

# THE PROBLEM WITH SUING SOVEREIGNS

*Geoff McLay\**

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*In Sloman v The Governor and Government of New Zealand<sup>1</sup> the plaintiff attempted to sue the New Zealand Government for failing to make good on emigration contracts concluded in Europe. This article analyses the decision in Sloman, that the New Zealand government could not be sued in English courts, both within its own historical context and with respect to 19th century concerns over the general inability of the Crown to be sued. The article points to archival documents which show that the New Zealand Government itself was concerned, in the wake of the earlier loss of the *Cospatrick*, as to its own ability to recover the passage monies it had paid, and whether that recovery might be prevented by a lack of legal personality in the English Courts. The article concludes that while Sloman is an important case in its own right, there is also a need for greater investigation of both the practical and theoretical legal difficulties that faced the New Zealand Government in its development and immigration projects of the 1870s.*

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## ***I INTRODUCTION***

### ***A Sloman – the Case, Briefly***

*Sloman* involved an attempt to sue the "The Governor and Government of New Zealand" in the English courts in order to recover passage money for emigrants to New Zealand. It was one of at least two attempts to sue the New Zealand Government in the English Courts for failing to live up to obligations concluded with overseas companies.<sup>2</sup> *Sloman* was a German shipping agent based in

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1 *Sloman v New Zealand* (1875-76) LR 1 CPD 563.

2 The other case was brought by the Brogdens in their dispute discussed below, see the files held by Crown Law, Archive Box No 844. The Crown law file only contains preliminary pleadings and does not include a final judgment. Presumably the case failed on the same grounds as *Sloman*'s.

Hamburg who sought both the costs incurred and the future profits lost as a result of the New Zealand Government's refusal to pay the passage money he had been expecting on both completed and cancelled voyages. Sloman had found himself gravely disadvantaged by Sir Julius Vogel's somewhat sudden decision in May 1875 that New Zealand would no longer pay passage money to subsidise such emigrants.<sup>3</sup> Sloman claimed that he was obligated to transport those already promised passage on his ship the *Fritz Reuter*, a voyage that began in April 1876. A claim was also made by New Zealand's continental agent, Kirchner. Sloman and Kirchner maintained during subsequent negotiations for settlement that the German authorities had threatened legal proceedings if they did not carry out their obligations to the passengers.

The New Zealand Government objected to the attempt to serve the Government of the Colony of New Zealand with the relevant court documents by service on New Zealand's solicitor in London, arguing that the Government was not a legal person. This was despite the fact that the documentation had been concluded in the name of her Majesty the Queen. The attempt to get substituted service foundered in the English Court of Appeal. Neither the Governor, who had been added as defendant after a chambers hearing, nor the Government, existed at English law, notwithstanding the plaintiffs' attempt to say both had somehow become "corporations sole" in New Zealand law by virtue of the Crown Redress Act 1871. James LJ held that "there is no body politic residing in England, or having a place of business in England, called the Governor or Government of New Zealand".<sup>4</sup>

### ***B The Wider Significance of Sloman***

This article is part of a wider project looking into government liability in both historical (nineteenth and early twentieth century) and contemporary contexts.<sup>5</sup> Most of that project has concerned liability in tort, but this article is about the government's liability under immigration and public works contracts. At this time contracts concluded on the part of the Crown were ascribed directly to the Crown. The officer who concluded those contracts was not liable for their fulfilment.<sup>6</sup> The converse of this proposition was that the agent could not sue in his own capacity to enforce the contract. It took English law until the enactment of the Crown Proceedings Act in 1947 to allow the

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3 Enclosure 1 in Letter The Hon Sir J Vogel to the Hon the Minister for Immigration 3 May 1875 [1875] AJHR D1 A.

4 *Sloman v New Zealand*, above n 1, at 565.

5 For this historical part see Geoff McLay "Crown Liability in the Time of Constitutional Foxes" (JSD Thesis, University of Michigan, 2008). Some of the material in this piece is taken from that thesis. The contemporary part of that research has been supported by the New Zealand Law Foundation, as their 2006 International Research Fellow. Outcomes from that project can be found at <<http://ssrn.com/author=83312>>.

6 *Gidley v Palmerston (Lord)* (1822) 3 Brod & B 275 129 Eng Rep 1290. See generally George Stuart Robertson *The law and practice of civil proceedings by and against the Crown and departments of the government: with numerous forms and precedents* (London, Stevens and Sons, 1908) at 643-646.

Crown to be sued vicariously in tort, although the Australasian colonies, with the exception of Victoria, had allowed suits against the Crown in tort from the 1860s onwards.<sup>7</sup> It remains an important tenant of English common law that officials who commit a tort cannot plead as a defence that they were an agent of the Crown.<sup>8</sup>

In comparison to the drama of mid-nineteenth century English tort cases like *Denman*<sup>9</sup> or *Tobin*,<sup>10</sup> which concerned the alleged wrongful destruction of property during British attempts to suppress the slave trade, immigration contracts may seem a prosaic subject. But it was a critical one for a colonial government intent in the 1870s on jump starting economic development through immigration and public works, both of which required foreign involvement and capital. This article focuses on *Sloman*, as an example of the legal difficulties that such enterprises posed for both the Government and those who dealt with it. Given the New Zealand Agent-General in the United Kingdom could not be sued, Crown liability law in contract in the 1870s raised the real problem that unless the Crown itself could be sued, a relatively new innovation under statutes in the Empire, no one could be held liable. What interests me is the theory of the nature of government that late 19th century lawyers operated under and the practical effect that that theory had on who could sue and be sued by the Government. The transcripts of the actual hearing in Common Pleas, the plethora of correspondence both before and after the London hearings and the subsequent settlement of the *Sloman* and *Kirchner* claims give a unique insight into these difficulties. But perhaps the most exciting find was contained in the Crown Law court proceedings file on *Sloman* which showed that the New Zealand Government was, itself, concerned at this lack of personality,<sup>11</sup> a lack it feared would prevent it from suing its contractors in London in the aftermath of the tragic explosion of the ship *Cospatrick* in November 1874. Sovereignty was very much a mixed blessing.

### ***C A Wider Significance Still***

It is not entirely true to say that *Sloman* is a lost case, in the sense of being forgotten by scholars until the work of the lost cases project uncovered it.<sup>12</sup> Indeed *Sloman* is referred to, albeit mostly

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7 See Stuart Anderson "'Grave injustice', 'despotic privilege': the insecure foundations of crown liability for torts in New Zealand" (2009) 12 Otago LR 1.

8 See Geoff McLay "Remedies for Breaches of 'Public' Obligations: The Equality Principle Meets the Welfare State and the New Constitutionalism" in Jeff Berryman and Rick Bigwood (eds) *New Law of Remedies: New Direction in the Common Law* (Irwin Law, Toronto, 2010) 387.

9 *Buron v Denman* (1848) 2 Ex 167 154 ER 459.

10 *Tobin v The Queen* (1864) 16 CN (NS) 310 143 ER 1148.

11 Crown Law Proceedings File, *Sloman v Governor of New Zealand*, Crown Law Office Archive, box 844.

12 See generally the other articles in this issue, and the lost cases project at <[www.victoria.ac.nz/law/NZLostCases](http://www.victoria.ac.nz/law/NZLostCases)>.

always as a footnote, in a number of important articles concerning the personality of colonies,<sup>13</sup> and more recently as an authority in the tricky areas of sovereign immunity and legal personality in English courts.<sup>14</sup> At least two of my colleagues, Janet Maclean<sup>15</sup> and Campbell McLachlan,<sup>16</sup> have referred to the case in their own work. That does not by itself prove that a case is a leading one, but an examination of the legal personality of colonies is part of the work on of the constitutional law of empire that still needs to be undertaken. Understanding the question of legal personality is important to explaining how both London and colonials lawyers thought about the divisibility of the Crown, a subject which has had a modern echo in the efforts to link the current United Kingdom Crown to actions done in the colonies.<sup>17</sup>

## ***II LEGAL BACKGROUND – SUING THE CROWN IN CONTRACT***

### ***A The English Inheritance***

At common law it was not possible to sue the Crown for either breach of contract or tort. Over the centuries a number of different procedures had been utilised to recover money from the Crown. By the mid-19th century the only such procedure still "standing" was the petition of right, which itself had become mired in procedural complexity. The difficulties created by not being able to sue the Crown in contract led to the passage in England of the Petition of Right Act 1860 which sufficiently reformed the procedure so as to enable what were effectively suits against the Crown to proceed in the common law courts. While there had been statutes in both South Australia and

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- 13 The case has been examined, or referred to by some of the major figures in the early part of the 20th century as one dealing with something fundamental: FW Maitland "The Crown as Corporation" (1901) 17 L Q Rev 131; P Corbett "The Crown as Representing the State" (1904) Cth L Rev 23; Edwin M Bourchard "Government Responsibility in Tort, V" (1926-27) 36 Yale L J 757, at 776 fn 49; W Harrison Moore "The Structure of the Empire" (1906-1907) 4 Cth L Rev 49.
- 14 DHN "Johnson The Puzzle of Sovereign Immunity" (1974-1975) Australian Year Book of International Law, Vol YBIL 1; and see Geoffrey Marston "The Personality of the Foreign State in English Law (1997) 56 Cambridge Law Journal 374.
- 15 Janet McLean "From Empire to Globalization: The New Zealand Experience" (2004) 11 Indiana Journal of Global Legal Studies 161, cited for the proposition that the sovereign could not contract with entities that might also be considered part of the crown or otherwise enjoy distinct legal personality, and "Crown him many Crowns: Crown and the Treaty of Waitangi" (2008) 6 NZJPIIL 35, at fn 53 in discussing Salmond's views on divisibility.
- 16 Campbell McLachlan "Transnational Civil Litigation for Commonwealth Governments" in Meetings of Commonwealth Law Ministers (Christchurch, New Zealand, 23-27 April 1990) LMM (90) cited for the general proposition "A government as such is not a legal person and therefore is not capable of suing or being sued."
- 17 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453; *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 AC 529; [2006] 3 All ER 111 HL(E) see the discussion in Anne Twomey "Responsible Government and the Divisibility of the Crown" [2008] Public Law 742.

Victoria that preceded the 1860 Act, it was English reforms that largely served as the model throughout the rest of the Empire.

The Bill appears to have met almost universal acceptance. The mid-part of the nineteenth century had seen an upswing in the bringing of petitions as advocates attempted to hold the Crown responsible in ways that it previously had not been. In his 1923 article, Holdsworth wrote:<sup>18</sup>

[T]he reason why the petition of right was revived in the nineteenth century was partly due to the fact that the manifold activities of the modern State necessitated some remedy against the Crown for breaches of contract and other wrongs committed by its agents, and partly to the fact that the old remedy of suing for a writ of liberate or petitioning the Barons of Exchequer had become obsolete with changes in the financial machinery of the State. Once the remedy had been revived, litigants naturally tried to use it whenever they thought that they had a claim against the Crown for which they could have brought an ordinary action against a fellow-subject. Hence the question of the competence of the remedy was forced upon the attention of the Courts; and this question became more pressing than ever when, in 1860, the *Petitions of Right Act*, by reforming the procedure on such a petition, made it a more generally available remedy.

The paucity of reported cases before the passage of the 1860 Act, however, was blamed by contemporaries not on doctrine so much as on the rather elaborate proceedings that were required. Archibald, a barrister who advocated for the change, wrote that the then current procedure was cumbrous, dilatory, and expensive.<sup>19</sup> The inconvenience of the procedure was also emphasised by William Bovill MP. In introducing the Bill into the Commons he recounted difficulties with bringing contract claims against the Admiralty.<sup>20</sup> While the Act did not replace the basic principle that a claim could only be brought against the Crown through a "petition", it altered the procedure to such an extent that once the petition was filed, the case would now closely resemble an ordinary legal action. The unanimity of acceptance might have been a reflection of the reality that Bovill's statute kept much of the constitutional form of the previous petition process and particularly the requirement that the monarch grant her fiat, or permission, by signing the document "Let Right be Done".<sup>21</sup> Bovill expressly disclaimed an intention to enable suits directly against the Crown for fear of 'frivolous and vexatious proceedings on the part of the subjects.'<sup>22</sup> This reflected the earlier

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18 WS Holdsworth "The History of Remedies against the Crown - Part II" (1923) 38 LQR 280 at 290.

19 Thomas Dickson Archibald *Suggestions for Amendment of the Law as to Petitions of Right: A Letter to William Bovill, Esq* (William Walker and Sons, London, 1859) at 8-9.

20 (1860) 156 *Hansard's Parliamentary Debates*, 26 January 1860, at 162 [House of Commons].

21 "Fiat" is taken from the Latin *fiat justiciam* (let right be done)

22 (1860) 156 *Hansard's Parliamentary Debates*, 3 February 1860, at 546-547 [House of Commons].

'advice' he had received from Archibald<sup>23</sup> who accepted that, in essence, he was proposing an 'ordinary action' against the Crown.<sup>24</sup>

English judges relatively easily agreed after the 1860 Act that a petition of right could be based on contract. Bovill and his supporters had passed the 1860 statute to allow contract cases to be brought against the Admiralty. In introducing the Bill, he compared the costs of a petition with the relative simplicity of the Crown's own action against a defaulting contractor. He recorded that the costs in one petition that he had been involved with had amounted to over £1000.<sup>25</sup> The concern over the Admiralty not defaulting its bills was reflected in the 1874 case of *Thomas v The Queen*. In that case the Admiralty had failed to honour its contract with an inventor for his new models of artillery.<sup>26</sup> The *Thomas* case confirmed that a petition might be brought for an alleged breach of contract by the Crown.<sup>27</sup>

The *Bankers' case*, which dates from Restoration England, formed an essential part of the intellectual background to this judicial willingness to allow contractual claims against the Crown. In an example of very pragmatic reasoning, the Courts held that a petition of right might be brought in respect of an alleged breach of contract.<sup>28</sup> It was in everyone's best interest to acknowledge that the promissory notes the Crown had sold to finance its expenses, had a real value recognisable in Court. The case arose from the 'Stop on the Exchequer'<sup>29</sup> under which Charles II sought to regain a degree of control over public expenditures. Charles, despite a proclamation issued in 1667 that he would never stop payment on bills issued by his household, did exactly that in 1672. The Stop was never total. Payment was allowed for 'public services', including the salaries of Ministers, and to finance the fleet. Three groups were particularly affected: creditors and suppliers of goods and services that were not exempted from the Stop; pensioners; and the goldsmiths. It was the goldsmiths that ultimately brought the case. A system had grown up whereby suppliers had turned purchase orders

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23 Archibald, whose pamphlet advocating reform formed the basis of the subsequent Act, was made Junior Counsel to the Treasury (the Crown's chief advocate in the Courts) eight years after the passage of the Act. Archibald later became a judge, see *The Times* (London, 15 November 1872), "The New Judge – Mr Archibald of the Home Circuit" 8.

24 Thomas Dickson Archibald *Suggestions for Amendment of the Law as to Petitions of Right*, above n 24, at 15-16.

25 (1860) 156 *Hansard's Parliamentary Debates* 3 February 1860, at 546-547.

26 *Thomas v The Queen* (1874) 10 LR QB 31.

27 *Ibid*, at 34.

28 *R v Hornby (The Bankers' Case)* (1795) 5 Mod 29 at 49 87 ER 500. The case is given an extended analysis by WS Holdsworth in the subsection of his history "Remedies against the Crown" which forms part of his account of "Status", above n 18, at 7-45.

29 See the discussions generally J Keith Horsefield "The 'Stop on the Exchequer' Revisited" (1982) 35 *The Economic History Review* (New Series) 511.

from the Crown into cash by assigning them to goldsmiths who acted as bankers. The Stop had been originally intended to last for a year, but it was extended in 1673 and 1674 and created a degree of crisis in the general banking system. Subsequent negotiations in 1674 resulted in a compromise whereby £140,000 was made available by the Crown to pay interest in quarterly payments, but the capital remained unpaid.<sup>30</sup> Letters patent issued to the leading goldsmiths by the King appeared to guarantee the payment of six per cent interest (rather than the eight to 10 per cent that the goldsmiths had normally demanded from the King) from his own hereditary funds. A Bill that was designed to validate the letters patent lapsed in the Commons in July 1678. Horsefield records that in the remaining eight years of the reign of Charles II, five and a half years of interest was paid and three quarterly payments were made during the reign of James II. That meant that the goldsmiths got just over half the payments due in a 12 year period. The accession of William and Mary in 1689 saw that money now used for the war against France, much to the consternation of the goldsmiths who pointed to their letters patent and claimed that they had a charge that had to be paid before the money could be appropriated for war. What had begun as a postponement had effectively become a renunciation. The goldsmiths who had worked to recover the debts through Parliament now turned to the courts by filing a petition in the Court of Exchequer, the Court in which claims that related to the revenue were heard. In a complicated series of hearings the result was that the petition was allowed, but a dispute over whether there might also be compulsory enforcement remained unresolved.<sup>31</sup> As Holdsworth records, the bankers were never, in fact, paid.<sup>32</sup>

Leading economic historian and 1993 Nobel Prize winner Douglas North and his colleague Barry Weingast have argued that the rise of modern forms of governance following the Glorious Revolution of 1688 was a critical part of subsequent English economic success.<sup>33</sup> They argued that the critical development of the period was the Restoration monarchy's agreement 'to be bound by its own rules'<sup>34</sup> As Bruce Caruthers has pointed out, the *Bankers' case* and the logic used by those who upheld the recovery of the capital fit closely into North and Weingast's argument.<sup>35</sup> The House of Lords reduced the Crown's opportunistic ability to renounce debt. But care needs to be taken. Clark assembled data to show that there had been established capital markets for public borrowing since

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30 A subsequent Commons committee revealed that that the total amount unpaid was £1,211,065 5s 8d.

31 *The Bankers' Case*, above n 28, at 512.

32 Holdsworth, above n 18, at 33; the statute was 12-13 William III c 12, s 24.

33 Douglass C North and Barry R Weingast "Constitutions and Commitment: the Evolution of Institutions Governing Public Choice in Seventeenth-Century England" (1989) 49 *Journal of Economic History* 693.

34 *Ibid*, at 704.

35 Bruce G Caruthers "Politics, Popery and property; a Comment on North and Weingast" (1990) 50 *Journal of Economic History* 693.

the time of Henry VIII.<sup>36</sup> Yet the insight remains that abandoning sovereign immunity for contract might not actually be against the State's best interests.

### ***B The New Zealand Scene***

New Zealand took until the 1870s to reform suits against the Crown in New Zealand. At first, New Zealand adopted the Victorian model in allowing only contractual claims.<sup>37</sup> The 1871 New Zealand Act's long title and preamble expressly referred to claims against 'the Crown in New Zealand' and the need to provide 'a remedy for enforcement thereof.' It allowed, in the same terms as the 1858 Victorian statute, 'claims or demands against her Majesty' to be filed as 'on claim or demand as nearly as may be in the same manner as a declaration in an ordinary action in the Supreme Court.' The limitation to contractual claims was contained in section 9.<sup>38</sup> The 1871 Act was even more conservative than the Victorian statute as it retained the fiat. The Crown Liabilities Redress Bill was introduced by Gillies<sup>39</sup> as a Private Member's Bill but was immediately adopted by the Fox Government. Gillies' case for reform was that:<sup>40</sup>

[T]he matter was one of considerable importance, especially considering the position of the Government under the Public Works Bill. The Government would be entering into very large contracts, and it was of great importance that the contractors with the Government should have an easy mode for obtaining a remedy against the Crown in regard to their contracts, and not be driven to the roundabout mode of a petition of right, as they would be if no such Act were passed as indicated.

Gillies, in introducing the Bill, made great play of the Victorian Act as having been 'passed a long time ago.' In moving the second reading of the 1871 Act, Sewell, the then Minister of Justice, also appeared to base the case for the reform on the grounds that it had been done everywhere else.<sup>41</sup> Both the fiat and limitation to contract were removed by the 1877 amendments.<sup>42</sup>

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36 Gregory Clark "The Political Foundations of Modern Economic Growth: England, 1540-1800" (1996) 26 *Journal of Interdisciplinary History* 563.

37 Claims against the Government Act 1858 (Vict).

38 Nothing should be deemed a claim or demand within the meaning of this Act unless the same shall be founded on and arise out of some contract entered into by the authority of Her Majesty's local Government in New Zealand and no person shall be entitled by virtue of this Act to prosecute or enforce any claim against her said Majesty in the nature of action for specific relief for the performance of nor any action for damages for the breach of any contract for the purchase of Waste or other Lands of the Crown.

39 Gillies was a MP at that time from Auckland, but formerly from Dunedin, who had previously served as Attorney-General and who would serve in 1872 as Colonial Treasurer: see Hugh Rennie "Gillies, Thomas Bannatyne 1828-1889" (2007) *Dictionary of New Zealand Biography* <[www.dnzb.govt.nz/](http://www.dnzb.govt.nz/)>.

40 (13 August 1871) 10 NZPD 84 [House of Representatives].

41 (6 October 1871) 11 NZPD 152 [Legislative Council].

42 Crown Redress Act 1877, s 3.

Importantly for the *Sloman* case the 1871 Act expressly required in s 2 that the "obligation arise within the Colony of New Zealand". Despite the later rhetoric that *Sloman's* remedy was in the New Zealand courts, rather than the English ones, it was at least arguable that the contract was an obligation that arose either in London or Hamburg rather than in Wellington

The 1877 Act effectively tolled the end of sovereign immunity in New Zealand in terms of contract. In the meantime however, the weaknesses of the 1871 Act had led to insistence by one firm of Railway engineers that New Zealand pass a particular statute to deal with potential claims they might have against the Government. The 1870s were dominated by a long drawn out dispute between the Government and the Brogden Brothers, a Yorkshire firm of steelworkers and railway builders. The Brogdens' 1872 contracts with the Government to lay tracks and to bring immigrant workers caused serious disappointment to all. As part of the contract the Brogdens required a special dispute resolution statute, the Government Contractors Arbitration Act 1872. The Act was limited to their contracts with the Government, circumscribing a procedure that left the Minister as the first arbitrator for their various contract disputes over the railway construction with the Government.<sup>43</sup> The Brogdens later complained that the Minister effectively acted as a judge in his own cause, resolving disputes even if the Minister's decision was really only an initial determination that could be appealed to a Supreme Court judge.<sup>44</sup> Also significant was a six months limitation period.<sup>45</sup> The Brogdens' view of their experience of courts in the colony was unsatisfactory, and could easily be the subject of a lengthy article in its own right. In an 1876 claim for £2300 in relation to the

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43 The long title of the Act read:

An Act referring Disputes occurring between certain contractors and the Government of the Colony to decision of a judge of the Supreme Court, and for giving jurisdiction to such judge in certain cases therein.

The preamble expressly referred to the possibility of disputes under contracts with "John Brogden and Sons" while the interpretation section expressly defined the applicable contracts as ones:

entered into between the Governor in the name of Her Majesty the Queen, and Messieurs Alexander Brogden, Henry Brogden, and James Brogden (carrying on business as aforesaid under the style of "John Brogden and Sons" for the execution of public works).

44 Government Contractors Arbitration Act 1872, s 4:

[C]ontract, act, deed, matter, or thing done, executed, or entered into by or under the authority express or implied of her Majesty's local Government in New Zealand, or for which the said local Government would be responsible if they were private subjects of her Majesty in New Zealand.

45 Government Contractors Arbitration Act 1872, s 31:

Whenever either of the parties shall desire to proceed to a reference under the provisions of this Act, the proceedings for that purpose shall be commenced within six months after the particular dispute or matter of difference shall have arisen, and not afterwards, unless with consent of the other said parties.

construction of another railway line,<sup>46</sup> the Crown attempted to raise an issue of set-off based on promissory notes from the Brogdens. The Court of Appeal unanimously rejected the claim for set-off, believing the New Zealand statutes, unlike the Imperial one, did not expressly provide for a right of set-off. More interestingly, however, the Court accepted that the Crown was entitled to rely upon another contract for costs relating to Brogdens' role in bringing workers to New Zealand. This contract, the Brogdens alleged, ironically given their general position of wanting to hold the Crown to its obligations, was invalid, as it had been concluded by the colony's agents in the name of the Governor as opposed to the name of the Queen. Two of the judges, Gillies and Williams JJ accepted that the form of the contract was improper and that had the contract been executory it probably could not have been enforced. However, both parties had adopted the contract by their actions. Prendergast CJ also accepted that the contract entered into on behalf of the Governor was necessarily one made on behalf of the Crown. The Governor was not a legal person, nor was the Colony of New Zealand, and the Governor's actions were necessarily on the behalf of the Crown.<sup>47</sup>

The unfortunate saga illustrates a much wider theme shared with *Sloman*. The Brogdens, as their original contracts show, were keenly aware of the difficulties of obtaining judgment against sovereign governments. Ultimately the Brogdens paid the price for their involvement in New Zealand, being bankrupted in London in 1884.<sup>48</sup> For its part, the Government and its advisers appeared to accept immediately that the Brogdens had a right to have their claims heard before an independent tribunal. But they argued that the Government Contractors Arbitration Act was, in fact, to the Brogdens' own advantage. There was no argument that as a sovereign the Crown could walk away from its obligations. Indeed, one doubts that in a heavily indebted and undeveloped place like New Zealand, the Crown could ever walk away from such a contract. New Zealand desperately needed international capital in the 1870s and 1880s as much as the Restoration Monarchy had needed it in the late 1680s, and hence issued bonds that ultimately the House of the Lords held were enforceable. For both, sovereign immunity for debts was as much a hindrance as a cherished right.

### **III THE PROBLEMS WITH SUING SOVEREIGNS**

By the time that the New Zealand government had considered *Sloman's* claim, its Agent-General in London, Featherston,<sup>49</sup> and the legal advisor to the New Zealand Government, John

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<sup>46</sup> *Brogden v The Queen* (1876) 1 NZ Jurist NS 69 (CA).

<sup>47</sup> *Ibid*, at 76.

<sup>48</sup> "The Brogden Claims" *Hawke's Bay Herald* (Napier, 10 January 1884) at 2.

<sup>49</sup> Featherston who had been an active and controversial figure in Wellington politics, was appointed the first New Zealand Agent-General in London in 1871, see David Hamer "Featherston, Isaac Earl 1813 – 1876" (2007) Dictionary of New Zealand Biography <[www.dnzb.govt.nz](http://www.dnzb.govt.nz)>.

Mackrell,<sup>50</sup> had confronted the legal issue at the heart of the *Sloman* case; the lack of legal personality of the New Zealand Government in the English courts but in terms of whether it itself has sufficient personality to sue. Featherston had been engaged in 1875, the year before the *Sloman* case, in efforts to recover the passage money that had been paid to the operators of the ill-fated *Cospatrick* which had sunk en route to New Zealand on 18 November 1874, several hundred miles west-by-south of the Cape of Good Hope. Over 450 passengers and crew had perished, and only three had survived, somewhat mysteriously, on one of the two lifeboats which had been successfully launched.<sup>51</sup> The *Cospatrick* contract had contained a clause that required a half refund of the passage money for passengers who either died or left the ship before they reached New Zealand.<sup>52</sup>

But was the Government of New Zealand was a sufficiently "legal" person to conduct litigation in the English courts? In June 1875 Mackrell wrote in a letter to Sir Julius Vogel, still then Premier, of his concern that the contract might be open to the serious objection that it was "unilateral". He does not record quite what he meant by this. He then goes on to explain the essential problem by reference to an opinion by John Dennistoun Wood, a former Victorian politician who practiced at the English bar on colonial matters.<sup>53</sup> While the contract had concluded by the Agent-General, it could not be enforced by or against the agent as the contract was properly enforceable by the Crown. However, there might be difficulties in taking action "in this country".<sup>54</sup> Mackrell then obtained another legal opinion dated 27 November, to which Sir Henry James QC, who had briefly served as Attorney-General under Gladstone the previous year, was a party. That opinion concluded that while the contracts were clearly binding, the New Zealand "Crown" could not enforce them without the assistance of the English Attorney-General, assistance that was not likely to be forthcoming presumably because it was not really on behalf of the British Government. The contracts could therefore only be enforced only in New Zealand (the opinion appears to miss the point that to be enforceable under the 1871 Act the contract would have had to have been concluded in England). The only solution was legislative, either to create a body corporate under New Zealand

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50 See "Obituary J Mackrell" *The Times* (London, 14 December 1909) at 10. Mackrell was also appointed advisor to the New South Wales Government. He was remembered for the advice that he gave Vogel on the raising of colonial stock.

51 See the accounts from *Illustrated London News* (London, 9 January 1875) and *Illustrated London News* (London, 2 January 1875) available at <[www.theshipslist.com/accounts/cospatrick.html](http://www.theshipslist.com/accounts/cospatrick.html)>. See also the correspondence Broaching Cargo at Sea: the loss of the *Cospatrick* at [1876] I AJHR H-01 at 1.

52 Letter Agent-General to the Hon Minister of Immigration (10 February 1876) [1876] AJHR 1876 D-2

53 Jill Eastwood "Wood, John Dennistoun (1829-1914)" (2006) *Australian Dictionary of Biography*, <[www.adb.online.anu.edu.au](http://www.adb.online.anu.edu.au)>.

54 Letter Mackrell to Vogel (19 June 1875) enclosing opinion from John Dennistoun Wood to Mackrell, *Sloman* proceedings file, above n 11

law that would have sufficient personality, or to convince the imperial parliament to pass legislation, which was unlikely to do unless New Zealand was to consent to be amenable to suit as well.<sup>55</sup>

This was a matter of concern not only for the *Cospatrick* case but, as Featherston explained to the Colonial office, was also of general importance, especially for a colony very much in the business of contracting with European companies for various matters including chartering ships to carry immigrants, railway plant and materials. Featherston requested Lord Carnarvon, the Secretary of State for the Colonies, consider introducing legislation.<sup>56</sup> The Colonial Office expressed sympathy but promised little. On the one hand Lord Carnarvon was "fully sensible of the inconvenience to which the case stated shows the New Zealand government to be subject, and that he would be glad if you should be able to assist in obviating it". But on the other hand, his Lordship placed a key condition on any legislation that the colonial governments should themselves agree to be sued.<sup>57</sup>

The issue was sent back to Featherston by expressing uncertainty as to what the approach of the New Zealand Government would be. Featherston, unsurprisingly, replied in February 1876 that he doubted the Government would be so amenable to being sued in English courts, but suggested that in any event the proper remedy for such plaintiffs would be in the colonial courts.<sup>58</sup> Some of the sting of the issue had no doubt been taken out by a special answer given against the ship's owners, Shaw, Saville and Co, in Common Pleas as to whether the refund clause had been triggered by the death of the passengers. At the hearing on 1 February 1876, Shaw, Saville and Co's barrister had been left somewhat haplessly trying to argue that 'died' meant "died by themselves". The case was then simply a standard contractual one and there was no possible defence.<sup>59</sup> Featherston recovered half of the passage money, £2,562 15s 6d.

This procedure craftily avoided the wider point as to the ability of New Zealand to sue which would have been raised had New Zealand sought a writ. Indeed, Mackrell had expressly acknowledged in a June 1875 letter to Vogel that if he could not get agreement that there be a

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55 See Patrick Jackson, "James, Henry, Baron James of Hereford (1828–1911)" (2004) Oxford Dictionary of National Biography <[www.oxforddnb.com](http://www.oxforddnb.com)> [ODNB]. Given the subject matter of the opinion, the comment in the biography as to how James had built his career at the bar seems apt. It reads "without patronage or inherited wealth James steadily built up a lucrative career by concentrating on unfashionable commercial cases, often in obsolete recesses of the legal system".

56 For Carnarvon's career see Peter Gordon "Herbert, Henry Howard Molyneux, Fourth Earl of Carnarvon (1831-1890)" ODNB, *ibid*.

57 Letter from Colonial Office to New Zealand Agent General (25 January 1876) *Sloman* proceedings file, above n 11.

58 Letter Featherston to Malcolm, Colonial Office February 1876 *Sloman* proceedings file, *ibid*.

59 Notes on *Featherston v Shaw, Saville and Co*, Queens Bench, Archives New Zealand (ANZ), Wellington, IM 5 4.2 no 126 Micro 5842

special question the likelihood was they would lose the litigation.<sup>60</sup> The question stated did not refer to the issue, and the litigation was brought in Featherston's name, not New Zealand's, and stated that the contract had been concluded between Featherston and the shipping company.<sup>61</sup> In Featherston's defence he did not receive the opinion from James until 2 days after the question as stated had been filed, although, of course, that opinion reflected early advice he had received from Dennistoun Wood. There was an agreement, it seems, that the New Zealand Government was not going to disclose that advice. A later April 1876 memorandum authored by an official in Wellington to the then Premier, Dr Pollen, which reviewed the correspondence with Carnavon over the possibility of the law review, concluded that New Zealand should not press its case for reform, and ended with the sage advice that the opinion be kept confidential as courts might well decide the other way.<sup>62</sup> Featherston may have had a poor reputation for his administration of the Agent-General's office in London,<sup>63</sup> but he does not appear to have been lacking in legal cunning.

#### **IV BACK TO SLOMAN**

##### **A A Better Look at the Facts<sup>64</sup>**

The origins of the *Sloman* case lay in the attempts in the early 1870s to expand immigration through the provision of passage money to shippers prepared to bring over immigrants. One of Featherston's key roles when he was appointed in 1871 as Agent-General was the promotion of this paid immigration project. Featherston's early attempts to organise continental immigration had foundered in 1873 when his earlier contract with Sloman failed, seemingly because provisions relating to the promissory notes which passengers were required to sign were invalid according to German law. The relationship with Sloman was apparently saved through the intervention of Kirchner. At the time Kirchner was acting as agent for Queensland, which was engaged in a similar immigration project. Queensland had withdrawn and Featherston decided to essentially adopt the contract. This initial voyage had resulted in a rather minor legal dispute about whether payment ought to be made for those who embarked at Hamburg, including those subsequently left at another affected another European port, or only for those who actually landed in New Zealand. Sloman later claimed he was unable to meet the original Queensland contract because Kirchner had failed to

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60 Letter Mackrell to Vogel, 29 June 1875, *Sloman* proceedings file, above n 11.

61 Notes on *Featherston v Shaw, Saville and Co*, above n 59.

62 Letter to Pollen, Central Government Offices (April 1876) *Sloman* proceedings file, above n 11

63 See the account of the disputes between Featherston and Vogel over the running of the office: Raewyn Dalziel *Julius Vogel: business politician* (Auckland University Press, Auckland, 1986) at 201 [*Julius Vogel*].

64 Heinz Burmester "*The Ship "Fritz Reuter" and other Sloman sailing vessels brought Migrants to New Zealand and Australia*", offprint from "*Beittraege zur Deutschen Volks- und Altertumkunde*" (Hamburg, 1983) translated by Mrs Helga Gratta and Rick Hogben, ANZ, AAAA 6014 W3251.

produce sufficient immigrants for him to be able to sail. This sailing of the *Fritz Reuter*, on 16 April 1876, that was to be subject of the litigation, was to be the first instalment of a contract for 4,000 emigrants. Sloman, in anticipation of the contract, had made a considerable investment in new boats. He was obviously not pleased when he was told the New Zealand Government was unilaterally renouncing their obligation.

Sir Julius Vogel, as Premier, had begun to question the efficacy of paid immigration, but had not gained sufficient support to end it completely. He did end continental emigration, on the basis that the separate settlements somehow necessary for them were expensive.<sup>65</sup> Vogel argued that Continental immigration was not worth the bother. Immigration quotas could be more easily filled from the United Kingdom. During a visit to London, he gave instructions to Featherston on 30 April 1875 to put a stop on the German emigration in a rather terse memorandum that also severely criticised Featherston's running of the immigration service, which he had, on a previous visit to London, been concerned to reform.<sup>66</sup> Featherston later wrote that on receipt of the instructions he had immediately contacted Kirchner and toured various local European agents to explain that paid New Zealand emigration would cease in November on the freezing of the Elbe.<sup>67</sup> There seems to have been mixed messages in this intervening period. In any event, Featherston had confirmed the news to Kirchner on 25 January 1876 that there would be no new emigration season when the spring came, and a telegram had been sent to inform Sloman on 7 February. Sloman subsequently wrote to Featherston that he believed he was bound by prior instructions from Kirchner and that the *Fritz Reuter* would sail when ready. Considerable pressure had been placed, understandably, on Kirchner by the immigrants who had been promised passage, and by the German Government which threatened legal action if Kirchner did not follow through. Featherston told Wellington that it was his belief that any further contractual arrangement with Sloman had been dependent on Sloman completing the Queensland contract by November 1875, and no compensation would be due to him on the subsequent contracts.<sup>68</sup> As it emerged, there was no such written term in any of the arrangements.

The *Fritz Reuter* ultimately arrived in Wellington on the evening of 4 August 1876, after three and a half months at sea. The Government disclaimed any responsibility for the immigrants, and they were not accorded the assistance that would have been normally given to assisted immigrants. This necessitated the intervention of the honorary consul to the German Empire, Mr Krull, who was able to negotiate assistance, but at a level less than would have normally been given. This was all

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<sup>65</sup> Dalziel *Julius Vogel*, above n 63, at 201.

<sup>66</sup> See enclosure 1 in Letter The Hon Sir J Vogel to the Hon the Minister for Immigration (3 May 1875) above n 3

<sup>67</sup> See the correspondence included in letter from Agent-General to Hon Minister for Justice (17 May 1876) [1877] AJHR D2.

<sup>68</sup> *Fritz Reuter Story*, above n 64, at 36

described in press reports at the time as something of a debacle reflecting on the poor administration of Featherston in London.<sup>69</sup> Featherston had died in Hove while *The Fritz Reuter* was at sea. His death perhaps had provided some political cover. It also had the effect of leaving the position of Agent-General in London vacant, ultimately to be filled at the beginning of 1877 by Vogel himself who stepped temporarily away from New Zealand political life. Featherston's death had no effect on the conduct of the subsequent litigation because he was involved in the contract only as an agent and was hence not personally liable on it.

### ***B The Case in Court***

The case came to the English courts on a procedural point – could service be affected on Mackrell, as solicitor for the New Zealand Government under the rules for substituted service?<sup>70</sup> As recounted in the transcript of the case in Common Pleas, the case was first heard in chambers by Lindley J. His Lordship suggested that the proper defendant was not the Government of New Zealand, as had originally been named in the case, but rather the Governor, on the basis that the contracts were concluded under statute on behalf of the Queen.<sup>71</sup> Mackrell had been present at the chambers hearing, but had not said anything. Between the chambers hearing and the hearing in Queens Bench, Mackrell had filed an affidavit denying that he was solicitor for the Governor.

The procedural point was at first instance heard in the Common Pleas division by Lord Coleridge and Archibald J, the same Archibald who had done so much to promote the passage of the English Petitions of Right Act 1860. After spending quite some time debating personality their Lordships simply kicked for touch on the big issue, but refusing to answer the substantive point and simply to give the order for service as requested:<sup>72</sup>

When pressed further by the plaintiff as to who the proper defendant ought to be, the Governor or the Government, Lord Coleridge replied curtly "that is a matter for you rather than for us. You will take the Writ in the form you think proper".<sup>73</sup> By the time the case had got to the Court of Appeal, the plaintiffs' lawyers had clearly decided that the better course was to cover all bases, as it were, by including both, in a composite pleading.

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69 The Evening Post (Wellington, 5 August 1876) at 2

70 Rule 2, Order 9 Judicature Act 1876: "If it be made to appear to the Court or to a Judge that the Plaintiff is from any cause unable to effect prompt personal service the Court or Judge may make such order for substituted or other service or for the substitution of notice for service as may seem just"

71 See s 4 of the Immigration and Public Works Act 1871 which provided that contracts were to be concluded in the name of the Queen.

72 *Sloman v Attorney-General*, transcript of hearing in Common Pleas, above n 11.

73 *Ibid.*

The Court of Appeal was simply not impressed by that pleading at all. The basic problem remained the lack of incorporation of an entity that could be sued. In the transcript of the oral argument Mellish and James LJ came back repeatedly to this problem, exactly as the earlier legal opinions had. The problem was not just that there was not such a corporate body in England, there probably was not such a body anywhere.<sup>74</sup> Mellish LJ rejected the contention that the Crown Suits Act 1871 had created a corporation sole capable of being sued:<sup>75</sup>

It is said that these New Zealand Acts have made the governor a corporation sole; but I have great doubt whether any colonial Act could make him a corporation sole. But if they have done so, it is plain that the colonial legislature never intended that these contracts should be made in the name of the governor, so that the governor, as a corporation sole, should be liable to be sued on them. They are to be made in the name of the Queen for the express purpose of preventing actions from being brought on them, and that the legislature may have the power to determine how the money of New Zealand shall be expended. That being so, in my opinion it would not be right to try and compel the governor to come in and defend. What I am afraid of is, that we should enable the plaintiffs to get a judgment against the governor and government, who might be advised not to appear, as it would be against their dignity to appear, and a judgment would be obtained which could not be enforced;

Maitland, in his well-known article which castigated the English courts for failing to develop a theory of state personality, "The Crown as Corporation", held the decision somewhat to ridicule:<sup>76</sup>

... I should not wish to see a 'Governor' or a 'Government' incorporated. But can we - do we really and not merely in words-avoid an admission that the Colony of New Zealand is a person? In the case that was before the Court a contract for the conveyance of emigrants had professedly been made between 'Her Majesty the Queen for and on behalf of the Colony of New Zealand' of the first part, Mr. Featherston, 'the agent-general in England for the, Government of New Zealand,' of the second part, and Sloman & Co. of the third part. Now when in a legal document we see those words 'for and on behalf of' we generally expect that they will be followed by the name of a person; and I cannot help thinking that they were so followed in this case.

He then went on to contrast the decision with the ability to sue the Crown directly in the Australasian colonies, an approach which he called "wholesome".

## ***V THE SETTLEMENT OF THE CASE: THE GOVERNMENT PAYS (AND WAS POSSIBLY ALWAYS GOING TO)***

Care needs to be taken when basing conclusions as to what happened in a case only by reference to the accounts in the law reports, but this is especially so in government liability. The leading "the

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<sup>74</sup> Sloman, above n 1, at 565-566.

<sup>75</sup> Ibid, at 567.

<sup>76</sup> FW Maitland "The Crown as Corporation", above n 13, at 142-143.

king can do no wrong" case, is *Tobin*. Captain Douglas who had been patrolling as part of the English naval blockade of the African slave trade, had sunk a suspected slaver in circumstances which were not authorised by the rather complex regime that governed the actions of the ships in the blockade. The law reports tell the story that there was no crown liability for the actions of Captain Douglas in sinking *The Britannia*.<sup>77</sup> But Treasury Solicitor files reveal not only that that ultimately there was a settlement, but that the Admiralty had always intended to settle the case – there being no way that the actions of Captain Douglas could be justified by the legislation that required suspected slavers, like *The Britannia*, to be taken to special courts to have their fate determined. What the Crown had objected to, however, was the form of action that Tobin had commenced.<sup>78</sup> While it was prepared stand behind Captain Douglas in the legal actions against him, it preferred that such an obligation not be recognised by the court by allowing a suit directly against him.

The same is very much true of *Sloman*. The case in the law reports is authority as standing for extending the proposition that the colonial governments were not liable in English courts. But the New Zealand Government, including Vogel, who had been the cause of it all, ultimately settled with both Sloman and Kirchner, albeit not quite in the amounts that either would have liked. Indeed Vogel was instrumental during his time as Agent-General in getting the cases settled. Moreover even at the time of his initial decision to stop the German emigration, Vogel had expressly referred to the possible necessity of compensating Kirchner as a result of the contracts that Kirchner had been party to.<sup>79</sup>

I am unable to say what our legal position in the matter is, but I think that the question should be referred to our solicitor, Mr. Mackrell, for his opinion, and that, if necessary, Mr. Kirchner should be compensated for giving up any claim he may have. If the contracts were carried out, you would have to insist upon his exacting promissory notes from his emigrants, in the same manner as it is now proposed to exact them from emigrants from the United Kingdom. It would be intolerable that our own countrymen should have to pay for reaching New Zealand, while we were conveying foreigners thither entirely at our own expense. I need scarcely add that I do not propose you should take advantage of

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77 Letter Bristow (Admiralty Solicitors) to the Secretary of the Admiralty (23 January 1863) TS 45/106, The National Archives, London (TNA).

78 Letter Wm Atherton (Attorney-General), RO Collier, Henry W West to the Lords of Admiralty (10 May 1863) TS 45/106 TNA:

With our present imperfect information it appears to us to be unnecessary to give an opinion upon the question of the legality of the course adopted by Captain Douglas in this matter. The question of the liability of the Crown for the acts of a Naval Officer alleged to be illegal is one of much great importance and we are inclined to think that the Crown is not liable for such acts of its Officers in a Petition of Right, we are therefore of the opinion that this Petition should be defended and have pleaded a General Traverse and a General Demurrer to it.

79 Enclosure 1 in Letter The Hon Sir J Vogel to the Hon the Minister for Immigration (3 May 1875) [1875] AJHR D1 A No 1.

technical points to defeat any equitable claim Mr. Kirchner possesses: in brief, you must deal with him justly.

The problem was what "justly" meant. There was considerable correspondence between Kirchner and Featherston over what the New Zealand government ought to pay, and whether the government ought to be liable for Kirchner's obligations to other agents. Kirchner assessed his own expenses as relatively minor, some £97. Nothing was settled before Featherston died. On reviewing the file for Vogel, Mackrell questioned whether what appeared to be quite amicable negotiations had become tainted by Featherston's reaction to Kirchner's role in the *Fitz Reuter* setting sail.<sup>80</sup> The correspondence between Featherston and Kirchner contains very little about the nature of the claims that Kirchner was making. Featherston focused on allegations that Kirchner had acted wrongfully in approving the sailing, and had failed to wind up the operations in a timely fashion. Kirchner justified his various actions, not least of which was failing to honour the contract with the immigrants might have led to police action against him by the German authorities. Ultimately Vogel settled Kirchner's claim with £500 payment.

Despite the decisions of the English courts in favour of the New Zealand Government, negotiations continued as to the correct way in which Sloman's claims might be settled. Things changed somewhat for the better after Vogel's arrival in London. While the initial advice he had from Mackrell was that the claims could be rejected,<sup>81</sup> Vogel had later sought Mackrell's advice as to the validity of Featherston's argument that the failure to complete the Queensland contract by the end of November 1875 had voided the contract under which the *Fritz Reuter* had sailed. Mackrell could only conclude that while certain practice and correspondence perhaps favoured the interpretation that Featherston had given the contract, there was nothing actually written that made the subsequent contract dependent on the timely performance of the prior contract.<sup>82</sup> After this advice there seemed very little doubt in Vogel's mind that the New Zealand Government ought to compensate £6,137 for the passage money as if there had been a contract for the immigrants who had sailed on the *Fritz Reuter*. The dispute between Vogel and Sloman focused rather on Sloman's claim for a share of the profits that he would have made on the performance of the contract for passage of the 4,000 immigrants. Sloman's starting position was £25,000. Ultimately, after face-to-face meetings, Vogel offered £9538 and Sloman purported to hold out for £10,000. The matter

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80 See Letter Agent-General (Vogel) to Hon Minister of Immigration (18 April 1877) enclosing opinion from Mackrell dated 9 March [1877] AJHR D 2 No 39

81 See Letter Agent-General (Vogel) to Hon Minister for Immigration (8 January 1877) [1877] AJHR D2 No 15.

82 See Letter Agent-General (Vogel) to Hon Minister of Immigration (18 April 1877) enclosing opinion from Mackrell above n 80.

appears to have been settled ultimately for Vogel's offer which the New Zealand Government quickly approved back in Wellington.<sup>83</sup>

What is interesting about the negotiations is the complete absence of a reference to the New Zealand Government's "leading" victory in 1876 in the Court of Appeal. Rather there are a number of veiled threats by Sloman that he was prepared to recommence action if they could not reach an amicable settlement, although it is not stated how or where this would happen. Similarly Vogel was concerned about the risk that the new advice from the solicitors might mean for the New Zealand government, potentially making it liable for the full amount of Sloman's claim of £25,000. But the point is that nobody was relying on the Court of Appeal judgment. Of course, the Court of Appeal judgement meant the proceedings probably would have had to have been taken in New Zealand, a factor which may have made the German Sloman more appreciative of the New Zealand Government's London offer.

## **VI SLOMAN AND THE DIVISIBILITY OF THE CROWN**

It might be tempting to read a case like *Sloman* as being evidence for some kind of theory of indivisibility of the Crown, after all the effect of the judgment was that Court of Appeal denied that the New Zealand Crown had a separate personality from the British one. But there is evidence of something far more sophisticated behind the case. Certainly no one thought that the British Government should be responsible for a contract that on its face had been concluded on behalf of her Majesty. This was strongly voiced by Mellish LJ during argument:<sup>84</sup>

This is a Contract made by the Queen. I think there is some case if I recollect right in which it was held you cannot have a Petition of Right against the Queen in this Country on a matter that arises in the colony because there is no fund out of which the Judgment can be paid

In response to the reply from New Zealand's barrister "there is a remedy given in the Colony" Mellish LJ continued "the petition of right against the Queen must be in that Country which it relates to because there are not funds out of which the payment is to made".<sup>85</sup>

The paucity of reported cases after the 1860 statute is surprising given the fundamental nature of Crown divisibility in a system that needed to think both of what united and yet differentiated the Imperial, the United Kingdom, and the colonies. Perhaps, as was likely, the 'King can do wrong'

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83 See Letter Minister of Immigration to the Agent-General 25 April 1877 [1877] AJHR D1 no 26 Also see the discussion in *The Fritz Reuter Story*, above n 644, at 4. There is more correspondence about the details of Vogel's negotiations in "Sloman-Kirchner Dispute – 22 May 1876-21 August 1877" ANZ, Wellington, IM6 2/2/2 1876/71-1877/938.

84 Court of Appeal Transcript, *Sloman v Governor and the Government of New Zealand*, *Sloman* proceedings file, above n 11, at 7

85 *Ibid.*

prevented the most significant of colonial claims from germinating. However, English courts also almost immediately employed the device of divisibility to prevent claims in English courts, to colonial government's actions.

One of the very first petitions brought under the Petitions of Right Act 1860 was, in fact, a case from Ontario where the would-be owners of land that had been taken for, but not used for, the construction of the Rideau canal, sought to get an acknowledgment that the Crown held the unused land as a trustee. The Rideau Canal Act 1824 of the Province of Upper Canada had empowered the taking of necessary land. Land was taken from a family who had earlier received a Crown grant of that land.<sup>86</sup> In the meantime a Lieutenant-Colonel By, who had done the surveying, had purchased whatever rights remained with the family. A subsequent statute validated claims like his to land that had been taken before the current owner had obtained his interest. An 1836 statute provided for compensation but neither Colonel By nor the original owners had received any.

In the resulting case, *Holmes*, which appears to be the case that Mellish LJ referred to in *Sloman*, raised the issue whether an English petition of right could be brought in relation to the illegality of the taking of the land. The English Court immediately refused to recognise that it was the English Queen who might have appropriated the land in question. Rather, if any entity was to be liable, it was the local Canadian Crown that ought to be held responsible for the taking of the land, and the failure to return it. Sir W Page Wood VC invoked an early version of the divisibility argument:<sup>87</sup>

It is said that the Queen is present here, and therefore amenable (by virtue of the recent Act ... ) to the jurisdiction of this Court. But it would be at least as correct to say that as the holder of Canada's land for public purposes of Canada, the Queen should be considered as present in Canada and out of the jurisdiction of this Court. This alone supplies a sufficient answer ... I hold that for the purposes of any claim for such land, made under the provincial statutes, the Queen is not to be regarded as within the jurisdiction of this Court. I wish to rest my decision upon the broadest ground, that it was not the object of the Petitions of Rights Act, 1860, to transfer jurisdiction to this country from any colony in which an Act might be passed vesting lands in the Crown for the benefit of the colony ... I prefer to rest upon the higher ground, that this land cannot be withdrawn from the control of the Canadian Legislature and brought within the jurisdiction of this Court merely on the technical argument that the Queen in whom it is vested, for Canadian purposes, is present in this country.

India was more easily treated as a separate entity. *Sloman* was contrasted by the judges, for instance, with cases that might be brought against the Secretary of State for India, because in James LJ's view 'there is no body politic residing in England, or having a place of business in England,

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<sup>86</sup> Upper Canada later became known as Ontario.

<sup>87</sup> *In re Holmes* (1861) 2 J & H 527 70 ER 1167.

called the governor and government of New Zealand'.<sup>88</sup> In relation to India, the established procedure was to sue the Secretary of State for India. This was recognised by the Exchequer Court in *Frith v the Queen* in 1872, in which the supplicant had brought a petition of right seeking monies he claimed had become due to his grandfather from the sovereign of Oude, before Oude had been annexed to the territories of the East India Company in 1856.<sup>89</sup> Frith's counsel attempted to allege that the debt had passed by succession from Oude to the East India Company and thence to the Queen, rather than to the Secretary of State for India, and hence a petition of right might lie. The four Barons who heard the case had very little difficulty in rejecting the claim, stating that the remedy had to be against the revenue of India, if there was such a remedy at all. Bramwell B accepted that there was a certain logic in the debts transferring with sovereignty, but the matter could not be viewed in the abstract, and absent express statutory wording, he could not see why:<sup>90</sup>

[T]he people of this country [should] pay the debts of the East India Company, I cannot see why, on such principles, we might be liable for the whole Indian debt just as much as this debt. We must in my opinion, look at the Act of 1858 as a whole; and I think it manifest that whilst it transferred the sovereignty of India to the Crown, it did not transfer the obligation to pay previously unenforceable debts. If these were transferred at all, they were transferred to the Secretary of State. Moreover looking at the matter practically, it is perfectly plain that the revenues of England cannot be liable to pay his claim, and the judgment for the supplicant would be a barren one.

A similar approach was taken in *Reiner v Marquis of Salisbury*, a case in which the plaintiff was trying to recover what he alleged to be his family property. The property had been purchased by the East India Company from those who had dispossessed the family, Mallins VC wrote:<sup>91</sup>

Now what is the title of this Plaintiff to sue? He has no right to sue in this country to recover land situate in *India*. His right is to sue in *India*, as I pointed out in the case of *Doss v Secretary of State for India*. I there decided that if a person had a claim to property in *India* the proper tribunal for the recovery of such property was in *India*, where there are Courts armed with every requisite power for granting relief. I then said that the subject matter in dispute being in *India*, the Plaintiffs resident in *India*, and the Secretary of State being in *India* as well as in this country, all circumstances concurred in shewing that if the case could be sustained at all it was in the *India* Courts and not in the Courts of this country. That was a suit in which the Plaintiff claimed a debt, and if I was right in that case in holding that the Indian Courts were the proper tribunals, how much stronger is this case, where the claim is for land in *India*? It is not the practice to entertain suits in this country for the recovery of land in a foreign country. That was decided in *Re Holmes*.

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88 *Sloman*, above n 1, at 565.

89 *Frith v The Queen* (1872) 7 LR Ex 365.

90 *Ibid*, at 384-385.

91 *Reiner v Marquis of Salisbury* (1875-76) LR 2 Ch D 378 at 384-385.

This view gloss on indivisibility reflected, it seems, some consensus between the two leading treatise writers, Clode and Robertson, that English courts might hear claims under the Petitions of Right Act if brought in relation to Imperial affairs, but not in relation to local affairs in different parts of the Empire. After a closer look at the writs for possession, Clode wrote:<sup>92</sup>

Such is the suppliant's position where his claim is for land out of the jurisdiction of the English Courts, and having no remedy in the country where the land is situated, he sues his petition in England, and his position is the same where he is proceeding under similar circumstances for chattels. If his claim is on a contract he will in addition have to show that the contract is one which the English people, and not the colony, have obtained the benefit, and that he is not saddling the English revenue with a liability incurred in respect of its dependencies.

Robertson, under the heading of 'claims arising abroad', wrote:<sup>93</sup>

It seems to have been thought that the same rule applies to these claims to land situated abroad, in respect of which a petition of right will not lie in England or Ireland ... It is submitted that there is no analogy between the two cases. If the sum claimed is chargeable on the Imperial revenues, there seems to be no reason why a petition of right should not be presented to the Crown here in respect thereof. That seems to be the only criterion. If the sum were not chargeable on the Imperial revenues, there could be no satisfaction of judgment under sect 14 of the Petitions of Right Act, 1860.

This seeming contradiction between not recognizing the existence of the colonial crown that lay at the heart of *Sloman* and the refusal to allow the imperial revenue to be charged with the expenses of the Crown was explained in somewhat mysterious way by the great Salmond. Salmond took *Sloman* as establishing "There is no such person known to the law of England as the state or government of India or of Canada" and continued:

The King or the Crown represents not merely the empire as a whole, but each of its parts; and the result is a failure of the law to give adequate recognition and expression to the distinct existences of those parts. The property and liabilities of the government of India are in law those of the British Crown.

This would be different if the law recognised incorporation, or there could be, as had been suggested in *Sloman*, incorporation. But a greater mystery allowed Salmond to escape from the

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<sup>92</sup> Walter Clode *The Law and Practice of Petition of Right under the Petitions of Right Act, 1860* (William Clowes and Sons Ltd, London, 1887) at 48-49.

<sup>93</sup> George Stuart Robertson *The Law and Practice of Civil Proceedings by and Against the Crown and Departments of the Government: with Numerous Forms and Precedents*. (Stevens and Sons, London, 1908) at 340.

consequence that the British Crown would actually be responsible – rather there might be what he called a "plural personality":<sup>94</sup>

Although the King represents the whole empire it is possible for the law recognise a different personality in him in respect of each of its component parts. The King who owns the public lands in New Zealand is not necessarily in the eyes of the law the same person who owns the public lands in England.

Salmond did not however quite have the magic that would reconcile the absence of personality in *Sloman* with this recognition of plural personality, but *Sloman* is one of those cases from the 1860s and 1870s that remind us that whatever the language of there being "one queen" the reality was always different.

## **VII CONCLUSION – A CALL FOR MORE SCHOLARLY ATTENTION**

This article could only touch the surface of the interesting and practical questions that lay behind *Sloman*. What I hope this article has done is point to both the practical and theoretical legal problems behind the business of Colonial Government. As such it serves, I hope, as a call for further scholarship on the legal implications of the colony's great enterprise in the 1870s. We have a fantastic study of the impact of law on the development of railways and of the development of the railways on the law, in England.<sup>95</sup> We need such a study in New Zealand.

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94 John Salmond *Jurisprudence* (7th ed, Stevens Sons, London 1924) at 353-354. (This is the last edition for Salmond was responsible for, the same observation is repeated in his previous editions).

95 RW Kostal *Law and English Railway Capitalism, 1825-1875* (Clarendon Press, Oxford University Press, New York, 1994).

