

JOHN BAKER'S ACT: THE SOUTH AUSTRALIAN ORIGINS OF AUSTRALIAN CLAIMS-AGAINST-THE-GOVERNMENT LEGISLATION

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I INTRODUCTION

It has been rightly stated that '[o]ne of the most valuable parts of the United Kingdom's legacy to Australia has been the principle that all officials are under the law and must perform their duties according to law'.¹

Nevertheless, the law as Australia inherited it from the United Kingdom was not perfect in this respect. This article is about the origins of the Australian method of remedying one of the most glaring imperfections in the subjection of the executive to the rule of law – the Crown's common law immunity (except via the petition-of-right procedure,² which was generally not available in tort)³ from the legal liability that applies to subjects.

Earlier writers have pointed out that the first example of an Australian statute removing the Crown's immunity⁴ is Act No 6 of 1853 of South Australia.⁵ It is the ultimate ancestor of present-day Australian Crown proceedings statutes, such as the *Crown Proceedings Act 1988* (NSW), as well as ss 56 and 64 of the

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1 Peter Anthony Howell, *South Australia and Federation* (2002) 133.

2 See *Xenophon v South Australia* (2000) 78 SASR 251, 261.

3 See, eg, Sir William Holdsworth, *A History of English Law* (1903–66) vol 9, 19 ff, 41–3 (pointing out the special position of damages for conversion and in trover), vol 10, 651; Glanville Williams, *Crown Proceedings: An Account of Civil Proceedings by and against the Crown as Affected by the Crown Proceedings Act 1947* (1948) 16 ff.

4 At least, all immunity apart from that applying to the Sovereign personally, on which see David Pannick, 'Turning Queen's Evidence' [2003] *Public Law* 201, 201. No attempt is made here to consider questions relating to the applicability of such rules in Australia.

5 *Downs v Williams* (1971) 126 CLR 61, 78; *De Bruyn v South Australia* (1990) 54 SASR 231, 239; Australian Law Reform Commission, *Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) 462; Paul Desmond Finn, *Law and Government in Colonial Australia* (1987) 142 ff.

Judiciary Act 1903 (Cth),⁶ assimilating the rights of the Crown to those of the subject in suits to which the Crown is a party.⁷ Some credit for the reform of the law of the United Kingdom by the *Crown Proceedings Act 1947*, 10 & 11 Geo 6, c 44 ('*Crown Proceedings Act*') may also be claimed for the Australian line of statutes commencing with that of South Australia, given that the principle adopted in Australia became fairly well known in the United Kingdom⁸ after the decision of the Privy Council on the New South Wales version of the statute in *Farnell v Bowman*.⁹ Indeed, in introducing the Bill for the *Crown Proceedings Act*, the Lord Chancellor said:

this experiment we are now making has already long been the law in some of His Majesty's Dominions and Colonies – particularly in Australia and South Africa. They have Acts on the lines of this Bill, and they have worked well.¹⁰

The influence of the pioneering South Australian Act of 1853 on the law of the rest of Australia can be traced back to the 1850s. John Baker, later the second Premier of South Australia and the chief promoter in the legislature of the South Australian innovation, referred in a later debate to the means by which these ideas began to spread to the other Australian colonies:

The Act of 1853 provided the means of affording relief to persons having particular claims upon the government; but the Attorney-General of the day objected to that part of it which, as he [Baker] introduced it, made provision for granting relief to persons having other than pecuniary claims on account of an outstanding land-order then held in the name of Mr Matthew Smith. At that time a friend of his residing in Hobart Town wrote to him upon the subject, and in his reply he explained the reason for that exception. Subsequently, and as the result of the correspondence, a Bill was passed in Tasmania and another in New South Wales, which was a verbatim copy of our own Act, with the exception to which he had referred.¹¹

If these statements can be relied on (and there is no reason to suspect that they are false),¹² the South Australian statute was indeed the 'model for the New

6 This is made even clearer by reference to the *Claims against the Commonwealth Act 1902* (Cth), on which see *British American Tobacco Australia v Western Australia* (2003) 200 ALR 403, 421–2; Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17 *Australian Bar Review* 214, 219.

7 It has been held that the liability of the Crown in right of the Commonwealth in at least some cases of tort and contract actually arises directly under the *Constitution*: see *British American Tobacco Australia v Western Australia* (2003) 200 ALR 403, 409–10, 419. See also 438–43.

8 Holdsworth, above n 3, vol 9, 44 ff. It also became well known in Quebec, of all places: Peter Hogg and Patrick Monahan, *Liability of the Crown* (3rd ed, 2000) 109.

9 (1887) 12 App Cas 643.

10 United Kingdom, *Parliamentary Debates*, House of Lords, 4 March 1947, vol 146, col 67. See also United Kingdom, *Parliamentary Debates*, House of Commons, 5 December 1946, vol 431, written answers, col 122 ff. For an historical sketch of the development of the law of South Africa on this point, which post-dated that in (South) Australia by some decades, see *Mhlongo v Minister of Police* 1978 (2) SA 551 (A), 563; H R Hahlo and Ellison Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (1960) 194 ff. See also below n 264.

11 South Australia, *Parliamentary Debates*, Legislative Council, 25 September 1867, col 789.

12 John Baker does not appear to have left any papers to posterity which would enable the unearthing of a copy of the letter to which he refers – unless it may be found somewhere in Hobart or Sydney.

South Wales legislation of 1857¹³ and the direct ancestor of a series of similar (but not identical) claims-against-the-government Acts in the other colonies.¹⁴ However, no investigation of the reasons behind the enactment of the groundbreaking South Australian Act and thus the introduction of this innovation into Australian law has ever been carried out. As will be shown, the motives behind this reform included a considerable degree of self-interest by those responsible for the statute's enactment. In this respect, the Act did not differ from the most well-known South Australian legal innovation of the 1850s, the *Real Property Act 1858* (SA), which served a wide variety of vested interests, from those of existing land-holders to those of R R Torrens, the first Registrar-General (and also a landowner himself).¹⁵ Perhaps, therefore, we should not be too judgmental: cases in which an entirely disinterested party has sufficient energy and enthusiasm to carry through a reform are probably relatively infrequent.

The origins of claims-against-the-government legislation in South Australia extend slightly beyond 1853, for the 1853 Act was largely based on 'Act' No 14 of 1851, which, although described and numbered as an Act and bound in the statute book, never became law because it was never assented to by the Queen, for the signification of whose pleasure it had been reserved by the local Governor. The story of the enactment of the first claims-against-the-government legislation in Australia therefore also includes this episode and an explanation of why the Colonial Office objected to the first but not the second version of the claims-against-the-government legislation.

In this introductory section, however, attention will be given to the Act as passed in 1853. Like most South Australian statutes of the day, it had no short title, and never received one. Its long title was *An Act to give relief to Persons having Claims against the Local Government of South Australia, by authorizing them to try the validity of such Claims in a Court of Law or Equity*¹⁶ (which, with the substitution of 'authorizing' for 'authorising', was exactly the same as the

13 Finn, *Law and Government*, above n 5, 143. See also New South Wales Law Reform Commission, *Proceedings by and against the Crown*, Report No 24 (1976) 13, 19.

14 The reference to the statute of Tasmania in Baker's speech just quoted is to the *Crown Redress Act 1859*, 23 Vict, No 1, another statute that writers have generally ignored. Although not enacted until 1859, the Bill for this Act was introduced much earlier and indeed announced in the Governor's speech opening the first Parliament: see *Hobart Town Daily Mercury* (Hobart), 5 December 1856, 2. The Governor concerned was Sir H E F Young, who was Governor of South Australia at the time of the passage of the South Australian legislation. Was he perhaps the 'friend' to whom Baker referred in his speech? The Tasmanian Act is clearly not a verbatim copy of the South Australian Act, although a close reading of Mr Baker's statement indicates that he was merely asserting that the New South Wales Act was such a copy, not the Tasmanian one (note the word 'was' – not 'were' – after 'which'). Even so, the Tasmanian Act contains some sections that are clearly modelled on the South Australian Act (such as s 10). Section 13, excluding claims which would be 'paid from Imperial Funds, as distinguished from the Land Fund or General Revenue of this Colony', is another hint that the South Australian experience was called upon by the drafters of this Act. See also *Hobart Town Daily Mercury* (Hobart), 26 October 1857, 2; 17 August 1859, 2. However, this author has made no attempt to look into the origin of the Tasmanian statute in any detail.

15 Douglas Pike, 'Introduction of the *Real Property Act* in South Australia' (1960) 1 *Adelaide Law Review* 169, 169, 178, 182, 186.

16 For a reference to a claim in equity brought under the Act, see South Australia, *Parliamentary Debates*, Legislative Council, 20 October 1862, col 1109. See also below n 183.

long title of 'Act' No 14 of 1851). It was, however, 'popularly known',¹⁷ at least in South Australia, as the *Claimants Relief Act*.¹⁸ As transformed into ss 74–77 of the *Supreme Court Act 1935* (SA), it remained without major changes¹⁹ on the South Australian statute book²⁰ until the enactment of the *Crown Proceedings Act 1972* (SA). (Unlike those of some other colonies,²¹ the Provincial legislature of South Australia did not replace its own innovation by the English one after the enactment there of the *Petitions of Right Act 1860*, 23 & 24 Vict, c 34 ('*Petitions of Right Act*').)

A brief description of the Act's provisions is in order, although, as it was largely copied by legislation in other colonies that has been summarised elsewhere,²² no extensive description will be required. The preamble to the Act recited that disputes had arisen, and may later arise, between 'Her Majesty's Local Government in the Province of South Australia' and the subject, and that the 'ordinary remedy', the petition of right, 'is of limited operation, is insufficient to meet all such cases, can only be obtained in England, and is attended with great expense, inconvenience, and delay'. Although the petition-of-right procedure may in fact have been available outside England,²³ the rest of what is said in the preamble was hardly an exaggeration. Some of the principal difficulties facing the petitioner were these:

In the first place, there was a lengthy preliminary procedure before the legal question at issue could be brought before the Court. The petition must be endorsed.

17 South Australia, *Parliamentary Debates*, House of Assembly, 30 June 1875, col 298.

18 Just before its repeal, for example, it was so referred to (see *Hunkin v Siebert* [1934] SASR 347; *Hunkin v Siebert* (1934) 51 CLR 538) as it was by Hanson CJ, Advocate-General at the time of its passing (see *North Australian Co v Blackmore* (1871) 5 SALR 157, 176), and before the Privy Council (see *Blackmore v North Australian Co* (1873) LR 5 PC 24, 34). See also T R Ambrose, 'Claims Against the Crown' (1934) 8 *Australian Law Journal* 214, 214. The *Claimants Relief Act* will mostly be referred to here simply as 'the Act'.

19 Perhaps the most important change made in 1935 was the addition of the rule that the plaintiff could make not only a pecuniary claim, but also one for 'the restitution of real or personal property' in South Australia: s 74(1). See also below nn 31, 172. In addition, some spent provisions of the Act of 1853 were removed, the language was updated and an outline of the procedure was given.

20 It was repealed in the Northern Territory by the *Supreme Court Ordinance Repeal Ordinance 1965* (NT) O 2(2), sch 2.

21 See Finn, *Law and Government*, above n 5, 143. Attempts were, however, made to do so: see Petition of Right Bill 1866 (SA) (State Archives of South Australia, GRG 1/15/7 – in this article, all references to 'GRG' indicate records preserved in the State Archives of South Australia); Petitions of Right Bill 1875 (SA) (preserved in the State Library of South Australia in volume entitled 'Bills Standing Over Session 1875'), on which see South Australia, *Parliamentary Debates*, House of Assembly, 13 October 1875, col 1379. See also below n 185.

22 See generally Finn, *Law and Government*, above n 5, especially 142–5.

23 No-one considered in 19th century South Australia whether the Crown could have consented, or been asked to consider consenting, to a trial in a colonial court: see *R v Dalgety & Co* (1944) 69 CLR 18, 20; Sir William Reynell Anson, *Law and Custom of the Constitution* (4th ed, 1935) vol 2, pt 2, 338 (but see 360 ff); George Stuart Robertson, *The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (1908) 380–2. But even if it could or would have, presumably the lengthy preliminary stages would still have been required in Chancery and by commission: Holdsworth, above n 3, vol 9, 16 ff, 22. The availability of a petition of right at all for a claim on the local revenue could have been disputed: Butterworths, *Halsbury's Laws of England* (1st ed, 1909) vol 10, Crown Practice, '2 Petition of Right' [61]. *A-G v Great Southern & Western Railway Co of Ireland* [1925] AC 754 is, however, distinguishable owing to the Dominion status of the Irish Free State.

A commission must issue to take an inquest to find the facts. If the facts were not found satisfactorily, a second commission might issue to find them again. If they were found satisfactorily, it was sometimes necessary to put in a second petition to stir up the Crown to take the next step of answering the petitioner's plea, and coming to an issue, which could be sent to the King's Bench for trial; and in all cases begun by petition the Crown could delay the petitioner by instituting a search for records which would support his title. In the second place, [the King's prerogatives] placed a very heavy burden on the petitioner. ... When this fence had been successfully surmounted, the petitioner was further handicapped by the fact that the King had many advantages in pleading which he had not. ... At any time he could stop the proceedings by the issue of a writ *rege inconsulto*; and the Judges could not then proceed without an order from the King.²⁴

Section 1 of the South Australian Act accordingly bypassed this and gave a right to present a petition, supported by a barrister's certificate, to the Governor²⁵ of the Province setting out the claim. The Governor was then to refer the petition to the Supreme Court 'for trial by a jury or otherwise as such Court shall ... direct'. The exception to this – a crucial provision in the history of the Act, as we shall see – was for cases in which the Governor, advised by the Executive Council, certified that the petition 'affects the Royal prerogative', in which case it was to be sent to the Secretary of State for the Colonies in London for decision. In the case of a refusal to entertain such a petition, the reasons were to be published in the *Gazette*. (In the original version, 'Act' No 14 of 1851 had provided for claims that affected the Royal prerogative to be identified by means of a judge's certificate to that effect.)

Section 2 provided that, for the purposes of the trial, the Governor was to name a 'Nominal Defendant or Defendants', who was/were not to be personally liable. Section 3 provided that those with claims existing at the passing of the Act were to have two years in which to present them before the usual limitations rules were to apply. Section 4 provided a rule-making power for the court²⁶ and went on to declare that the parties to such a suit 'shall have the same rights, either by way of appeal, rehearing, motion for reversal of verdicts, or otherwise, as in ordinary cases of law and equity'.²⁷

Section 5, clearly the ultimate ancestor of s 64 of the *Judiciary Act 1903* (Cth) and also not dissimilar to s 12 of the *Petitions of Right Act*,²⁸ continued this

24 Holdsworth, above n 3, vol 9, 22 ff. See also *Xenophon v South Australia* (2000) 78 SASR 251, 261.

25 The statute actually said 'Lieutenant-Governor', although by the middle of the section it had reverted to the more normal title of Governor. The change in title was connected with the appointment of a Governor-General of Australia in the early 1850s and had no substantive significance. The discrepancy in titles appears at one stage to have caused a raised judicial eyebrow: South Australia, *Parliamentary Debates*, House of Assembly, 11 October 1867, col 997; 5 December 1867, col 1267. Here, 'Governor' will be used throughout (except of course in quotations which contain the fuller title), as it is the title which has survived.

26 For the use which was made of this, see *Bloch & Welden v Smith* [1922] SASR 95, 119 ff; *Welden v Smith* [1924] AC 484, 490; *William Charlick Ltd v Smith* [1922] SASR 551, 554.

27 On the width of this, see *Welden v Smith* [1922] SASR 186, 190–2. Cf *Robinson v South Australia (No 2)* [1931] AC 704.

28 See also *Administration of Justice (Miscellaneous Provisions) Act 1933*, 23 & 24 Geo 5, c 36, s 7(1).

theme²⁹ by providing (in full) that '[c]osts of suit shall follow on either side as in ordinary cases between suitors, any law or practice to the contrary notwithstanding'. Section 6 made it 'lawful for the Governor to satisfy and pay any judgment recovered ... out of any available balance of the Ordinary Revenue'³⁰ of South Australia, and also authorised the Governor to perform any equitable decrees. While this wording is not as clear as it might be,³¹ the contemporary understanding was that the words just quoted operated as a standing appropriation of the revenue to satisfy judgments against the Crown.³² Thus, the credit for first introducing such a provision into claims-against-the-government legislation belongs not to the Parliament of Queensland,³³ but to the Legislative Council of South Australia. Finally, s 7 stated that the Act was to commence 'immediately after the passing thereof', which was 23 November 1853.

That, therefore, was the day on which a new procedure was provided for claims against the local government of South Australia, a procedure which was significantly simpler than that existing in England at the time or even, it might be thought, after the enactment of the *Petitions of Right Act*. It also predated the first case³⁴ in England in which it became necessary actually to decide that the petition of right was generally applicable in contract. As we shall now see, it took some years of sustained lobbying by well-connected people who believed that they had a legitimate grievance against the government to achieve this result. The main lobbyists will now be briefly sketched. After then considering the progress of the measure through the legislature of South Australia – something which had to occur twice owing to the non-assent of the Imperial authorities to the initial measure of 1851 – the effect of the Act on the lobbyists' claims, and the law of South Australia more generally, will be examined. The chief question for consideration under that heading is whether the Act merely provided a better procedure for enforcing those claims which might, under the law as it then stood,

29 In later colonial statutes, the matter dealt with here in ss 4 and 5 was dealt with in one section. See, eg, Paul Desmond Finn, 'Claims against the Government Legislation' in Paul Desmond Finn (ed), *Essays on Law and Government Volume 2: The Citizen and the State in the Courts* (1996) 28. For an overview, see Susan Kneebone, *Tort Liability of Public Authorities* (1998) 297. See also Act No 17 of 1874, s 5.

30 See also Act No 17 of 1874, s 6.

31 The drafter of s 77 of the *Supreme Court Act 1935* (SA) added the words 'for which payment this Act shall be a sufficient authority and appropriation of revenue'. Cf *Re Shaw* (2001) 4 VR 103, 108.

32 South Australia, *Parliamentary Debates*, Legislative Council, 8 March 1866, coll 1262–5; Legislative Council, 13 March 1866, coll 1311–13; House of Assembly, 15 March 1866, col 1358 ff; Legislative Council, 1 October 1867, coll 848–50; House of Assembly, 13 October 1875, col 1377 (it is the future Way CJ who is speaking here).

33 Geoffrey Sawyer, 'Crown Liability in Tort and the Exercise of Discretion' (1951) 5 *Res Judicatae* 14, 14 fn 7.

34 *Thomas v The Queen* (1874) LR 10 QB 31 (although note that there was previously a 'general impression' that the petition was available: at 34); Janet McLean, 'The Crown in Contract and Administrative Law' (2004) 24 *Oxford Journal of Legal Studies* 129, 145.

have been enforced in England by petition of right,³⁵ or whether it made a substantive as well as a procedural reform and permitted the Crown to be sued in tort, in which it had not previously been liable.

II THE CLAIMANTS

Certain names occur with monotonous regularity in the period leading up to the enactment of the *Claimants Relief Act*. It was to the lobbying of those with real or imagined grievances against the Provincial government of South Australia that the Act owed its genesis. A short summary of each claim therefore seems in order.

A Borrow & Goodiar

It has been said that '[p]risons are built with stones of law'. The *Claimants Relief Act* might be said to have been built with the stones of prisons, for the main lobbyists for such a law, the building firm of Borrow & Goodiar and their creditors, based their claim principally³⁶ on their construction of the Adelaide Gaol in the early 1840s.

Even if it were possible, it would not be desirable here to provide a detailed account of the events surrounding this claim, which was likened more than once to a South Australian version of *Jarndyce v Jarndyce*.³⁷ Those interested in the detail of the dispute, the unsuccessful arbitration and the various claims put forward could do worse than consult the Colonial Office files for 1844–45,³⁸ which contain more than 250 folios with detailed information about the claim up to that point, or the book of over 150 pages published by the claimants in June

35 The procedure under the Act was in fact sometimes called a 'petition of right': *Bloch & Welden v Smith* [1922] SASR 95, 96; *William Charlick Ltd v Smith* [1922] SASR 364, 366; *Hunkin v Siebert* [1934] SASR 347, 357; aff'd (1934) 51 CLR 538, 539; *Miesiewicz v South Australian Railways Commissioner* [1961] SASR 190, 194. See also South Australia, *Parliamentary Debates*, House of Assembly, 28 March 1972, 4346 (Len King QC, Attorney-General).

36 Although not solely, as is shown by the petitions reprinted in the South Australian Parliamentary Papers (South Australia, Parl Paper No 42 (1853); South Australia, Parl Paper No 43 (1856)), the reports of the trial of the case in July 1856 in the newspapers cited below, Part IV, and sundry other documents. (For ease of reference, the Papers of the Legislative Council of 1851–56 are cited herein as Parliamentary Papers.)

37 *The South Australian Register* (Adelaide), 5 December 1856, 2 (Mr Dutton MLC); *The Adelaide Times* (Adelaide), 2 August 1856, 2.

38 CO 13/39/271–536 (AJCP 5989). Details may also be found in the later petitions of Borrow & Goodiar or their creditors: see, eg, South Australia, Parl Paper No 43 (1856); South Australia, Parl Paper No 59 (1857–58).

1844³⁹ – each produced well over a decade before the claim finally was tried under the *Claimants Relief Act* in 1856. The gaol concerned was the first permanent gaol in the Province and, although no longer in use (except as a tourist attraction), is still standing. A new gaol was certainly needed in Adelaide, as the grand jury of March 1840 pointed out.⁴⁰ Sir Henry Ayers comments:

The [gaol] I found on my arrival was certainly not adapted to the end in view – the safe-keeping of prisoners. It consisted of a tent, with an airing ground in front, enclosed with a rope, around which one or two turnkeys patrolled, armed with a Brown Bess musket. But while it will be acknowledged that this accommodation was altogether inadequate for the purpose, there was no need why the other extreme should have been adopted. High walls and strong doors were doubtless necessary, but no angle towers, surmounted with cut-stone embattlements, the stone alone costing 42s per cube foot to work, while for other services artisans were paid from £3 18s to £4 4s per week, and the cost generally was [so] greatly enhanced from the high price of labor and unforeseen contingencies, that it brought ruin upon a most respectable firm of contractors, and involved the colony in debt for years to come.⁴¹

This edifice was but one example, although perhaps the most striking, of the over-expenditure by George Gawler, second Governor of South Australia, on public buildings. As Professor Pike records,⁴² and the Colonial Office⁴³ and other records bear out, the claim for this edifice reached dizzy heights; the claimants had by mid-1842 received a total of £19 800 and were claiming £32 022/2/9, a claim which was condemned as ‘preposterous and extravagant’.⁴⁴ An initial offer by the government, based on a suggestion from the creditors of the firm in December 1841⁴⁵ and approved at a meeting of the local Executive Council on 1 March 1842,⁴⁶ to submit the remaining claims to trial using a nominal defendant to represent the Crown⁴⁷ – a precursor of the procedure adopted under the

39 The only copy of this known to the author is in the private possession of Mr K T Borrow. Mr Robert Edwards AO has informed the author that its ultimate destination is the Library of the Flinders University of South Australia. The book bears the title *Case of Borrow and Goodiar* and appears to have been self-published; it is dated at Mount Barker, June 1844. Further valuable resources in Mr K T Borrow's collection are two unpublished volumes entitled *The Transactions of Borrow and Goodiar with the Local Government of South Australia 1840 to 1858* apparently written by Mr K T Borrow, and an accompanying collection of original documents, all of which are also to be given to the Flinders University. These sources were not available to this author until the completion of most of the research for this article.

40 British Parl Paper No 394 (1841) Appendix, 315. See also *The South Australian Register* (Adelaide), 11 July 1840, 6; *The Southern Australian* (Adelaide), 10 July 1840, 3.

41 John Blacket, *The Early History of South Australia: A Romantic Experiment in Colonization 1836–1847* (1907) 121. See also Henry Thomas Burgess (ed), *The Cyclop[a]edia of South Australia in Two Volumes: An Historical and Commercial Review, Descriptive and Biographical, Facts, Figures and Illustrations: An Epitome of Progress* (1907) vol 1, 309; Douglas Pike, *Paradise of Dissent: South Australia 1829–1857* (1st ed, 1957) 294; Sue Scheiffers, *Inside: A Brief History of the Adelaide Gaol* (2002) 7–10.

42 Pike, *Paradise of Dissent*, above n 41, 237 ff. On Gawler's extravagance, see also 185, 230–6.

43 CO 13/39/376–9 (AJCP 599).

44 CO 13/39/433 (AJCP 599).

45 CO 13/39/436 (AJCP 599).

46 GRG 40/1/121 ff; extracted in CO 13/39/462 (AJCP 599).

47 CO 13/39/4362 (AJCP 599). In GRG 24/6/1842/225½ (reproduced in *Transactions of Borrow and Goodiar*, above n 39, 138 ff) there is a statement by George Morphet, counsel to the Bank, that it was usual for the government to nominate a nominal defendant to enable a suit against it to be conducted. This is dated 19 April 1842.

Claimants Relief Act – was withdrawn when allegations were made that Borrow & Goodiar were fraudsters and grossly overcharging.⁴⁸ These allegations never seem to have been substantiated, let alone disposed of. Possibly, however, the more compelling reason for the withdrawal of the offer was that given by Gawler's successor, George (later Sir George) Grey, in a despatch to the Colonial Office – namely, that

the number of persons interested directly or indirectly in the settlement of this claim is so large, and the means which have been resorted to for the purpose of influencing the public mind through the Press and otherwise have been so improper and constant that I fear it would be hopeless to expect an impartial consideration of the subject from any Jury in this Colony.⁴⁹

Cutting the first half of a very long story very short, lobbying for payment by Borrow & Goodiar came to a temporary halt when in April 1842, clearly pressed by their creditors for money, they signed a full discharge of their claim relating to the gaol in return for £6432/12/10 in government debentures, making a total payment of £19 800 plus interest.⁵⁰ Competition for the money owed to Borrow & Goodiar soon emerged: as well as having numerous general creditors, the firm had also executed an assignment of all sums due or to become due to it to cover its debts of about £7750 to the South Australian Banking Company.⁵¹ For this reason, the debentures of April 1842 were made payable not to Borrow & Goodiar, but to the Bank, which received the money in full at the end of 1845.⁵² Borrow & Goodiar therefore became insolvent.⁵³

By an amazing coincidence, one of the principal general creditors of Borrow & Goodiar was the Adelaide Auction Company, the Chairman of Directors of which was a prominent local man of affairs, one John Baker.⁵⁴ This was the very same man who, a few years later, was to introduce the *Claimants Relief Act* and press for its passage – despite, as we shall see, hurdles which might have daunted a lesser man. The Adelaide Auction Company seems to disappear from the

48 CO 13/39/364–6, 369 (AJCP 599).

49 GRG 2/5/6/No 123 of 23 September 1844; CO 13/39/271–8 (AJCP 598). See also CO 13/39/497 (AJCP 599).

50 GRG 36/32/10/9; CO 13/39/376 ff, 502 ff (AJCP 599). In *Case of Borrow and Goodiar*, above n 39, 38, 129, and in *Transactions of Borrow and Goodiar*, above n 39, 148, it is stated that the Adelaide Auction Company, represented by John Baker, threatened them with the immediate sale of their possessions.

51 GRG 36/32/10/5; *Transactions of Borrow and Goodiar*, above n 39, 57–62. On the South Australian Banking Company, see Ordinance No 16 of 1843. See also below n 56.

52 GRG 24/4/1845/92; *Transactions of Borrow and Goodiar*, above n 39, 163–8, 178, 264. See also CO 13/39/505 ff (AJCP 599).

53 *South Australian Government Gazette* (Adelaide), 29 June 1843, 167; South Australia, Parl Paper No 21 (1856) 4 ff, item 88. Their premises were sold by J B Neales the auctioneer (see below n 55): *The South Australian Register* (Adelaide), 24 April 1844, 2; *The South Australian* (Adelaide), 3 September 1844, 2.

54 Cf CO 13/39/321, 324 ff, 441–6 (AJCP 598–9); GRG 36/32/10/8 (draft endorsed by Baker for the Adelaide Auction Company); *Case of Borrow and Goodiar*, above n 39, 38, 44.

historical record at the end of 1843,⁵⁵ suggesting that it may have been hit hard by the failure of Borrow & Goodiar to pay their debts in full as well as the general economic depression around that time. Also creditors of the firm, or representing persons who were, were Messrs Neales and Forster MLC,⁵⁶ the former possibly claiming from his time as the auctioneer of the Adelaide Auction Company.⁵⁷ Other members of the local legislature in the early 1850s had somewhat different reasons for favouring the claim:⁵⁸ Borrow had a daughter who had married Mr Gwynne MLC, a prominent local lawyer and later to be the first locally appointed judge, in July 1854.⁵⁹

The claim for the remaining sums allegedly due to Borrow & Goodiar, despite their giving of a full discharge, was kept in view by various methods until the start of the 1850s.⁶⁰ It was the opening of the first representative legislature in 1851 that, as we shall see, finally permitted legislation to be proposed to allow it to be submitted to a jury.

B The Land Order Cases

One of the crucial stages in the commencement of settlement in South Australia, and a reflection of Wakefield's theories of colonisation, was the

55 The index to GRG 24/4 and GRG 24/6 shows the following newspaper reports on the Adelaide Auction Company: *The South Australian Register* (Adelaide), 17 October 1840, 3; *The South Australian* (Adelaide), 10 November 1840, 3; 4 January 1842, 2; 7 January 1842, 2; 3 October 1843, 3; 21 November 1843, 3. The last two reports in particular suggest that the Company may have ceased trading at about this time; various searches and enquiries of learned persons who might have further information on the Adelaide Auction Company have been fruitless. See also James F Bennett, *Historical and Descriptive Account of South Australia: Founded on the Experience of a Three Years' Residence in that Colony* (1843), 120; *The South Australian Register* (Adelaide), 20 May 1872, 5 (Adelaide Auction Company was 'one of the most important institutions of the early times'). It is also stated, however, that J B Neales, also later an MLC, was 'for many years' the auctioneer of the Adelaide Auction Company: *The South Australian Register* (Adelaide), 1 August 1873, 5.

56 *The South Australian Register* (Adelaide), 5 December 1856, 3; *The Adelaide Times* (Adelaide), 5 December 1856, 2 ff. See also Pike, *Paradise of Dissent*, above n 41, 248 (and for Hagen's non-election to the Legislative Council of 1851, see 431). By 1853, Edward Stephens, the manager of the Bank, had also joined the Legislative Council: Pike, *Paradise of Dissent*, above n 41, 466. As the Bank was a competitor with Baker for the fruits of Borrow & Goodiar's estate, this led to some sharp exchanges in the legislature: *The South Australian Register* (Adelaide), 28 October 1854, 2 ff; *The Adelaide Times* (Adelaide), 28 October 1854, 2 ff.

57 See above n 55.

58 Although note that Gwynne signed a petition of the firm's creditors and legal advisers: CO 13/39/517–22 (AJCP 599). He might in fact have qualified under both headings, but see below n 203.

59 See Douglas Pike (ed), *Australian Dictionary of Biography* (1851–90) vol 4, 312 (Mr Justice Gwynne's entry). Documents in the possession of Mr K T Borrow (see above n 39) include a bill of costs from Gwynne to Borrow & Goodiar dated 31 December 1841, so the relationship of lawyer and client obviously pre-dated the marriage.

60 See, eg, the report of the proceedings in South Australia, *Votes and Proceedings*, Legislative Council, 12 March 1850, 6; *The South Australian Register* (Adelaide), 13 March 1850, 2; *The South Australian* (Adelaide), 15 March 1850, 3; *South Australian Gazette and Mining Journal* (Adelaide), 14 March 1850, 2; *The Adelaide Times* (Adelaide), 13 March 1850, 3. GRG 1/23 (bundle '1846 – Supreme Court') contains a writ issued by Borrow & Goodiar to Charles Sturt dated 6 November 1846 and claiming £590/-/2.

advance sales of land to begin a fund to pay the costs of emigration.⁶¹ By proclamations in February and April 1843,⁶² the rights of priority in selection conferred by such advance sales, and granted by what were called 'land orders', were declared liable to expiry if not exercised by May 1843. Speaking rather generally, it might be said that the problems that had become apparent with the whole of Wakefield's theory of colonisation had occasioned this change; at the level of detail, one wonders why provision was not made in the original scheme for lapse of the rights of priority under land orders after the expiry of a reasonable time for selection.⁶³ At any rate, as Pike records, one land order

fell into the hands of the lawyer, Matthew Smith, who after pleading his case at the Colonial Office through his patron John Buckle,⁶⁴ regularly petitioned the colonial legislature for the right to use his privilege in any part of the colony. In 1853 his persistence was rewarded and he was allowed to exercise the land-order as he wished within six months.⁶⁵

The issue of the unexercised land orders, however, first emerges (as far as can be determined) at the end of 1845, when the South Australian Company, as the holder of some preliminary land orders, sued the Governor in equity for an injunction preventing the sale of certain land that the Company wished to select. The case was based on the preservation of existing rights under s 20 of 5 & 6 Vict, c 36 (1842) ('*Waste Lands Act*'), which otherwise subjected all sales of waste land in Australia to a prescribed statutory scheme. The Advocate-General, William Smillie, accepted service of the proceedings under protest that the Governor could not be compelled to submit to the jurisdiction of the local courts.⁶⁶ Mr Justice Cooper refused the injunction, chiefly on the bases of *laches* and non-compliance with the conditions laid down for exercising the land orders.⁶⁷

Although the means available to the subject (before the passing of legislation) to sue the Crown in equity appear to have been different, and somewhat more extensive, than those available at law,⁶⁸ the response to these proceedings by the

61 See 4 & 5 Wm 4, c 95 (1834), s 6; Alex Castles, *An Australian Legal History* (1982) 311; Pike, *Paradise of Dissent*, above n 41, 120 ff; Pike, 'Introduction of the *Real Property Act*', above n 15, 169, 171.

62 See *South Australian Government Gazette* (Adelaide), 16 February 1843, 54; 6 April 1843, 95.

63 See the opinion of John Buckle, reproduced in *The South Australian* (Adelaide), 17 August 1849, 2; *The South Australian Register* (Adelaide), 3 June 1846, 2.

64 See *ibid*.

65 Pike, *Paradise of Dissent*, above n 41, 193.

66 For the Government's substantive response, see GRG 2/5/7/No 42 of 23 December 1845. The Governor was also sued personally as a result of the dishonour of government bills, an incident which will be dealt with shortly. See, eg, GRG 2/5/6/No 61 of 5 June 1844; Alex Castles and Michael Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia 1836–1986* (1987) 37.

67 *The South Australian* (Adelaide), 23 December 1845, 2 ff, 3. See also *The South Australian* (Adelaide), 16 December 1845, 3; *The South Australian Register* (Adelaide), 20 December 1845, 2 ff, 3; *South Australian Gazette and Colonial Register* (Adelaide), 20 December 1845, 2; 27 December 1845, 3 ff. In GRG 2/5/7/No 42 of 23 December 1845, the Governor states that the case was 'fairly reported in the South Australian newspaper of today'.

68 See *Commonwealth v Mewett* (1997) 191 CLR 471, 542; Hogg and Monahan, above n 8, 5; Holdsworth, above n 3, vol 9, 30–2; New South Wales Law Reform Commission, above n 13, 27 ff; Leeming, above n 6, 214, 215 ff.

Colonial Office was firm. In a despatch of June 1846, the Secretary of State for the Colonies, one W E Gladstone, told the Governor off:

I cannot sanction the course which you followed in this case. By appearing, or permitting any officer of the Crown to appear in defence of such a suit, you virtually acknowledged that the head of the Local Government was amenable to the jurisdiction of the Courts of the Colony which he governs. ...

I object to that acknowledgment, not on any ground of mere dignity, or usage, or precedent; but, because thus to break down the barriers which separate the judicial and the administrative authorities must result in great practical evils. The immunities of the Sovereign in this country, and the corresponding immunities of a Governor in the Colony he rules, exist for the good of the people at large. If it were admitted that you, as Governor of South Australia, were amenable to the Courts of the Colony, you would of course be liable to fine, to distress, and to imprisonment at their bidding. Many of the grounds of public policy, on which you might well justify your acts to the Queen or to Parliament, would be altogether inadmissible as a defence at the trial of an action against you in those Courts. Nor can I omit to notice that a colonial Jury might, however unconsciously, be under a strong bias against a Governor in the character of a defendant; especially when they understood, or supposed, that the British Treasury would be really responsible.⁶⁹

It is worth noting in passing that William Smillie, the Advocate-General, was a Scots lawyer.⁷⁰ Scots law was by no means as restrictive as English law (or equity) on the question of the subject's rights to an interdict against the Crown,⁷¹ and accordingly Smillie might have been rather less alarmed by the Company's attempt to obtain such relief than was Gladstone.

After its defeat in court in December 1845, the Company tried again in early 1846, seizing a piece of land and proceeding at law for trespass when the Crown expelled it.⁷² It lost again, although the case shows that it certainly was possible in early colonial South Australia to sue a servant of the Crown in tort, thus bypassing the Crown's immunity.⁷³ It also shows that Gladstone's fears about colonial juries were not necessarily justified, as the jury in this instance rejected the claim.

Notably, however, we find claims under the old land orders being urged to their conclusion not by the South Australian Company but by Matthew Smith, who, according to a later newspaper report,⁷⁴ bought his land order from the original grantee, a Mr Richmond, in May 1845 – about two years after its expiry under the notice of February 1843. (As a lawyer, Smith had coincidentally

69 South Australia, Parl Paper (22 October 1851), reproducing GRG 2/1/6/No 42 of 13 June 1846.

70 R M Hague, *A History of the Law in South Australia 1836–1867* (1936) 1282; Greg Taylor, 'South Australia's *Judicature Act* Reforms of 1853: The First Attempt to Fuse Law and Equity in the British Empire' (2001) 22 *Journal of Legal History* 55, 63 ff.

71 For references to the pre-1947 Scots law, see *McDonald v Secretary of State for Scotland* 1994 SC 234, 238–41, 246; *Commonwealth v Mewett* (1997) 191 CLR 471, 544; Thomas Broun Smith, *Scotland: The Development of its Laws and Constitutions* (1962) 65.

72 *The South Australian Register* (Adelaide), 30 May 1846, 2–4 (note that the special jury here included R F MacGeorge, one of the other claimants). See also *The South Australian Register* (Adelaide), 22 April 1846, 3; 15 April 1846, 3; *The South Australian* (Adelaide), 17 April 1846, 3; 14 August 1849, 2; GRG 2/5/8/No 64 of 2 June 1846; Pike, *Paradise of Dissent*, above n 41, 334. See also below n 287.

73 See also above n 47.

74 *The South Australian* (Adelaide), 14 August 1849, 2.

witnessed Borrow & Goodiar's declaration of insolvency⁷⁵ and acted for their assignees.)⁷⁶ Smith's claims were summarily rejected in Downing Street, the Colonial Office referring Smith to the courts and adding for good measure that, if he had a claim, 'it must enure to the serious prejudice of the South Australian Public at large'.⁷⁷ An attempt to have the matter resolved by petitioning the Imperial Parliament was also unsuccessful.⁷⁸

The stage then shifted to South Australia, and on 23 August 1849 a motion was carried in the Legislative Council by four votes (those of the non-official members) to three (those of the officials) that, as it was 'the birthright of every British subject who feels himself aggrieved' to go to law, Smith should be permitted to sue a nominal defendant appointed to represent the interests of the government.⁷⁹ The debate brought forth the interesting statement from the Colonial Secretary that

it might be said that on former occasions an officer has been nominated to represent the Crown in a trial of right, but it did not by any means follow that such was the correct course, or that it was advisable, by repetition, to sanction or confirm the precedent.

This was because a waiver of rights by the Crown was 'unconstitutional'.⁸⁰ The precedent referred to was probably the second case involving the South Australian Company just mentioned, in which the Crown servant alleged to be responsible for the trespass was the defendant. But although the motion in favour of Smith's claim was passed, this had no effect, for the Legislative Council at this stage in the Province's affairs was not able to do more than express its opinion. It could not compel the Governor to sanction Smith's claim and, given the Colonial Office's attitude to such claims, there was little likelihood of that occurring anyway.

As we shall see, the land order claims played a role in the debates on the original 'Act' of 1851, but by the time the Act of 1853 was enacted an amendment in effect prohibited the claims from being urged under that Act. Even so, the important role of the claims of the South Australian Company and Smith in highlighting the lack of legal redress against the local government should not be overlooked. As late as September 1852, Smith was still petitioning for the appointment of a nominal defendant.⁸¹ And although his claim, at least to select land, was excluded from the ambit of the Act of 1853 by the insertion of the provision that it was to apply only to 'pecuniary' claims,⁸² Smith received his

75 *South Australian Government Gazette* (Adelaide), 29 June 1843, 167.

76 GRG 24/6/1844/812; *Transactions of Borrow and Goodiar*, above n 39, 245.

77 GRG 2/1/9/No 20 of 2 March 1849.

78 GRG 24/6/1848/222, 263; 24/4/1849/340.

79 South Australia, *Minutes of the Legislative Council*, 23 August 1849 (preserved in the Library of Parliament House, Adelaide). See also South Australia, *Minutes of the Legislative Council*, 25 September 1849; *The South Australian Register* (Adelaide), 26 September 1849, 3; *The South Australian* (Adelaide), 24 August 1849, 2; 28 September 1849, Supp. 1; *South Australian Gazette and Mining Journal* (Adelaide), 27 September 1849, 5; *The Adelaide Times* (Adelaide), 27 August 1849, 4; 1 October 1849, 3.

80 *The South Australian Register* (Adelaide), 25 August 1849, 3. See also above n 47.

81 South Australia, *Votes and Proceedings*, Legislative Council, 14 September 1852, 17.

82 Act No 6 of 1853, s 1.

remedy. The Advocate-General, R D Hanson, reported on 31 October 1853, a few weeks before assent was given to the *Claimants Relief Act*, that the proclamation of 16 February 1843 was 'absolutely nugatory, since it was in violation of the *Waste Lands Act*', 'an attempt by one of the parties to a contract to change its terms, without the consent of the other party', '[an] attempt to substitute prerogative for legislation' and, if that were not enough, 'unjust in principle'⁸³ given that no compensation was offered. This caused the Colonial Secretary to reflect that the case had, until that point, been treated as one of expediency rather than one of law.⁸⁴

Mr Hanson's devastating assessment of the government's behaviour towards Smith doubtless sprang from conviction rather than professional friendship, for we find him repeating similar sentiments in an unrelated case almost 20 years later as Chief Justice of the South Australian Supreme Court.⁸⁵ At all events, the opinion of 1853 led to the granting of Smith's request to select land in a letter dated 14 November 1853,⁸⁶ although the final resolution of the matter was delayed when Smith responded by selecting land on the Echunga Gold Field.⁸⁷ Smith, however, did not live long to enjoy the fruits of his struggle,⁸⁸ for he died on 18 November 1858 just after completing his term of service as Acting Commissioner of Insolvency.⁸⁹ Just as the testimonial to him presented on completion of that term had attracted very broad support in the local legal profession,⁹⁰ his funeral⁹¹ was attended by a veritable 'who's who' of the early South Australian legal profession, including Cooper CJ, Boothby J and Hanson A-G.⁹² Again we see that it was the well-connected who lobbied for the provision of a remedy for the subject against the Crown.

C The Dishonoured Bill Cases

Pike explains that the practice in very early South Australia was to draw on the Colonisation Commission to pay government debts. This was done by means of bills which were sent to England for the Commission's acceptance; if the Commission failed to accept a bill, it was returned 'protested' and, after 60 days, became dishonoured and was 'sent back to the drawer who became liable for the face value of the draft and a penalty of twenty per cent'.⁹³ This occurred on a massive scale in the wake of the financial collapse of the colony in 1840–41. The

83 GRG 1/1/1853/108; GRG 24/6/1853/2616.

84 GRG 24/6/1853/2616.

85 *North Australian Co v Blackmore* (1871) 5 SALR 149, 153. See also below n 270.

86 GRG 24/4/26/852; *The Adelaide Times* (Adelaide), 22 November 1853, 3.

87 See, eg, GRG 24/4/1854/395; 24/6/1854/197; 24/6/1855/404, 2406 (the last of which appears to suggest that another claimant under another land order had also surfaced).

88 And, for the same reason, could not have been the plaintiff in *Smith v Bewes* (1868) 2 SALR 149, although it is possible that the plaintiff was related to Matthew Smith.

89 See George Etienne Loyau, *Notable South Australians, or, Colonists – Past and Present* (1885) 229.

90 *The Adelaide Observer* (Adelaide), 12 June 1858, Supp, 1.

91 *The Adelaide Observer* (Adelaide), 27 November 1858, 6.

92 See *ibid.* See also *Biggs v McEllister* (1880) 14 SALR 86, 95.

93 Pike, *Paradise of Dissent*, above n 41, 185, 211.

solution ultimately adopted was to issue debentures payable at the discretion of the colonial government in place of the repudiated bills.⁹⁴

This did not, however, settle all the claims, for some holders of the debentures, although paid reasonably promptly, claimed the expenses they had incurred in consequence of the dishonour of the original bills, starting with the 20 per cent charge mentioned by Pike.⁹⁵ The Colonial Office refused to authorise the reimbursement of these expenses, because, in the words of Earl Grey, the Secretary of State for the Colonies,

[t]he Colony having become wholly insolvent, Parliament had munificently granted an aid of no less than £200 000 to extricate it from its difficulties. But that grant had not been made without its limitation. In submitting the vote to Parliament, Her Majesty's Government had deemed it enough to propose that the principal of the various demands, including the dishonoured bills drawn upon the Colonization Commissioners, should be discharged, but not the interest, and only upon condition that the parties should give a receipt in full. In liquidating from the British Treasury debts, of which the payment must otherwise have been hopeless, the Government of that day were entitled to impose such terms as appeared to them reasonable; and they required, as is so common in similar cases, and from motives of mutual convenience, which are sufficiently obvious, that the settlement should be final. They paid off the principal, but not the incidental expenses, because they considered it not unfair that all parties concerned should bear some portion of the consequences of what was deemed a general improvidence.⁹⁶

The holders of the dishonoured bills were not to be dismissed so easily. They too joined the claims-against-the-government bandwagon. One of the most persistent of such claimants was William Jacob,⁹⁷ a member of the staff of Colonel Light, the surveyor of the city of Adelaide. Jacob had done survey work for the Province in its very early days and resigned from the government service together with Light.⁹⁸ Afterwards, he had the good sense to join the surveying

94 *South Australia Act 1842* (Imp) 5 & 6 Vict, c 61, s 10; Pike, *Paradise of Dissent*, above n 41, 185–92.

95 See Jacob's itemised claim for £768/15/8: *South Australia*, Parl Paper (19 September 1851) (preserved in the Library of Parliament House, Adelaide); Macgeorge's itemised claim for £381/16/5: *South Australia*, Parl Paper No 40 (1853); GRG 2/1/5/No 24 of 24 July 1845; Phillips' petition: *South Australia*, Parl Paper No 41 (1853); *Transactions of Borrow and Goodiar*, above n 39, 15, referring to a contemporary source (Francis Dutton, *South Australia and its Mines: With an Historical Sketch of the Colony, under its Several Administrations to the Period of Captain Grey's Departure* (1846)) stating that the expenses could approach half the value of the bills. On Phillips, see *The Adelaide Observer* (Adelaide), 8 January 1898, 16.

96 Despatch to the Governor of South Australia, 27 August 1850, reproduced in *South Australia*, Parl Paper (19 September 1851) (preserved in the Library of Parliament House, Adelaide). For debate on this statement, see *The Adelaide Times* (Adelaide), 3 October 1851, 3; 4 October 1851, 5; 6 October 1851, 3; *The Austral Examiner* (Adelaide), 4 October 1851, 9, 12. The despatch was itself a response to the debate in the Legislative Council recorded in *South Australia*, *Minutes of the Legislative Council*, 19 February 1850; *The South Australian Register* (Adelaide), 20 February 1850, 3; *The South Australian* (Adelaide), 22 February 1850, 2, 4; *South Australian Gazette and Mining Journal* (Adelaide), 21 February 1850, 3; 23 February 1850, 3; *The Adelaide Times* (Adelaide), 21 February 1850, 3.

97 See *South Australia*, *Minutes of the Legislative Council*, 12 December 1849; the *South Australian Parliamentary Papers* for 1851, papers ordered to be printed on 19 September and 3 October 1851; *South Australia*, *Votes and Proceedings*, Legislative Council, 3 October 1851, 82 (and the correction to be found in *Votes and Proceedings*, Legislative Council, 7 October 1851, 85, and in sources such as *The Adelaide Times* (Adelaide), 8 October 1851, 3; *The Austral Examiner* (Adelaide), 11 October 1851, 7).

98 Pike, *Paradise of Dissent*, above n 41, 175; *The Adelaide Observer* (Adelaide), 10 August 1901, 32; 19 July 1902, 25. See also State Library of South Australia, Mortlock Library, PRG 558.

firm of B T Finnis,⁹⁹ Colonial Secretary and later the first Premier of South Australia, and to marry a daughter of Mr C H Bagot MLC.¹⁰⁰ That gentleman was also referred to by another claimant, R F Macgeorge, in a letter pushing his claim, as a 'friend'.¹⁰¹ Indeed, it was 'after an angry debate'¹⁰² on Macgeorge's claim that John Baker obtained leave in 1851 to introduce what became the first version of the claims-against-the-government legislation.

Another holder of a dishonoured bill was Captain John Hart, later an MLC, although his claim was resolved in April 1845 and a receipt issued by his attorneys, one of whom was John Baker.¹⁰³ John Baker himself held dishonoured bills, and when his cheeky attempt to pay government charges by returning the bills for credit was refused he added this to his list of complaints against the Governor that he sent to the Secretary of State for the Colonies in London. (The complaint was rejected.)¹⁰⁴ One wonders whether he had any claim for expenses to urge on his own behalf. Certainly, at all events, he would have had great sympathy for those who did.

Again, however, Jacob's claim, at least, could be resolved before the Act of 1853 finally came into effect: Jacob received his money in July 1852¹⁰⁵ after the Colonial Office decided that

when a claim of this nature is again urged on Her Majesty's Government by the Legislative Council, representing, as it now does, the Community of South Australia, it should not be disregarded unless on stronger grounds than any of which I am aware in the present instance.¹⁰⁶

The *South Australian Register* called this 'a gratifying triumph of right against might'.¹⁰⁷ The fate of the other claims is less certain and, as always, the absence of a comprehensive index to the newspapers of the day makes it hard to determine whether there is anything more to find.¹⁰⁸ At all events, in 1852 and 1853, some time after Jacob's claim had been paid, Macgeorge and/or H W Phillips can still be found petitioning the Legislative Council for their claims to

99 *The Adelaide Observer* (Adelaide), 10 August 1901, 32; 19 July 1902, 25.

100 Jill Statton (ed), *Biographical Index of South Australians 1836–1885* (1986) vol 1, 54.

101 GRG 2/5/13/No 141 of 27 October 1851, attachment dated 17 October 1851.

102 *The Austral Examiner* (Adelaide), 10 October 1851, 7.

103 GRG 24/6/1845/414. See also Baker's involvement in the claim the subject of the despatch in GRG 2/5/8/No 63 of 28 May 1846, and note the implication in *The South Australian Register* (Adelaide), 12 June 1857 that one of the Members of the House of Assembly was acting for Borrow & Goodiar: at 3.

104 GRG 2/1/5/No 6 of 25 August 1845; 2/5/6/No 163 of 19 December 1844; 24/6/1844/1442, 1463; 24/4/1844/336; 24/4/1846/159.

105 GRG 24/6/1852/2006.

106 GRG 2/1/12/No 1 of 5 March 1852.

107 *The South Australian Register* (Adelaide), 22 September 1851, 2.

108 In addition, there is nothing in the index to GRG 24/6 or GRG 24/4 relating to either gentleman – and this may also indicate that no legal proceedings were taken, because such proceedings are sometimes indexed *eo nomine*, and usually led to the writing of letters which find their way into that index. The last entries for Macgeorge are GRG 24/6/1852/3017, 3054; GRG 24/4/1852/936, which again constitute a refusal. Macgeorge died on 26 October 1859 (Statton, above n 100, vol 3, 993) and it is possible that he gave up owing to ill health before he died.

be dealt with.¹⁰⁹ H W Phillips was apparently advised against bringing a claim at law,¹¹⁰ and this may well have deterred others. Furthermore, a Select Committee of the Legislative Council rejected Phillips' petition in 1854 as not worthy of the Council's attention; Phillips, they thought, should be confined to any remedy he might have at law.¹¹¹ It is possible that he gave up, thinking that the cost of proceedings was not worth the risk of failure. Certainly, given the number of dishonoured bills, the number of claims lodged after the passage of the *Claimants Relief Act* appears surprisingly low; possibly further research would unearth more. Another petition by H W Peryman¹¹² and James Macgeorge, presumably the son of R F Macgeorge,¹¹³ which was based on a different claim, sank without trace in 1856.¹¹⁴ Clearly, however, they played their role in the lobbying campaign that led to the enactment of the Act.

III THE PASSAGE OF THE ACT

Until the advent of representative government in South Australia with the creation of the part-elective Legislative Council in 1851, there was little that those agitating for the putative claimants against the government could do but present petitions to the nominee Legislative Council¹¹⁵ and hope – in vain – that something would be done about them. This was because the Governor had the sole right of proposing legislation under the pre-1851 arrangements.¹¹⁶ Once, however, the part-elective Legislative Council had been set up in mid-1851, John Baker lost little time in proposing legislation to remedy the grievances with which he and some of his fellow members were so familiar. It was a task for which his character was eminently suited given, on the one hand, that he 'was intensely loyal to the Crown and established English traditions' such as the amenability of the government to suit under the petition-of-right procedure and, on the other, his suspicion of and opposition to 'the arbitrary powers of governors'.¹¹⁷ There were, in other words, reasons of broad principle as well as motives of self-interest for putting forward the legislation, a point that will become clearer as the story unfolds. Of Baker's colleagues with a personal interest in the claims, J B Neales MLC, the former auctioneer, also stands out, for

109 South Australia, *Votes and Proceedings*, Legislative Council, 16 November 1852, 145; 13 September 1853, 81; 14 September 1853, 83; *The South Australian Register* (Adelaide), 14 September 1853, 2; *The Adelaide Times* (Adelaide), 14 September 1853, 2; 15 September 1853, 2.

110 South Australia, Parl Paper No 46 (1854).

111 South Australia, Parl Paper No 120 (1854). See also *The South Australian Register* (Adelaide), 28 October 1854, 2 ff; *The Adelaide Times* (Adelaide), 28 October 1854, 2 ff.

112 Who appears to have become insolvent in 1853: *The South Australian Register* (Adelaide), 24 September 1853, 3.

113 Statton, above n 100, vol 3, 993.

114 South Australia, *Votes and Proceedings*, Legislative Council, 20 February 1856, 167; South Australia, Parl Paper No 113 (1856).

115 See, eg, above nn 96, 97.

116 Castles and Harris, above n 66, 39 ff.

117 Pike, *Australian Dictionary of Biography*, above n 59, vol 3, 76 (Baker's entry).

the 'B' in his name stood for the surname of his uncle and patron, Jeremy Bentham.¹¹⁸ For him too, then, the reform of the law embodied in the Act of 1853 was doubtless also a question of principle.

Despite the united claims of self-interest and principle, continued Crown control of the Province's finances¹¹⁹ made it difficult even after 1851 for the Legislative Council to provide money of its own motion to settle the claims. The Legislative Council could do things such as pass a motion 'praying that His Excellency will make early provision for the payment of the claim'¹²⁰ of Jacob and adopting a Select Committee report to the effect that the claim of Borrow & Goodiar should be submitted to a jury. (The Select Committee had also reported that, not being able to examine witnesses on oath, it had been unable to determine the truth.)¹²¹ But, as Mr Baker pointed out on introducing the Bill for 'Act' No 14 of 1851 on 7 October of that year, if the colonists were no longer to be prevented by Downing Street from restoring the Province's honour and actually paying their debts rather than just calling on the government to do so,

some Court was necessary. In England the petition of right was a means of redress, but here the distance debarred claimants from its use. In the United States a Court had been appointed for the purpose.¹²²

However, he added that he would be satisfied with the provision of a nominal defendant who could be sued in the existing Courts.¹²³

As mentioned above, it took two attempts before the *Claimants Relief Act* became law, as the first attempt, 'Act' No 14 of 1851, was reserved by the Governor for the Royal pleasure and never received assent. Nevertheless, the debates on it are crucial because, by the time the Bill was eventually enacted in 1853, the comprehensiveness of the debate of 1851 rendered prolonged debate superfluous. Tracing the progress of the Bill for the 'Act' of 1851 through the Legislative Council is a difficult process given the need to rely, in the absence of official reports of the debates beyond the outline given in the 'Votes and

118 Ibid vol 2, 280 (Neales' entry).

119 *Australian Constitutions Act 1850* (Imp) 13 & 14 Vict, c 59, s 14.

120 South Australia, *Votes and Proceedings*, Legislative Council, 2 October 1851, 78; *The South Australian Register* (Adelaide), 3 October 1851, 3; *South Australian Gazette and Mining Journal* (Adelaide), 4 October 1851, 3 (and see the report of the debate, in which Mr Gwynne apologised for his 'warmth of language': *South Australian Gazette and Mining Journal* (Adelaide), 3 October 1851, 3); *The Austral Examiner* (Adelaide), 4 October 1851, 9. Cf *The South Australian Register* (Adelaide), 4 October 1851, 2; *The Adelaide Times* (Adelaide), 4 October 1851, 5.

121 South Australia, *Votes and Proceedings*, Legislative Council, 2 September 1851, 29 (referring to the tabling of papers); 22 October 1851, 108; *The South Australian Register* (Adelaide), 23 October 1851, 3; *South Australian Gazette and Mining Journal* (Adelaide), 23 October 1851, 4; *The Adelaide Times* (Adelaide), 6 October 1851, 3; *The Austral Examiner* (Adelaide), 24 October 1851, 8.

122 *The South Australian Register* (Adelaide), 16 October 1851, 3; *The Adelaide Times* (Adelaide), 16 October 1851, 3. See also *The Adelaide Times* (Adelaide), 27 November 1851, 3 ('They only sought to pay their own debts out of their own money').

123 *South Australian Gazette and Mining Journal* (Adelaide), 9 October 1851, 3; *The Adelaide Times* (Adelaide), 8 October 1851, 3. Cf *The South Australian Register* (Adelaide), 8 October 1851, 3. See also below n 159.

Proceedings', on newspaper reports of the debates.¹²⁴ On its second reading, John Baker said rather airily that he did not expect opposition to it, but Hanson feared that it might be disallowed if it did not distinguish between claims against the Provincial government and claims against the Imperial government.¹²⁵ Baker had, however, already considered this prospect, and was remarkably sanguine about it. He pointed out that '[l]aws had been passed and acted upon in New South Wales, which were disallowed as contrary to British law, and yet they had been re-enacted, the colonists being determined to have the benefit of them'.¹²⁶

The Bill of 1851, like the Act of 1853, provided for suits to be conducted against a nominal defendant. The use of a nominal defendant had been suggested in previous correspondence on the case of *Borrow & Goodiar*.¹²⁷ In proposing this solution, Baker was doubtless also thinking of the practice, followed in South Australia in the South Australian Company's action in trespass a few years before, of suing a Crown servant behind whom the Crown stood. Even more importantly, it was a neat solution to Gladstone's earlier objection to actions or suits against the Crown's representative personally.¹²⁸ The government would doubtless not have accepted any Bill that made the Governor personally a defendant. Indeed, as the Registrar-General (B T Finniss) had said, in the debate on the Select Committee's report¹²⁹ on 22 October 1851, 'the Governor was above the law, and should not stoop to be made a defendant'.¹³⁰ This rather tactless observation brought forth a furious editorial in the *South Australian Gazette and Mining Journal*¹³¹ and a somewhat more restrained although still condemnatory one in the *Adelaide Times*,¹³² which remind us that there was a principle at stake here, not just the claims of certain well-connected personages. The former editorial, headed 'Above the Law', accused the Provincial government of 'foul' conduct and of perpetrating 'undeviating injustice', and attacked Gladstone's despatch of June 1846 and 'Downing-street government'.

124 Nor has any copy of the Bill as introduced survived: personal communication with Mr Howard Coxon, Parliamentary Library; unsuccessful search in GRG 1/15, State Archives of South Australia. It also does not appear to be in any newspapers, unless it was printed in the missing final issues of *The South Australian*, or, of course, the current author has overlooked it or not searched back far enough.

125 *The South Australian Register* (Adelaide), 30 October 1851, 3; *South Australian Gazette and Mining Journal* (Adelaide), 30 October 1851, 3; *The Adelaide Times* (Adelaide), 30 October 1851, 3; *The Austral Examiner* (Adelaide), 31 October 1851, 9.

126 *South Australian Gazette and Mining Journal* (Adelaide), 9 October 1851, 3; *The Adelaide Times* (Adelaide), 8 October 1851, 3. Cf *The South Australian Register* (Adelaide), 8 October 1851, 3.

127 See above n 47.

128 See above n 69.

129 See above n 121.

130 *South Australian Gazette and Mining Journal* (Adelaide), 23 October 1851, 4; *The Austral Examiner* (Adelaide), 23 October 1851, 8. He also claimed that 'it was contrary to the law of the mother-country for a nominal defendant to be selected on the part of the Crown'. This view, in so far as it related to a nominal defendant who had in truth nothing to do with the case and the position at common law, appears to have been confirmed by *Adams v Naylor* [1946] AC 543. See also *Royster v Cavey* [1947] KB 204; *Barnett v French* [1981] 1 WLR 848. However, it was not contrary to the law of South Australia to provide for a nominal defendant to represent the Crown once the law had been so altered: see below n 159.

131 *South Australian Gazette and Mining Journal* (Adelaide), 25 October 1851, 2.

132 *The Adelaide Times* (Adelaide), 26 November 1851, 2 ff; 29 November 1851, 1.

As the debate on the 1851 Bill wore on, clear warnings were given by members of the government that they would advise the Governor not to assent to the Bill but to refer it to the Imperial authorities. As the Registrar-General saw matters, the Bill was retrospective (applying to accumulated as well as new claims) and an attempt to satisfy claims against the Imperial government or those involving Imperial interests out of local revenue and without reference to the Imperial authorities.¹³³ That was not in the financial interests of the Provincial government nor likely to be sanctioned in London. Given the continually expanding responsibilities of the local authorities, not to mention the fact that the Imperial authorities had been required to save the Province from bankruptcy in the early 1840s, questions of who was responsible for what could be rather difficult to decide. However, the Registrar-General pointed out, referring no doubt to the dishonoured bills, that the

contracts which led to the introduction of this measure arose out of contracts made at the time when the colony was dependent on the British Treasury, which would have borne the expense had the claims been thus enforced; but at present such claims, if established, must be paid from the Local Revenues.¹³⁴

And then of course there was Matthew Smith's claim¹³⁵ (and any other claims against the waste lands of the Crown that might later emerge). This claim was also one affecting Imperial interests, given that the Province did not at this stage control the disposal of Crown lands within its territory.¹³⁶

Certainly, however, the Bill as finally passed provided, in s 1, that it applied only to claims against 'the Colonial Government of the Province of South Australia'. This was the result of the debate on 26 November. Various unclear reports¹³⁷ suggest that this phrase was adopted in order to remove a wide-ranging clause or amendment suggested by Mr Baker enabling subjects to press claims against 'Her Majesty' as well as the Provincial government by suing the nominal defendant. That phrase was intended, it would seem, to include claims against the Imperial government, or at the least Imperial interests, arising within South Australia.

Had any Bill permitting subjects to sue 'Her Majesty' rather than merely Her colonial government been passed, it would certainly have been disallowed in London (even if it had received assent locally). Baker appears later to have dropped the 'Her Majesty' proposal, possibly in the course of negotiations with

133 *The South Australian Register* (Adelaide), 1 December 1851, 3; *South Australian Gazette and Mining Journal* (Adelaide), 27 November 1851, 3.

134 *South Australian Gazette and Mining Journal* (Adelaide), 29 November 1851, 3.

135 See *The South Australian Register* (Adelaide), 30 October 1851, 3; *South Australian Gazette and Mining Journal* (Adelaide), 27 November 1851, 3; 30 October 1851, 3; *The Adelaide Times* (Adelaide), 30 October 1851, 3; *The Austral Examiner* (Adelaide), 31 October 1851, 9.

136 *Australian Constitutions Act 1850* (Imp) 13 & 14 Vict, c 59, s 14; Pike, *Paradise of Dissent*, above n 41, 304; Pike, 'Introduction of the *Real Property Act*', above n 15, 169, 170. Control was vested in the local legislature under the *Australian Waste Lands Act 1855* (Imp) 18 & 19 Vict, c 26, ss 2, 5.

137 *The South Australian Register* (Adelaide), 27 November 1851, 2, 3; *South Australian Gazette and Mining Journal* (Adelaide), 27 November 1851, 3; *The Adelaide Times* (Adelaide), 27 November 1851, 3; *The Austral Examiner* (Adelaide), 28 November 1851, 8 ff.

the government,¹³⁸ so that this was never tested; but it is likely that such political realities, rather than any noble desire to avoid ‘the confusion between Sovereign and State’,¹³⁹ were the basis for omitting ‘Her Majesty’ and instead referring merely to the colonial government.

However, appearances after the removal of this clause were deceptive. Section 1 of the Bill continued to provide that claims against the local government ‘the subject matter of which may lie or be within’ South Australia could be the subject of a petition. This would still have permitted people such as Matthew Smith to sue for an order in the nature of a decree of specific performance compelling the local government to permit him to select land,¹⁴⁰ at least if the judges were prepared to conclude that land sales did not fall under the proviso protecting the Royal prerogative – ‘whatever that might mean’¹⁴¹ – or, if they did, if the Secretary of State for the Colonies were prepared to allow the suit.

As we shall see, another crucial clause in the Bill that led to its non-assent in England was this very provision: that is, the proviso to s 1 which stated that claims should be referred to the Imperial authorities if a judge certified that they affected the Royal prerogative. The sources do not tell exactly the same story about the origin of this proviso: the *South Australian Gazette and Mining Journal*¹⁴² and *Austral Examiner*¹⁴³ have the Acting Advocate-General (Mr Hanson) initially proposing it (unsuccessfully), while the *South Australian Register*¹⁴⁴ and the *Adelaide Times*¹⁴⁵ have Baker proposing the amendment, also unsuccessfully. The latter report states that Baker ultimately voted against his own proposal. It was, at all events, clearly lost the first time round – once the clause permitting claims against ‘Her Majesty’ had been deleted, the idea of exempting claims touching the Royal prerogative was probably thought to be superfluous,¹⁴⁶ and that is no doubt why Baker voted against it. Subsequently, however, the proviso became a government amendment and was successful, the Registrar-General warning that it would be needed to secure Royal assent.¹⁴⁷ In fact, this was to be one of the clauses to which London objected, but at the time it was probably thought to be a double security against objection by the Imperial

138 As local newspapers put it, he had ‘consented to exchange’ it: *South Australian Gazette and Mining Journal* (Adelaide), 29 November 1851, 3; *The Austral Examiner* (Adelaide), 5 December 1851, 7.

139 New South Wales Law Reform Commission, above n 13, 13.

140 See Hanson’s opinion on the Act, reproduced in South Australia, Parl Paper No 32 (1853).

141 South Australia, *Parliamentary Debates*, House of Assembly, 13 October 1875, col 1376. The author has found no indication of anyone raising the point that selling land was not a prerogative of the Crown, as subjects can sell land too (although, of course, they cannot sell Crown land). Hanson’s opinion on this is unclear: South Australia, Parl Paper No 32 (1853).

142 27 November 1851, 3.

143 28 November 1851, 8.

144 27 November 1851, 3.

145 27 November 1851, 3.

146 The report of the debate in *The South Australian Register* (Adelaide), 27 November 1851 strongly implies that this was the reason for the rejection of the clause: at 3.

147 See *South Australian Gazette and Mining Journal* (Adelaide), 29 November 1851, 3; *The Adelaide Times* (Adelaide), 29 November 1851, 5 (both reporting advocacy of the proviso by the Register-General); *The Austral Examiner* (Adelaide), 5 December 1851, 7. Cf *The South Australian Register* (Adelaide), 27 November 1851, 3.

authorities on the grounds that the legislation invaded their territory. Nevertheless, 'affect[ing] the Royal prerogative' was a strange way of describing Imperial interests. In fact, it was a curious provision, and little thought seems to have been given to what the Royal prerogative actually was and how it might be affected by the legislation, or to whether this provision would have had any effect on Smith's claim.¹⁴⁸

Another crucial issue was whether to restrict the Bill to pecuniary claims, thus furnishing an impregnable defence against specific claims to the waste lands of the Crown and Imperial complications. Such a restriction was first inserted into the Bill¹⁴⁹ and then taken out again¹⁵⁰ so that the 1851 Bill, as passed by the Legislative Council, was not confined, as was the Act of 1853, to pecuniary claims. This too was obviously relevant chiefly to Matthew Smith's claim, as a Bill restricted to pecuniary claims would have satisfied Borrow & Goodiar. Incidentally, the fact that Messrs Baker and Gwynne MLC opposed the restriction to pecuniary claims indicates that they were not solely concerned with the claim of Borrow & Goodiar (which was entirely pecuniary) and were prepared to add to the Bill in order to make it more comprehensive and give effect to a principle in which they believed – even if that decreased the likelihood that it would be assented to either locally or in London.

It is, in fact, possible to exaggerate the extent to which Baker's advocacy of the Bill was driven solely by his interest in providing funds to Borrow & Goodiar from which his own claim could then be satisfied. In the debates on the scope of the Bill, Baker was asked by a fellow member: 'Is it the old land grants at which the hon Member for Mount Barker [Baker] is hammering away?'. Baker's response was that he was 'hammering away ... at every wrong that has been committed or that may occur within the province of South Australia'.¹⁵¹ Now Baker's interest in the Adelaide Auction Company's claim against Borrow & Goodiar was well known to the members of the Legislative Council by this stage.¹⁵² So the 'hammering away' statement cannot have been an attempt to cover up this notorious fact, and no-one would have been fooled by any such attempt. Rather, the questioner was puzzled about why Baker was so insistent on proposing a Bill which covered more than his 'own' case. But Baker was clearly interested in a broader principle as well: otherwise, he would have had no reason to propose, and have carried through, a Bill that included non-pecuniary claims

148 See above n 141.

149 *South Australian Gazette and Mining Journal* (Adelaide), 27 November 1851, 3; *The Austral Examiner* (Adelaide), 28 November 1851, 8 ff.

150 *South Australian Gazette and Mining Journal* (Adelaide), 29 November 1851, 3; *The Adelaide Times* (Adelaide), 29 November 1851, 5; *The Austral Examiner* (Adelaide), 5 December 1851, 7. The *South Australian Register* (Adelaide), 1 December 1851, presumably has its wires crossed when it states that words were retained that had earlier been struck out: at 2. It gets it right in the edition of 29 November 1851, 2.

151 *South Australian Gazette and Mining Journal* (Adelaide), 27 November 1851, 3. See also *The South Australian Register* (Adelaide), 27 November 1851, 3.

152 *South Australian Gazette and Mining Journal* (Adelaide), 20 September 1851, 3. See also *The South Australian Register* (Adelaide), 20 September 1851, 3; *The Adelaide Times* (Adelaide), 20 September 1851, 5.

(except perhaps as a means of winning the support of some other MLCs who had interests in the land-order claims).¹⁵³ And as we shall now see, it was this breadth of the first Bill that was fatal to it.

Efforts made to produce a Bill that was acceptable to all sides were obviously in vain. On 28 November, as the debate approached its conclusion and the clauses of the Bill were being read in the Legislative Council, ‘the officials, nominees, and a stray representative of the people ... sung [sic] out distinctly “No”’.¹⁵⁴ However, the hope was expressed that the Bill would receive more favourable official consideration in England than it clearly had in Adelaide.¹⁵⁵ Baker’s view was that the ‘passing of the Bill would at least show Her Majesty what was wanted, and even should her assent be refused, it would occasion little more than a twelvemonth’s delay’.¹⁵⁶

As might be expected, the Governor reserved the Bill for the Queen’s pleasure.¹⁵⁷ His Excellency forwarded the Bill to London with a despatch in itself quite neutral on whether the Bill should receive the Royal assent and enclosing an equally non-committal report from Hanson as Acting Advocate-General. He concentrated on legal issues rather than broader policy ones¹⁵⁸ and pointed out that the Bill was required to be reserved under the Governor’s instructions.¹⁵⁹ As it turned out, it was just as well that Hanson’s opinion was as detached as it was, as the Legislative Council called for a copy of it in 1853¹⁶⁰ and it was soon published to all the world.¹⁶¹

The Colonial Office considered the Bill accordingly. The files present an interesting picture of paternal indulgence, with one official minuting that if the South Australians ‘choose to yield to pressure from people with old land-grievances’ they should be permitted to do so – the revenues were now theirs rather than the Imperial Treasury’s – ‘although it seems a very unwise piece of

153 Other MLCs admitted their interests in the land-order claims in the debate on 26 November 1851: *The Adelaide Times* (Adelaide), 27 November 1851, 3.

154 *South Australian Gazette and Mining Journal* (Adelaide), 29 November 1851, 3. See also *The Adelaide Times* (Adelaide), 29 November 1851, 5; *The Austral Examiner* (Adelaide), 5 December 1851, 7. ‘Nominees’ is a reference to the members of the Legislative Council nominated by the Crown, and ‘officials’ to the members holding office *ex officio* as a result of their occupation of what would now be called ministerial positions.

155 *South Australian Gazette and Mining Journal* (Adelaide), 29 November 1851, 3; *The Adelaide Times* (Adelaide), 29 November 1851, 5; *The Austral Examiner* (Adelaide), 5 December 1851, 7.

156 *The Adelaide Times* (Adelaide), 29 November 1851, 5.

157 See His Excellency’s prorogation speech in South Australia, *Votes and Proceedings*, Legislative Council, 2 January 1852, 182.

158 Hanson stated that ‘[i]t will be for the constitutional advisers of Her Majesty, and not I think for His Excellency to decide whether the proviso furnishes a sufficient security against any interference with the Rights or prerogatives of the Crown’: GRG 1/6/3/257; GRG 2/5/14/No 26 of 29 January 1852; South Australia, Parl Paper No 32 (1853).

159 This was principally a reference to the despatch of June 1846 (see above n 69): CO 13/76/15 (AJCP 785). See also CO 323/73 (AJCP 2956). Hanson is reported to have said that ‘[t]he Government were bound by their instructions, and in the absence of any law could not appoint a nominal defendant’: *The South Australian Register* (Adelaide), 15 September 1853, 2.

160 South Australia, *Votes and Proceedings*, Legislative Council, 10 August 1853, 40; 12 August 1853, 45. See also 28 July 1853, 19.

161 South Australia, Parl Paper No 32 (1853).

legislation'.¹⁶² The Bill's fate was, however, sealed when the Colonial Office referred it to the Law Officers.¹⁶³ Thesiger A-G and Kelly S-G reported that it

does not provide a sufficient security against interference with the rights and Prerogatives of the Crown nor do we think that that it would be constitutionally right to entrust the Judges of the Supreme Court with the decision of such a question, as whether the subject matter of a Petition does or does not affect the Royal Prerogative.¹⁶⁴

Assent should therefore be refused, they thought; and it was.¹⁶⁵

It should be noted here that, at this stage in South Australia's history, judicial appointments were still made from the Colonial Office; the last, and disastrous, such appointment was that of Boothby J in 1853. Therefore, the refusal to permit judges to determine the question posed by the proviso to s 1 of the Bill – whether 'the subject matter of' a claim for relief 'affects the Royal prerogative' – implied no lack of confidence in the colonists, unless the Colonial Office was looking forward to the time when judicial appointments were vested in the Provincial government. It seems much more likely that the objection was simply to the determination of political questions, under a test which was as vague (even meaningless) as 'affect[ing] the Royal prerogative', by judges rather than politicians. Seen in this light, the objection cannot be easily dismissed. Indeed, it seems exactly the sort of question that might be raised under modern jurisprudence relating to the extent of quasi-judicial or non-judicial functions that can be vested in the Judiciary. The objection by the Law Officers was therefore well taken and based upon a sound principle – even if it, too, involved a happy coincidence between principle and self-interest given that the Governor was amenable to Colonial Office instructions but the judges were not.

The despatch notifying the Governor of the refusal to assent to the Bill, sent in October 1852, appears to have been received at about the start of May 1853.¹⁶⁶ On its receipt, the question for South Australians such as Baker was whether to try again.¹⁶⁷ There could be little doubt about the answer to this question. A second attempt was indeed suggested by the Secretary of State's statement in his despatch notifying the fate of the first attempt that

I have ... to request you to bring the subject again before [the Legislative] Council, and whenever an Enactment containing the defined [unstated!] amendments shall reach this Department I shall be prepared to submit it for the Royal Assent.¹⁶⁸

Baker and his colleagues certainly knew of this statement, as it was published in the South Australian Parliamentary Papers.¹⁶⁹

162 CO 323/73/No 6309 (AJCP 2956). This minute is presumably from the offices in Park Street described in Pike, *Paradise of Dissent*, above n 41, 304.

163 CO 396/9/13 August 1852 (AJCP 878).

164 CO 13/79/98 ff (AJCP 787) (letter of 25 August 1852 from Law Officers to Secretary of State).

165 GRG 2/1/12/No 64 of 15 October 1852; South Australia, Parl Paper No 22 (1853) (Secretary of State (Sir J Pakington) to Governor).

166 GRG 2/5/15/No 48 of 4 May 1853.

167 Other innovators later faced the same question and responded in the same way: see Finn, *Law and Government*, above n 5, 144 ff.

168 GRG 2/1/12/No 64 of 15 October 1852, above n 165.

169 South Australia, Parl Paper No 22 (1853).

The officials back in Adelaide may well have been surprised that no more extensive objection was taken to making the local government liable in this way. However, that was perhaps not very surprising given that the Imperial Parliament itself was shortly to begin the process of assimilating the law relating to suits involving the Crown to that applicable between subjects that reached a temporary climax in the *Petitions of Right Act*.¹⁷⁰ As we have seen, various objections to the proposed statute had been urged, such as its retrospective nature. The Colonial Office, however, was content to leave the South Australians to make their own mistakes (if mistakes they were). This deprived the South Australian officials of any real argument against the principle of the Bill.

Reading the despatch notifying the Governor that the Bill had not received the Royal assent, the South Australians would have been able to conclude without great difficulty that, if the power to decide whether a claim affected the Royal prerogative were vested in the executive rather than the judges, a different result would ensue. The Bill for what later became the *Claimants Relief Act* duly vested in the Governor rather than the judges the power to refer a claim to the Colonial Office on the grounds that it affected the Royal prerogative. Even though this did, perhaps, prevent the judges from having to decide a quasi-political question and thus avoid a breach of the principle of separation of powers, this change cannot have been welcome to the original Bill's promoters. It restored some considerable executive control over whether to allow a claim to proceed or not.

However, Baker and his fellow agitators doubtless concluded that they had little choice in this matter. That being so, it is easy to dispose of the argument that a 'legal revolution'¹⁷¹ in the field of claims against the government could be said to have occurred only when the *Claims Against the Government Act 1866* (Qld) removed the discretion in the Governor to refuse to permit a claim to go to trial. The South Australian legislators originally wanted to vest this power – which was itself necessary only because of the limited authority of colonial legislatures in 1853 as distinct from 1866 – in impartial judges, but had been overruled by the Law Officers. The creation of the discretion in the form in which it emerged in 1853 was a necessary compromise in order to have the legislation passed. The real breakthrough was thus not the removal of the discretion in 1866, but the creation of the occasion for its exercise in 1853. And, although the discretion survived in the law of South Australia until 1972,¹⁷² there appears to be no report of any injustice caused by its existence or even of its exercise in a manner unfavourable to a claimant.

Given the prior debate in 1851 and the despatch informing the colonists of the reasons for the disallowance of the Bill passed in that year, the Bill of 1853 enjoyed a comparatively easy progress through the Legislative Council. Although it is reported that Baker spoke on the earlier travails 'at considerable length, and with some warmth',¹⁷³ the principle had already been conceded. The

170 See also 16 & 17 Vict, c 107 (1853) s 263; *Crown Suits Act 1855*, 18 & 19 Vict, c 90.

171 Finn, *Law and Government*, above n 5, 144.

172 Latterly as the proviso to s 74(3) of the *Supreme Court Act 1935* (SA) (referring to the Secretary of State for the Dominions).

173 *The Adelaide Times* (Adelaide), 15 September 1853, 2.

lack of objection to the principle (as distinct from the detail) taken by the Colonial Office was probably seen by Baker as something of a triumph; and the main dispute in the Legislative Council was about whose fault it was that the original version of the Bill had been disallowed.¹⁷⁴ The government members were in an embarrassing position: the clause of the 1851 legislation inserted at their suggestion providing for judges' certificates to identify claims involving the prerogative was one of the clauses to which London had objected. The line taken by the government members in 1853 was that the 1851 legislation would have been assented to locally had it been made clear that it was limited to claims against the local government¹⁷⁵ (which, it should again be noted, would have been sufficient to cover the claim against Borrow & Goodiar; Baker's insistence on the wider principle accordingly cost him personally two years in which he might have pursued his own claim).

In moving the second reading of the Bill on 28 September 1853, Mr Baker made no long speech, merely stating that 'he did not anticipate any opposition to the measure'.¹⁷⁶ This was a slightly over-optimistic statement, even if it was made with rather more justification than the similar statement two years earlier. However, the Bill appears to have emerged from the Legislative Council in roughly the same form in which it went in. Aside from the changes already mentioned, and the addition of marginal notes,¹⁷⁷ the main change to the Bill was the introduction of a limitation period of two years, starting from the passing of the Act, for claims arising before its passing;¹⁷⁸ the 1851 version of the Bill had abolished all limitation periods for suing the Crown for claims that arose before the creation of that right. This was a considerable improvement, as it enabled the extent of all outstanding claims as at the passing of the Act to be known within a relatively short period.

In addition to shifting responsibility for identifying prerogative claims, the Bill and Act of 1853 excluded all claims but those 'touching any pecuniary' claim and omitted the words in the 'Act' of 1851 permitting claims 'the subject matter of which may lie or be within' South Australia.¹⁷⁹ This of course excluded Matthew Smith's claim and caused him to petition the Legislative Council asking

174 *The South Australian Register* (Adelaide), 15 September 1853, 2; *The Adelaide Times* (Adelaide), 15 September 1853, 2.

175 *The South Australian Register*, (Adelaide) 15 September 1853, 2; *The Adelaide Times*, (Adelaide) 15 September 1853, 2.

176 *The South Australian Register* (Adelaide), 29 September 1853, 3.

177 *The Adelaide Times* (Adelaide), 7 October 1853, 2.

178 Act No 6 of 1853, s 3, proviso. See *The South Australian Register* (Adelaide), 22 October 1853, 3. Presumably this is also the cl A referred to in South Australia, *Votes and Proceedings*, Legislative Council, 21 October 1853, 147, which would mean that, up to this point, what became s 3 was still contained in cl 2 of the Bill (as in the 1851 version). For drafting reasons, it was doubtless thought necessary to create a separate clause when inserting this refinement and not to pile qualification upon qualification in cl 2.

179 Are these latter words those that constituted the 'sentence in the first clause' to which the Advocate-General objected on the second reading of the Bill for the Act of 1853?: *The South Australian Register* (Adelaide), 29 September 1853, 3.

to be included again;¹⁸⁰ but, as we have seen, his claim was resolved shortly afterwards without the need for legal action. Under the Act, however, there were to be no legal or equitable remedies for such claimants against what was still the Imperial Crown's land.

The despatch received by the Governor notifying the non-assent to the 'Act' of 1851,¹⁸¹ as distinct from the Law Officers' advice, did not make it entirely clear that the lack of protection for Imperial interests was a second, independent objection by the Law Officers to that involving the judges and the prerogative. But this time, no doubt, the decision was made to err on the safe side, and the two additional exclusions outlined in the last paragraph ensured that it could not be said that the Bill did not provide sufficient security for Imperial interests in waste lands. It is interesting to note that, much later, in 1866 and 1867 (by which time the waste lands were firmly in the colonists' control¹⁸² and a case had emerged in which a suitor required relief going beyond the merely pecuniary),¹⁸³ John Baker promoted a Bill to delete the restriction to 'pecuniary claims' and assimilate the South Australian law to that in New South Wales and Tasmania – which, as he pointed out in the extract quoted in the introduction,¹⁸⁴ was itself inspired by the South Australian innovation.¹⁸⁵ This, too, suggests that Baker was not entirely unconcerned with establishing the principle of Crown liability 'all round' as well as recovering his money from the estate of Borrow & Goodiar.

Once the Bill had passed through the Legislative Council on 27 October 1853,¹⁸⁶ the question arose whether it should be assented to, and if so whether the local Governor could do it or the Bill should be sent to the Colonial Office with a recommendation. There was some public pressure: a letter to the editor in the *South Australian Register* on 17 November asked why the Bill had not yet received the Royal assent.¹⁸⁷ The answer was, as might be expected, that the question was being discussed whether the Bill would have to be sent to London for assent; after all, the despatch notifying non-assent to the 'Act' of 1851 had said that once an '[e]nactment containing the defined amendments shall reach this Department I shall be prepared to submit it for the Royal Assent'.¹⁸⁸ Furthermore, the Governor of South Australia was required to reserve for the

180 South Australia, *Votes and Proceedings*, Legislative Council, 23 September 1853, 97; 5 October 1853, 119; *The South Australian Register* (Adelaide), 6 October 1853, 3; *The Adelaide Times* (Adelaide), 24 September 1853, 2; 6 October 1853, 2.

181 See above n 165.

182 See above n 136.

183 See South Australia, Parl Paper Nos 64 & 64A (1865–66). See also South Australia, Parl Paper No 120 (1868–69).

184 See *Parliamentary Debates*, above n 11, col 789.

185 South Australia, *Parliamentary Debates*, Legislative Council, 27 February 1866, col 1143; 8 March 1866, col 1261; 13 March 1866, col 1314; 25 September 1867, col 789 ff; 1 October 1867, col 850; House of Assembly, 11 October 1867, col 997; 5 December 1867, col 1266. See also above n 21; South Australia, *Parliamentary Debates*, House of Assembly, 27 November 1866, col 1075.

186 South Australia, *Votes and Proceedings*, Legislative Council, 27 October 1853, 153. See also *The South Australian Register* (Adelaide), 28 October 1853, 3; *The Adelaide Times* (Adelaide), 28 October 1853, 2.

187 *The South Australian Register* (Adelaide), 17 November 1853, 3.

188 CO 13/79/98 ff (AJCP 787), above n 164.

Royal pleasure any Bill to which assent had once been refused.¹⁸⁹ Gladstone's rebuke of June 1846 had not been forgotten either.¹⁹⁰

A government wishing to be obstructive could have used these facts as an excuse for further delay. On the other hand, the Advocate-General might have felt morally bound to have the Act assented to locally, if possible, given his statement in the debate that, if the 'Act' of 1851 had had the same form as that now awaiting assent, it would have received assent locally. Even so, it is to the credit of the Advocate-General that he did not try delaying tactics. Indeed, in writing to the Crown Solicitor he had stated that 'it is the wish of the Colonial Secretary and myself to recommend it [the Bill] for the signification of the Royal Assent by the Governor if that can properly be done'.¹⁹¹ Both came to the conclusion that that could properly be done,¹⁹² for, as Hanson explained only a few days after writing the opinion in favour of Matthew Smith's claim dealt with above,

the present Bill does not really relate to the same objects [as that of 1851], since all questions with the Imperial Government which as arising in the Colony would have been within the scope of the former Bill are excluded from the present.¹⁹³

That, it might be thought, was stretching the matter a bit, and it was also not very good English; but it was all in a good cause.

Accordingly, the Royal assent was given locally on 23 November 1853 to the first claims-against-the-government legislation passed on Australian soil, an innovation predating the *Petitions of Right Act* by seven years. The Governor was able to announce on proroguing the Legislative Council on 9 December that the Act would 'remove one great source of dissatisfaction which has existed in all British Colonies – the want of a local tribunal in which claims against the Government could be enforced'.¹⁹⁴

On receiving advice that the Governor had assented to the Bill, the Colonial Office again referred the matter to the Law Officers. The Attorney-General (Sir Alexander Cockburn) and Bethell S-G, not noticing that the Act had already received assent in the colony, advised that 'the Act may properly be submitted to the Queen for Her Majesty's assent'.¹⁹⁵ In the end, however, the Colonial Office

189 This emerges from the subjection of the Governor (actually Lieutenant-Governor) of South Australia to the Royal Instructions to the Governor-General of all Her Majesty's Australian Colonies (see South Australia, Parl Paper No 51 (1852) 5) and the inclusion in those Instructions of the stipulation described in the text (see New South Wales, Parl Paper (1851, 2nd sess) vol 1, 708; CO 380/117/198 (AJCP 848)). It is worth noting that the Royal Instructions from 1858 inclusive refined this prohibition somewhat so that it included a Bill 'containing provisions to which our assent has been once refused': see South Australia, Parl Paper No 17 (1858) cl 11 XII; South Australia, Parl Paper No 42 (1862) cl 11 VIII; Edwin Gordon Blackmore, *The Law of the Constitution of South Australia: A Collection of Imperial Statutes, Local Acts and Instruments relating to the Constitution and Government of the Province, with Notes, Historical and Constitutional* (1894) 145 cl VII(8) (emphasis added). This would certainly have caught the Bill of 1853.

190 See above nn 69, 159.

191 GRG 1/6/3/323 (10 October 1853).

192 GRG 1/6/3/327 ff (9 November 1853).

193 GRG 1/6/3/329 (17 November 1853).

194 South Australia, *Votes and Proceedings*, Legislative Council, 9 December 1853, 248.

195 CO 13/88/60 ff (AJCP 792) (letter dated 3 May 1854 from Law Officers to Secretary of State).

did not object to the pre-emption of its rights to review involved in the Governor's assenting to the Bill in the colony.¹⁹⁶

IV THE RESOLUTION OF BORROW & GOODIAR'S CLAIM

The passing of the Act enabled Borrow & Goodiar, or rather those claiming as their creditors, finally to bring a claim for the work done in the early 1840s. This obviously took some time to prepare, and before their case came to court at least one other case had been decided under the *Claimants Relief Act*. This involved one William Humberstone,¹⁹⁷ who sued R R Torrens, then Colonial Treasurer, as the nominal defendant under the Act. The claim was settled by arbitration, and the government's good faith was demonstrated by its prompt payment of the award.¹⁹⁸

In Borrow & Goodiar's case, interlocutory proceedings clearly started as early as May 1854.¹⁹⁹ It is worth noting that the government had declared itself willing as late as August 1853 (just before the passing of the Act) to

name a nominal defendant, for the purpose of allowing the question to be tried between the Bank [that is, the South Australian Banking Company] and the Assignees of Borrow & Goodiar, which of the two is entitled to the amount admitted to be due to the Insolvents – provided that the sum owing from the Government is first settled.²⁰⁰

However, this transparent attempt to divide and rule clearly was unsuccessful, and the action eventually came to trial in July 1856. When it did, it was titled not *Borrow & Goodiar v Torrens* (again the nominal defendant),²⁰¹ but *Baker v Torrens*.²⁰² The plaintiff's leading counsel at the trial was Mr Gwynne MLC, who was not only Borrow's son-in-law but also owed money to Borrow &

196 GRG 2/5/15/No 84 of 23 November 1853; GRG 2/1/4/No 30 of 13 May 1854; CO 13/83/71 (AJCP 789); CO 323/77/271 ff (AJCP 2957).

197 The same gentleman appears together with Borrow in South Australia, Parl Paper No 20 (1858).

198 GRG 24/6/1856/118 (copy of a petition under the Act), 238, 1807, 1808, 1877, 2226, 2656 (indicates that Boothby J was administering the Act without objection); GRG 24/4/1856/323, 334; *The South Australian Register* (Adelaide), 8 April 1856, 3; *The Adelaide Times* (Adelaide), 8 April 1856, 3. (For copies of other petitions under the Act, see South Australia, Parl Paper No 72 (1867); above n 183.)

199 GRG 1/1/1854/16. See also GRG 1/6/3/343; 24/4/1854/561; 24/6/1854/1357 (Governor suggests that the government should 'adopt every legal expedient to quash the proceedings [last word unclear] at an early stage of the Process'), 1522.

200 GRG 24/4/1853/647 ff.

201 In fact, GRG 24/4/1854/444 states that 'the Col[onial] Treasurer for the time being has been nominated Defendant on [the] part of the Crown', leading one to wonder whether an appointment by office rather than name was authorised by the Act. The question, however, appears never to have been decided. See also GRG 24/4/1854/414.

202 See also correspondence to or from Baker on behalf of the plaintiffs: GRG 1/6/3/425; 24/4/1856/455; 24/6/1856/2598, 2770; 24/6/1855/2855.

Goodiar (a debt which was forgone in consideration of his appearance).²⁰³ The trial took place before Cooper CJ and a special jury²⁰⁴ from which Boothby J had excluded all government officers and persons who had signed petitions in favour of the plaintiffs.²⁰⁵ In opening, Gwynne stated that he 'had every confidence in the sympathy of all old colonists',²⁰⁶ while Mr Advocate-General Hanson reminded the jury that damages would have to be paid by the taxpayer. He also stated that he

hardly knew whether he should most congratulate the Jury or himself upon the circumstance that that was the first occasion, he might say, in the history of the civilised world in which a Jury had been called upon, as a matter of right, to adjudicate a question between a Government and individuals. He believed this was the only country in the world where such a law existed.²⁰⁷

At least to a modern reader, this comes across as so smug that one wonders whether it endeared Hanson to the jurors at all. If the newspaper quoted Hanson accurately, his claim to be the first in the world, as distinct from the common law world, is also startling.²⁰⁸ However, this statement does at least show how conscious, and proud, Hanson in particular and South Australians in general were of their role as legal pioneers. It also shows that the new statute was considered to have created a 'right' despite the existence of the residual discretion to refuse to permit claims that might affect the Royal prerogative.

Chief Justice Cooper, for his part, ruled that 'the object of the Act was to place the nominal defendant in the exact position of a person sued, and that there could be no deviation from the ordinary rules of evidence',²⁰⁹ which also underlined the innovative nature of the Act, if in a more understated way.

203 The papers of Mr K T Borrow (above n 39) contain a release by Goodiar in favour of Gwynne dated 4 January 1856 of all debts owed by Gwynne to Goodiar up to that date. Borrow is not mentioned, but of course he was Gwynne's son-in-law and so the release by Borrow may have occurred more informally or not at all. Those papers also contain a bill by Borrow & Goodiar to Gwynne for £48/13/3 dated September 1843 for what appears to be farm-related work.

204 The questions submitted to the special jury may be found in *The Adelaide Times* (Adelaide), 12 July 1856, 3.

205 *The Adelaide Times* (Adelaide), 15 July 1856, 2. See also GRG 1/1/1856/59 and a book kept in the Library of the Supreme Court of South Australia containing Master Jickling's Court records from 1853 to 1860, which records the names of the special jury under the date 10 June 1856; the names crossed out in this record may be those thus excluded. Two petitions in favour of Borrow & Goodiar may be found in *Case of Borrow and Goodiar*, above n 39, 43–64, 141–3. (Those pages are almost exclusively taken up by numerous signatures.)

206 *The South Australian Register* (Adelaide), 8 July 1856, 3.

207 *The South Australian Register* (Adelaide), 9 July 1856, 3. See also *The Adelaide Times* (Adelaide), 9 July 1856, 3.

208 While the South Australian statute appears to have been a first in the common law world, there is no reason to think that all civil law countries did not permit suits against the government. See *Alien Tort Claims Act*, 28 USC § 1350 (1789), although this is worded, and has been interpreted, quite restrictively and applies in a narrow field; thus, it is not really a precedent for the South Australian statute: see *Sosa v Alvarez-Machain*, (2004) 124 S Ct 2739; Russell G Donaldson, 'Construction and Application of Alien Tort Statute (28 USCA § 1350): Providing for Federal Jurisdiction over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States' (1993) 116 *American Law Reports, Federal* 387; Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (2004) ch 2. See also *Pyrenees Council v Day* (1998) 192 CLR 330, 375 (although Gummow J appears to be unaware of the date on which sovereign immunity in tort was removed in Victoria: see below n 261).

209 *The South Australian Register* (Adelaide), 8 July 1856, 3.

The case proceeded for five days. In summing up to the jury, Cooper CJ in essence directed them to find a verdict for the defendant, stating that he had consulted with Boothby J and come to the conclusion that the full receipt given by the firm in April 1842 was effective to extinguish all claims. The jury, acting as old colonists rather than taxpayers, came back with a verdict for Borrow & Goodiar on the grounds that the discharge had been given ‘under force of circumstances’.²¹⁰ Chief Justice Cooper thereupon argued with the jury, which justified its decision by reference to an alleged promise by the government to send on a petition by Borrow & Goodiar to the Imperial authorities made at about the time of the discharge of April 1842:

[Foreman –] We should be happy to follow your Honor’s opinion so far as we can do so consistently with our sense of duty. We consider there is a balance of account still due; that the sum was received [pursuant to the discharge of April 1842] on the condition that the Governor should forward their memorial to the Home Government.

His Honor – Gentlemen, there was no such promise.

[Foreman –] There certainly was such a promise referred to in Mr Stephens’s evidence. ...

Mr Gwynne – Will your Honor allow me to observe that it is the privilege of an English jury to return a general verdict.

His Honor – Certainly; and it is my duty to take their verdict, and I am endeavouring to do so.

Mr Gwynne – Will your Honor excuse me for saying that you argue with the Jury, and do not take their verdict. ... This is a great constitutional question – the right of a Jury to return a general verdict.²¹¹

(Chief Justice Cooper was moved to remark shortly afterwards that he could forgive Gwynne’s ‘considerable energy and vehemence’ in the exchange quoted above ‘on account of the strong personal interest which he felt in the matter’.)²¹² The jury was thereupon sent out again, but on its return stuck to its guns, the foreman stating that ‘[t]he receipt having been given under the force of circumstances, we wish to give a general verdict for the plaintiff’.²¹³ A verdict for the fantastic sum of £35 405/1/5, including interest of £19 669/9/8, was entered.

That was not, however, the end of the matter. A rule for a new trial on all issues²¹⁴ was made absolute, Boothby J remarking: ‘I trust my recommendation of introducing an equitable replication [on the new trial] may be considered’.²¹⁵ (The Full Court, per Boothby J, had earlier refused the government’s application as a plaintiff in equity for a common injunction on the rather narrow grounds that

210 *The South Australian Register* (Adelaide), 12 July 1856, 3; *The Adelaide Times* (Adelaide), 12 July 1856, 3.

211 *The South Australian Register* (Adelaide), 17 July 1856, 3.

212 *Ibid.*

213 *The South Australian Register* (Adelaide), 12 July 1856, 3.

214 *The South Australian Register* (Adelaide), 2 August 1856, 2; *The Adelaide Times* (Adelaide), 2 August 1856, 4.

215 *The South Australian Register* (Adelaide), 22 July 1856, 3.

the 'Act did not seem to grant power to the Government to appear as plaintiff, though it was allowed to appear as defendant'.²¹⁶

Although the award was that of a jury, it is clear that its extent caused some shock in the community. The amount awarded was about one-sixth of the Provincial government's entire yearly revenue in 1856 (excluding previous years' surpluses and other abnormals).²¹⁷ The *South Australian Register* was moved to publish an editorial to quieten 'the fears of the community' that future huge sums could be awarded for long-finished works, and pointed out that the period of two years under which claims predating the enactment of the Act could be brought – as we have seen, a wise addition to the Act made in 1853 – had by now expired.²¹⁸ On the other hand, the strongly pro-claimant *Adelaide Times*,²¹⁹ which at one stage even called on the electorate to vote against those who had opposed the claim of Borrow & Goodiar,²²⁰ stated that a new jury would simply come to the same conclusion. Even this newspaper, however, printed a letter asking how much of the 'monstrous'²²¹ award would be received by Borrow & Goodiar and how much by the Adelaide Auction Company.

The matter was, however, foreshortened. A long debate in the Legislative Council on 4 December 1856,²²² during which the government was accused of attempting to wear out the claimants before the second trial could take place by seeking evidence on commission from far-flung corners of the Empire,²²³ was inconclusive, as the Legislative Council could do no more than recommend payment. This it duly did in a debate in which Baker moved the ultimately successful motion.²²⁴ But the creditors had to wait until responsible government was inaugurated in April 1857. The creditors (although *sans* John Baker on this occasion), rather than Borrow & Goodiar themselves, lost no time in petitioning the new Parliament for a 'final settlement of your petitioners' long outstanding claims on Her Majesty's Local Government, on an equitable basis, free from all legal technicalities' and pointed out that, as a litigator, the government possessed 'vast and crushing advantages ... in their having in the public funds an unfailing resource for the prosecution of litigation to an endless extent'.²²⁵ On 11 June 1857, the House of Assembly (of which the Hon John Baker MLC was not a member)²²⁶ agreed to a vote of £10 000 to the assignees of Borrow & Goodiar, on condition that £2000 be handed over to Borrow and Goodiar personally for

216 *The South Australian Register* (Adelaide), 23 April 1856, 2; *The Adelaide Times* (Adelaide), 23 April 1856, 3.

217 See South Australia, Parl Paper No 5 (1857–58), 2 (revenue of £205 009/18/5).

218 19 July 1856, 2.

219 2 August 1856, 2.

220 *The Adelaide Times* (Adelaide), 10 December 1856, 2.

221 *The Adelaide Times* (Adelaide), 16 July 1856, 2.

222 *The South Australian Register* (Adelaide), 5 December 1856, 2 ff; *The Adelaide Times* (Adelaide), 5 December 1856, 2 ff.

223 See also South Australia, Parl Paper No 43 (1856) 1; South Australia, Parl Paper No 59 (1857–58) 2 (petitions of the *creditors*, for some reason not including Baker).

224 South Australia, *Votes and Proceedings*, Legislative Council, 4 December 1856, 45 ff; 5 December 1856, 49.

225 South Australia, Parl Paper No 59 (1857–58) 2 ff.

226 But see above n 103.

their private use. This last proviso had been added at the instance of Hanson A-G,²²⁷ despite his opinion that ‘the claim was emphatically a dishonest one’²²⁸ and that the jury had made its award based ‘not [on] the justice of the case, but the wealth of the other party’.²²⁹ (Clearly, the government’s unlimited resources could also be a burden in litigation.) Not everyone, however, shared this view of the claim: during the debate, one member declared that the treatment meted out to Borrow & Goodiar was ‘the blackest spot in the history of South Australia’.²³⁰ Commenting on the parliamentary vote, the *Adelaide Times* declared sarcastically that Borrow & Goodiar would be ‘utterly overwhelmed’ by the generosity of the House.²³¹

That, however, was still not the end of the matter. As a further petition from a certain John Baker and Thomas Waterhouse pointed out,²³² the South Australian Banking Company claimed almost the entire sum of £8000 voted for the creditors by adding interest to its original, more modest claim.²³³ The petition asked the House of Assembly to express its intentions in making the vote.²³⁴ This the House quite properly refused to do, despite a motion to that effect by Mr J B Neales, the former auctioneer of the Adelaide Auction Company;²³⁵ it decided to leave the parties to fight the matter out in the courts.²³⁶

The sum of £8000, which was originally paid to Baker and Waterhouse personally, awaiting the outcome of the dispute with the Bank, had by this time been paid by them, by order of the Insolvency Court, to the Official Assignee.²³⁷ The case before the Insolvency Court to determine the fate of this sum was heard at first before the Acting Commissioner, Matthew Smith,²³⁸ and then before the

227 South Australia, *Votes and Proceedings*, House of Assembly, 11 June 1857, 96 ff; South Australia, *Parliamentary Debates*, House of Assembly, 11 June 1857, coll 271–4. The Advocate-General had become an Attorney-General with the inauguration of responsible government – hence the suffix ‘A-G’.

228 South Australia, *Parliamentary Debates*, House of Assembly, 11 June 1857, col 272.

229 Ibid col 273.

230 Ibid col 272 (Mr Duffield).

231 13 June 1857, 2.

232 Who seems not to have been a close relative of the politician G M Waterhouse judging from Statton, above n 100, vol 4, 1679. See also the debate mentioned above n 152, in which Mr Waterhouse MLC essentially accused Baker of feathering his own nest by putting forward Borrow & Goodiar’s claim.

233 The sum actually claimed by the Bank was £7383/10/7: *The South Australian Register* (Adelaide), 28 May 1858, 3.

234 South Australia, Parl Paper No 94 (1858).

235 See above n 55.

236 South Australia, *Parliamentary Debates*, House of Assembly, 26 October 1858, col 442 ff. The report in *The South Australian Register* (Adelaide), 27 October 1858 suggests that Neales’ motion was in fact carried: at 3. It is not surprising that the unusual and confusing form of parliamentary procedure adopted here should have confused the reporter. The true position can be determined in South Australia, *Votes and Proceedings*, House of Assembly, 26 October 1858, 117; Sir Thomas Erskine May, *A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament* (first published 1844, 18th ed, 1971) 173 ff. See also Sir Donald Limon and W R McKay (eds), *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (22nd ed, 1997) 341 fn 2.

237 *The South Australian Register* (Adelaide), 19 May 1858, 3. The papers of Mr K T Borrow (above n 39) contain an account indicating that, of the £8000, £7176/14/10 was left after legal costs and other expenses, which was paid to the Official Assignee. This document is undated, but the Official Assignee’s receipt, also in Mr Borrow’s collection, is dated 20 May 1858.

238 *The South Australian Register* (Adelaide), 12 May 1858, 3; 19 May 1858, 3.

Commissioner, Charles Mann, who had at one point been legal adviser to Borrow & Goodiar and in that capacity had signed minutes of record with John Baker.²³⁹ Mr Commissioner Mann refused to grant the Bank's claim to the sum of £8000²⁴⁰ and an appeal to the Supreme Court by the Bank was unsuccessful.²⁴¹ By the time the case then reappeared in the Insolvency Court before Mr Commissioner Mann, the Bank's claim was for only £2500.²⁴² Perhaps there had been a compromise. At all events, a dividend of 6s in the pound was declared as early as February 1859.²⁴³ One of the creditors that benefited from this dividend, almost 20 years after the gaol had been built, was the Adelaide Auction Company, which claimed for £1220/2/-.²⁴⁴ A *Gazette*²⁴⁵ notice of April 1859 also refers to John Baker – together with the Hon George Hall, presumably the same person as the MLC of that name from 1851 to mid-1853²⁴⁶ – as a co-owner of the estate of the South Australian Marine and Fire and Life Assurance Company,²⁴⁷ which claimed for £1140/15/9.

Borrow and Goodiar themselves lived until 1862 and 1887 respectively. From their obituaries²⁴⁸ we learn that neither was deterred by his experiences as a government contractor from entering the government service. The former became, even before the claim against the government was resolved, and apparently on Hanson's recommendation,²⁴⁹ Secretary of Railways²⁵⁰ and an official of the Births, Deaths and Marriages Office. Goodiar, after again becoming insolvent in the early 1860s,²⁵¹ became Superintendent of the Port Augusta Waterworks.²⁵² In that capacity, he reappears in South Australian public records. The Auditor-General's report for 1872 states:

In consequence of my frequent Reports as to the Superintendent's delay in remitting Waterworks Revenue from Port Augusta, and want of Collector's Accounts, correspondence ensued ...

On my becoming fully acquainted with the state of affairs, and reporting, the Superintendent was suspended from office, and subsequently removed. Meanwhile, I personally entered upon a tedious research, from the commencement of water

239 *Case of Borrow and Goodiar*, above n 39, 123–9. Furthermore, numerous documents in the possession of Mr K T Borrow (above n 39) mention Mann's contribution.

240 *The South Australian Register* (Adelaide), 28 May 1858, 3. See also 24 May 1858, 3.

241 *The South Australian Register* (Adelaide), 12 July 1858, 3.

242 *The South Australian Register* (Adelaide), 20 December 1858, 2. Cf *Transactions of Borrow and Goodiar* above n 39, 42.

243 *The South Australian Register* (Adelaide), 9 February 1859, 3.

244 *The South Australian Register* (Adelaide), 11 December 1858, 3. See also *The South Australian Register* (Adelaide), 16 December 1858, 3; 28 January 1859, 3.

245 *South Australian Government Gazette* (Adelaide), 7 April 1859, 323.

246 Pike, *Paradise of Dissent*, above n 41, 429 ff, 466.

247 See Ordinance No 20 of 1842 (SA); Ordinance No 14 of 1843 (SA).

248 *The South Australian Register* (Adelaide), 23 July 1862, 5; *The Adelaide Observer* (Adelaide), 13 August 1887, 35.

249 *Transactions of Borrow and Goodiar*, above n 39, 26.

250 GRG 24/6/1855/579; 24/6/1855/648. James Allen, *Royal South Australian Almanac for 1858* (1858) 33 shows that Borrow's appointment, originally made under Act No 18 of 1854, survived the enactment of the Act No 27 of 1855–56. See also above n 197.

251 South Australia, Parl Paper No 128 (1865) 2 ff. The middle name of Mr Goodiar varies slightly in different records, but it may be assumed that it is the same man.

252 See GRG 53/271.

supply in 1865; and, having corrected the local cash records (by such checking as was found possible, and by explanation readily afforded by Mr Goodiar), I submitted a balance-sheet. From time to time, as anything came to light, Mr Goodiar paid in sums which it appeared he *should* have collected; and eventually he completely satisfied the Government's claim, so far as I could establish it from the data in command. I should think he must have suffered considerable pecuniary loss, as well as deprivation of office, as the result of his laxity and want of business method.²⁵³

Probably Hanson CJ, as Goodiar's principal foe in the earlier struggle had by then become, learnt of this damning assessment of Goodiar's business skills before his death in 1876.

V EFFECT AND INTERPRETATION OF THE CLAIMANTS RELIEF ACT

The precise effect of the Act was long uncertain. As well as the occasional dispute about who was included within the Crown for purposes of the Act,²⁵⁴ the question arose whether the Act removed the Crown's immunity in tort. It was clear enough that the Act was intended to give rights to sue the Crown in contract. This was so not just because of the history of the Act, as sketched above and well known to everyone in the first decades of its operation, but also because the procedure created by the Act was roughly analogous to the English petition of right²⁵⁵ (which may be why we never find Boothby J objecting to it as repugnant to English law),²⁵⁶ and a principal use of the petition of right was in contract.²⁵⁷ However, the Act's effect on the Crown's immunity in tort would depend on whether it was a merely procedural statute for enforcing the Crown's existing liability or one that created substantive rights beyond those already in existence.²⁵⁸ The Act's preamble, with the reference to the difficulty of using the petition-of-right procedure in South Australia, and the vague similarity of the procedure it created to the petition of right, pointed to the Act being procedural only – merely providing a more convenient means of enforcing the pre-existing liability of the Crown in contract and other areas in which the petition of right applied, without extending the Crown's liability into other areas.²⁵⁹

On the other hand, the procedure under the Act was far simpler than, and rather different from, that applicable in England under the petition-of-right

253 South Australia, Parl Paper No 3 (1873) 3 (emphasis in original). See also Marianne Hammerton, *Water South Australia: A History of the Engineering and Water Supply Department* (1986) 24, 41, 42 fn 27.

254 *Mander v Hutton (on behalf of Commissioner of Public Works)* (1870) 4 SALR 1.

255 See above n 35.

256 In fact, his Honour is recorded as administering various provisions of the Act in the early years of its operation: see, eg, above nn 198, 205, 210, 215. However, this was at a comparatively early stage in his Honour's career, and in particular before his disposition took a turn for the worse after the appointment of Hanson CJ. It cannot be ruled out that an expression of displeasure at the deviations sanctioned by the Act from the law of England might be found at some later point in his Honour's career.

257 See above n 34.

258 Cf Finn, *Law and Government*, above n 5, 145.

259 Cf *Tobin v The Queen* (1864) 16 CB (NS) 310, 353; 143 ER 1148, 1164 ff; *Feather v The Queen* (1865) 6 B & S 257, 295 ff; 122 ER 1191, 1205.

procedure. Furthermore, the preamble also complained about the 'limited operation' of the petition of right, and s 1 commenced by giving a right to sue '[i]n all cases of dispute or difference, touching any pecuniary claim'. In themselves, these words were wide enough to include at least a claim for damages in tort, not to mention other claims that might be said not to be for money as such but could be seen as *touching* a pecuniary claim.²⁶⁰ The South Australian Act also did not contain any express restriction to contractual claims, as did the somewhat altered version of it enacted in Victoria in 1858²⁶¹ (which, it would seem, was copied with variations on this point to include some tortious claims in Western Australia,²⁶² New Zealand²⁶³ and Natal).²⁶⁴ Additionally, on the second reading of the Bill in 1851, the following exchange occurred:

MR GWYNNE observed that no case could be tried under the present Bill, but such as could be tried by a petition of right to the Queen. ... No case of tort, or personal damage could be tried by petition of right, as it was presumed that the Queen could do no wrong. He would therefore suggest to the hon mover [Baker] that the remedy should be extended to all cases of claim against the local government. ...

MR BAKER ... had taken his view of the petition of right from Lord Coke, and it would be remembered that the petition of right arose on the illegal Acts of King Charles, and gave the subject the means of remedy in all cases of claims upon the Crown.²⁶⁵

And then there was Baker's line in the debate of 1851 that he was 'hammering away ... at every wrong that has been committed or that may occur within this province of South Australia'.²⁶⁶

260 See *Thomas v Raymond* [1913] SALR 144, 159; South Australia, *Parliamentary Debates*, Legislative Council, 1 October 1867, col 848 (proceedings in trover).

261 21 Vict, No 49 (1858) s 8. For the further development of the law in Victoria away from the South Australian model, see *Crown Remedies and Liability Statute 1865* (Vic) s 27; *Crown Remedies and Liability Act 1890* (Vic) s 27; *Crown Remedies and Liability Act 1915* (Vic) s 27 (note also the case law summarised in the 1915 reprint which indicates that a reasonably broad interpretation was given to this phrase); *Crown Remedies and Liability Act 1928* (Vic) s 27. The non-liability in tort of the Crown in right of Victoria was finally ended by the *Crown Proceedings Act 1955* (Vic) ss 4(1)(b), 8. See also Harrison Moore, 'A Century of Victorian Law' (1934) 16 *Journal of Comparative Legislation and International Law* 175, 189; *The Argus* (Melbourne), 29 January 1938, 2. Reference to the Victorian Parliamentary Debates suggests that the Act was confined to contractual claims only in order to head off a debate about whether it might allow squatters to claim the land which they had appropriated: Victoria, *Parliamentary Debates*, Legislative Assembly, 18 February 1857, 478. However, further research would be required to confirm this. See also Finn, *Law and Government*, above n 5, 155–9.

262 *Crown Suits Act 1898* (WA) s 33. The earlier statute, 31 Vict, No 7 (1867), had contained no such restriction and was clearly of the family sired by the South Australian statute of 1853. See also 2 Wm 4, No 5 (1832).

263 *Crown Redress Act 1871* (NZ) s 9 (also excluding waste lands claims); *Crown Redress Act 1877* (NZ) s 3 (widening the coverage); *Crown Suits Act 1881* (NZ) s 37; *Crown Suits Act 1908* (NZ) s 35; *Crown Suits Amendment Act 1910* (NZ) ss 3, 4 (coverage for contract and most torts). See John Lochiel Robson, *New Zealand: The Development of its Laws and Constitution* (2nd ed, 1967) 192–200.

264 *Crown Suits Act 1894* s 2. See also above n 10.

265 *The Adelaide Times* (Adelaide), 30 October 1851, 3. The report in *The South Australian Register* (Adelaide), 30 October 1851 is similar, although it omits Mr Gwynne's express mention of the law of torts: at 3.

266 *South Australian Gazette and Mining Journal* (Adelaide), 27 November 1851, 3. See above n 151 and accompanying text.

It is perhaps not surprising that the precise extent of the Act's operation was not settled as it went through the legislature, despite the exchange between Messrs Gywnne and Baker just quoted. It appears, in the first place, that '[t]he question whether a petition of right would lie for damages in respect of a tort was first argued'²⁶⁷ in 1843. If this is right, the issue of the liability of the Crown in tort *eo nomine* (rather than just as standing behind an individual Crown servant defendant) under the petition-of-right procedure that the Act adapted had only just emerged. Secondly, the issue was not at the forefront of the minds of those who debated the Act, for none of the claimants whose lobbying led to the enactment of the Act had a claim in tort.

Nevertheless, a consensus on this question appears to have developed within the first few decades of the Act's operation. Finn states that the 'contemporary understanding'²⁶⁸ of the Act was that it did not include claims in tort, and refers to Quick and Garran as the authorities for this proposition.²⁶⁹ The proposition about contemporary understanding is correct, although more impressive authority can be cited for it than the mere *ipse dixit* of two non-South Australians.

One authority sometimes cited is *North Australian Co v Blackmore*. In that case, Hanson CJ, who might be thought to have had some insight into the reasons behind the passing of the Act, stated that it

applies, and was intended to apply, to cases in which the Government in relation to contracts made in its public capacity had done, or omitted to do, something which if done or omitted by an individual in his private capacity would have given a right of action, and was only required in such cases.²⁷⁰

However, this dictum, although sometimes quoted as authority for the proposition that Hanson CJ believed the Act to apply only to contractual claims,²⁷¹ does not say that the Act is exclusively applicable to such cases (which would, at any rate, have given it a more limited operation than the petition of right²⁷² – and that cannot be correct given the preamble's complaint that the petition of right 'is of limited operation' and 'insufficient to meet all ... cases').²⁷³ Even the final words of the above quotation do not bear that meaning in context, for it is clear that their purpose was to rebut an argument that a contract made in a public undertaking as large as the settlement of the Northern Territory was not amenable to the Act simply because of the size of the undertaking and the unusual nature of the contracts involved. The quoted statement therefore means merely that the Act applies to all cases of contract,²⁷⁴ not that it does not apply in tort.

²⁶⁷ Robertson, above n 23, 350 (emphasis added).

²⁶⁸ Finn, 'Claims Against the Government Legislation', above n 29, 30 fn 41. See also Australian Law Reform Commission, above n 5, 462.

²⁶⁹ John Quick and Robert Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 806.

²⁷⁰ (1871) 5 SALR 157, 176; aff'd (1873) LR 5 PC 24.

²⁷¹ *Thomas v Raymond* [1913] SALR 144, 159; *De Bruyn v South Australia* (1990) 54 SASR 231, 240.

²⁷² See Holdsworth, above n 3, vol 9, 19 ff, 41–3; Williams, above n 3, 16 ff. Cf Finn, *Law and Government*, above n 5, 155 (referring to a section in the Victorian Act (above n 261) which had no equivalent in South Australia).

²⁷³ Cf *MacDonald v Tully* (1879) 1 QLJ 21, 29.

²⁷⁴ Cf *Bloch & Welden v Smith* [1922] SASR 95, 129; *Welden v Smith* [1924] AC 484, 494.

So there is, as far as the author is aware, no 19th century judicial support for the view that the Act excluded claims in tort. However, there is better authority available than a judicial dictum, namely the authority of Parliament. Act No 17 of 1874 was *An Act to provide for the Recovery of Damages caused by Negligence on the part of Persons employed by the Government of South Australia in certain cases*.²⁷⁵ Section 1 provided:

Every person injured in his person or property by the wrongful act, neglect, or default of the Commissioner of Railways, or of any person or persons employed by him or by his authority, express or implied, upon any of the Government lines of railway in the said Province [of South Australia], or upon or in connection with any other undertaking on the part of the said Government having for its object the carriage of passengers or goods for reward, shall have a similar right of action against the Commissioner of Railways for the recovery of damages sustained by reason of such wrongful act, neglect, or default, to that which such person would have against a private company or companies if such railways or other undertakings were carried on by a private company or companies, any law or usage to the contrary notwithstanding; and no defence to any such action against the said Commissioner shall be available that could not be maintained by such company or companies.²⁷⁶

Much, much later, in 1961, Brazel J explained that the purpose of s 1 of Act No 17 of 1874 was 'to confer a statutory right of action against the Commissioner and to render no longer necessary the procedure by way of petition of right',²⁷⁷ that is, the *Claimants Relief Act*.²⁷⁸ The contemporary record shows, however, that his Honour was quite wrong to see this as the aim of the Act's drafters. The Act was not intended to substitute a more convenient method of enforcing the Crown's liability in tort for a less convenient one, but to create Crown liability in tort in the first place (if only, of course, against the Commissioner of Railways). This is made quite clear by contemporary statements. Thus, the Commissioner of Crown Lands, in moving the second reading for the Bill which became Act No 17 of 1874, stated that '[a]t present if an action was brought against the Government for an accident sustained on the railway the maxim that the Queen could do no wrong' – the classic means of expressing the Crown's immunity in tort – 'was pleaded'.²⁷⁹ As a result of this, petitions were presented to Parliament by persons injured on the railways pleading for an *ex gratia* payment;²⁸⁰ it is clear that their claims had been

275 For a case under this Act, see *Taylor v Ramsay* (1884) 18 SALR 47. There was a Victorian precedent for such an Act, although the statute in question was very differently worded: see *Sweeney v Board of Land and Works* (1878) 4 VLR (L) 440.

276 Section 2 of the Act subjected the Commissioner to liability under 'Lord Campbell's Act' (*Fatal Accidents Act 1846*, 9 & 10 Vict, c 93, in South Australia, Act No 1 of 1865–66 (now *Civil Liability Act 1936* (SA) s 23 ff)). These provisions, supplemented by a cap on damages for the uninsured of £1000 by s 66 of the *South Australian Railways Commissioners Act 1887* (SA), remained on the South Australian statute book until the separate railways legislation was wholly repealed: *Wrongs Act 1936* (SA) s 2; *Railways Act 1936* (SA) ss 2(1), 109–14, sch 1; *State Transport Authority Amendment Act (No 2) 1981* (SA) s 3(b).

277 *Miesiewicz v South Australian Railways Commissioner* [1961] SASR 190, 194.

278 See above n 35.

279 South Australia, *Parliamentary Debates*, 27 October 1874, col 2162.

280 See South Australia, *Parliamentary Debates*, House of Assembly, 1874, Index, under 'Railway Accident', which lists no fewer than four claims by five people.

defeated by the maxim that the Queen could do no wrong.²⁸¹ In commenting on the proposal to abolish this maxim in railway cases, the *South Australian Register* welcomed this ‘much-needed reform’, the removal of the ‘burning reproach to the administration of justice’ constituted by the ‘indefensible’ and ‘monstrous maxim that the Queen can do no wrong’, a maxim that was ‘constantly’ working injustice.²⁸² This leaves little doubt about the contemporary understanding of the *Claimants Relief Act* just over 20 years after its enactment. The apparent absence of judicial authority against the applicability of that Act in tort therefore probably merely reflects the fact that no-one even thought to sue in tort under it.

An attempt to extend the principle of Act No 17 of 1874 to all torts claims in 1875 was not successful.²⁸³ Perhaps this lack of interest in extending the Crown’s tortious liability is not surprising given that, if a Crown servant could be identified as the actual wrongdoer (something that might sometimes be difficult in relation to railway travel, when the system rather than an individual person might have been at fault), the Crown may be assumed to have stood behind its servant in the traditional manner if damages awards were made.²⁸⁴ As time went on, however, and the initial reasons behind the passing of the Act of 1853 gradually faded into oblivion, it was realised that its terms were wide enough to embrace liability in tort. As with similar, later Acts of other colonies, the South Australian innovation was accordingly applied in a way which ‘went far beyond [what was] initially intended’.²⁸⁵ A series of cases in the first third of the 20th century accordingly expanded the Act’s area of application and turned it from a procedural statute into one creating substantive rights as well. In 1913, the Full Court of the Supreme Court held in *Thomas v Raymond*²⁸⁶ that the Act was available for enforcing a statutory claim arising out of an injury sustained by a police officer during employment. In 1922, the same Court held, in the words of Murray CJ (who had stated obiter as late as 1915 that the Crown was not liable in tort in South Australia),²⁸⁷ that *Farnell v Bowman*²⁸⁸ could not be distinguished on the wording of the South Australian legislation. In *Farnell v Bowman*, the Privy Council had held that the New South Wales version of the South Australian statute (which did not contain the restriction ‘touching any pecuniary claim’ but was otherwise similar) removed the Crown’s immunity in tort. The Full Court now held that the presence of those words in the South Australian statute ‘is not

281 Although there is one reference in the debates just before the enactment of Act No 17 of 1874 to the Government’s refusal to put in such a plea: South Australia, *Parliamentary Debates*, House of Assembly, 8 July 1874, col 861.

282 4 September 1874, 4.

283 See Mode of Enforcing Claims Against the Crown Bill 1875 (SA) (preserved in the State Library of South Australia in volume entitled ‘Bills Standing Over Session 1875’); South Australia, *Parliamentary Debates*, House of Assembly, 30 June 1875, col 298; 13 October 1875, col 1376.

284 See, eg, Leeming, above n 6, 216.

285 Finn, *Law and Government*, above n 5, 142.

286 [1913] SALR 144.

287 *Folland v Stevens* [1915] SALR 25, 39. The statement was obiter because the suit was not one under the Act; the alleged tortfeasors were Crown servants.

288 (1887) 12 App Cas 643.

sufficient to exclude torts, for a claim for damages for a tort is plainly a "pecuniary claim".²⁸⁹ (According to Napier CJ and Abbott J, speaking in 1955, this was the first time that the point had been directly raised.)²⁹⁰ The contrary was not even argued before the Privy Council later in the 1920s.²⁹¹ Also in 1922, Poole J made a declaration that the Crown was not entitled to recover a certain sum, thus further expanding the remedies available.²⁹² In 1933 and 1934, two appeals by the State of South Australia against a finding that the Act permitted public servants to sue for their salaries were dismissed.²⁹³ In 1948, an English commentator on the new *Crown Proceedings Act* dated the Crown's liability in tort in South Australia to 1853.²⁹⁴ Mr Justice Windeyer added his voice to the chorus in 1971,²⁹⁵ just before the words first introduced into the law of South Australia by the Act of 1853 were finally expunged from the statute book, after 119 years, by the *Crown Proceedings Act 1972* (SA).

VI CONCLUSION

The *Claimants Relief Act* can take its place alongside other pioneering legal innovations of the 1850s from South Australia, such as the concluding provisions of the *Supreme Court Procedure Amendment Act 1853* (SA),²⁹⁶ the *Associations Incorporation Act 1858* (SA)²⁹⁷ and, of course, the great *Real Property Act 1858* (SA). Like the last two statutes mentioned, the *Claimants Relief Act*, as we have seen, started a rash of legislation to the same effect, and in some cases in more or less identical terms, in the other Australian colonies and even overseas. The *Claimants Relief Act* is therefore another South Australian legal innovation that enriched the legal heritage of the common law world.

The 1850s was a decade that was extraordinarily fruitful for law reformers in South Australia. Clearly, a great deal of pent-up ingenuity and reforming zeal – not to mention a good helping of self-interest – was released once the part-

289 *Bloch & Welden v Smith* [1922] SASR 95, 106. See also 111, 123. Note, however, the exercise in fine-tuning conducted in *Hall v Bonnett* [1956] SASR 10, 22 ff.

290 *Hall v Bonnett* [1956] SASR 10, 22. See also A P Canaway, 'Actions Against the Commonwealth for Torts' (1904) 1 *Commonwealth Law Review* 241, 244.

291 *Welden v Smith* [1924] AC 484, 486, 494. See also *Wolrige v South Australia* [1927] SASR 1, 9; *Robinson v South Australia* [1929] AC 469, 475.

292 *William Charlick Ltd v Smith* [1922] SASR 551, 571; rev'd (1924) 34 CLR 38.

293 *Hunkin v Siebert* [1933] SASR 433; aff'd [1934] SASR 347; aff'd (1934) 51 CLR 538. This had been the subject of debate earlier on owing to the use that had been made of such a facility in Victoria: see South Australia, *Parliamentary Debates*, House of Assembly, 5 December 1867, col 1268; 13 October 1875, col 1379; Finn, *Law and Government*, above n 5, 158 ff.

294 R M Bell, *Crown Proceedings, being a Full Statement of the Law Relating to Action by and against the Crown as Affected by the Crown Proceedings Act 1947* (1948) 22 fn n.

295 *Downs v Williams* (1971) 126 CLR 61, 78. See also *Commonwealth v Mewett*, (1997) 191 CLR 471, 544 ff.

296 On which see Taylor, above n 70, 55.

297 See Greg Taylor, 'The Origins of Associations Incorporation Legislation – The Associations Incorporation Act 1858 of South Australia' (2003) 22 *University of Queensland Law Journal* 224–38.

elective Legislative Council had been created in 1851 and the colonists were able to begin to take control of their own legislative agenda.

John Baker left behind a record of the means that he adopted to ensure the spread of his innovation to other colonies.²⁹⁸ The fact that he took the trouble to propagate and proselytise for his innovation, as well as several other features of his Act, indicates that he was not just concerned with making provision for his own claim through the estate of Borrow & Goodiar.

It is, however, a shame that he did not leave behind a record of who the drafter of the Bill was. It might have been Baker himself, or possibly he asked a friendly lawyer to do it. There is just no direct evidence available on this point. However, the debate on the second reading of the Bill of 1851, part of which was quoted earlier,²⁹⁹ strongly suggests that Mr Gwynne MLC, the obvious 'friendly lawyer' who might have been the drafter, was not responsible for the Bill, and that Baker had educated himself on the law relating to claims against the Crown. Accordingly, the Bill may be Baker's own handiwork – in which case, it would be a remarkable achievement for a non-lawyer.

Whatever the answer to that question might be, it is clear that it was Baker's energy, persistence and self-interest that resulted in the enactment of this innovatory statute. It might justly be called, in a dual sense, 'John Baker's Act'; and so might its numerous successors throughout Australia.

298 See *Parliamentary Debates*, above n 11, col 789.

299 See above n 265.