The New Zealand
LAW JOURNAL

3 February No 2 1981

COMMISSIONS, WITNESS AND COUNSEL

The witch-hunting of the McCarthy era, with its accusatorial smears and destroyed reputations, may seem remote from New Zealand today. But it may be mentioned as an example of what can happen in the absence of adequate legal safeguards for witnesses appearing before a Commission of Inquiry. It assumes relevance in that during 1980 two Commissions of Inquiry presented reports which, in their findings, may be seen as bearing adversely on the reputations of such as Cabinet Ministers, police and ordinary citizens. These reports are, of course, those into the conviction of A A Thomas and into the Marginal Lands Board affair — and they are not unique examples of this genre for the Moyle and Mount Erebus Inquiries could also be mentioned. It is not suggested that witnesses before those inquiries were not safeguarded: the point is that their protection lay with the Commission, not the law.

In July 1980 the Commissions of Inquiry Act 1908 was amended, but the witness safeguards introduced fall short of the safeguards thought desirable by no less than three separate advisory groups, namely, the Royal Commission of Tribunals of Inquiry 1966 (UK) chaired by Lord Justice Salmon, the Law Reform Commission of Canada, and the Public and Administrative Law Reform Committee (NZ). At the outset a difference in approach between the New Zealand Committee and the Salmon Committee should be noted. The New Zealand Committee tended to look on Commissions of Inquiry as adjuncts to the working of Government; the Salmon Report looked at them more as a "method of investigating events giving rise to public disquiet about the alleged misconduct of Ministers or other public servants". The latter approach is more attuned to the specific issue of witness protection.

As our Act stands, a person who satisfies the Commission that he may be adversely affected by evidence is to be given an opportunity to be heard in person or by his counsel. The New Zealand Committee (and the Canadian) would have added a requirement that the Commission not make a Report alleging misconduct by any person until reasonable notice of the proposed allegation had been given to him and he had had an opportunity to be heard in respect of it. It would also have given him power to call and examine witnesses and, at the Commission's discretion, to cross-examine witnesses. The Salmon Report takes the matter further as may be seen from the guidelines from it set out below.

For those who would say that these guidelines are largely followed in practice anyway so why legislate? — it suffices to say that Colin Moyle, whose conduct was crucially in issue in the Moyle Inquiry, was refused his request to be represented by counsel. Reference could also be made to the reported remarks of Mr M Minogue MP who noted in respect of the Marginal Lands Board Inquiry that "former Marginal Lands Board member Roly White had appeared before the Commission under the impression that he was a witness — in fact, he was on trial, but was at no stage advised of this."

Cost is a significant factor in any Inquiry. Legal fees expended by the Crown in respect of the Thomas Inquiry (to 9 December 1980)

totalled $335,915.00 divided as follows among counsel representing:

The Commission and A A Thomas	$196,484.44
The Commission in High Court Proceedings	$ 16,474.38
DSIR	$ 46,711.20
Police	$ 64,209.69
Crown Law (for the Crown Prosecutor)	$ 12,034.82

Whether the Crown will similarly meet the cost of those represented by counsel in the Marginal Lands Board Inquiry is not known at the time of writing and that, in itself, is an indictment of the current situation in New Zealand.

The Salmon Report leaves no room for doubt as to how the Commission's discretion to award costs should be exercised. An Inquiry is in the public interest and a witness, and his counsel, are assisting the Tribunal. Normally therefore, a witness should be allowed his costs. Only in exceptional circumstances should the Tribunal's discretion be exercised to disallow costs. (Disallowance may be appropriate if a witness sought to obstruct the Tribunal or unreasonably delayed the Inquiry.) So said the Salmon Report.

In addition, though, the object of a Commission of Inquiry is to inquire and report. It is not, and must never be, to penalise. Commissions of Inquiry must never become the grey and penumbral arm of criminal justice. If a penalty is to follow it must be from other sources. Costs of the magnitude outlined above may, through discretionary reimbursement, become a means of punishment.

The Salmon Report also went further on the subject of witness immunity. As well as entitling a witness to the same immunities and privileges as in a Court of law it would extend that immunity.

> "so that neither his evidence before the Tribunal, nor his statement to the Treasury Solicitor, nor any documents he is required to produce to the Tribunal, shall be used against him in any subsequent civil or criminal proceedings except in criminal proceedings in which he is charged with having given false evidence before the Tribunal or conspired with or procured others so to do."

The Salmon Commission recognised that this entailed a risk of a guilty person escaping prosecution but considered it "much more important that everything reasonably possible is done to enable a Tribunal to establish and proclaim the truth about a matter which is causing a nation-wide crisis of confidence." It also recognised that because of the publicity attending the Hearings of a Commission of Inquiry it would be "virtually impossible for a person against whom an adverse finding was made to obtain a fair trial afterwards." After noting that "no such person has ever been prosecuted" the Tribunal said (more in hope than reality?)

> "This again may be justified in the public interest because Parliament having decided to set up an Inquiry under the Act has clearly considered whether or not civil or criminal proceedings would resolve the matter and has decided that they would not."

The safeguards outlined are no more than those applied in our ordinary judicial processes to safeguard against unnecessary personal hurt and injustice to individuals. They should be applied formally to Commissions of Inquiry. The reason why is succinctly put in the words of one who speaks with authority on this topic, Mr M Minogue MP, who is quoted as saying "Commissions of Inquiry are created by politicians, the personnel set by politicians, and the terms of reference drawn up by politicians, — and the scope for abuse has become tremendous." That scope is not lessened by general and imprecisely defined terms of reference — such as in the Marginal Lands Board Inquiry where the meaning of "impropriety" was very much at large — which enable a Commission to decide very much as it will.

One other matter emerging from the Marginal Lands Board hearing concerns the function of counsel assisting a Commission of Inquiry. In the final summing up, counsel assisting, Mr J Upton made a very strong submission in support of the view that there had been impropriety. He was criticised by the Prime Minister for not giving an even-handed summing up and his submission was described as a "vicious attack" on two Ministers of the Crown. The Attorney-General declined an invitation to disassociate himself from this criticism.

As the Attorney-General saw the role of counsel assisting a Commission it was to put both sides of the case in a balanced way rather than to advance one line of argument only. With all respect to the Attorney-General this is

to take far too narrow a view of the function of counsel assisting. The Salmon Commission underlines that the nature of the task of a Commission of Inquiry investigating alleged impropriety is inescapably inquisitorial and the assistance of counsel is necessary if the Tribunal is not itself to descend into the arena. It saw it as essential for a Commission to be represented by counsel to make an opening speech if necessary, to make submissions in respect of any question that may arise for decision, to cross-examine and if need be to examine witnesses-in-chief. These remarks were made having in mind an Inquiry involving Budget leaks in which all parties, including the Attorney-General, had a similar interest and it was left for the Tribunal itself to adopt an inquisitorial role. This was felt to be most undesirable and it is quite clear that the Salmon Commission saw counsel assisting as taking a full adversary part in the proceedings.

This view finds support in the comments of the New Zealand Law Society in support of Mr Upton's role in the Inquiry. In its opinion the role of counsel assisting a Commission is

> "to assist in arriving at the truth as to the facts, and to arrive at the appropriate findings or recommendations. How best counsel could fulfil that role depended on the nature of the Inquiry, and on the interests of the other parties to be represented."

In the Society's opinion, where opposite points of view are adequately represented by opposing counsel, counsel assisting may adopt a neutral role, filling in any gaps to ensure a proper balance. Where the parties represented are more concerned to defend their own position then counsel assisting must adopt a more positive approach and his role becomes more akin to that of a prosecutor.

With the six other lawyers involved supporting one point of view the clear duty of counsel assisting was surely to present the other view and so ensure that the proceedings *as a whole* were properly balanced. For counsel to switch from an adversary role during the proceedings to a neutral role during the summing up would do nothing to preserve this balance and would suggest a certain predeterminaton on his part of issues more properly left to the Commission.

The point to emphasise out of all this is that the independence and impartiality of counsel for the Commission is every bit as important as the independence and impartiality of the Commission itself.

As matters stand, the use of Commissions of Inquiry is increasing. Witnesses are vulnerable. Legislatively, what has been done is not enough from the civil rights point of view. The situation is anything but healthy.

TONY BLACK

Salmon Report Guidelines

The following cardinal principles should be observed to minimise the risk of personal hurt and injustice to any person involved in the inquiries:—

(i) Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.

(ii) Before any person who is involved in an inquiry is called as a witness, he should be informed in advance of allegations against him and the substance of the evidence in support of them.

(iii) (a) He should have adequate opportunity of preparing his case and of being assisted by legal advisers.
(b) His legal expenses should normally be met out of public funds.

(iv) He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.

(v) Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.

(vi) He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.

CASE AND COMMENT

Cheques "in full satisfaction" of a larger sum

Suppose that a debtor tenders to his creditor a cheque for a smaller amount expressed to be "in full satisfaction" of a larger debt. Does the creditor, by accepting and cashing the cheque, forfeit his rights to the unpaid balance of the debt? The "robust" or common sense answer to that question would surely be "yes". But whether "yes" or "no", it would at least be uniform and invariable. In our law, however, no such invariable response is possible.

The reason is, of course, that an apparent contract to accept a lesser amount fails, prima facie, for want of consideration. But consideration can take a wealth of forms. At one time, indeed, the mere fact of payment by cheque, as a form of negotiable instrument, could amount to consideration since it involved the drawer in a new set of liabilities (*Goddard v O'Brien* (1882) 9 QBD 37). As it happens, that particular escape-route was closed by Lord Denning and the English Court of Appeal (unless and until there is some decision otherwise) in *D & C Builders Ltd v Rees* [1966] 2 QB 617 where it was held that, nowadays, payment by cheque is in no different case from payment in coin or by banknotes. Consideration apart, there are two other possible ways out of the difficulty. One is the establishment of some form of waiver or promissory estoppel and the other, in this country, is s 92 of the Judicature Act 1908 which has the effect that a creditor will be bound by an acknowledgement in writing that he has accepted the lesser sum in satisfaction of the whole debt.

In recent months, two New Zealand decisions have been concerned with cheques tendered and accepted "in full settlement" or "in final payment" of a larger debt. In both, the common sense conclusion was reached that the creditor was bound. But, with respect, in both cases the judgments leave some element of doubt whether all the requirements of the law were fully met.

The earlier of the two cases was *Houseguard Products (NZ) Ltd v Kiwi Packaging Ltd.* (Mahon J, Auckland, judgment 10 September 1980), an appeal from the Magistrates' Court. It arose from a contract for the supply of goods under which, at differing times, quantities of goods were returned as being not in accordance with the contract. Questions arose as to whether all the goods claimed to be returned had in fact been returned. Errors were also made as to the amount of the balance due by the buyer for goods not yet paid for. In September 1977, the buyer notified the seller that on its calculations the amount owing was $765. The buyer replied claiming that the amount outstanding was $900. A few days later the buyer sent the seller a cheque for $765 with a covering letter stating that the cheque was "in full settlement of our account". The seller did not reply to the letter, but it did bank the cheque. Five or six weeks later the seller sent a letter to the buyer claiming a further $1187.

Mahon J held that on the facts there was a genuine dispute as to the amount due. The seller's act of banking the cheque was in acceptance of the condition on which it had been tendered and meant that there had been both accord and satisfaction. His Honour relied on a line of authority in the United States to the effect that where a cheque is offered in settlement of a disputed or unliquidated debt, the creditor must either reject the tender or accept it in accordance with the specified condition. As far as it goes, the rule so established accords with principle and thus represents the law of New Zealand as it does the law of the United States. Its justification is that the settlement of a disputed or uncertain claim binds the parties because both have given consideration by abandoning their disputed or potential rights. There will therefore certainly be consideration where the very existence of the debt is in genuine dispute and there will usually be consideration where the debt is unliquidated and the quantum is still uncertain. But care is necessary when applying the rule to debts the existence of which is admitted and where only the quantum is in issue. To give consideration for his payment of a lesser amount, the debtor has to surrender some right or advantage. If all he does is to pay the lowest amount which he admits to be due, he prima facie surrenders nothing and hence gives no consideration. Indeed, if he admits to owing the minimum, his liability to pay it is, to that extent, undisputed so that his pay-

ment should on that account alone fall outside the rule as stated. It has to be remembered, too, that whatever the position may have been in the past, the cheque itself, since *D & C Builders Ltd v Rees*, can no longer provide the consideration. There was no discussion of this aspect of the problem in the judgment of Mahon J. But on the facts as recounted by the learned Judge, there are certainly grounds for inferring that the amount offered and tendered by the debtor was of no more than an admitted liability.

The second and more recent decision was that of the Court of Appeal in *James Wallace Pty Ltd v William Cable Ltd* (judgment 15 October 1980). This time the subject matter was a sub-contract for the manufacture and supply of steel framing to Wallaces as contractors for the construction of the Postal Centre in Wellington. In May 1968, Cables claimed in a letter to Wallaces that part of the work it was obliged to perform under the sub-contract should be paid for as an extra. There was apparently no reply to this letter, nor was the claim for extras ever subsequently admitted by Wallaces. In September 1970, Cables wrote to Wallaces applying for the payment of "all outstanding moneys" which were stated to total $57,623. A few days later Walllaces replied by a letter explaining that they had deducted a "backcharge" of $488.25 and enclosing a cheque for $57,135 as "final payment". Cables presumably accepted the justice of the deduction since they cashed the cheque without comment. Twelve months later, however, they sent Wallaces a claim for an additional $47,530 in respect of the alleged extras. In the High Court, Jeffries J made an order that Wallaces join in appointing an arbitrator to resolve the alleged dispute. This involved his holding that Cables' acceptance of Wallaces' cheque had not constituted an accord and satisfaction barring Cables' claim for extras.

In the Court of Appeal, Woodhouse and Richardson JJ allowed the appeal on the ground that, properly construed, the letters of September 1970 showed that Cables had accepted the cheque as a final payment of all moneys owing whether under the sub-contract or as extras. McMullin J dissenting, adopted the opposite construction. On the construction adopted by the majority, the question would next arise whether Wallaces had given any consideration for the abandonment by Cables of their claim for extras. The judgment of Woodhouse J is silent on the point. But Richardson J dealt with it by stating:

> "The rule in *Foakes v Beere* (1884) 9 App Cas 605, that a creditor is not bound by a promise to accept part payment in full settlement of a debt, does not apply on the facts. As at September 1970 Cables' claim was not for a liquidated or ascertained amount of which the sum stated in the letter of 15 September was part only: the exchange of letters . . . constituted an agreement between them as to the final amount due under the contract which was then discharged by payment."

With respect, it is submitted that that passage is not a full answer to the consideration problem. From the judgments of all three Judges taken together, the inferences can be drawn that the quantification of the sum owing under the sub-contract, and apart from the claim for extras, was a matter of accounting only and that it was because the figure claimed by Cables in their letter of September 1970 did not include anything for extras that Wallaces paid it as they did. If those inferences are correct, and given that Cables' letter did evince an abandonment of their earlier claim for extras, it is not easy to see how the payment by Wallaces of the sum due under the contract, about which there was no dispute, could constitute consideration for that abandonment. By itself, the mere *performance* of a contract by one party cannot be his consideration for a second and subsequent contract between the same parties. (See for example *Pao On v Lau Yiu* [1980] AC 614). That is not to say that the agreement by Cables might not have constituted a waiver or given grounds for an estoppel, though McMullin J rejected the possibility on the ground that no detriment could be shown by Wallaces. Nor did he think s 92 of the Judicature Act would apply.

While McMullin J mentioned the need for consideration to be shown for there to be an accord and satisfaction, his dissent was based on the construction point. But whether or not he was right as to that, there is arguably another basis in law for sympathising with the instinct which led him to conclude that Cables ought not to be held to have forfeited their claim for extras. On the other hand, of course, that basis would disappear altogether if the English Court of Appeal were wrong in *D & C Builders v Rees* and payment by cheque can by itself be a sufficient consideration.

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A restrictive covenant in gross?

New Zealand law permits easements in gross (which the common law does not) : s 122 of the Property Law Act 1952. By analogy, it perhaps ought also to permit restrictive covenants in gross; and indeed, on present authority and by way of a local variation of the rule in *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143, it does permit them (I D Campbell (1944) 20 NZLJ 68; F M Brookfield [1970] NZLJ 67). The decision of the Court of Appeal is in *Staples v Corby* (1899) 17 NZLR 734 (discussed ibid) is clear on the latter point; which may however yet come to be reconsidered and New Zealand law brought into line with the orthodox English view, established in *London County Council v Allen* [1914] 3 KB 642, that a restrictive covenant Must be for the benefit of other land if *Tulk v Moxhay* is to operate.

Because of the present divergence of New Zealand law on the matter, it is important that the practitioner drafting a covenant restrictive of the use of land should identify it as either being in gross or else for the benefit of quasi-dominant land described in the instrument containing the covenant. If the latter is the case and assuming there is a subdivision, the covenant should be expressly made with the vendor *and* with the respective purchasers of any lots intended to be benefited which have already been sold (who need not be named : see s 7 of the Property Law Act 1952). Alternatively the vendor's intention to create a building scheme should be clearly and correctly expressed. See Goodall and Brookfield *Conveyancing* (1980 4th ed), 84-85, 165-167.

If these requirements are not fulfilled, doubts as to the effect of the covenant may be resolved only with difficulty and expense, no doubt by having regard to the substance of the covenant and the surrounding circumstances. For example, a covenant imposing building height restrictions will be assumed to be for the benefit of those lots whose view will thereby be preserved (see below as to annexation) and the quasi-dominant land thus identified from the circumstances of the case as in *Marten v Flight Refuelling Ltd* [1961] 2 All ER 696. But, because the covenant is interpreted as not being in gross, the covenantee will be able to enforce it against assignees of the restricted land only so long as the former retains land that is benefited by the covenant.

The proposition in the last sentence is established in England by the decision in *Chambers v Randall* [1923] 1 Ch 149 — in effect as a corollary to *London County Council v Allen*. But it appears from the judgment of Bisson J in *Thomson v Potter & Moodie* (High Court, Hamilton, 6 May 1980, A186/77) that, notwithstanding the existing divergence of New Zealand law on the matter of restrictive covenants, what is a corollary in England stands as an independent principle here; applicable where the parties are held to have intended the covenant to be for the benefit of land of the covenantee though they failed to say so in the instrument, as well as where the lands to be benefited (ie the quasi-dominant tenements) are identified therein.

In *Thomson v Potter & Moodie* the plaintiffs had transferred Lot 3 of their residential subdivision to a purchaser who covenanted in the transfer as follows:

> ". . . not at any time hereafter to erect, build, place, grow or plant, any [sic] or suffer to be erected, built, placed, grown or planted, any building, structure, tree, plant, shrub or thing of any description on any part of the land hereinbefore described to a height exceeding 14.63 metres above Mean High Water Mark of Spring Tides, Tauranga Harbour."

The covenant was, as Bisson J held, in fact intended to benefit and did benefit certain lots of the subdivision. Upon registration of the transfer the covenant was notified on the certificate of title to Lot 3, apparently under s 126 of the Property Law Act 1952. Then Lot 3 was transferred to the first defendant whose builder (the second defendant) built on it in excess of the height restriction. The subdivider, having transferred all the other lots except one which did not benefit from the covenant restricting Lot 3, sued to enforce that covenant. He was unsuccessful however, for Bisson J held that the covenant was not in gross. Although it was enough if, as here, the identity of quasi-dominant land could be ascertained outside the instrument, the plaintiff, having parted with all that land, on the English authority mentioned above could not enforce the covenant against the first defendant as assignee of Lot 3. Further his Honour found no general intention on the plaintiff's part to benefit the whole subdivision by the height restriction imposed on Lot 3 and certain other lots and therefore held there was no building scheme within the rule in *Elliston v Reacher* [1907] 2 Ch 374 which the plaintiff could enforce by reason of his one remaining lot.

But the covenant could be enforced at the suit of the respective owners of any of the lots which, still owned by the plaintiff at the time of the sale of Lot 3, could be identified as land to

be benefited by the covenant (the benefit being presumably annexed by virtue of s 63 of the Property Law Act 1952: *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371). Bisson J referred to two lots in particular which apparently came into this class, in considering an application made by the first defendant in the proceedings before him for the modification or extinguishment of the restrictive covenant in question, under s 127(1) of the Property Law Act 1952. Finding the covenant (i) not unreasonable or impracticable and (ii) of practical benefit to the respective owners of the two lots referred to, Bisson J upheld the objections of those owners and rejected the application.

One last matter of comment. Had the covenant been a covenant in gross, there was no authority for the District Land Registrar to notify it upon the register, since s 126 of the Property Law Act 1952 applies only to covenants made for the benfit of other land. As Bisson J pointed out, under s 126(b) notification under the section gives a restriction no greater operation than it would have under the instrument creating it. Thus no question can arise that the equitable interest purportedly created by a restrictive covenant in gross might become, as it were, "indefeasible" in accordance with the principle in *Frazer v Walker* [1967] NZLR 1069, on its being entered on the register. What then would be the effect of a Registrar's so entering it? Presumably the notification could be ignored by any person taking title to the land who is not otherwise so notified of the covenant that it would be fraudulent for him to ignore it. But, in any event, as mentioned at the beginning of this note, New Zealand law in unorthodox in its present recognition of restrictive covenants in gross.

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Effect of a release of mortgage — is the mortgagee estopped from denying the release?

The recent judgment of Roper J in *Perpetual Trustees Estate and Agency Co of New Zealand Ltd v Morrison* [1980] BCL para 875 has removed some of the doubts which have existed about the effect inter partes of a discharge of mortgage since the decision of Kennedy J in *Broad v Public Trustee* [1939] NZLR 140.

In *Broad's* case the plaintiff mortgagee lent his brother 700 pounds repayable on demand on the security of a registered second mortgage. Some years later, after repayments totalling 148 pounds 10 shillings had been made, the plaintiff found that he could conveniently use the money in his own business, so he made to the mortgagor "a sporting offer" to accept the sum of 400 pounds in full settlement if paid in cash. The mortgagor did not have the money at the time, but it was agreed that the second mortgage should be discharged so as to give him a better chance of refinancing. A discharge of the second mortgage in the usual form containing a receipt for the money "in full satisfaction and discharge of the within obligation" was executed and registered, but no money was paid by the mortgagor to the mortgagee. The Court found, however, that the money was still considered as owing by the mortgagor to the mortgagee. The mortgagor died before he could refinance, and the Public Trustee, as administrator of the mortgagor's estate, required the plaintiff mortgagee to prove his claim. The plaintiff accordingly brought an action claiming the balance owing to him of 551 pounds 10 shillings. Purporting to follow the decision of the High Court of Australia in *Groongal Pastoral Co Ltd v Falkiner* (1924) 35 CLR 157, Kennedy J held that a discharge of mortgage in the usual terms not only discharges the land but, if a deed, operates as a release of personal liability under the covenant. He then proceeded to consider whether, as a matter of interpretation of the Land Transfer Act 1915, the release of mortgage had the effect of a deed, and came to the conclusion that it did, since it was executed with all the necessary formalities and registered (see [1939] NZLR 140 at 143-145). That part of the judgment of Kennedy J is, with respect, correct. It will, however, be remembered that now, by virtue of the changes made by s 2 of the Land Transfer Amendment Act 1958, an instrument which is duly executed in accordance with the requirements of s 157(1) of the Land Transfer Act 1952 has the force and effect of a deed from the moment of execution: registration is no longer necessary to make such an instrument equivalent to a deed. In *Broad's* case, having decided that the release of mortgage had effect as a deed, Kennedy J held that: "It estopped the plaintiff from claiming", and judgment was therefore given for the defendant.

In the *Groongal* case, upon which Kennedy J relied, Falkiner, the mortgagor, had covenanted by a registered memorandum of mortgage under the New South Wales Torrens statute to pay interest to the Groongal Pastoral Co Ltd "free from exchange income tax and all other deductions". It would seem that all the instalments of principal and interest under the mortgage had been paid, but that Falkiner had not reimbursed the amount of income tax

which the Company had paid in respect of the interest received from him. After a discharge of the mortgage in the usual form had been executed and registered, the Company brought an action at common law in the Supreme Court of New South Wales seeking to recover from Falkiner the total amount of the tax so paid. On appeal, the High Court of Australia held (35 CLR 157 at 163), as a matter of construction, that:

> "The dominant intention of the covenant as expressed is that the mortgagee shall receive 4 percent interest undiminished by any cost of exchange, or income tax, or by any other sum burdening that interest. The mortgagor, having so undertaken, was bound to indemnify the mortgagee and, if necessary, by reimbursement, in respect of any diminution so as to leave a clear 4 percent in the hands of the mortgagee."

It therefore became necessary for the Court to consider the effect of the discharge of mortgage. That discharge took the form of a receipt for the principal sum "being in full satisfaction and discharge of the within obligation". It was held that the discharge of mortgage had, in law, the effect of a deed, and operated by its terms to discharge Falkiner from his personal obligation as well as to release his land from the mortgage.

In 1942 Professor I D Campbell suggested ("Discharge of Land Transfer Mortgage" (1942) 18 NZLJ 173, 185) that the decision in *Broad's* case could not be supported on the authority of the *Groongal* case. He made two main points: first that the *Groongal* case was distinguishable and did not turn on the doctrine of estoppel; and secondly, that *Broad's* case incorrectly assumed that the law as to estoppel was the same in New Zealand as in New South Wales. As to the first point Professor Campbell said (at p 174):

> "Two points may be distinguished: (a) If the amount acknowledged by the mortgagee is not the full amount actually due, does an acknowledgement of such part payment 'in full satisfaction of the within obligation' operate to discharge the claim in full? (b) If the amount stated in the discharge has not in fact been paid, can the mortgagee deny actual payment and sue for the amount which was owing?
>
> "The first question turns on the effect of the discharge as construed by the Courts; the second turns on the doctrine of estoppel. Whether the discharge released the personal covenant depended in the *Groongal* case on the first question. In *Broad v Public Trustee* it depended on the second."

In relation to the second point, Professor Campbell quoted the statement in *Norton on Deeds* (2nd ed), 226, that: "Neither the receipt in the body of the deed, nor the indorsed receipt, was in equity conclusive that the purchase money had been paid, and this is now [ie, since 1875] the rule both at law and in equity", and explained (at p 185) that:

> "Prior to 1875 the receipt clause in a deed worked an estoppel at law to the same extent that any other statement in a deed might do so. In equity, however, it was open to a party to allege that notwithstanding the receipt the money had not in fact been paid. The receipt was no bar to recovery of the consideration which had been acknowledged but not received. Since the Judicature Act the equitable rule has prevailed throughout all Divisions of the High Court of Judicature. The receipt, even though by deed, is no more than prima facie evidence of payment, and does not of itself destroy the personal right of action to recover the whole amount due."

Whilst New Zealand has always had the same unity of administration of law and equity, the administrative fusion of the Courts had not taken place in New South Wales at the time when the *Groongal* case was decided (see the judgment of the trial Judge, Gordon J, in that case (1923) 24 SR (NSW) 122 at 129). Professor Campbell therefore argued (at p 185):

> "The *Groongal* case was a common law action for breach of covenant. Even if it had decided that the discharge created an estoppel against denying actual payment, this would not have been a decision which could properly be followed by a Court having jurisdiction to administer both law and equity. It is suggested that in *Broad's* case the High Court judgment was first construed in this way and then deemed applicable in New Zealand in disregard of this essential difference between the judicial systems of the two countries. It is as if a decision of a common-law Court in England prior to the Judicature Act, in a matter in which common law and equity were at variance, were to be regarded as of undiminished authority in spite of the amalgamation of Courts and the consequent alteration in the effect of precedents."

Roper J's judgment in *Perpetual Trustees Estate and Agency Co of New Zealand Ltd v Morrison* provides confirmation that Professor Campbell's criticisms of *Broad's* case are sound. In the *Perpetual Trustees* case the plaintiff brought an action claiming the sum of $9,070 alleged to be owing under a mortgage which had been inadvertently discharged. At all relevant times the plaintiff was acting either in its capacity as trustee of a certain estate or as collecting agent for that estate. In these circumstances it became necessary for the Court to consider the decision of Kennedy J in *Broad's* case and also that of the High Court of Australia in the *Groongal* case. Roper J considered the *Groongal* case in some detail and said that it did not touch on the question of estoppel at all. Echoing the words of Piper J in *Gower v Waples* [1930] SASR 120 at 122, Roper J said that *Groongal* was solely concerned with "a question of construction of a discharge as an operative instrument — not as a statement or assertion which might be contrary to fact, and so estop a party from asserting the truth". He went on to say:

> "*Groongal* decided no more than that the particular form of discharge under consideration extinguished the personal liability for the debt and the burden on the land. *Broad's* case has been further criticised on the ground that Kennedy J having mistakenly taken *Groongal's* case to be based on estoppel had assumed that the law as to estoppel was at that time the same in New Zealand as in New South Wales. The *Groongal* case was a common law action heard at a time when the administrative fusion of law and equity had not taken place in New South Wales."

Roper J went on to refer to Professor Campbell's article (supra) and to Spencer Bower and Turner, *Estoppel by Representation* (3rd ed 1977), 98-99 and 165-166. His Honour concluded his consideration of the point of law involved as follows:

> "It may be that in *Broad's* case there were circumstances not disclosed in the judgment which justified Kennedys J's conclusion that the receipt founded an estoppel, but I am not prepared to accept the case as authority for the proposition that such a receipt will raise an estoppel regardless of the circumstances."

Having taken the view that the execution of the discharge of mortgage did not necessarily estop the plaintiff from claiming the balance owing under the mortgage, Roper J was unable, in the particular circumstances, to take the case before him any further. He therefore required memoranda from Counsel on two additional questions, namely (1) whether, having regard to the finding that there was no agreement by the mortgagor to repay the money and that *Broad's* case is at least distinguishable, the plaintiff could succeed on its existing pleadings; and (2) whether there were any circumstances special to the *Perpetual Trustees* case disclosed in the evidence which could found an estoppel.

Perpetual Trustees Estate and Agency Co of New Zealand Ltd v Morrison is important because it establishes that the doubts which have been held concerning the scope of *Broad's* case are well-founded. Although a release of a mortgage of Land Transfer land in the usual form, which is duly executed with the formalities prescribed by s 157 (1) of the Land Transfer Act 1952, has the effect of a deed executed by the parties signing it, the doctrine of estoppel by deed does not necessarily preclude a mortgagee from recovering an amount owing under the mortgage which has not in fact been paid. There may, of course, be circumstances special to a particular case in which the execution by the mortgagee of a release of mortgage will found an estoppel inter partes as to the payment of the money.

G W Hinde

CONSTITUTIONAL LAW

THE STARTLING REALITY: TOWARD UNCONSTITUTIONAL GOVERNMENT

By PHILIP A JOSEPH*

A. Introduction

It would be a startling reality for citizens of this country to be told that their governments hold office in breach of the law conferring the authority to govern. Startling as it may be, this is the reality, resulting from legal oversight in the administration of our constitutional rules.

This article establishes the oversight, examines its consequences, and proposes a remedy; a remedy satisfying the need for legal regulation of the unrestricted constitutional practice giving rise to the oversight.

B. The law beyond the election

In a liberal democracy such as New Zealand, seldom is there need to look further than a parliamentary election to identify the legal right to political office. Inasmuch as the elected assembly is the organ of the people, from whence our governments are recruited, this identification is to be expected. In New Zealand, the machinery securing parliamentary elections triennially for governments of the people's choice is detailed, specific and procedurally certain.[1] On occasion, individual election results are contested[2] but only once in this country has the electoral process returning the government been challenged. On that occasion, legal continuity was judicially upheld and the challenge refuted.[3] The question not again having arisen,[4] New Zealanders have cause to be confident that their government's electoral mandate is constitutionally secure.[5]

But the legal foundations of government encompass more, there being conditions of office-holding beyond the return of the electoral writs. The electoral machinery of the liberal democracy serves, in addition to its democratic purpose, the principle of unbroken legal continuity of government regardless of the political office-holder. Not only, therefore, must the electoral machinery for selecting politicians operate strictly in accordance with the law, but there must also be strict adherence to the prerequisites of office-holding established by the legal rules. The latter, of course, involves no innovation, it being four hundred years too late to deny Coke CJ's speech to James I, "quod Rex non debet esse sub homine sed sub Deo et lege", the King ought not to be under a man but under God and the law.[6] For, as Coke reasoned, were there no law there would be no King and no inheritance.[7]

Today, Coke CJ's speech is no less applicable to the rules locating the highest office-holders in whom is entrusted the country's administration. In this regard, it is indeed a startling reality to examine the legal prerequisite of appointment as Minister of the Crown in New Zealand. This requires that persons receiving appointment as Ministers be members of the popularly elected assembly.[8] Yet, notwithstanding regular triennial elections as from the time of the rule's enactment in 1950, this condi-

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[1] See the Electoral Act 1956, reprinted 1 January 1976 (see Vol 3 1975 *New Zealand Statutes*), hereinafter footnoted the E A Act 1956.

[2] For Election Petitions, see the E A Act 1956, Part VI.

[3] *Simpson v Attorney-General* [1955] NZLR 271 (S Ct and CA).

[4] But cf, *Re Hunua Election Petition* [1979] 1 NZLR 251 (Full Ct of the S Ct), wherein the Court acknowledged the "substantial constitutional importance" of the decision as affecting not only the electorate in question; see eg, at 260.

[5] Cf, ". . . a Prime Minister and his administration derive their power and authority from the people themselves — the people who elected them"; Cleveland & Robinson, *Readings in New Zealand Government* (1972), per the Rt Hon K J Holyoake. The statement is only partially correct; see infra.

[6] *Prohibitions del Roy* (1607) 12 Co Rep 63, quoting Bracton.

[7] Ibid.

[8] See infra, C. "The legal prerequisite".

tion has been breached on each occasion a new government has taken office.

The usual assumption is that those receiving appointment as Ministers are Members of Parliament as from the return of the writs declaring their election.[9] This is not so. Examined below is the delegated prerogative of the Crown in New Zealand. In exercise of the prerogative, the Governor-General's proclamations dissolving and summoning Parliament have the peculiar effect of creating an interregnum in the legal existence of Parliament.[10] A priori the period during which Parliament has no existence, it has no Members.

That, effectively, summarises the article. It is not a political comment in the sense of politicians improperly aggrandising executive power. Rather it is a legal argument founded upon the interaction of New Zealand statute law and the historic legal rules governing the existence of our Parliament. In New Zealand it is the practice of National and Labour governments to delay the first sitting of a new Parliament until May (or thereabouts) of the post-election year, and not until that time, it is submitted, is Parliament constituted and in existence so as to admit membership of those earlier receiving Cabinet appointment.

C. The legal prerequisite

In the United Kingdom, and formerly in New Zealand, constitutional convention restricts the Crown's unbridled legal power to appoint Ministers[11] by requiring that they either be or become Members of Parliament, in the latter instance the Minister being required to obtain a seat at the earliest opportunity or resign.[12] As with most conventions governing the Executive-legislature relationship, the raison d'etre of this rule is the democratic purpose it serves in promoting responsible government.[13] Coupled with the peculiar status English constitutionalism attributes to convention, the recognition and acceptance of this purpose on the part of politicians and officials is sufficient to ensure that the prerequisite in question, though extra-legal, is observed.[14]

In New Zealand, however, unlike the position in the United Kingdom, the convention governing Ministerial appointments has legal status pursuant to the Civil List Act 1950, as re-enacted by s 9 (1) of the Civil List Act 1979. Section 9 (1) reads:

> "**9. Ministers to be Members of Parliament** — (1) No person shall be appointed as a Minister of the Crown or as a Member of the Executive Council unless that person is at the time of appointment a Member of Parliament."

As to why it was thought necessary in 1950 to legally promulgate the convention is unclear. Not only was the convention in New Zealand regularly observed, but the original section was added in committee without explanation or the benefit of Members' debate.[15] But for whatever

[9] But see infra, "D. The oversight", for the differing views of Members.

[10] See particularly, *Erskine May's Parliamentary Practice* (1976, 19th ed), at 259, quoted infra, corresponding to note 43.

[11] For the delegation of this power to the Governor-General in New Zealand, see the *Letters Patent*, dated 11 May 1917, cl VII.

[12] Eg, in 1963 the Queen invited Lord Home to form a government following Harold Macmillan's resignation on grounds of ill-health. Pursuant to the Peerage Act 1963 (UK), Lord Home disclaimed his hereditary title, became Sir Alec Douglas-Home, and obtained a seat in the Commons at a by-election shortly thereafter. For the obvious practical and constitutional reasons necessitating membership of the elected House, see S A de Smith, *Constitutional and Administrative Law* (1973, 2nd ed), at 58-60 and 155-58.

[13] See de Smith, ibid.

[14] Ibid, at 47 et seq.

[15] Added at the behest of the Rt Hon Mr Nash (Hutt); (1950) 293 NZPD. at 4764. K J Scott, *The New Zealand Constitution* (1962) at 95, makes the quaint (albeit only

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reason it was promulgated, the convention is now statutory, specific and justiciable in New Zealand. Formerly, the requirement was temporally flexible to the extent that Ministerial appointments were not precluded solely by reason of non-membership: now it is specific, enjoining Ministers and Members of the Executive Council to be Members of Parliament *"at the time of appointment"*.[16]

It is thus surprising that in the three decades of its enactment the provision has not elicited the question, when is a candidate successful at a general election a Member of Parliament? To illustrate, the last change of government in New Zealand occurred following the general election of 29 November 1975, the thirty-seventh Parliament having been dissolved on 31 October 1975. The Leader of the National Party previously in Opposition, the Rt Hon R D Muldoon, was sworn in as Prime Minister on 12 December 1975. The thirty-eighth Parliament did not meet for the dispatch of business until 22 June 1976, the writ of summons being issued on 25 May 1976.[17]

As with other post-election appointments to Cabinet, the assumption of the appointment of Mr Muldoon on 12 December 1975 is that he was a Member of the thirty-eighth Parliament, a Parliament that did not meet until some six and a half months later. Quiescence as to this assumption is remarkable in view of the legal rules governing Parliament's existence, and thereto its membership, discussed below. It is even more remarkable in view of the fact that the membership question surfaced recently in the House debates on the Legislature Amendment Bill,[18] the question arising with regard to the legality of Parliamentary select committees sitting in the interregnum between the dissolution of one Parliament and the meeting of its successor.[19] On that occasion Members of our previous Parliament, including Ministers, demonstrated that they either had no idea or that there are at least four answers to the same question.

This is pertinent, of course, not for the reason that the debate ended in disagreement but that it ended in oversight of s 9 (1). Indeed, on the tacit admission of more than one member, Mr Muldoon and his Cabinet colleagues became Members of Parliament not until 22 June 1976, the day on which Parliament assembled and the oaths (or affirmations) administered.[20] It suffices to add that the law is unambiguous, namely, that they be Members of Parliament "at the time of appointment".[21]

D. The oversight

(a) *The Members' disagreement.* In none of the three major statutes dealing with the composition and procedures of Parliament[22] is there any stipulation, express or implied, as to the moment of membership or the event giving rise to it. Nor is the question answered by any of the authorities, Erskine May included. The assumption of most, however, including Members of the House in 1977, is that a candidate elected or returned at a general election is, in law, a Member of Parliament as from the date fixed for the return of the writs declaring the results of the polls.[23]

This view, though incorrect, is understandable in view of the pre-eminence of the electoral contest in a liberal democracy. Though a number of legal qualifications must be met for membership of the House,[24] success at the

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forthcoming) comment, "[t]he size of the Executive Council is limited by section 6 of the Civil List Act 1950, which converted convention into statute by providing that only Members of Parliament may be appointed to the Executive Council". Inter alia the statement is misleading since conventional politics restricts membership of the Executive Council to the sitting Members of the party in power.

[16] Civil List Act 1979, s 9 (1) (italics added). Note the saving provision in subs (2), providing that Ministers and Members of the Executive Council do not, by operation of s 9, vacate office by reason only of dissolution (that is, upon vacating their seats pending the general election). Although prima facie this provision confines the argument to the appointment of a Ministry incumbent on a change of government, subs (2) is dispossessed of effect if those purportedly in office have not, in law, been validly appointed in accordance with subs (1).

[17] (1976) 403 NZPD 1. For judicial notice of the appointment, see *Fitzgerald v Muldoon* [1976] 2 NZLR 615, at 616 per Wild CJ; *Police v Walker* [1977] 1 NZLR 355, at 356 per Cooke J for the Court of Appeal.

[18] (1977) 410 NZPD 330-39; 412 NZPD 2283-85; 413 NZPD 2433-38.

[19] The question was first raised with regard to the Statutes Revision Committee and the Committee on Social Services; (1976) 403 NZPD 239-41.

[20] See eg, 410 NZPD at 331-32 (per the Member for Henderson), 335 (per the Member for Mangere); 412 NZPD at 2284 (per the Members for Henderson and Porirua). See infra.

[21] Civil List Act 1979, s 9 (1).

[22] See the New Zealand Constitution Act 1952 (UK) 15 & 16 Vict, Ch 72; the Legislature Act 1908; the E A Act 1956.

[23] Albeit, without the capacity to act as Member of Parliament until Parliament is assembled and the oaths administered (see the New Zealand Constitution Act 1852 (UK), s 46).

[24] See the E A Act 1956, s 25.

Election is the principal qualification. Politicians know this. Moreover, of the views expressed, it is the most consistent with the provisions of the Electoral Act 1956. Notably, s 116 requires the Returning Officer's declaration of the result of the poll to be in the form specified in the First Schedule of the Act, that being "I HEREBY declare the result of the poll taken on the day of 19 for the election of a Member of Parliament for the Electoral District to be as follows: . . . I therefore declare the said . . . to be elected".

These words, it is true, imply membership of the House immediately upon the issuing of the declaration (as subsequently endorsed by the return of the writ to the Clerk of the Writs) but, for the reasons below, candidates elected are, in status, Members elect, not Members. This status connotes a right to membership that is contingent upon the exercise of legal powers on which Parliament's existence following dissolution depends.[25]

Significantly, this status is unaltered by s 11 of the Electoral Act 1956 defining the constitution of the House of Representatives. Contrary to what one might expect, this section does not designate when a Member elected to Parliament is, in law, a Member or, indeed, the precise time at which the House following dissolution comes into existence so as to admit membership. Section 11 declares what the House, to quote, "shall consist of", namely, "(a) The Members elected for the General electoral districts . . ., being one Member for each such district; and (b) The Members elected for the Maori electoral districts, being one Member for each such district". In so declaring, the section does not alter the special consequences of dissolution of Parliament executed by proclamation of the Governor-General in New Zealand: only were these consequences ignored could s 11 constitute the House and the successful candidates Members upon declaration of the result of the polls. This view is consistent with the recent New Zealand Court of Appeal decision discussed below.[26]

The only further provision requiring mention is s 31 of the Electoral Act 1956, entitled "Members disqualified from being public servants":

> "(1) If any public servant is elected as a Member of Parliament he shall forthwith, on being declared, be deemed to have vacated his office as a public servant."

This provision is notable for the reason that it specifies the precise time at which public servants are deemed to vacate office, but this does not equate with the fact that a public servant so elected has as from the election full status as Member of Parliament. The special position of a public servant seeking election is evidenced by s 30, requiring any public servant seeking candidacy for election to be placed on leave of absence commencing not later than nomination day and, in the event of nomination, continuing until the seventh day after polling day.[27] Section 30 reinforces this position by expressly prohibiting the discharge of any of the public servant's official duties during the period of candidacy, the section also suspending the right to receive any salary or other remuneration for the same period.[28]

The theory underlying these provisions, and in particular s 31 deeming public servants to have vacated office upon confirmation of election, is in the form of a compromise protecting the impartiality required of the public service and the individual's right to stand for political office. Whereas public service employment is in effect suspended for purposes of the election, it is not forfeited by reason thereof.[29] The compromise is further effected by deeming the office to have been vacated upon election. For this reason, then, s 31 cannot be construed other than as a device to maintain the appearance of impartiality in the public service. In particular, it cannot be construed to denote membership status as from a candidate's election to Parliament.

The second view proferred during the debates on the Legislature Amendment Bill is a modification of the first. It is incorrect not only for that reason, however. The proponent was the then acting Prime Minister, the Rt Hon B E Talboys, the Hon David Thomson (then Minister of Justice) agreeing. The Minister contended:

> "It is set out in the legislation that an individual becomes a Member of Parliament on the date of the return of the writ, which is then backdated to the date of the poll, so that he effectively becomes a Member

[25] For the effect of the Governor-General's proclamations dissolving and summoning Parliament, see infra, particularly *Police v Walker*, supra, note 17.

[26] Ibid.

[27] E A Act 1956, s 30 (1) (2).

[28] E A Act 1956, s 30 (3).

[29] See particularly s 30 (4) expressly saving the rights of public servants except to the extent of these provisions.

from the date of the poll."[30]

The Minister of Justice explained that "the legislation" to which the speaker was referring was the Electoral Act 1956,[31] an Act in which nowhere is it "set out" that membership dates as from the return of the writs. As commented above, a candidate becomes a Member elect, and not a Member, on confirmation of his election.[32]

As to the further view, that membership backdates to the date of the poll, the 1956 Act is similarly silent. It may be that the Ministers were influenced by the Civil List Act 1979 (re-enacting the 1950 statute), s 18 (1) of which makes provision for Members to receive salaries and allowances as from the period commencing the day after polling day.[33] If so, the statutory date for the commencement of salaries was equated with the date on which Members accede to their legal status as Members, the statutory right to receive salaries being equated with full membership rights. If this is in fact the case, the Ministers erred.

First, the fact that it was necessary to legislate for the commencement of salaries as from the date of the poll indicates that, but for the Civil List Act 1979, the right ordinarily arising as an incident of membership — to receive salaries — would not exist. Thus the specific statutory right indicates the reverse, namely, lack of membership. Second, the Court of Appeal has held as much with regard to the Speaker of the House and his statutory right to receive salary following Parliament's dissolution, Cooke J for the Court of Appeal commenting:

> "[W]e are satisfied that . . . the Speaker is elected for the duration of the Parliament . . . . The provision that for salary purposes he shall be deemed to continue to be Speaker would, of course, have been unnecessary if he were in truth still in office."[34]

And third, the fallacy of relying on s 18 in support of membership backdating is demonstrated by subs (3) which confers on Members failing to gain re-election the right to receive Member's salary for a period of three months following the elections. Presumably, the Ministers contending that membership backdates to the polls would not also contend that Members losing their seats continue as Members for a further three months on the strength of their right to salary. Indeed, even if re-elected it is agreed that Members vacate their seats in consequence of the proclamation dissolving Parliament.[35]

The second view is incorrect, then, for reasons apart from those stated with regard to the first. The third view has more to commend it. A number of Members in 1977 believed that the requirement to take the oath (or affirmation) of allegiance administered upon the meeting of a new Parliament precludes those elected who have not been sworn from taking their seats in the House and entering upon the dispatch of business.[36] Until administered, these Members believed that it precludes membership itself of the House; in effect, that the administering of the oath or affirmation consummates the status of Member elect; to quote, a status denoting "only half a member . . . not entitled to act in the fullness of his responsibilities".[37] Another Member expressed it thus:

> "[T]he reality is that a Member of Parliament is not a Member of Parliament until such time as he or she has taken the oath provided by section 46 of the New Zealand Constitution Act. This provision [in the Legislature Amendment Bill] authorises a Member of Parliament [sic], who has not taken and subscribed to the oath required by section 46, to sit or vote as a member of a committee constituted pursuant to the section. That begs the question . . .

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[30] 410 NZPD 335.

[31] Ibid.

[32] Apart from s 11 defining the constitution of the House (discussed supra), the only provisions of any assistance are ss 119 and 120. Section 119, entitled "Endorsement and return of writ", requires the Returning Officer to endorse on the writ "[t]he name of the person declared to be elected". In so doing, the section does not address the question as to when persons so elected are Members, it therefore being consistent with their status as Members elect. Section 120, requiring the Clerk of the Writs to forward to the Speaker a copy of the writs, addresses those endorsed on the writs as "the Members elected". However, inasmuch as all Members whensoever that status accrues are elected, these words do not pre-empt the status of Member elect pending the Governor-General's proclamation assembling Parliament.

[33] Cf, the Hon David Thomson's reference to the commencing date for salaries; 41 NZPD 332.

[34] *Police v Walker*, supra, note 17, at 362.

[35] See de Smith, supra, note 12, at 83.

[36] For the obligation to subscribe to the oath, see the New Zealand Constitution Act 1952 (UK), s 46 (quoted infra).

[37] 412 NZPD 2284, per the Hon Dr A M Finlay. The Member expressed similar views. 410 NZPD 331-32.

> because if that person does not have the status that the oath affords him, thereby becoming a Member of Parliament, then there is no question of that person being able to sit or vote in a committee."[38]

Obviously, the Member was overlooking implied repeal of s 46 of the New Zealand Constitution Act 1852 to the extent of the proposed legislation authorising the sitting of select committees contrary to the s 46 requirement,[39] but that is immaterial with regard to the general view expressed. The question needs be asked, therefore, is the administering of the oath or affirmation the critical event securing Member's legal status?

No certain answer can be given. In the United Kingdom, the implication is that membership of the Commons precedes the taking of the oath (albeit that implication arising under United Kingdom statute presumably not forming part of New Zealand law). Commenting on the Parliamentary Oaths Act 1866 (UK), Erskine May pre-empts the inquiry by stating that "*any Member* of the House of Commons who votes as such, or sits during any debate . . . without having taken the oath, . . . is subject to the penalties prescribed".[40] Though that assumption (of Member status despite the oath) for purposes of the commentary on the 1866 Act is not conclusive, it is if anything reinforced in New Zealand by s 46 of the New Zealand Constitution Act 1852. Whether it be an intended consequence, this section incorporates and gives statutory force to the assumption, its principal intent being to impose on Members a disability:

> "**46. Oath of Allegiance** — No Member of the said (House of Representatives) shall be permitted to sit or vote therein until he shall have taken and subscribed to the following oath before the Governor-General, or before some person or persons authorised by him to administer such oath:"

On whom the disability precluding sitting and voting is imposed, the section reads "[n]o *Member* of the said House of Representatives".[41] From this, a Court might incline toward some event prior to the swearing in of Members as affording Member status. The fourth view expressed in the debates on the Legislature Amendment Bill, indeed, reveals that event.

In the third reading of the Bill, the Member for Henderson, the Hon Dr A M Finlay, sought an amendment so as to make retrospective the provision conferring parliamentary privilege on select committees sitting following dissolution of a Parliament. Stating that the provision as it stood would protect future, but not past, committees, the Member explained the need for the section, revealing also the fundamental event that affords the status of Member of Parliament:

> "A distinction must be drawn between the prorogation of a Parliament to continue with the same Parliament next year, and the dissolution of a Parliament to be followed by an election and the creation of a new Parliament, because when Parliament is dissolved it ceases to exist, and for business to be continued when Parliament is not in session after an election means that the business will be continued while Parliament is in fact not in being. It is not in existence. *It does not come into being until Parliament is assembled* and the elected Members are sworn."[42]

Simply, of a non-existent legal entity, membership of which is a legal status, there can be no membership.

(b) *The historic prerogative.* In the United Kingdom:

> "'A Parliament' in the sense of a Parliamentary period, is a period not exceeding five years which may be regarded as a cycle beginning and ending with a proclamation. Such a proclamation (which is made by the Queen on the advice of her Privy Council) on the one hand, dissolves an existing Parliament, and, on the other, orders the issue of writs for the election of a new Parliament and appoints the day and place for its meeting. This period, of course, contains an interregnum between the dissolution of a Parliament and the meeting of its successor during which there is no Parliament in existence; but the principle of the

[38] 410 NZPD 335, per Mr Lange (Mangere).

[39] See further, eg, "The fact is that we have the New Zealand Constitution Act . . ., and we cannot beg the question yet again by saying that, although you might not exist, we will pretend you do [ie, for purposes of the proposed legislation] and we will count your vote"; ibid.

[40] Supra, note 10, at 270 (emphasis added).

[41] Emphasis added.

[42] 413 NZPD 2434 (emphasis added).

> unbroken continuity of Parliament is for all practical purposes secured by the fact that the same proclamation which dissolves a Parliament provides for the election and meeting of a new Parliament."[43]

With one important difference in the practice of the New Zealand Parliament, noted below,[44] that statement from Erskine May is applicable with regard to the existence and continuity of our Parliament. The proclamation referred to is issued in exercise of the ancient royal prerogative to dissolve, prorogue and summon Parliament; that prerogative having been delegated in New Zealand to the Governor-General pursuant to Cl X of the Letters Patent, constituting the office of Governor-General and Commander-in-Chief of the Dominion of New Zealand, dated 11 May 1917. The unbridled nature of this delegated power in New Zealand was acknowledged from the outset of our Parliament, s 44 of the New Zealand Constitution Act 1852 (UK) empowering the Governor-General "at his pleasure" to issue the proclamation in exercise of the Sovereign's prerogative.[45] It was further acknowledged in *Simpson v Attorney-General*.[46] The Court of Appeal established that the statutory rules contained in the Electoral Act 1956 for the holding of elections place a duty on the Governor-General in aid of the summoning of Parliament — the object of that statute being "to sustain, not to destroy, the House of Representatives"[47] — but that that statute does not impose any limitations, restrictions or conditions on the power so delegated.[48]

In the absence of statutory regulation convention governs the exercise of the Crown's prerogative powers, the Crown long ago having ceded the initiative to Ministers responsible to Parliament. This, however, does not, nor cannot, alter the incidents of the legal power to summon, prorogue and dissolve Parliament;[49] specifically, the resulting "interregnum between the dissolution of a Parliament and the meeting of its successor during which there is no Parliament in existence";[50] a period during which, perforce, it has no Members. This is to say no more than that there can be no shareholders of a company that in law does not exist.

Thus, in New Zealand, it is a legal condition of appointment as Minister that Parliament first be summoned and assembled: breach of this condition has been illustrated in the case of the last change of government, the Cabinet appointments of December 1975 preceding the first sitting of the new Parliament by some six and a half months.

Further, s 13 of the Electoral Act 1956 does not cure the defect, that section reading:

> "**13. Members of Parliament** — Members of the House of Representatives shall be known and designated by the title of 'Members of Parliament', and in this Act and all other Acts the term 'Member of Parliament' shall be construed accordingly."

By operation of this section, the condition that those appointed as Ministers be Members of Parliament is satisfied if those receiving appointment are Members of the House of Representatives, the fiction of membership of a non-existent legal entity notwithstanding. However, just as the title "Member of Parliament" is synonymous for "Member of the House", so too is the effect of the prerogative on the existence and continuity of Parliament synonymous for the effect of the prerogative on the House. Upon dissolution, the House ceases to exist. This effects the purpose for which Parliament is dissolved, that is, to reconstitute the House according to the people's wish. Statute recognises this. Section 12 of the Electoral Act 1956 provides that "every House of Representatives . . . shall, *unless Parliament is sooner dissolved*, continue for a period of three years . . ., and no longer".[51]

It is implicit that dissolution pursuant to the Governor-General's proclamation ends the existence of both Parliament *and* the House.[52] And similarly, just as the existence of the new Parliament is contingent on the Governor-General's proclamation that assembles it, so too is the legal existence of the new House contingent on that proclamation. That those con-

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[43] *Erskine May's Parliamentary Practice*, supra, note 10, at 259.

[44] See infra, "F. Reform and the uncontrolled prerogative".

[45] The co-existent statutory power has never been construed as having dispossessed the Crown of its prerogative, the latter surviving despite the former; see *Simpson v Attorney-General*, supra, note 3, and the dicta quoted therein.

[46] Ibid.

[47] Ibid, at 275 (S Ct) and 280 (CA).

[48] See infra, "(c) The judicial acceptance".

[49] See *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC), at 722-23, affirming the United Kingdom Parliament's competence to legislate in unequivocal disregard of conventional limitations.

[50] See supras, corresponding to note 43.

[51] Emphasis added.

[52] For judicial acceptance, see *Simpson v Attorney-General*, supra, note 17; *Police v Walker*, supra, note 17.

stituting it, being one Member for each of the electoral districts, is predetermined by the election is not in point. *Todd's Parliamentary Government in England* explains:

> "From the supremacy of the Sovereign in a constitutional monarchy, it necessarily follows that, while regular meetings of Parliament are indispensable, *the legal existence of this High Court* results altogether from the exercise of the prerogative. It is summoned, by virtue of the King's writ, . . . at whatsoever time or place he may please to direct."

For that purpose, namely:

> "In order to give life and existence to a Parliament, and to enable it to proceed to the execution of its functions, the personal presence or delegated authority of the Crown is required for the formal opening of the session. At the beginning of every new Parliament . . . the cause of summons must be declared to both Houses, either by the Sovereign in person, or by commissioners appointed to represent him, in a speech from the throne; *until this has been done neither House can enter upon any business.*"[53]

It is recalled that s 11 of the Electoral Act 1956 defining the constitution of the House (notably, what it "shall consist of") is silent as to when, or by what event, the House is constituted and legally in existence. Since no other statute contains direction as to this, the peculiar effect of the prerogative survives the differing origins and status of our Parliament,[54] the inheritance of which is that for each Parliament and its elected component the Crown gives life and the Crown takes. In fact, in New Zealand, the identification of Parliament and the House as being one and the same for purposes of the prerogative is strengthened. In New Zealand, there being but one Legislative Chamber, a proclamation summoning Parliament is, in truth, a proclamation summoning the House.[55]

For these reasons s 13 of the 1956 Act designating interchangeable titles does not assist. The legal argument that precludes membership of a non-existent legal entity precludes membership not only of Parliament but also the House. The following case law is confirmation.[56]

(c) *The judicial acceptance.* The principal authority is *Police v Walker*, a 1976 decision of the Court of Appeal.[57] Also, of some assistance is *Simpson v Attorney-General.*[58] The discussion in *Simpson* is not conclusive, yet is consistent with the creative consequence of the prerogative constituting the House. The decision in *Police v Walker*, based on that fact, is judicial acceptance of the interregnum following dissolution during which there is no House in existence.

The first point regarding *Simpson* is that neither Court attached significance to the fact that the House returned at the 1943 general election ceased to exist by effluxion of time rather than as the result of a proclamation of dissolution. For purposes of the prerogative of summoning Parliament, this, in the opinion of both Courts, did not create an exception to the usual post-election events ensuring Parliament's continuity.

The Supreme Court and the Court of Appeal upheld both submissions of the Crown, expressed in the alternative. First, it was agreed that the timetable provisions of the Electoral Act for the holding of elections were directory and not mandatory, and which were "substantially, and, therefore, sufficiently, complied with" in the case of the 1946 election. More significantly, second, it was held that it mattered not that it may have been too late to comply with the statutory timetable for the holding of the election. Hence, in answer to the plaintiff's contention that the irregularity in the proceedings leading to the election could be rectified

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[53] (1892, rev ed), V II, at 138-39 (emphasis added). See generally, *Erskine May's Parliamentary Practice*, supra, note 10.

[54] Viz, as a statutory creature (see the New Zealand Constitution Act, 1852 (UK), s 32) it is not the High Court of Parliament as in the United Kingdom.

[55] Cf, the Legislative Council Abolition Act 1950.

[56] See also the distinction drawn by de Smith, supra, note 12, at 58 and 158 between Members of the House and, in effect, Members elect. Respectively, "it is a convention that the Prime Minister should be chosen from the House of Commons (*or from among persons elected to the House* if a change of Prime Minister becomes necessary as a result of a General Election)"; emphasis added, and "the procedures now adopted by all the major parties . . . for electing their own leaders seem to carry a necessary implication that the Prime Minister, when appointed, shall be a Member of, *or shall be about to occupy his seat in*, the House of Commons", the part to which emphasis is added being footnoted "[w]here a change of Prime Minister is necessary after an election while Parliament stands dissolved". Semble, were the status of Member of the Commons consummated prior to the assembling of Parliament the distinction would be superfluous.

[57] [1977] 1 NZLR 355.

[58] [1955] NZLR 271 (S Ct and CA).

only were the Governor-General to summon another House of Representatives, Barrowclough CJ in the Supreme Court held that "[t]his . . . is exactly what His Excellency did in 1946".[59] In issuing his warrant directing the Clerk of the Writs to proceed with the election, his Honour held that the Governor-General had taken "the requisite steps to summon the House".[60] This, if not acceptance of, is consistent with the fact that the return of the writs declaring those elected is not the event constituting the House; that it does not, of itself, resurrect the House upon ceasing to exist. Indeed, the Chief Justice treated it as a "requisite step", those steps leading to and culminating in the assembling of the House, the purpose for which Parliament is summoned.

The Court of Appeal agreed. Stanton and Hutchison JJ reasoned that the provisions of the Electoral Act requiring triennial elections exist in aid of the prerogative, not in negation of it. Specifically, their Honours held that s 101 (1) of the Electoral Act 1927, specifying that the Governor-General shall within seven days of the dissolution or expiry of Parliament direct the Clerk of the Writs to proceed with the elections, does not impose any limitations, restrictions or conditions upon the exercise of the prerogative: "What it does purport to do is to place a duty on the Governor-General in aid of the summoning of Parliament".[61] In explanation:

> "It could not have been the intention of the Legislature that, if . . . as is doubtless the position here, some mistake on the part of some officer, resulted in the Governor-General's not issuing his Warrant within seven days . . ., that should affect the prerogative right to summon Parliament . . . . We think that the section does not operate to restrict such exercise of the prerogative."[62]

For these reasons, it was immaterial that the Governor-General in 1946 purported to follow the prescribed statutory procedure for the holding of the elections since "the effect of what he did was the same as if he had acted by virtue of the prerogative".[63] This, consistently with Barrowclough CJ, identifies the Governor-General's proclamation summoning Parliament as the proclamation by which its constituent, the elected House, is summoned and assembled. That the effect of the proclamation — the proclamation to which Parliament as an entity owes its existence once assembled — cannot be severed with respect to the House is confirmed by the second case, *Police v Walker*.[64]

This case concerned the Maori land march of 1975 and the occupying of the "Maori Embassy" in Parliament grounds. The appellant was appealing against conviction on a charge of wilful trespass laid under s 3 of the Trespass Act 1968, the appellant and others being arrested upon refusing to remove the tent and vacate the grounds on instruction of the Prime Minister, the Rt Hon R D Muldoon.

Significant was the timing of the protest and the Prime Minister's instruction to vacate. On 13 October 1975 the marchers arrived at Parliament buildings. On 28 October the Acting Speaker of the House of Representatives gave permission for the tent to remain on the grounds. On 31 October Parliament was dissolved in preparation for the November elections. On 12 December the Governor-General accepted the resignations of the out-going Government, on the same day appointing the new Government, the Hon R D Muldoon becoming Prime Minister and Minister of Finance. On 23 December the Deputy Clerk of the House delivered the Prime Minister's instruction ordering the protesters to vacate by the following day. The proclamation summoning the new Parliament, it will be recalled, was issued not until 25 May 1976, the thirty-eighth Parliament opening on 22 June 1976.

The issue was whether the Prime Minister possessed authority in the interregnum following the general election to terminate the appellant's licence formerly given by the Acting Speaker. First, as to whether the Speaker possessed that authority, the Court of Appeal held that he ceases to hold office when the House by which he is elected is dissolved. The premise on which the Court so held is pertinent, for Cooke J speaking for the Court accepted that were a House in existence on 23 December (11 days following the cabinet appointments of 12 December, be it noted) the Speaker as spokesman of the House would have been seized of control of Parliament grounds and thus authority to revoke the licence. To quote:

[59] Ibid, at 275-76.
[60] Ibid.
[61] Ibid, at 280-81.
[62] Ibid, at 280-81.
[63] Ibid, at 281.
[64] Supra, note 57.

> "When a House of Representatives (now the only house of the General Assembly) is in existence, whether in session or not, the obvious implication . . . is, we think, that the Crown allows the house to occupy and control the land. That control would normally be exercised through the Speaker or his deputy."[65]

The Court of Appeal cited in support s 14 of the Electoral Act 1956, which provides "[t]he House of Representatives shall, immediately on its first meeting after the general election . . . choose one of its Members as its Speaker during the continuance of the said House . . .". Emphasising the words "during the continuance of the said House", the Court added that "prima facie there is neither a House nor a Speaker between the time when the old House is dissolved . . . and the time when the new House first meets, after a general election, to choose the Speaker".[66] As to the inclusion of the words "prima facie", any reservation which this might imply is extinguished by the decision in this case upholding the Prime Minister's instruction to vacate.

The Court held that Mr Muldoon was invested with authority to issue the direction, and thus revoke the appellant's licence, in his capacity not as Prime Minister but as Minister in Charge of the Legislative Department. Reversing Ongley J in the Court below, Cooke J held that there was no basis on which the Prime Minister qua Prime Minister could possess implied authority from Members of the House: "Any authority from the dissolved House would presumably cease with the dissolution".[67] And as earlier explained in the judgment, nor could those elected to the incoming House confer any express or implied authority until they had assembled and taken the oath, citing for this purpose s 46 of the 1852 Act.[68]

Rather, the reason for decision is confirmation that as at 23 December Mr Muldoon, despite being "appointed" Prime Minister on 12 December, was neither Member of Parliament nor Member of the House:

> "It seems to us the reasonable and proper inference . . . that when no House of Representatives is in existence the control and occupation of the land are delegated by the Crown as owner to the government department having the function of servicing Parliament and administering the Legislature Act 1908."[69]

The Court took judicial notice of the fact that the Prime Minister is concomitantly appointed Minister in Charge of that Department, and that the instruction was issued in that capacity.[70]

(d) *Summary.* The decisions in *Simpson* and *Police v Walker* are consistent with the historic rules governing Parliament's being. Notwithstanding, one substantive possibility need be dispelled; that is, that there may be Member status at different times for specific purposes — purposes, for example, for which the Civil List Act exists. Since the Civil List Act is concerned principally with salaries and allowances, it might be argued that for exclusive purposes of the Act (notably, s 9 (1), enjoining Ministers upon appointment to be Members of Parliament) membership dates as from the time the Act specifies for commencement of salaries, being the day after polling day. The concession, the other side of the argument, is for all other purposes pertaining to Parliament's functions persons elected or returned are Members not until the House is assembled and the oaths administered. Section 17 is the precedent for the argument, that section imputing a status with regard to the Speaker's office following dissolution. However, the same argument cannot be applied to s 9 (1).

It suffices to contrast these sections. Section 17, a "deeming" provision for purposes of the Act, provides that the Speaker of the House at the time of dissolution "shall, for the purpose of this Act, . . . be deemed to hold his office until the first meeting of the next Parliament". The effect of this section was discussed in *Police v Walker.* In view of the expressed object, "for the purposes of this Act", the Court of Appeal held that the Speaker retains office for purposes of salary and allowances payable following dissolution, but that for all other purposes the office is vacant.[71] Hence, the fiction for salary purposes did not affect the general inquiry as to when the Speaker held office in order to determine who was invested with control of Parliament grounds.

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[65] Ibid, at 359.
[66] Ibid, at 360.
[67] Ibid, at 363.
[68] Ibid, at 360.
[69] Ibid, at 363.
[70] Ibid, at 356 and 363.
[71] See the dictum, supra, corresponding to note 34.

Section 9 (1), on the other hand, is not confined in purpose to the Act. Since the condition stipulated is general it enjoins Member status for all and not specific purposes as those relating to salaries. The impossibility of belonging to a non-existent legal entity is not overcome, therefore, by the fact that the right to Member's salary arises prior to appointment to Ministerial office.

E. Judicial alternatives

It is a truism that "[w]here there is no legal remedy, there is no legal wrong".[72] The administrative chaos that would result from a judicial order declaring Ministerial appointments never to have been made warrants mention of the alternatives availing a Court refusing a remedy. These are sketched in light of a 1909 New Zealand Court of Appeal decision exemplifying the supervisory authority of Courts to issue a remedy, in particular to strike down appointments purportedly made in exercise of the Governor-General's delegated prerogative.[73]

(a) *Cock v Attorney-General.* The question here concerned a Commission appointed by Order in Council to inquire into allegations of bribery made against members of a Licensing Committee. The plaintiffs sought relief on the basis that the Order in Council was illegal.

The issues were in the alternative; first, whether the Commission was authorised pursuant to the Commissions of Inquiry Act 1908. Delivering judgment of the Court of Appeal, Williams J held the object of the Commission — to inquire into bribery allegations — fell beyond the statutory purposes for which commissions of inquiry could be appointed. In that event, second, the issue was whether the Governor, though purporting to act under the 1908 statute, had authority pursuant to the Letters Patent,[74] clause VII of which delegates the prerogative of the Crown to appoint "Judges, Commissioners, . . . and other necessary officers". Granting a prohibition order, the Court of Appeal held the prerogative so delegated must be exercised in accordance with law and constitutional practice,[75] and that in this instance the prerogative to appoint commissioners had been abolished by statute.

Significantly, the second issue is indistinguishable from the present. At one time, the Crown's prerogative encompassed the power to adjudge all causes respecting rights of subjects but this prerogative was eroded by the statutes 42 Edw III, c3 (enacting that no man shall be put to answer for a crime unless in the manner prescribed by law) and 10 Car I, c10 (which abolished the Court of Star Chamber and declared all Courts but the ordinary Courts of Justice illegal).[76] For this reason the Order in Council was illegal in *Cock v Attorney-General.* Acceptance of a bribe being an indictable offence, the Court held that the statutes divested the Crown of the prerogative to appoint the Commission.

Similarly, the Crown's prerogative to appoint Ministers is abridged in New Zealand by the statutory condition that appointees be Members of Parliament, and, on authority of the Court of Appeal decision, not until that condition is met is the prerogative to appoint Ministers "exercised in accordance with law and constitutional practice."[77]

In that decision, the Court did not hesitate to grant relief. Upon an application pursuant to s 9 (1), the following alternatives might avail a Court refusing relief.

(b) *Contra, Cock v Attorney-General?* First, the potential for legal consequences could be confined to the period ending with the first meeting of the new Parliament by a decision that the defect in the appointment of Ministers was cured by the status that that event affords. It being not conjecture that a Court would strive to minimise (indeed, avoid) these consequences, that decision is assumed for purposes of the discussion.[78]

Second, in respect of collateral proceedings challenging executive acts performed in the interregnum, the distinction could be drawn between de jure and de facto officers, the acts in question determined as being those of the latter. The analogous situation, involving judicial appointment, was discussed by the New Zealand Court of Appeal in *Re Aldridge* (1893),[79] the Privy Council the previous year having held invalid the appointment of Edwards J as a Puisne Judge of the High Court of New Zealand.[80] Quoting American authorities — that

[72] *Bradlaugh v Gossett* (1884) 12 QBD 271, per Stephen J.
[73] *Cock v Attorney-General* (1909) 28 NZLR 405.
[74] Dated 18 November 1907.
[75] Supra, note 73, at 422.
[76] Cf, *Prohibitions del Roy* (1607) 12 Co Rep 63.
[77] Supra, note 75.
[78] It would, of course, be per incuriam in the absence of fresh appointments following the assembling of Parliament, s 9 (1) requiring Member status "at the time of appointment".
[79] (1893) 15 NZLR 361.
[80] [1892] AC 387; [1892] NZPCC 204 (appointment invalid since no salary appropriated to a fifth Puisne Judge).

"[w]here an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of his office, and exercises its powers and functions"[81] — the Court of Appeal observed that Mr Edwards held a Commission from the Governor (albeit the Commission, being illegal, could not constitute him a Judge de jure); he was recognised as Judge by officers of the High Court; he conducted sittings of that Court in a regular manner; and in each instance all parties to proceedings acquiesced in his adjudication.[82] In these circumstances, the Court held that his defective appointment could not prejudice his acts as *de facto* appointee.

Similarly, citing the example of the Ministry appointed 12 December 1975, the National Government under Mr Muldoon was commissioned by the Governor-General, was discharging functions of government in the accustomed manner,[83] and for all ostensible purposes was the Government. The persons commissioned occupying an office known to law, a Court might resolve that their acts were those of de facto officers, and hence cannot be attacked in collateral proceedings by reason of their disqualification under the Civil List Act 1979.[84]

Third, in direct proceedings by way of application for an order of quo warranto[85] or declaration, a Court might simply say that as at 12 December 1975 the Governor-General was not at liberty to make appointments but this is not to say that, in law, they were not made at all. Reference is to the renewed dichotomy — between "void" and "voidable" — initiated in *Ridge v Baldwin*.[86] A Court might say that although invalid, but not void,[87] the appointments are good unless and until set aside, and that since the time for so doing expired upon the first meeting of Parliament neither the appointees nor their acts can be impeached.

The consequence of ultra vires action pertaining equally to prerogative acts,[88] the conceptual difficulties with this approach are familiar. Inasmuch as the Governor-General was not at liberty in exercise of the prerogative to make appointments in contravention of the Civil List Act, his action was unauthorised by law and, perforce, destitute of legal effect. Validity is presumed in the absence of judicial decision to rebut the presumption[89] but this fact, prior at least to the dissenting opinions in *Ridge v Baldwin*, does not alter the established consequence of nullity.[90] Wade comments, "[t]he point at which intelligibility ceased was when Judges began to suggest that even ultra vires action might be merely voidable".[91] Formerly, the Courts confined the term "voidable" to action liable to be quashed for error on the face of the record, the essential difference being that it denotes intra vires action which, therefore, is valid and effective until such time as a Court quashes it. This, as Wade explains, is the only basis for the distinct legal consequences underlying the distinction.[92]

However, since Judges have readily attributed legal effect to invalid action in less sensitive situations than the one mooted here, the approach would likely be used as a basis for declining relief.

Finally, in direct proceedings by way of quo warranto or declaration, ample opportunity would avail a Court refusing a remedy as a matter of judicial discretion. Administrative chaos[93] and the fact that it would oppose rather

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[81] Supra, note 79, at 379-80 per Denniston J (quoting *Norton v Shelby* 118 US Rep 425, at 444).

[82] See eg, ibid, at 380 per Conolly J.

[83] But see, *Fitzgerald v Muldoon*, supra, note 17.

[84] For the doctrine precluding collateral challenge on the basis of some unknown flaw in the appointment of an officer or Judge, see H W R Wade, *Administrative Law* (1977, 4th ed), at 287-89.

[85] For the jurisdiction to grant such an order for the removal of a person from office, see the Code of Civil Procedure 1908, Rule 464.

[86] [1964] AC 40 (HL), per the dissenting opinions (see particularly, Lord Evershed). See generally, Wade, supra, note 84, at 295-301.

[87] See infra, note 91.

[88] "[I]t is a well-established law that, if a discretionary power is exercised under the influence of a misdirection, it is not properly exercised, and the Court can say so"; *Laker Airways Ltd v Department of Trade* [1977] 2 All ER 182, at 194 per Lord Denning MR, equating for this purpose prerogative powers with discretionary statutory powers.

[89] *Hoffman-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295 (HL); *Reid v Rowley* [1977] 2 NZLR 472 (CA), at 479 per Cooke J.

[90] "[T]here are no degrees of nullity"; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC (HL), at 170 per Lord Reid.

[91] Wade, supra, note 84, at 297. Since *Ridge v Baldwin*, Courts have tended to categorise the classical terminology as a verbal confusion, preferring the simpler and less technical terms "invalid" and "vitiated"; *Reid v Rowley*, supra, note 89, at 479 per Cooke J, approving Wade, "Unlawful Administrative Action: Void or Voidable?" (1967) 83 LQR 499, (1968) 84 LQR 95.

[92] But cf, the reservation expressed by Cooke J, ibid, at 478.

[93] Cf, *Anderson v Valuer-General* [1974] 1 NZLR 603 (S Ct) (administrative chaos compounded by delay in seeking relief).

than promote the object of our constitutional system[94] would justify refusal.

F. Reform and the uncontrolled prerogative

If judicial restraint is understandable the alternative is legislative reform.

This issue has not arisen in the United Kingdom for two reasons. First, it remains conventional that Ministers be recruited from the representative organ, the requirement thus admitting of political and not legal sanction.[95] Moreover, the conventional requirement is flexible. The convention does not preclude Ministerial appointments from other than sitting Members of the upper or lower Houses, it sufficing that a Minister of non-Member status obtain a seat at the earliest opportunity or resign. In New Zealand, it has been seen that the Civil List Act denies this flexibility.

This reveals the first and obvious method of remedying the defect. Amend the Civil List Act so as to either reproduce the flexibility of the conventional requirement or deem for purposes of Ministerial appointment Member status as from the Returning Officer's declaration of the result of the poll. This would, in effect, be a reversion to the pre-1950 position but it would not correct the post-1950 departure from the Westminster tradition facilitating the illegality. This reveals the second reason why the issue has not arisen in the United Kingdom.

It has long been the Westminster practice that "the verdict of the country having been pronounced against Ministers at a general election, . . . it is necessary . . . and according to precedent, that the new Parliament should be called together without delay".[96] It is not curious, therefore, why, in the United Kingdom, the Queen's proclamation to dissolve an existing Parliament is also the proclamation summoning its successor, it not only directing the Lord Chancellor to issue writs for the return of a new Parliament but also appointing the day and place for its meeting.[97] Contrary to the New Zealand practice, "[w]hen Parliament has been dissolved and summoned for a certain day . . . it meets on that day for dispatch of business . . . without any proclamation for that purpose, the notice of such meeting being comprised in the proclamation relating to the dissolution and the writs then issued".[98] That meeting ordinarily occurs within two or three weeks of the elections, the proclamation dissolving Parliament usually taking effect within the same period prior to polling day.[99]

The New Zealand practice is in marked contrast. In exercise of the Governor-General's delegated power, dissolution and summoning is effected by separate proclamations issued on advice of the Prime Minister. And whether for political advantage obtaining from deferring Parliamentary debate, the practice of our Prime Ministers is to assemble Parliament not until May (on one occasion, not until late June) of the post-election year.[100]

Clearly, this is not what the rule requiring location of the Ministry within Parliament envisages. Its raison d'etre is to secure the former's responsibility to the latter, the people's representatives in Parliament assembled. As a matter of mere physical presence, as Members of Parliament, Ministers can be held accountable to it. It is not coincidence in the United Kingdom that the debate on the Queen's Speech outlining the Government's legislative policies is held within two or three weeks following the elections.[101] In New Zealand, in contrast, the debate on the Address at the commencement of a Parliament is a wasting asset, it being removed in time from the policies commending the Government's election. In contrast also to the United Kingdom, this is in addition to the fact that no Parliamentary control is exercised for the extended period pending the opening debate.

Hence, to decline Parliament existence for six and sometimes seven months following elections not only facilitates the legal imperfection underlying Ministerial appointments: the practice also undermines Government's accountability to Parliament, the object sought in recruiting Ministers from the elected assembly. For that reason it would be an inadequate

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[94] Cf, *Simpson v Attorney-General*, supra, note 58, particularly the Court of Appeal's comments on the objects of the E A Act 1956.

[95] *Madzimbamuto v Lardner-Burke*, supra, note 49.

[96] Todd, *Parliamentary Government in England* (1869), Vol II, at 414.

[97] See *Erskine May's Parliamentary Practice*, supra, note 10, at 259-60.

[98] Ibid, at 61.

[99] See *de Smith*, supra, note 12, at 233. This fact was noted in the debates on the Legislature Amendment Bill in support of "hav[ing] Members take the oath within six or seven days of the returning of the writs", the "first duty of, for example, the House of Commons in England"; 410 NZPD 333 per Mr Hunt (New Lynn). Labour Members generally supported the proposal; see infra for the New Zealand practice, the subject of controversy of late.

[100] According to the Speaker of the House in 1976, "the custom . . . over the last half century"; 403 NZPD 241.

[101] See *de Smith*, supra, note 12, at 234.

reform that merely accommodated the practice (through minor amendment to the Civil List Act), leaving intact the uncontrolled prerogative to postpone the Governor-General's proclamation summoning Parliament.[102]

G. Comment

(1) This article reveals the danger of complacency in a constitutional system thought to be more conventional than legal; more ethereal than real. In truth, it is a strange amalgam of both, of law and convention. Section 9 (1) of the Civil List Act 1979 codifying what was formerly convention illustrates this, and also that within that dichotomy of law and convention legal questions may still arise. Indeed there is none more remarkable than the one raised here, the question whether New Zealand governments of the past three decades have had constitutional standing. The Members' disagreement in the 1977 debates is proof that it need be asked.[103]

(2) Recently, the Full Court of the Supreme Court doubted the efficacy of the entrenching section of the Electoral Act 1956, the reason being *"[i]n the absence of a constitution"*.[104] The foregoing refutes the reason. Apparent above is that within the dichotomy of law and convention is a further amalgam, of inherited rules and modern statute constituting New Zealand's legal foundations. The above examines the delegated prerogative of the Crown in New Zealand and the Civil List Act; the former traversing centuries of constitutional development, the latter of but recent origin. As in this instance, the potential of rules of such differing origins and status to produce unsolicited consequences is undoubted. Not only then is it incorrect to comment, "in the absence of a constitution".[105] Rather, it is because of the peculiar combination of rules comprising our constitution that utmost caution is required in guarding against the unwanted consequences of unconsidered constitutional change. The promulgation of the convention in the 1950 Civil List Act is an example of unconsidered change.

[102] Albeit, inasmuch as it is constitutionally proper to expedite the country's verdict at the elections (in the case of an outgoing government, to appoint its successor as soon as administratively convenient), simply to adopt the United Kingdom practice may still result in contravention of the Civil List Act. However, statutory adoption of the United Kingdom practice would justify amendment to that Act so as to authorise appointments in the case of candidates elected or returned, the pending status of Member of Parliament being secured by the early assembling of Parliament.

[103] Supra, note 18.

[104] *Re Hunua Election Petition*, supra, note 4, at 298 (emphasis added).

[105] Ibid.

MR BRASSINGTON PASSES BY (W R L)

Alan Claudius Brassington retired from practice of the legal profession on 30 November this year. He will be missed from the hurly-burly of professional practice as we know it. A political system directed to the social control of the means of production, distribution and exchange inevitably means a super-abundance of law with added responsibility and tension imposed upon practitioners. That is why we derive a little comfort from the circumstance that such a conscientious, active, foraging mind is moving from turbulence to well deserved placidity in retirement.

Alan has worked among us for many years and is indeed almost a doyen of our profession. More than that he has held our affection and respect. He is a man of scholarship, philosophic mind and cultural objective.

His association with the law began as a law clerk with the firm of Wilding and Acland and he qualified as a Barrister in 1924. For many years he lectured in international law, constitutional history and political science. He had a great attachment to his Alma Mater — Canterbury University College — and his academic and philosophic spirit led him to activity in founding the English Association, the Classical Association Foundation, and the Institute of International Relations. It also led him to crusade for Parliamentary Reform with special support for restoration of the Second Chamber and advocacy of a Bill of Rights aimed at security of individual freedom.

Detached from the loftiness of these aims he was a very different person in his ordinary life among us. There was a touch of Bohemian-

ism in him. He could turn with rapidity from discoursing with erudition upon his beloved Samuel Butler and his Erewhon to dilate with hilarious gusto upon social or political controversy.

His love of literature extended from long years of work in improvement of library facilities to the expression in apt phrase of his opinions upon matters of equity.

At a legal dinner or annual general meeting of the Law Society he was at the apogee of his hilarity. To brush patellas with him at a Law Dinner was to feel assured of conviviality which brightened as the Burgundy flowed on and when, as was almost inevitable he rose to his feet, he transferred the liquid sparkle to those felicitous, witty and where necessary, pungent, phrases which added to the gaiety of our evenings.

He was the same in the street. Though no Beau Brummel and always garbed with a casual but certain dignity, an encounter with him there was forever a joyful circumstance. He served our society and our social order long and well. We shall miss him and watch with regret his passing by.

[No tribute to ACB would be complete without reference to his participation in the deliberations of the Public and Administrative Law Reform Committee and his very active involvement with the New Zealand section of the International Commission of Jurists, particularly in its formative years. He was also an authoritative contributor to the New Zealand Law Journal and a valued correspondent. Ed.]

Mixed Metaphors — a selection from the House of Commons — "There has been a dramatic change in Government policy. It is not at all surprising that the birds on the government side have flown; that the worms have turned; and that the sacred cows have come home to roost."

There is always trouble over "sacred cows". Also about bottle-necks. "This is a short-term de-bottlenecking operation," said one MP. "There is a world-wide bottleneck," said another, conjuring up a vision of breathtaking proportions.

Sometimes they get their metaphors mixed up. One Tory told the House: "The Government have done a little to patch up an extremely leaky boat, but the question of mixed hereditaments seems to us to be one of the most ghastly mongrels that any committee has ever been asked to swallow!"

Then there was the Welsh MP who was worried about hydro-electric developments. "Water is dynamite in Wales," he declared. "It quite obviously tugs at the heartstrings and sentiments of the people living in the valleys."

"Concrete proposals" often crop up but never so aptly as in the speech of a Welshman who said: "There is a cement shortage and there has been a bit of a mix-up. I hope the Government will come forward with concrete proposals." There are also proposals that lack teeth. Sometimes they are even more defective. "This Clause not only lacks teeth but it will be still-born," said Mr Julius Silverman.

We must often take a leaf from someone else's book. But Mr Marcus Kimball, Conservative MP for Gainsborough and a Master of Foxhounds, a champion of rural life, went one better: "We must take a leaf from the Forestry Commission," he suggested. George Clark, Political Correspondent of *The Times* in *Hand in Hand* (CU) Nov 1980.

Games with names — and other Churchillian quips — When Mr Alfred Bossom, then the MP for Maidstone, was speaking, Sir Winston inquired of a near neighbour, "Who is this fellow?" He was told who it was. "Extraordinary name!" he exclaimed. "Neither one thing, nor the other!" Another famous remark came after Mr Wilfred Paling, Labour MP for Dearne Valley, had called him " a dirty dog". "Be careful," said Mr Churchill. "You know what dirty dogs do to palings!"

Commenting on another MP's speech, he said: "It contained, so far as I know, every platitude known to the human race, with the possible exception of 'Prepare to meet thy Doom!' and 'Please adjust your dress before leaving'!" George Clark, Political Correspondent of *The Times* in *Hand in Hand* (CU) Nov 1980.