, upon a hitherto untried system, in an unexplored wilderness at the other side of the world. No complaint could be made that it was a mere skeleton: the charge is that it was a skeleton which had some bones missing altogether, and many others very poorly articulated. In part this was due to the maltreatment it received in the course of its passage through the Colonial Office and through Parliament. The Bill in its final form was vastly different from the original draft. "We struck out this provision"—wrote Wakefield—"because it displeased somebody, altered another to conciliate another person, and inserted a third because it embodied somebody's crotchets."⁷

The colonists were tired of waiting. "The ardour of individuals," James Mill soundly observed, "where anything is to be risked, is more easily excited than upheld." Daily the ranks of prospective emigrants were thinned by vexatious and expensive delays. The survivors were desperate for an act at almost any cost, provided only there was left sufficient of their original plan to enable them to hope for the successful foundation of a colony on the lines which they proposed, and they were as little inclined to pay attention to intricate questions of legal or constitutional verbiage as they were to the gloomy predictions of the Duke of Wellington, implicit in his laconic

statement that if they wanted to go to South Australia, and make damned fools of themselves, let them.⁸

To cap all, the Act was the tainted offspring of a miserable and vicious compromise between two parties whose views upon the government of the proposed colony were as immiscible as oil and water. The Colonial Office maintained that South Australia, like other Crown colonies, should be ruled from England, through a governor and nominated Council. Contrariwise, an essential feature of the Wakefield theory of colonisation (the superiority of which, it was claimed, South Australia would demonstrate) was colonial self-government, and "We are being sold to the Colonial Office!" was the faction cry of those who were in the habit of congregating about the Adelphi to discuss the new principles. James Stephen ("Mr Mother-Country", "Mr Over-Secretary Stephen", "King Stephen", as he was variously called) has usually been taken as typifying the Colonial Office, and he was cautious, conservative, aristocratic; the majority of those who had actively taken up the scheme for the founding of South Australia were radicals, whose enthusiasm Stephen disliked, and whose political principles he distrusted.

(Sir) James Stephen
(1789–1859)
An opponent of
Wakefield's scheme,
Stephen served in the
Colonial Office as,
variously, counsel,
assistant undersecretary
and undersecretary
between 1825 and 1847.



The Adelphi was an important urban development designed by the Adam brothers in 1768 for a section of the Thames River bank. The South Australian Commissioners' office in the precinct was the site of much early discussion on the colony. Once a favoured area for writers and artists, the Adelphi has all but been demolished. (SLSA)

Historical Background

“The Wakefield theorists considered that, in attempting to wring a new colony from the Colonial Office, they were struggling with “the judgments of ignorance, the insults of pride, and the delays of idleness” Stephen and his satellites believed that they were fighting a handful of revolutionary dreamers, who desired, from reasons by no means devoid of self-interest, to found a colony which would become a charge upon the mother-country, and would “erect within the British monarchy a government purely republican”.’⁹

Years of higgling took place. The Colonial Office doggedly insisted that the government of the colony and the administration of the law must be left in the hands of the Crown, and that no part of the expense of the colony should fall upon England. Necessarily the plans and schemes which were presented by the Wakefield party for the approval of the Secretary of State became successively less and less democratic in their nature.¹⁰

Edward Gibbon Wakefield
(1796–1862)
Wakefield is shown here displaying the style that may have tempted a young heiress. His more admirable pursuits included his theorizing on colonization that lead to the formation of the South Australian Association and the establishment of the Province. Drawing by A Wivell, London, 1823. (NLA)



Negotiations had been begun in 1831, not by Wakefield but by Anthony Bacon, an officer who had fought at Waterloo and was subsequently to distinguish himself in the struggle in Portugal between Don Miguel and Pedro IV. His plan for founding an Australian colony appears to have been modelled on the South Sea Bubble Company, "for carrying on an Undertaking of Great Advantage, but no one to know what it is", and Major Bacon himself (like Arnold Bennett, who used modestly to say that the best was good enough for him) asked only to be appointed the Governor of the colony, with the power to make its laws and appoint its officers. The Colonial Office frowned on this adventure, and coldly replied that no encouragement could be given:

'... to schemes which have for their object the extension of the number of His Majesty's settlements abroad, and which, whether founded in the outset by individuals, or by the Government, are always liable to end in becoming in some way or other a source of expense to the revenue of this country.'¹¹

Bacon then joined the party headed by Wakefield and Robert Gouger, and in June 1831 Gouger forwarded to Lord Howick a draft of a proposal to establish a colony by means of a chartered company, to carry out Wakefield's principles as to land and emigration. A local elective assembly was suggested, to be established when the male adult population reached 5,000 (later raised to 10,000). The first Governor was to be recommended by the company and appointed by the Crown, and, as a sop to make the request for an assembly more palatable, it was proposed that the Governor, until the meeting of the Assembly, should have supreme power "unencumbered by any Colonial Council to divide and weaken his responsibility". Until one year after the meeting of the local Assembly, all the expenses of government would be borne by the company; thenceforward the Governor would be appointed by the Crown, and the colonists would pay for their own government.

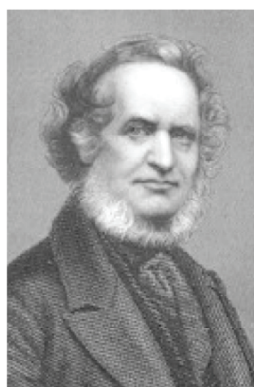
This scheme was received with favour, but while the matter was still under official consideration the colonisers prematurely announced that the Government had approved of the scheme. When an explanation was requested, Bacon admitted that the assertion of the Government's sanction had been made to attract capital, and the Colonial Office would not go on with what looked suspiciously like a mere scheme for making money for its promoters.¹²

In July 1832 the provisional committee of the South Australian Land Company put forward a proposal for a chartered company, with a capital of £500,000. The company wanted power to constitute courts and to make laws for the government of the colony, until the population reached 50,000, when an assembly was to be established, under a governor nominated by the Crown. For revenue purposes a perpetual tax of 6d per acre would be reserved upon every original sale of land.¹³

Robert Gouger
(1802–1846)
Gouger was an important
campaigner for the
establishment of South
Australia and publicist of
Wakefield's theories. He
arrived in South Australia
in November 1836 as the
first Colonial Secretary
and Member of the
Executive Council.
Appointed a Justice of the
Peace on 2 January 1837
he decided the first case
in the colony.

Historical Background

James Stephen had strong objections. He disliked the system of chartered companies. Adam Smith had said that "the government of an exclusive company of merchants is, perhaps, the worst of all governments for any country whatever", and Stephen agreed with him. He thought the scheme "wild and impracticable", the proposals far too wide. There was no security for the proper use by the company of its powers of legislation, and the requests of the promoters showed "either a remarkable heedlessness or a singular degree of confidence". In his view the proper form of government of such a colony must be an official council, to be superseded later, perhaps, by an assembly, but not until the colony was firmly and successfully established. As for the power to erect courts, that could not possibly be granted; "the administration of justice ought to be studiously reserved to His Majesty".¹⁴



Lord Stanley (14th Earl of Derby)
(1799–1869)
Edward George Geoffrey Smith Stanley's long political career as a Conservative saw him serve as Prime Minister three times. Before this he was Colonial Secretary from 1833 to 1834 and from 1841 to 1845. (NLA)

Upon these objections being communicated, the company immediately abandoned the obnoxious claims, "reserving only the principles of submitting all grants of land to a sale, the application of the proceeds of sale to the furtherance of emigration, and the eventual privilege of a legislative assembly". The reply was final:

"The very readiness with which the objectionable points have been abandoned, contrasted with their prominent appearance in the plan as fundamental principles, unavoidably induces in the mind of the Secretary of State a serious misgiving as to the maturity of their knowledge and counsels on the very important subject which they have submitted to his consideration ... It does not appear to His Lordship that any advantage will arise from continuing the correspondence on this subject."¹⁵

It was not until Lord Stanley became Secretary of State in 1833 that the proposals for a joint stock company could be renewed, with modified provisions as to the government of the colony. All the public officers were to be appointed by the Crown, and it now appeared "highly desirable that the whole power and responsibility of the Government should devolve upon the Governor until the Colony shall be thought sufficiently advanced to receive the grant of a legislative assembly". Of the subscribed capital of £500,000, one half was to be employed in the purchase of lands and the other half used as a fund for the government of the colony and the construction of public works, the advances made to the colony to be considered a public debt. This plan the Colonial Office would not consider unless the company agreed to purchase the land, whether they settled it or not, by fixed instalments to be paid within a limited period—a demand with which the company could not comply.¹⁶

In November 1833 the South Australian Association was formed, and their proposals were laid before the Colonial Office in February 1834. The powers they asked were much less extensive than those of

previous schemes. A corporation of trustees, the South Australian Commission, was to manage the economic side of the scheme and have power to make laws, constitute courts and appoint judges and officers, but their laws were to be placed before the Colonial Office for approval before being transmitted to the colony. The Crown would appoint the first Commissioners and vacancies would be filled by the remainder of the Commissioners, subject to the Crown's approval.¹⁷

Stanley replied that, unless the Government of the colony was left entirely in the hands of the Crown until it was able to govern itself, he would decline to proceed any further.¹⁸ "He would only allow the economic side of Wakefield's system to be based on the centralised administration of a Crown Colony."¹⁹ All hope of a chartered colony had therefore to be abandoned. "It was clear to us," said Wakefield, "that the part of our South Australian plan to which the Colonial Office most objected was a provision for bestowing on the colonists a considerable amount of local self-government. As we could not move an inch without the sanction of that Office, we now resolved to abandon the political part of our scheme, in the hope of being able to realise the economical part."²⁰

Although the Wakefield party grudgingly consented to cede the power of government to the Colonial Office, it remained to be decided how the expenses of government were to be met. Provision for this had been made without difficulty in the schemes for a chartered company, but now the only means of obtaining money to establish and carry on the government of the colony was to borrow on the security of the land sales and the future revenue of the colony, for the Colonial Office flatly refused to give any financial assistance. Upon this point a deadlock was imminent:

'Stanley, on the one hand, would not move until sufficient money was subscribed and guaranteed to carry on the colonial government for ten years, so as to prevent all expense to the mother-country. The Association, on the other hand, could not promise to raise the money until they knew what kind of an Act of Parliament they were going to get.'²¹

But in June 1834 Stanley was succeeded at the Colonial Office by Thomas Spring Rice, with whom terms of compromise were arranged. A Bill purporting to embody these terms was introduced into the House of Commons and, after a hazardous passage through Parliament, it became law on 15th August 1834.

So far the attitude of the Colonial Office had been clear and definite - the government of the colony must be left to the Crown. Upon this point it appeared to everyone that the Wakefield party, whilst retaining their principles as to land and emigration, had been forced to give way. The Foundation Act, however, proved to have quite unexpected qualities, and the Secretary of State gradually discovered that, owing to the language used in the Act, he had

Thomas Spring-Rice
(1790–1866)
A Whig politician, Spring-Rice was only Colonial Secretary for a few months but spent over four years as Chancellor of the Exchequer up to 1839.

Historical Background

retained merely the shadow of authority while the substance had escaped him and had passed into the hands of the South Australian Commissioners.

Following 8 pages – The Foundation Act (4 & 5 Wm IV c.95)



ANNO QUARTO & QUINTO

GULIELMI IV. REGIS.

C A P. XCV.

An Act to empower His Majesty to erect *South Australia* into a *British* Province or Provinces, and to provide for the Colonization and Government thereof.

[15th August 1834.]

WHEREAS that Part of *Australia* which lies between the Meridians of the One hundred and thirty-second and One hundred and forty-first degrees of East Longitude, and between the Southern Ocean and Twenty-six Degrees of South Latitude, together with the Islands adjacent thereto, consists of waste and unoccupied Lands which are supposed to be fit for the Purposes of Colonization: And whereas divers of His Majesty's Subjects possessing amongst them considerable Property are desirous to embark for the said Part of *Australia*: And whereas it is highly expedient that His Majesty's said Subjects should be enabled to carry their said laudable Purpose into effect: And whereas the said Persons are desirous that in the said intended Colony an uniform System in the Mode of disposing of Waste Lands should be permanently established: Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That it shall and may be lawful for His Majesty, with the Advice of His Privy Council, to erect within that Part of *Australia* which lies between the Meridians of the One hundred and thirty-second and One hundred and forty-first Degrees of East Longitude, and between the Southern Ocean and the Twenty-six Degrees of South Latitude, together with all and every the Islands adjacent thereto, and the Bays and Gulfs thereof, with the Advice of His Privy Council, to establish One or more Provinces and to fix the respective Boundaries of such Provinces; and that all and every

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Person

His Majesty
may establish
One or more
Provinces in
that part of
Australia
herein
described.

Person who shall at any Time hereafter inhabit or reside within His Majesty's said Province or Provinces shall be free, and shall not be subject to or bound by any Laws, Orders, Statutes, or Constitutions which have been heretofore made, or which hereafter shall be made, ordered, or enacted by, for, or as the Laws, Orders, Statutes, or Constitutions of any other Part of *Australia*, but shall be subject to and bound to obey such Laws, Orders, Statutes, and Constitutions as shall from Time to Time, in the Manner herein-after directed, be made, ordered, and enacted for the Government of His Majesty's Province or Provinces of *South Australia*.

His Majesty may empower Persons resident in the Colony to make Laws.

II. And be it further enacted, That it shall and may be lawful for His Majesty, His Heirs and Successors, by any Order or Orders to be by Him or Them made with the Advice of His or Their Privy Council, to make, ordain, and, subject to such Conditions and Restrictions as to Him and Them shall seem meet, to authorize and empower any One or more Persons resident and being within any One of the said Provinces to make, ordain, and establish all such Laws, Institutions, or Ordinances, and to constitute such Courts, and appoint such Officers, and also such Chaplains and Clergymen of the Established Church of *England* or *Scotland*, and to impose and levy such Rates, Duties, and Taxes, as may be necessary for the Peace, Order, and good Government of His Majesty's Subjects and others within the said Province or Provinces: provided that all such Orders, and all Laws and Ordinances so to be made as aforesaid, shall be laid before the King in Council as soon as conveniently may be after the making and enacting thereof respectively, and that the same shall not in anywise be contrary or repugnant to any of the Provisions of this Act.

Such Laws to be laid before the King in Council.

Commissioners may be appointed to carry this Act into execution.

III. And be it further enacted, That it shall be lawful for His Majesty, His Heirs and Successors, by Warrant under the Sign Manual, to be countersigned by His Majesty's Principal Secretary of State for the Colonies, to appoint Three or more fit Persons to be Commissioners to carry certain Parts of this Act, and the Powers and authorities herein-after contained, into execution, and also from Time to Time at Pleasure to remove any of the Commissioners for the Time being, and upon every or any Vacancy in the said Number of Commissioners, either by Removal or by Death or otherwise, to appoint some other fit Persons to the said Office; and until such Appointment, it shall be lawful for the surviving or continuing Commissioners or Commissioner to act as if no such Vacancy had occurred.

Style of Board of Commissioners.

IV. And be it further enacted, That the said Commissioners shall be styled "The Colonization Commissioners for *South Australia*"; and the said Commissioners or any Two of them may sit from Time to Time, as they deem expedient, as a Board of Commissioners for carrying certain Parts of this Act into execution.

All Proceedings to be sealed.

V. And be it further enacted, That the said Commissioners shall cause to be made a Seal of the said Board, and shall cause to be sealed or stamped therewith all Rules, Orders, and Regulations made by the said Commissioners in pursuance of this Act; and all such Rules, Orders, and Regulations, or Copies thereof, purporting to be sealed or stamped with the Seal of the said Board, shall be received as

Evidence of the same respectively without any further proof thereof; and no such Rule, Order, or Regulation, or Copy thereof, shall be valid, or have any Force or Effect, unless the same shall be so sealed or stamped as aforesaid.

VI. And be it further enacted, That the said Commissioners shall and they are hereby empowered to declare all the Lands of the said Province or Provinces (excepting only Portions which may be reserved for Roads and Footpaths) to be Public Lands, open to Purchase by *British* Subjects, and to make such Orders and Regulations for the surveying and Sale of such Public Lands at such Price as the said Commissioners may from Time to Time deem expedient, and for the letting of the Common of Pasturage of unsold Portions thereof as to the said Commissioners may seem meet, for any period not exceeding Three Years; and from Time to Time to alter and revoke such Orders and Regulations, and to employ the Monies from Time to Time received as the Purchase Money of such Lands, or as Rent of the Common of Pasturage of unsold Portions thereof, in conducting the Emigration of poor Persons from *Great Britain* or *Ireland* to the said Province or Provinces: Provided always, that no Part of the said Public Lands shall be sold except in public for ready Money, and either by Auction or otherwise as may seem best to the said Commissioners, but in no Case, and at no Time for a lower Price than the Sum of Twelve Shillings Sterling *per English Acre*: Provided also, that the Sum *per Acre* which the said Commissioners may declare during any Period to be the upset or selling Price at which Public Lands shall be sold shall be an uniform Price; (that is to say,) the same Price *per Acre* whatever the Quantity or Situation of the Land put up for Sale: Provided also, that the whole of the Funds from Time to Time received as the Purchase Money of the said Lands, or as the Rent of the Common of Pasturage of unsold Portions thereof, shall constitute an "Emigration Fund," and shall, without any Deduction whatsoever, except in the Case herein-after provided for, be employed in conveying poor Emigrants from *Great Britain* or *Ireland* to the said Province or Provinces: Provided also, that the poor Persons who shall by means of the said "Emigration Fund" be conveyed to the said Province or Provinces shall, as far as possible, be adult Persons of the Two Sexes in equal Proportions, and not exceeding the Age of Thirty Years.

Commissioners to make Orders for the Sale of Land.

Funds received as Purchase Money to form a Fund for conveying poor Emigrants to the Province.

VII. And be it further enacted, That no poor Person having a Husband or Wife (as the case may be), or a Child or Children, shall, by means of the said "Emigration Fund," obtain a Passage to the said Province or Provinces, unless the Husband or Wife (as the Case may be), or the Child or Children of such poor Person, shall also be conveyed to the said Province or Provinces.

No poor Person to be allowed a Passage from Fund unless Family also conveyed.

VIII. And be it further enacted, That it shall be lawful for His Majesty, His Heirs and Successors, by Warrant under the Sign Manual, to be countersigned by His Majesty's Principal Secretary of State for the Colonies, to appoint a Commissioner of Public Lands to be resident in the said Colony, and to act under the Orders of the said Board of Commissioners as herein-after directed.

A Resident Commissioner to be appointed.

IX. And

Treasurer
and other
Officers may
be appointed
and removed.

IX. And be it further enacted, That the said Commissioners shall and they are hereby empowered to appoint such Person or Persons as they may think fit Treasurer, Assistant Surveyors, and other Officers, for carrying this Act into execution respecting the Disposal of the said Public Lands and the Purchase Money thereof, and to remove such Treasurer or Assistant Surveyors or other Officers at their Discretion, and on every or any Vacancy in the said Office of Treasurer, Assistant Surveyor, or other Officer, by Removal or by Death or otherwise, to appoint, if they see fit, some other Person to the said Office.

Powers may
be delegated
to Colonial
Commis-
sioner.

X. And be it further enacted, That it shall and may be lawful for the said Commissioners to delegate to the said Colonial Commissioner, Assistant Surveyor, or other Officer, or to any of them, such of the Powers and Authorities with respect to the Disposal of the Public Lands of the said Province or Provinces as the said Commissioners shall think fit; and the Powers and Authorities so delegated, and the Delegation thereof, shall be notified in such Manner, and such Powers and Authorities shall be exercised at such Places, for such Periods and under such Circumstances, and subject to such Regulations, as the said Commissioners shall direct; and the said Commissioners may at any Time revoke, recall, alter, or vary all or any of the Powers and Authorities which shall be so delegated as aforesaid.

Treasurers to
receive and
pay all
Monies, and
to give
Security.

XI. And be it further enacted, That all Monies under the Controul of the said Board of Commissioners shall be received and paid by the Treasurers who may be appointed by the said Board, and who shall give Security for the faithful Discharge of their Duties to such Amount and in such Manner as to the said Commissioners may seem fit.

Accounts to
be audited.

XII. And be it further enacted, That all Accounts of the said Treasurer shall be submitted to the Lords of His Majesty's Treasury, and be audited in the same Manner as other Public Accounts.

Appointment
of Officers.

XIII. And be it further enacted, That the said Commissioners may and they are hereby empowered from Time to Time to appoint a Secretary, Treasurer, and all such Clerks, Messengers, and Officers as they shall think fit, and from Time to Time, at the Discretion of the said Commissioners, to remove such Secretary, Treasurer, Clerks, Messengers, and Officers, or any of them, and to appoint others in their Stead.

Commis-
sioners to
take Oath.

XIV. And be it further enacted, That every Commissioner and Colonial Commissioner to be appointed from Time to Time shall, before he shall enter upon the Execution of his Office, take the following Oath before one of the Judges of His Majesty's Court of Common Pleas, or one of the Barons of the Court of Exchequer, or (in the Case of such Colonial Commissioners) before the Judge of one of His Majesty's Courts in the said Province or Provinces; (that is to say.)

‘ I A. B. do swear, That I shall faithfully, impartially, and honestly, according to the best of my Skill and Judgment, execute and fulfil all the Powers and Duties of a Commissioner [or Colonial Commissioner, as the Case may be,] under an Act passed in the Fifth Year of the Reign of King William the Fourth, intituled [here set forth the Title of this Act].’

XV. Pro-

XV. Provided always, and be it further enacted, That the Salaries to be paid to all such Persons as may be appointed to any Office under this Act shall be fixed by the Lords of His Majesty's Treasury, and by them shall be revised from Time to Time as they may deem expedient.

Salaries to be fixed by Lords of Treasury.

XVI. And be it further enacted, That the said Commissioners shall, at least once in every Year, and at such other Times and in such Form as His Majesty's Principal Secretary of State for the Colonies shall direct, submit to the said Secretary of State a full and particular Report of their Proceedings; and every such Report shall be laid before both Houses of Parliament within Six Weeks after the Receipt of the same by the said Secretary of State, if Parliament be then sitting, or if Parliament be not sitting, then within Six Weeks after the next Meeting thereof.

Proceedings of Commissioners to be reported to Secretary of State, and laid before Parliament.

XVII. And be it further enacted, That it shall and may be lawful for the said Commissioners, previously and until the Sale of Public Lands in the said Province shall have produced a Fund sufficient to defray the Cost of conveying to the said Province or Provinces from Time to Time such a Number of poor Emigrants as may by the said Commissioners be thought desirable, from Time to Time to borrow and take up on Bond or otherwise, payable by Instalments or otherwise, at Interest not exceeding Ten Pounds *per Centum per Annum*, any Sum or Sums of Money not exceeding Fifty thousand Pounds, for the sole Purpose of defraying the Costs of the Passage of poor Emigrants from *Great Britain* or *Ireland* to the said Province or Provinces, by granting and issuing to any Person or Persons willing to advance such Monies Bonds or obligatory Writings under the Hands and Seals of the said Commissioners or of any Two of them, which Bonds or other obligatory Writings shall be termed "*South Australia* Public Lands Securities;" and all such Sum or Sums of Money not exceeding in the whole Fifty thousand Pounds so borrowed or taken up by means of the Bonds or Writings obligatory aforesaid, for the sole Purpose aforesaid, shall be borrowed on the Credit of and be deemed a Charge upon the whole of the Fund to be received as the Purchase Money of Public Lands, or as the Rent of the Common of Pasturage of unsold Portions thereof; and it shall and may be lawful for the said Commissioners from Time to Time to appropriate all or any Part of the Monies which may be obtained by the Sale of Public Lands in the said Province or Provinces to the Payment of Interest on any such Sum or Sums borrowed and taken up as aforesaid, or to the Repayment of such Principal Sum or Sums.

Until Sale of Lands, Money to be raised by Bond for conveying out poor Emigrants.

XVIII. And be it further enacted, That for defraying the necessary Costs, Charges, and Expenses of founding the said intended Colony, and of providing for the Government thereof, and for the Expenses of the said Commissioners (excepting always the Purpose whereunto the said Emigration Fund is made solely applicable by this Act), and for defraying all Costs, Charges, and Expenses incurred in carrying this Act into execution, and applying for and obtaining this Act, it shall and may be lawful for the said Commissioners from Time to Time to borrow and take up on Bond or otherwise, payable by Instalments or otherwise, at Interest not exceeding Ten Pounds *per Centum per Annum*, any Sum or Sums of Money required for the

Power to borrow Money to pay Expenses of Colony.

Purposes last aforesaid, not exceeding in the whole the Sum of Two hundred thousand Pounds, by granting or issuing to any Person or Persons willing to advance such Monies Bonds or obligatory Writings under the Hands and Seals of the said Commissioners or any Two of them, which Bonds or other obligatory Writings shall be termed "*South Australia* Colonial Revenue Securities;" and all such Sum or Sums of Money by the said Commissioners so borrowed and taken up as last aforesaid shall be and is and are hereby declared to be a Charge upon the ordinary Revenue or Produce of all Rates, Duties, and Taxes to be levied and collected as herein-before directed within the said Province or Provinces, and shall be deemed and taken to be a Public Debt owing by the said Province to the Holders of the Bond or Bonds or other Writings obligatory by the said Commissioners granted for the Purposes last aforesaid.

Commissioners may reduce Rate of Interest.

XIX. And be it further enacted, That it shall and may be lawful for the said Commissioners at any Time to borrow or take up any Sum or Sums of Money for any of the Purposes of this Act at a lower Rate of Interest than any Security or Securities previously given by them under and by virtue of this Act which may then be in force shall bear, and therewith to pay off and discharge any existing Security or Securities bearing a higher Rate of Interest as aforesaid.

Lands of Colony to be deemed a collateral Security.

XX. And be it further enacted, That in case it should so happen that the said Commissioners shall be unable to raise by the Issue of the said Colonial Revenue Securities the whole of the said Sum of Two hundred thousand Pounds, or that the ordinary Revenue of the said Province or Provinces shall be insufficient to discharge the Obligations of all or any of the said Securities, then and in that Case, but not otherwise, the Public Lands of the said Province or Provinces then remaining unsold, and the Monies to be obtained by the Sale thereof, shall be deemed a collateral Security for Payment of the Principal and Interest of the said Colonial Debt: Provided always, that no Monies obtained by the Sales of Public Lands in the said Province or Provinces shall be employed in defraying the Principal or Interest of the said Colonial Debt so long as any obligation created by the said *South Australian* Public Lands Securities shall remain undischarged: Provided also, that in case, after the Discharge of all Obligations created by the said *South Australian* Public Lands Securities, any Part of the Monies obtained by the Sale of Public Lands in the said Province or Provinces shall be employed to discharge any of the Obligations created by the said Colonial Revenue Securities, then and in that Case the Amount of such Deduction from the said Emigration Fund shall be deemed a Colonial Debt owing by the said Province to the Colonization Commissioners for *South Australia*, and be charged upon the ordinary Revenue of the said Province or Provinces.

Commissioners may sue and be sued in the Name of One Commissioner or of their Clerk or Secretary.

XXI. And be it further enacted, That the Commissioners nominated and appointed by His Majesty as aforesaid may sue and be sued in the Name or Names of any One of such Commissioners, or of their Secretary, Clerk or Clerks for the Time being; and that no Action or Suit to be brought or commenced by or against any of the said Commissioners in the Name or Names of any One of such Commissioners, or their Secretary or Clerk, shall abate or be discontinued by the Death or Removal of such Commissioner, Secretary, or Clerk, or any of them, or by the Act of such Commissioner, Secretary, or Clerk,
or

or any of them, without the Consent of the said Commissioners, but that any One of the said Commissioners, or the Secretary or Clerk for the Time being to the said Commissioners, shall always be deemed to be the Plaintiff or Defendant (as the Case may be) in every such Action or Suit: Provided always, that nothing herein contained shall be deemed, construed, or taken to extend to make the Commissioners who shall sign, execute, or give any of the Bonds or obligatory Writings so hereby authorized or directed to be given personally, or their respective Estates, Lands, or Tenements, Goods and Chattels, or such Secretary or Clerk, or their or either of their Lands and Tenements, Goods and Chattels, liable to the Payment of any of the Monies so borrowed and secured by reason of their giving any such Bonds or Securities as aforesaid, or of their being Plaintiff or Defendant in any such Action as aforesaid; but that the Costs, Charges, and Expenses of every such Commissioner, Secretary, or Clerk, by reason of having been made Plaintiff or Defendant, or for any Contract, Act, Matter, or Thing whatsoever made or entered into in the *bonâ fide* Execution of this Act, from Time to Time be defrayed by the said Commissioners out of the Money so borrowed and taken up as aforesaid.

XXII. And be it further enacted, That no Person or Persons convicted in any Court of Justice in *Great Britain* or *Ireland*, or elsewhere, shall at any Time or under any Circumstances be transported as a Convict to any Place within the Limits herein-before described.

Convicts not to be transported to the Colony.

XXIII. And be it further enacted, That it shall and may be lawful for His Majesty, by and with the Advice of His Privy Council, to frame, constitute, and establish a Constitution or Constitutions of Local Government for any of the said Provinces possessing a Population of Fifty thousand Souls, in such Manner, and with such Provisoos, Limitations, and Restrictions, as shall to His Majesty, by and with the Advice of His Privy Council, be deemed meet and desirable: Provided always, that the Mode herein-before directed of disposing of the Public Lands of the said Province or Provinces by Sale only, and of the Fund obtained by the Sale thereof, shall not be liable to be in anywise altered or changed otherwise than by the Authority of His Majesty and the Consent of Parliament: Provided also, that in the said Constitution of Local Government for the said Province or Provinces, Provision shall be made for the Satisfaction of the Obligations of any of the said Colonial Revenue Securities which may be unsatisfied at the Time of framing such Constitution of the said Province or Provinces.

A Constitution to be established when there shall be Fifty thousand Inhabitants.

XXIV. And be it further enacted, That for the purpose of providing a Guarantee or Security that no Part of the Expense of founding and governing the said intended Colony shall fall on the Mother Country, the said Commissioners shall and are hereby empowered and required, out of the Monies borrowed and taken up as aforesaid on the Security of the said *South Australian* Colonial Revenue Securities, to invest the sum of Twenty thousand Pounds in the Purchase of Exchequer Bills or other Government Securities in *England*, in the Names of Trustees to be appointed by His Majesty; and the said Trustees shall hold the said Exchequer Bills, or other Government Securities so long as may seem fit to His Majesty's Principal Secretary of State for the Colonies; or shall, in

20,000*l.* to be invested in Exchequer Bills as a Security upon the Mother Country.

Case

Case it shall seem fit to His Majesty's Principal Secretary of State for the Colonies, dispose of the same for any of the purposes to which the Monies raised by the Issue of the said *South Australian* Colonial Revenue Securities are hereby made applicable: Provided always, that if the said Secretary of State should dispose of any Part of the said Twenty thousand Pounds, a Sum or Sums equal to the Sum or Sums so disposed of shall be invested in the Names of the said Trustees by the said Commissioners, so that the said Guarantee or Security Fund of Twenty thousand Pounds shall not at any Time be reduced below that Amount: Provided always, that the Interest and Dividends accruing from Time to Time upon the said Exchequer Bills, or other Government Securities, shall be paid to the said Commissioners, and by them be devoted to the Purposes to which, as herein-before directed, the Monies to be raised by the Issue of the aforesaid *South Australian* Colonial Revenue Bonds are made applicable.

If after Ten Years from the passing of this Act the Population shall be less than 20,000 natural born Subjects Lands to be liable to be disposed of by His Majesty.

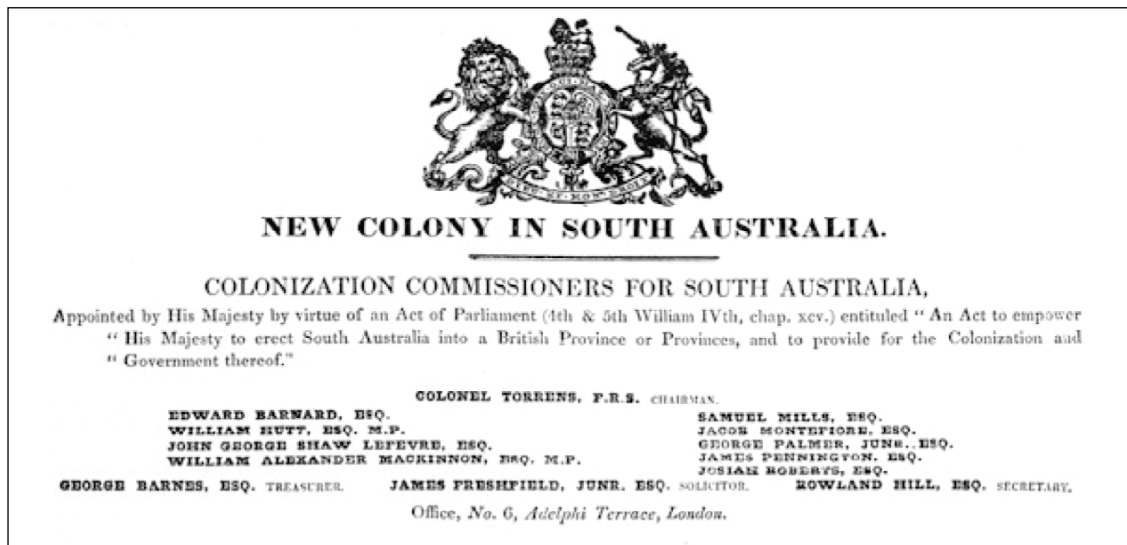
XXV. And be it further enacted, That if after the Expiration of Ten Years from the passing of this Act the Population of the said Province or Provinces shall be less than Twenty thousand natural born Subjects, then and in that Case all the Public Lands of the said Province or Provinces which shall then be unsold shall be liable to be disposed of by His Majesty, His Heirs and Successors, in such Manner as to him or them shall seem meet: Provided always, that in case any of the Obligations created by the said *South Australian* Public Lands Securities should then be unsatisfied the Amount of such Obligations shall be deemed a Charge upon the said unsold Public Lands, and shall be paid to the Holders of such Securities out of any Monies that may be obtained by the Sale of the said Lands.

Powers of Commissioners not to commence until the Money is raised, except for that Purpose.

XXVI. And be it further enacted, That until the said Commissioners shall, by the granting and issuing of Bonds and Writings obligatory as aforesaid, that is to say, "*South Australian* Colonial Revenue Securities," have raised the Sum of Twenty thousand Pounds, and have invested the same in the Purchase of Exchequer Bills, or other Government Securities, as herein-before directed, and until the Persons intending to settle in the said Province or Provinces and others shall have invested, (either by Payment to the said Commissioners, or in the Names of Trustees to be appointed by them), for the Purchase of Public Lands in the said Province or Provinces, the Sum of Thirty-five thousand Pounds, none of the Powers and Authorities hereby given to His Majesty, or to the said Commissioners, or to any Person or Persons, except as respects the Exercise by the said Commissioners of such Powers as are required for raising Money by means of and on the Security of the Bonds or Securities last aforesaid, and for receiving and investing the aforesaid Sum of Thirty-five thousand Pounds for the Purchase of Public Lands, shall be of any Effect, or have any Operation whatsoever.

The Foundation Act can be conveniently analysed under the following heads:

- A. The system of colonisation.
 - B. The method of government.
 - C. The self-supporting system.¹
- A. The System of Colonisation
- (1) Three or more fit persons, to be styled the "Colonization Commissioners for South Australia", were to be appointed by the Crown to carry out the provisions of the Act.



Heading to information for prospective emigrants to South Australia published by the Commission in December 1835. (SLSA)

- (2) The Commissioners were empowered:
- (a) To declare all the lands of the province (except portions reserved for roads and footpaths) to be public lands open to purchase by British subjects.
 - (b) To make orders and regulations for the survey and sale of such lands at such price as they deemed sufficient; provided that no part of the public lands should be sold except in public for ready money, either by auction or otherwise as the Commissioners should determine, but in no case and at no time for a lower price than 12s per acre.
 - (c) To let the common of pasturage of unsold portions of land for any period not exceeding three years.

Historical Background

- (d) To employ the whole of the purchase money or rent received as an "Emigration Fund" for conducting the emigration of poor persons from Great Britain and Ireland to the province.
- (e) To appoint officers. They were authorised:
 - (i) By section IX "to appoint such person or persons as they may think fit Treasurer, Assistant Surveyors, and other officers, for carrying this Act into execution respecting the disposal of the said Public Lands and the Purchase Money thereof".
 - (ii) By section XIII to appoint "a Secretary, Treasurer, and all such clerks, messengers and officers as they shall think fit".

By section VIII the King was empowered to appoint a Commissioner of Public Lands, to be resident in the colony and to act under the orders of the Commissioners.

The salaries of the officers appointed under the Act were to be fixed by the Treasury.
- (f) To delegate to the Colonial Commissioner or other officers such of the powers and authorities with respect to the disposal of the public lands of the province as they thought fit.
- (3) At least once a year the Commissioners were to submit to the Secretary of State for the colonies a "full and detailed report" of their proceedings to be laid before Parliament.

B. The Method of Government

- (1) By section I every person inhabiting or residing in the province "shall be free and shall not be subject to or bound by any laws orders statutes or constitutions which have been heretofore made or which hereafter shall be made ordered or enacted by for or as the laws orders statutes or constitutions of any other part of Australia, but shall be subject to and bound to obey such laws orders statutes and constitutions as shall from time to time, in the manner hereinafter directed, be made ordered and enacted for the government of His Majesty's Province of South Australia".
- (2) Section II empowered the King, with the advice of the Privy Council, "to make ordain, and, subject to such conditions and restrictions as to him shall seem meet, to authorise and empower any one or more persons" resident in the province:
 - (a) to make, ordain and establish all such laws, institutions or ordinances; and
 - (b) to constitute such courts or appoint such officers; and
 - (c) to impose and levy such rates, duties and taxes "as may be necessary for the peace order and good government of the Province".

‘... that part of Australia ...’

All such ordinances, laws and orders were to be laid before the King in Council and were not to be contrary or repugnant to any of the provisions of the Act.

- (3) A constitution of local government was to be established when the population reached 50,000.
- (4) No convicts were at any time or under any circumstances to be transported to the province.



Robert Dighton's *A Fleet of Transports under Convoy* depicts convicts at Newgate Gaol. No convicts were transported to South Australia but Newgate Gaol figures in the colony's history. This is where an imprisoned Edward Gibbon Wakefield formulated his system of colonisation and wrote *A Sketch of a Proposal for Colonizing Australasia* and *A Letter from Sydney*. (NLA)

C. The Self-Supporting Principle

- (1) Until the sale of lands, the Commissioners were empowered to borrow at interest not exceeding ten per cent per annum up to £50,000 for the sole purpose of defraying the costs of the passage of poor emigrants by issuing bonds to be termed "South Australian Public Lands Securities".

All sums borrowed "shall be borrowed on the credit of and be deemed a charge upon the whole of the Fund" to be received as purchase moneys and rent; and the Commissioners might appropriate moneys from the sale of public lands to the payment of interest on, or repayment of, any sums borrowed.

- (2) To defray the necessary costs, charges and expenses of founding the colony and providing for its government and the

expenses of administration, the Commissioners were empowered to borrow up to £200,000 at interest not exceeding ten per cent by issuing bonds to be termed "South Australian Colonial Revenue Securities". The sums so borrowed were to be charged upon the ordinary revenue or produce of all rates, duties and taxes to be levied and collected in the colony and were deemed to be a public debt owing by the province to the holders of the bonds.

- (3) The lands of the colony and the moneys obtained by their sale were to be a collateral security for the payment of the colonial debt.
- (4) Out of the moneys borrowed on the security of the "South Australian Colonial Revenue Securities", £20,000 was to be invested in the names of trustees to be appointed by the Crown; and this sum was to be at the disposal of the Secretary of State for the colonies as a guarantee against the government incurring any expense.
- (5) The powers of the Commissioners were not to commence (except for the purpose of raising money) until the guarantee fund of £20,000 had been duly invested and £35,000 had been subscribed for the purchase of lands.

‘... that part of Australia ...’



King William IV and Queen Adelaide (ACCA)

Historical Background

Father Paul Sarpi read the Scriptures with such care that, it being his custom to draw a line under passages which he considered important, there was not a single word in his New Testament but was underlined. If any querulous person took a pen and set out to underline all the passages in the Foundation Act which caused trouble, his scoring might not be so meticulously thorough, but there would be few sections left unmarked. Its creators might well have chanted in unison, "We have done those things which we ought not to have done, and we have left undone those things which we ought to have done." Difficulties arose both in providing for subjects upon which the Act was silent and in endeavouring to ascertain what it meant when it spoke. Several writers have investigated the economic and financial deficiencies of the Act, and it is only proposed here to mention some of the legal and constitutional difficulties to which it gave rise.

Officialdom was puzzled from the outset. How was the province to be created? There was no precedent for the establishment of a colony in the manner indicated by the Act. Section I (in ungrammatical language) empowered the King, with the advice of the Privy Council, "to erect and establish within the boundaries prescribed one or more provinces" and to fix the respective boundaries of such provinces. Nothing was said about the instrument by which the provinces were to be created. Parliament had usurped the prerogative of the Crown by authorising the King to do that which he could have done, by a Commission under the Great Seal, without Parliamentary assistance.¹ Long consideration by the law officers was necessary before the decision was reached that the colony should be established by the issue of Letters Patent, defining its boundaries.²

Then how many provinces were there to be and how were the boundaries to be fixed? No-one had any adequate knowledge of the country, and the fixing of boundaries could be nothing more than guesswork. In the House of Commons one member had expressed the opinion that a "cabbage garden" or at the most sixty or one hundred square miles of territory would be quite enough "for these gentlemen to play their pranks in", and the Colonial Office were disposed to restrict the area to be granted for the experiment. The Commissioners hastened to obtain the opinion of Sir William Follett (Solicitor-General in 1835 and afterwards Attorney-General) that under the Act the provinces must be proclaimed once for all and that the government had no power to erect only a small portion of the territory into a province, leaving the remainder in abeyance to be

added at a future time or made into another province, if the colony proved a success.³

Next, a legislature to be nominated by the Crown was to be established. Should it be official, unofficial or a mixture of both? And if official, what officers were to be members? The Commissioners wisely recommended that, as the Council was to conform to the instructions of the Colonial Office, no officers of the Commissioners should be members, so as to prevent any clashing, but it was eventually provided by an Order in Council on 23 February 1936 that the Council should consist of:

- (1) The Governor or officer administering the government.
- (2) The Judge.
- (3) The Colonial Secretary.
- (4) The Advocate-General.
- (5) The Resident Commissioner.

Any three of them (of whom the Governor should be one) could make laws and ordinances, appoint officers and impose and levy rates, duties and taxes. All laws were to be introduced into the Council by the Governor and transmitted for the approval of the Crown at home.⁴

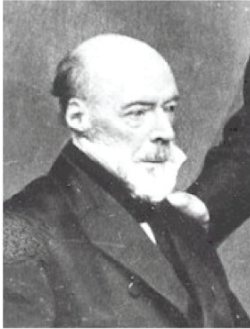
The following instructions were prescribed for the conduct of business by the Council:

- (1) Each law was to be confined to a single subject matter.
- (2) A law once disallowed was not to be re-enacted without leave.
- (3) No law was to continue in force for less than two years, except in cases of necessity.
- (4) No revenue law was to be lightened without leave.
- (5) Acts of an extraordinary nature, prejudicial to the prerogative or the property of the subject, affecting trade or shipping, or of a private nature, were to be reserved for the consent of the Crown.

In the exercise of the prerogative of mercy the Judge was to report upon the trial of everyone sentenced to death. His report was to be considered at the next Council and the advice of the members taken but the Governor was finally to decide on his own deliberate judgment whether the sentence should be executed.⁵

Again, the method by which the officers of the colony were to be appointed worried the law officers for more than three months, before they finally advised that the Governor should be appointed, like the governors of other Crown colonies, by Letters Patent, and the other officers by an Order in Council. This latter mode of appointment they described as "very inconvenient and so far as we know without precedent" and they recommended that a bill should be introduced to amend the Act on this point.⁶

These questions were mainly matters of legal forms; there were difficulties far more serious to be faced. The powers given to the Commissioners by the Act were very large, but when the Act was



Robert Torrens
(1780-1864)
Economist, politician,
soldier and newspaper
proprietor, Torrens was
an early promoter of
schemes for the
colonization of South
Australia and emigration
to colonies generally. He
became Chairman of the
Colonization
Commissioners in 1835.
(SLSA)

Robert William Hay
(1786-1861)
Undersecretary at the
Colonial Office from 1825
to 1836.

examined there was a total absence of any provision to secure the due exercise of those powers.

‘So large an administrative power in the discharge of so important a public trust ought not to have been confided to any other hands than those of the recognised authorities of the country. To devolve them upon a Board, the members of which were to be appointed and removed at the pleasure of the Crown, but over whose proceedings the responsible Ministers of the Crown could exercise no adequate control, was in effect to relieve the Government from its proper responsibility, and transfer it to persons of whose fitness for the office Parliament could take no assurance beyond the judgment of the Ministry for the time being, though the public faith was, to a great extent, implicated in their acts, and pledged to their engagements.’⁷

When Colonel Robert Torrens went to the Colonial Office to see Hay, "the ancient foe to South Australia", with a list of those whom it was proposed should be appointed Commissioners, Hay very naturally said that it would be necessary to ascertain in what way the Commissioners could be held responsible for the due execution of their duties. Supposing they suddenly resigned, for instance, the colony would be left stranded and the Government would have to come to the rescue. To the enthusiastic colonists Hay's sensible objections seemed merely obstructive. Further consideration by the Colonial Office opened up another question, and on 16 February 1835 Hay wrote to Colonel Torrens:

‘Lord Aberdeen considers it to be an essential preliminary to the further discussion of the subject, that it should be distinctly understood whether the proposed Commissioners are or are not to be accountants to the Crown, and personally responsible for the receipt and application of the money to arise from the sale of lands in the proposed colony.’

Although there was no express direction to be found in the Act, he presumed that:

‘... all the money which they shall receive as Commissioners must be considered as part of the King's revenue, and that the Commissioners, not being a body corporate, must be regarded only as His Majesty's agents (though appointed under the authority of Parliament) for the management, receipt and expenditure of that part of the revenue of the Crown.’

He thought the matter of "such essential importance, and involved in such obscurity, as to require a solution of the question on the highest accessible authority before the discussion advances further".⁸

Colonel Torrens submitted the matter to J.W. Freshfield (afterwards solicitor to the Commissioners), who advised:

'I have no hesitation in stating it as my opinion that the Commissioners are not to be accountants to the Crown, nor responsible for the receipt and application of the money made subject to their control by the Act of Parliament; of course, they would be liable for any personal corruption in the exercise of their powers, and for the application of the money to purposes not within the authority of the Act, but that liability is common to every person accepting a trust.'⁹

This opinion was forwarded to the Colonial Office and sent on to the Lords of the Treasury. There the matter slumbered until the colonists became impatient, and Robert Gouger went to see Sir Thomas Fremantle at the Treasury. An entry in John Brown's journal describes the interview and shows how little attention the Government officials had given to the South Australian scheme. Gouger complained of the delay and said that the question was a simple one — where was the responsibility to rest? Sir Thomas Fremantle said that:

'... he concluded that the Commissioners here would be as necessarily responsible for the loan and other monies they might raise as the Directors of any Land Company. And upon Gouger expressing astonishment at his confounding two offices so wholly dissimilar, it appeared that he had actually viewed the colony in the light of a land speculation for the benefit of individuals under the sanction of a Chater [sic]. Gouger then begged that as this view was wholly erroneous, he would allow him to wait while he sent for an Act of Parliament that the mistake might be at once rectified, and the impression removed. Fremantle accordingly sent, and confessed that he had not viewed it as a public and government Commission before.'¹⁰

Eventually the Treasury confirmed Freshfield's opinion and agreed that:

'... so long as the powers in the South Australian Commissioners by the Act 4 & 5 Wm IV c.95 in regard to the moneys to be raised and applied under its provisions are duly exercised, and not exceeded by the Commissioners, they will not be personally responsible or accountable to the Crown for those moneys.'¹¹

This decision was a surprise to the Colonial Office. Worse still was the gradual realisation that not only were the Commissioners free from any liability to account to the Crown for the expenditure of

John Brown
(1801–1879)
A businessman and
campaigner for the
colonization of South
Australia, Brown became
the first Emigration Officer
and one of those who
opposed Hindmarsh. He
was, variously, on
Adelaide's first municipal
council, a mine owner, the
editor of the *Southern
Australian* and the
manager of an insurance
company.

moneys coming to their hands but that they had complete and sole control over those moneys.

For some time neither the Commissioners nor the Colonial Office saw the full significance of the provisions of the Act. The Colonial Office believed that the Commissioners were limited to dealing with sales of land and emigration, while all questions of government remained under the direction of the Secretary of State. The only difference between the mode of government of South Australia and any other Crown colony, they thought, was that instead of the moneys required for the expenses of government being paid by the Treasury they would be drawn (until the colony was able to support itself) from the fund which the Commissioners were to raise, the Colonial Office having control of this revenue fund.

Most of the colonists who troubled themselves about constitutional matters probably came to South Australia holding this opinion. In the first number of *The Register*, for instance, which was published in June 1836 and contained information about the colony for the instruction of emigrants, it was said that:

‘South Australia is to be governed precisely as the other colonies of the Crown, not possessing a legislative assembly, that is, by a Governor appointed by the King, assisted by a Legislative Council’;

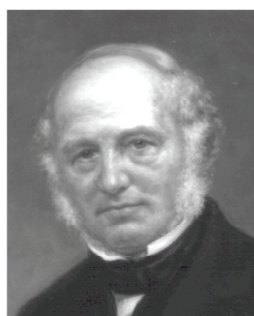
and that the powers of the Governor would be the same as those of other governors with the exception of the disposal of public lands.¹²

At first the Commissioners, who were themselves divided in opinion about the construction of the Act, acquiesced in this view and were subservient to the Colonial Office. By the end of 1835 it had begun to dawn on them that they had, perhaps, larger powers than they had expected. Brown noted in his journal on 24 November 1835:

‘A long discussion with the Governor, Mr Hill, Fisher, Stephens, Kingston and myself about writing to the Colonial Office to request their sanction to the Commissioners purchasing a vessel to accompany the first expedition as a small surveying vessel. The propriety of establishing a precedent for submitting all expenses to the permission of the Colonial Office was the question—in fact, whether the Commissioners are to have the direction of Government expenditure or the Office. The letter, tho’ written by the Governor, was withheld until the Board considered it again.’

Here the point was directly raised, but the Commissioners did not take the matter up with the Colonial Office for some months.

In January 1836 Lord Glenelg said he would consent to the proclamation of the colony provided three things at least were embodied in an amending act:



(Sir) Rowland Hill
(1795–1879)
Hill served as Secretary for the South Australian Commission from 1834 to 1839 but is best known for his reform of the postal system and invention of stamps. (NPG)

Lord Glenelg
(1778–1866)
Charles Grant was Secretary of State from April 1835 to February 1839. Despite success with the abolition of slavery in the West Indies his performance as Colonial Secretary was often criticised, particularly regarding Canada, and he was forced to resign from office.

- (1) Regulations for the protection of the Aborigines, whose existence had been completely overlooked in the Foundation Act.
- (2) Provision for the appointment of officers in a simpler and more convenient way.
- (3) The reservation to the Treasury of power to apply towards the civil government and administration of justice so much of the proceeds of sale of land as might be made necessary by the deficiency of other public resources.¹³

At this stage the Colonial Office still had no doubt that the Commissioners were limited to controlling land and emigration. Lord Glenelg did not ask for an act giving the Crown control of the revenue fund because he assumed that the Crown had the power to dispose of it: he only wanted power to supplement it from the land fund if it proved insufficient.

The last of his three points, however, caused consternation among the Wakefield party, to whom the land fund was sacrosanct. Torrens said that unless the Colonial Office abandoned this demand the colony was ended. He interviewed Sir George Grey and told him that any alteration in the appropriation of the land fund would bring about the immediate resignation of the Commissioners and the whole scheme would collapse.¹⁴ Surprised at this strong opposition, the Colonial Office allowed the matter of an amending act to drop.

It was not until June 1836 that the Commissioners definitely asserted that the control of the funds raised pursuant to the Act (except so far as related to the salaries of the officers, which were fixed by the Treasury) was placed in their hands entirely. The claim was referred to the law officers (Sir John Campbell and Sir R.M. Rolfe), and Lord Glenelg was startled to find that their opinion was that the disposition of the fund to be raised under the 18th section of the Act to provide for the expenses of government rested with the Commissioners.

'The Commissioners will be liable for any wilful misapplication of the money; but so long as they bona fide apply it for the purposes indicated in the 18th section, they appear to us to have a discretion as to its application.'¹⁵

This unforeseen interpretation of the Act placed the Colonial Office in an extremely awkward position.¹⁶ Lord Glenelg wrote that he could only anticipate "very great confusion and difficulty from the anomalous system which has been introduced into this branch of the public business".¹⁷

Two courses were open to him:

- (1) To have an amending act passed to give the Colonial Office control of the fund for the expenses of government.
- (2) To acquiesce in the complete control of the Commissioners and throw all the responsibility on them.



Sir George Grey
(1799-1882)
A Whig politician who, in 1836, was Colonial under-secretary to Spring Rice. He was to become Colonial Secretary from 1854 to 1855 and also served as the Home Secretary. In that post he carried the Bill that brought an end to transportation. (RVPL)

To have taken the first course would have involved a complete reconstruction of the Act. Out of the revenue fund had to be paid not only the governmental expenses but the preliminary costs of land sales and surveys, because by section 6 of the Act the whole of the money derived from the sale of lands had to be devoted to emigration. The Colonial Office did not want to take over the supervision of these expenses, for the division of authority would then simply be reversed and the Commissioners would have to embark upon enterprises, without control of the funds from which the expenses of them were to come. Further, thousands of pounds had been invested upon the basis of the scheme as set out in the original act. Seven vessels had sailed with over two hundred emigrants, and it was impossible to hold up emigration while the question was discussed in Parliament. Any step which might delay further progress or cast doubt upon the stability of the scheme would be ruinous. It is not surprising that Lord Glenelg shrank from such a course, and it is only fair to take it that he acted as much from a genuine belief that the best thing to be done in the emergency was to relinquish full control to the Commissioners, as from any Pontius-Pilate-like desire to shirk responsibility and wash his hands of the whole matter.

View on the Glenelg plains
ca. 1837 by J.A. Thomas
(NLA)



The Commissioners suggested it was desirable to have the point definitely decided by an amending act, but they received no reply.¹⁸ The Colonial Office treated the whole matter as settled by the opinion of the law officers. The Commissioners became the real rulers of the colony and thus "an unbusinesslike Board gained the complete control of the complicated scheme of an almost

unworkable Act of Parliament". All the dispatches and enactments which the Governor sent home to the Colonial Office were passed on to the Commissioners for their approval or condemnation. The only control which the Colonial Office retained was that the Commissioners were the nominees of the Secretary of State and might be removed by him.

Although the Colonial Office cannot be blamed, perhaps, for the course they took, there was no excuse for their failure to notify the Governor of the changed circumstances. James Hurtle Fisher, the Resident Commissioner, was advised of it by the Commissioners in August 1836, but the Governor sailed in the *Buffalo* firmly believing, as the Colonial Office had believed, that on the administrative side he was supreme and that he had, as representative of the Crown, complete control of this branch of affairs in the colony. It was not until March 1838 that Hindmarsh was informed of the volte-face which the Colonial Office had made; and then he only discovered it from Fisher.¹⁹

The worst error of the Foundation Act was the division of authority which it created. Edward Gibbon Wakefield said later that "according to the manner, I will not say system, in which South Australia has been governed, every body seems to have been fully relieved of responsibility to any body";²⁰ and the Select Committee of the House of Commons reported in 1841:

'In endeavouring to convey the necessary powers to the Commissioners without trespassing upon the Prerogative of the Crown, the Act created an inconvenient division of authority, and the powers of Administration were so parted between the two, that they could not be effectually exercised by either. The raising of a Revenue by means of Rates, Taxes and Duties, the appropriation of the Revenue so raised, and the general administration of the Government, were vested by the Act in a Local Board, appointed by the Crown, and subject to the authority of the Queen in Council; whilst the administration, not of the Land Fund only, but of the Fund out of which all the necessary expenses of Government for Surveys, Salaries, Police, Public Works &c were to be defrayed, was confided in England to the Commissioners, and in the Colony to a Commissioner, appointed indeed by the Crown, but acting only under their instructions, and subject only to their authority. Thus whilst one department was made responsible for the payment of the Colonial Debt, another had the management of the Fund out of which it was to be paid; and whilst one was responsible for conducting the Public Service, the money by means of which it was to be conducted was placed under the control of another. If the Revenues of



(Sir) James Hurtle Fisher (1790-1875)
A lawyer who became the first Resident Commissioner, Fisher's tenure of the position ended with the arrival of Governor Gawler in 1838. He returned to the bar and in 1840 became the first mayor of Adelaide and subsequently held various political offices until his retirement in 1865. (SLSA)

the Colony were mismanaged by the Local Government, the Commissioners could not satisfy the Public Creditor; if the Funds raised on the security of those Revenues were mismanaged by the Commissioners, the Government could not conduct the Public Service. Nor is it to be forgotten, that the evils to be apprehended from the conflict of authorities so ill-adjusted, which must be great in any case, were greatly aggravated in this by the distance at which they were exercised, and the length of time before a difficulty arising in South Australia could be removed by a fresh instruction from England.’²¹

The Commissioners afterwards pleaded that the Foundation Act was not sufficiently explicit to enable them, in their instructions to the Resident Commissioner, to draw any precise line between the limits of the authority of the Governor on the one hand and of the Resident Commissioner on the other, but the fact that the Act was not sufficiently distinct was only an additional reason why they should have taken care to define those limits which the Act had left obscure.

In this state of affairs the only hope for success in the colony lay in the selection of able officers who would work together amicably. Dr Price has pointed out the difficulties with which the Commissioners were faced in making the appointments—their fields of choice limited to men prepared to emigrate, willing to accept moderate salaries and able to maintain themselves at their own expense for a considerable time; the services of those who had assisted in the colonisation movement to be rewarded; patronage to be dispensed to men with money who could buy land or bonds. "Qualifications, on the whole, were measured by bank balances rather than ability." The various official positions were filled only after months of jealous scheming which laid the foundation for quarrels in the colony. Captain John Hindmarsh was appointed Governor; and James Hurtle Fisher, a London solicitor, Resident Commissioner. Of the other officers it is necessary to mention only Charles Mann (Advocate-General, Crown Solicitor and Public Prosecutor, at a salary of £300 a year), Robert Gouger (Colonial Secretary), Osmond Gilles (Colonial Treasurer) and John Brown (Emigration Agent).

The division of authority in the colony created by the Foundation Act was aggravated by the political prejudices of the officers. The Governor was an out-and-out Tory. Most of the officers were middle-class liberals and radicals of varying shades of opinion. Brown and Gilles were the most violent; they suspected Mann, who was at first the most moderate of the liberals, of being tainted with a tinge of Toryism. In between these extremes fell most of the others. Gilles, during his term as Colonial Treasurer, even went to the ridiculous length of attempting to have the Royal Arms removed from

Charles Mann
(1799–1860)
A campaigner for
colonization and the first
South Australian
Advocate General. After
clashing with Hindmarsh
he resigned on 13
November 1837. He
continued to work in law,
both in private practice
and in a number of judicial
offices. He was also co-
editor of the *Southern
Australian* with Brown.

Osmond Gilles
(1788–1866)
The first Colonial
Treasurer (1836 to 1839)
contrasted his failings as
an official with his
success as a
businessman. Gilles was
hot tempered but also a
religious man known for
his generosity.

government proclamations.²² Stevenson, the Governor's secretary, reported to the Colonial Office, with his usual asperity:

'Poor Gilles is a mere mischievous fool, whose propensity to intoxication and whose conduct when in that state makes it perfectly impossible for any gentleman to have the slightest connection with him. His common expression is, 'I have the support of Wakefield and Torrens, and care not a damn for any bugger of the Colonial Office.'" ²³

Though holding the most extreme views, the Colonial Treasurer was too erratic to be dangerous, and after Gilles had by his conduct antagonised the Resident Commissioner and his supporters, Hindmarsh turned him into a useful ally.

Long before the Governor sailed it was obvious that he was going to meet with decided opposition in the colony. Hindmarsh's energy, his splendid naval record, his frank and open appearance, had made a good impression at first and offset the disadvantage that he was not quite well enough known to the public to be an advertisement for the colony.²⁴ But within a few months he had managed to offend both the Commissioners and most of the prominent colonists. Angas had advanced him considerable sums of money and he thus became tied to the support of the South Australian Company against the Commissioners. He cared little about the economic details of the Wakefield plan and incurred the displeasure of a compact clique of its sponsors—Fisher, Brown, the Morphetts, George Strickland Kingston, Mann, Gilbert, Dr Wright. Hindmarsh thought them a set of unpleasant radicals who needed to be disciplined; they resented what they termed "quarter-deck government" and were suspicious that the Governor was trying to obtain complete power for the Colonial Office with himself as its representative. By November 1835 Brown, Morphett, Kingston and Rowland Hill were discussing plans for the formation of a society in the colony to oppose and check Hindmarsh if he acted "with greater promptitude decision and activity than may be compatible with sound and good judgment" or "from impulse or partiality, that may occasion differences of opinion, and possibly so that the colony may not be always benefitted", and by the end of the year Brown was expressing his conviction that Hindmarsh would not last long as Governor—"Indeed I should feel some anxiety about our future progress if I thought otherwise."²⁵

Hindmarsh was not unaware of this opposition. "I began to perceive on the part of the Commissioners," he said, "a rising jealousy which manifested itself in a variety of ways."²⁶ He said, after his recall, that he would have resigned had not Torrens persuaded him that the Commissioners' duties were only as to land, emigration and the raising of money, and that the Commissioners would have nothing to do with the Government of the colony, which "once established would be on precisely the same footing as the

(Sir) John Morphett
(1809–1892)
From 1834 Morphett was an advocate for the province and he became an influential landowner and politician. One of four non-official members of the Legislative Council in 1841 his political career continued until 1873

Sir) George Strickland Kingston
(1807–1880)
The Deputy-Surveyor-General to the new colony. Kingston also served as town surveyor and colonial architect. His political career began in the Legislative Council in 1851 and continued until 1880. "Paddy" Kingston is remembered as the "father" of South Australia's constitution and the father of Charles Cameron Kingston who was a major contributor to Australian federation and the federal constitution.

Dr Edward Wright
(c1788–1859)
A failed applicant for the position of the province's first medical officer, Wright, nevertheless, came to the colony in September 1836 to practice. His career was a chequered one due to his wayward character and bouts of drunkenness and at one time he was tried for murder.



Thomas Gilbert
(c1787–1873)
Gilbert arrived in South
Australia in 1836 to take the
position of Colonial
Storekeeper. He later
became the first
Postmaster. (SLSA)

government of any other colony".²⁷ The Governor consoled himself, therefore, with the belief that when he got to South Australia he would be able to rule with a free hand and be as completely master there as he had been of his ships of war. He took pains, however, to conciliate Gouger, in whom he saw a dangerous rival to his authority in the colony, and shortly before the *Buffalo* sailed Brown wrote disgustedly of Gouger:

'I find that he is all thick with Hindmarsh again, and that Hindmarsh abuses Torrens, Wakefield and Hill in no measured terms. What is perhaps more extraordinary, Gouger actually thinks that Hindmarsh is right, and the Commissioners wrong! So fatally prone is he to new friendships and new views. In 6 months he is quite as likely to head a party to get rid of the Governor. At present, however, the Governor and the Colonial Office are all in all. One melancholy reflection follows all this but too closely. How is this colony to succeed with these people as leaders?'²⁸



John Hill was the boatswain of the *Buffalo* and hoisted the flag on Proclamation Day. The *Buffalo* was launched in 1813 as a merchant ship named the *Hindustan*. Acquired and renamed by the Royal Navy it served until it was wrecked at Mercury Bay in New Zealand in 1840. (SLSA)

Historical Background

‘most romantic and beautiful’



George Stevenson
(1799–1856)
Appointed secretary to
Governor Hindmarsh and
Clerk of the Council
Stevenson was, more
notably, the original editor
of the *South Australian
Gazette and Colonial
Register*, the Province's
first newspaper. (SLSA)

The story of the voyage of the *Buffalo* has been told in detail by Stevenson (whose statements must be taken with suspicion), and sidelights on it, from another angle, are to be found in letters from Hindmarsh to Angas.¹ The Governor complained that Stevenson and his wife had made themselves thoroughly unpopular with everyone on board, and he bitterly regretted that he had asked them to dine at his table, for Mrs Stevenson was a perpetual annoyance to him.

‘This unfortunate tempered woman always sits at my right hand and tho' she will hardly speak to me she speaks at me in the most insolent way you can imagine, so much so that poor as I am I would not have taken her for a thousand pounds.’²

He had two consolations. One was watching the embarrassment of Stevenson, "who sits on the opposite side of the table upon thorns", dreading his wife would provoke an outburst of vice-regal rage. The other was that Stevenson "has made himself a perfect scapegoat for me, as I am sure I could hardly do any unpopular act but it would be attributed to his advice".³

Stevenson, on the other hand, was contemptuous about Hindmarsh. "The poor man," he said, "does not know his own mind for two hours together. This is a sad failing for one in authority to be overpowered with."⁴ He and Fisher came to the conclusion that the Governor was never less likely to do anything than when he announced it to be his "firm determination".⁵ From Rio de Janeiro, Stevenson wrote to Angas that a fatal error had been made in the appointment of Governor: "The colony cannot hope to flourish to the extent it ought to, or to go on in peace and tranquillity under Captain Hindmarsh."⁶

There was a childishness in Hindmarsh's character, he said, which "while it renders him jealous to the utmost of the *appearance* of authority totally deprives him of the *reality*". With his tongue in his cheek, Stevenson added: "The sooner a successor is provided the better it will be for all parties. Would you but take the office, what a colony would it not be?"⁷

After leaving Rio, arguments began about Hindmarsh's powers. The Royal Instructions issued to him on 6 July 1836 had instructed him to preside at the council and contained a clause directing him, in case he saw sufficient cause to dissent from the major part or the whole of the council upon any question, to execute his powers in accordance with his own judgment. The Governor maintained that all appointments were in his hands and that he was not obliged to ask the council's advice or approval.

'I have told him plainly my opinion'—wrote Stevenson—'which is that subject to his right of proposing, and the power of pardoning or remitting the sentences of convicts, all executive as well as legislative acts must be done by him in Council. By the Royal Instructions he has power to carry his propositions into law even against the opinion and voice of the 'whole or major part' of his advisers—being obliged, however, in such a case to assign his reasons for so acting to the Secretary of State at home—a check, which if not quite sufficient against temporary acts of folly or despotism, is at least fully as regards their permanence.'

The Governor was not pleased with Stevenson's views.

'He says he is determined to act singly and uncontrolled—that he has Lord Glenelg's and Mr Stephen's authority for so doing, and will not, to use his own words, 'abate an inch of his Master's prerogative', forgetting perhaps that His Majesty has in this instance expressly delegated his authority, prerogative and all, to others. But it is in vain to argue with him on this point, or indeed on any other.'

⁸

By December 1836 Stevenson was writing that "it seems more and more desirable that The Governor's powers should be defined strictly, or some strange antics we shall have".⁹

The relations between Hindmarsh and Fisher had not been improved by the voyage, which began inauspiciously with "a dust about a water-closet". Hindmarsh had contracted to cater for Fisher and his family for a lump sum and was annoyed at finding that he was losing money on it. He complained to Angas:

'I sat upwards of six months next but one to Mr Fisher, and I never heard him join in any general conversation whatever, rarely speaking, except upon the high attributes of the Commissioners, and the little or no power of the Crown in So. Australia, quibbling upon the meaning of words, and really expatiating upon the grand subject of feeding rabbits. Is this a man to carry out our great principle? I assure you that I think a worse selection could hardly have been made to represent the Commissioners. I wish Torrens was in his place, I wish Wakefield was, or any other man who understood what he was about.'

He charitably added that he believed "the poor man is unconscious of his error".¹⁰

Christmas Day 1836 was celebrated on the *Buffalo* with a display of "violence and ruffianism without parallel", the Governor's "profanity and abominable oaths " driving the passengers to seek

George Fife Angas
(1789–1879)
A merchant, banker and landowner, Angas was an early supporter of the colony and the capital and immigrants he introduced to the settlement were crucial to its success. He did not arrive in South Australia until 1851, although by then he had substantial interests and two sons in the colony. He entered the Legislative Council in 1851 continuing to hold a seat there until 1866.

Historical Background

refuge in their cabins;¹¹ but by 28 December, when the *Buffalo* anchored at Holdfast Bay, the storm had blown over. Those colonists who had already arrived, some two hundred in number, assembled on the beach in the scorching heat of a summer's day to receive their Governor. Shortly after two o'clock he landed; his commission was read; and the British flag hoisted to the accompaniment of a salute from the guns of the *Buffalo*, a straggling feu de joie from a party of marines, and the ringing cheers of the colonists. From the convenient shade of a gum tree, the establishment of the government was proclaimed. Everyone was delighted with the affability of the Governor, who shook hands all round, and in a hearty and genial manner congratulated the colonists on their good fortune in having such a fine country. At the open air luncheon which followed, toasts were proposed and drunk with rapidity and tremendous enthusiasm, and when the Governor himself gave—"May the present unanimity continue as long as South Australia exists," the plain rang with the acclamations.¹²

J.M Skipper's painting of Gouger's tent and hut at Holdfast Bay ca. 1837. The "Old Gum Tree" is shown on the left but the tree on the right is more likely to have been the true Proclamation Tree. (SLSA)



The colonists deluded themselves. If there was any unanimity induced by the excitement of the landing, it vanished with the setting of the sun. The evening was devoted by many to a drunken carousal, and those who went to bed at all that night rose to find that the Reign of Squabble had begun. For eighteen months Governor Hindmarsh presided over an administrative pandemonium. The emigrants were, in the words of Milton, "on the sudden transported under another climate to be tossed and turmoiled with their unballasted wits in the fathomless and unquiet deeps of controversy".

'most romantic and beautiful'

The public officials of the colony bickered amongst themselves with childish obstinacy, until South Australia was brought to the very verge of irretrievable ruin. "The administration of Hindmarsh," as Mr Rudall says, "was distinguished by little that was beneficial to the prosperity of the new settlement, by much that was injurious to its success, and principally by a continuous series of official quarrels which reduced the government to hopeless confusion."¹³



(Sir) John Hindmarsh
(1785–1860)
Hindmarsh was a naval
hero who became South
Australia's first Governor,
a position he held from
July 1836 until his recall in
June 1838. (SLSA)

The character of Hindmarsh was for a long time hidden under several layers of fuscous biographical varnish. Allen, for instance, in his *History of Australia* published in 1882 depicted him as a quarrelsome muddler, recalled in disgrace, and blamed him alone for: "... all the public and private quarrels, all the waste of time, all the stoppage of the surveys, all the delay in putting people in possession of their land" and said that they all arose: "out of his inordinate love of power, out of his objection to allow anybody to have a share with him in it, out of his unscrupulous opposition to all who did not defer to his wishes in everything; out of his constant intermeddling and intriguing".¹⁴

The modern view has been kinder. Admittedly the Governor had defects of character which militated against his success. By temperament he was obstinate and by training he was imperious and impatient of opposition. Like Dampier, his idea of a consultation with his officers was to swear at them if his opinions were questioned. Quick-tempered and changeable:

'Distracting thoughts by turns his bosom rules,
Now Fired by wrath, and now by reason cooled.'

Historical Background



Colonel William Light
(1786–1839)

Light was appointed Surveyor General after narrowly missing the position of Governor. Although his time as surveyor was productive it was far from happy – he resigned in 1838 in dispute with the Commissioners - and contributed to his failing health. (AGSA)

His acts were often hasty and ill-advised. He thought (and did not trouble to conceal it) that the colonial officials, with the exception of the Judge, Colonel Light, and one or two others, were a contemptible set—an opinion which was not entirely unfounded, for they were, in varying degrees, insolent, inexperienced and inefficient.¹⁵

But as James Stephen subsequently said, his case was hard. To a large extent he was the victim of circumstances over which he had little control—hostile officers, an unsurveyed country, an empty Treasury, lack of support from the Colonial Office. It was not to be expected that a colony could be founded without some mishaps and calamities. "The infirmity of human nature"—as Bentham has remarked—"renders all plans precarious in the execution, in proportion as they are extensive in design."

The honesty and good intentions of Governor Hindmarsh were never seriously questioned, and one may apply to him the words which John Dunmore Lang wrote of Bligh:

'That Governor Bligh was a passionate man, extremely irascible in his disposition, and disposed occasionally to give utterances to his angry feelings in language unbecoming an officer and a gentleman, I willingly admit; but that he had any other end in view than the administration of impartial justice, and the general welfare of the colony he was deputed to govern, I can find no ground whatever for believing.'¹⁶

It is perhaps not very useful to speculate upon Hindmarsh's probable success if he could have governed South Australia like an ordinary Crown colony:

'How easy 'tis when Destiny proves kind,
With full spread sails to run before the wind'

But his efficiency later as Governor of Heligoland shows, as Hodder wrote, that "if he had been so situated as to have been able to act on his own responsibility and exercise an independent judgment he would have proved a much more successful administrator of the affairs of the infant colony".¹⁷

On the other hand, history has been kind to Fisher. The scandals of his administration of the Commissioners' business were forgotten, and he lived to become Sir James, and the Father of the Colony. Yet his conduct was more reprehensible than the Governor's. For Hindmarsh there was some excuse—he was a sailor, unused to the intricacies of civil administration; Fisher was a shrewd man of business, with a professional training. It is always difficult to estimate character. "To judge a man", as Montaigne said, "we must a long time follow, and very curiously mark his steps." The available evidence, however, tends to show that the opinion which Sir John Jeffcott, the Judge, formed of the Governor and Fisher was substantially an accurate and just one: "I told you, as you will recollect, from the