CONSTITUTIONAL CHALLENGES IN THE SOLOMON ISLANDS

By

J.C. Corrin*

On 22 February 1989 a general election took place in the Solomon Islands.[1] Since that date there have been two constitutional challenges brought before the High Court. The first concerned the candidacy of Mr Frank Kabui, the Attorney-General, for the post of Speaker of Parliament. The second challenged the validity of the appointment of the Governor-General (which took place prior to the national elections), the election of the Prime Minister, over which the Governor-General presided, and all other Ministerial appointments made by the Governor-General.

The first case was *Nathaniel Waena* v. *Attorney-General*.[2] The facts were that on 8 March 1989, the Attorney-General was one of five people nominated for election to the post of Speaker of Parliament. Nominations closed on 10 March and, shortly thereafter, one of the other candidates withdrew, leaving four candidates.

Parliament sat on 14 March for the purpose of the election but before the ballot was held, the Member for Central Malaita objected to the candidacy of Mr Kabui on the ground that he was still Attorney-General, and therefore the holder of a Public Office.

The Chief Legal Officer from the Attorney-General's Chambers was asked by the Prime Minister to attend the sitting of Parliament and give his legal opinion on the point raised. The Speaker thereafter ruled that Mr Kabui's candidacy was invalid and he ordered his name to be deleted from the list of candidates.

A ballot was then held[3] and resulted in Mr Waeta Ben being elected on the first vote. Shortly thereafter an application was made to the High Court by the Honourable Nathaniel Waena, one of the members of Parliament who had nominated Mr Kabui, for the following declarations:

(a) A declaration as to the meaning of s.64(1)(a) of the Constitution.
(b) A declaration as to whether or not the nomination of the Honourable Attorney-General as a candidate for the election of a Speaker under s.64(1)(a) of the Constitution was valid.
(c) A declaration that the Speaker of Parliament has no jurisdiction in law to determine that the Honourable Attorney-General was disqualified from standing as a candidate for the election of a Speaker and that his ruling that the Honourable Attorney-General was disqualified from so standing contravened s.83 of the Constitution, thereby rendering the Speaker's ruling unconstitutional and invalid.
(d) A declaration that the advice given by the Chief Legal Officer of the Attorney-General's Office to Parliament on the floor of Parliament was a contravention of s.42(4) of the Constitution in that the said Chief Legal Officer did not have the locus standi to tender such advice to Parliament in Parliament.
(e) A declaration that the subsequent election of Mr Waeta Ben as Speaker of Parliament was null and void.

---

*Solicitor, Solomon Islands

1. See ss.73 and 74 of the Constitution of Solomon Islands, contained in the schedule to the Solomon Islands Independence Order 1978, LN 43.
2. Civil Case No. 42 of 1989.
3. Standing Order No. 5.

With regard to paragraphs (a) and (b), s.64(1) of the Constitution provides, as far as relevant, as follows:

> Parliament shall at its first sitting after any General Election elect —
> (a) from among persons who are qualified for election as a member of Parliament, a Speaker; . . .

The qualifications for election as a member are set out in s. 48:

> Subject to the provisions of the next following section, a person shall be qualified for election as a member of Parliament if, and shall not be so qualified unless:
> (a) he is a citizen of Solomon Islands; and
> (b) he has attained the age of twenty-one years.

The relevant part of the "next following section" referred to provides:

> 49(1) No person shall be qualified for election as a member of Parliament who —
> (a) . . .
> (b) holds, or is acting in, any public office.

"Public office" is defined in s.144 as an office of emolument in the public service.

It was argued for the applicant that, as the wording of s.64 only refers to qualifications for election, one is only required to refer to s.48. It was suggested that s.64 should, therefore, not be extended to include the disqualifying clauses of s.49.

It was further argued that the Court should avoid a construction which interfered with the vested rights of a subject, being in this case, the right of the Attorney-General to stand for the Speaker's post.[4]

Ward CJ declined to make a declaration in the general terms sought in paragraph (a). In relation to paragraph (b) he declared that the nomination of the Attorney-General was indeed invalid.

In dismissing the applicant's first argument the Chief Justice recited the general principles that "words in a statute must be given their ordinary and natural meaning unless there is some ambiguity"; and that "the meaning of a statute and the intention of the legislature when enacting it can only properly be ascertained by a consideration of the statute as a whole".[5]

More particularly he stated that s.64 made it plain that the Speaker must be elected from amongst persons qualified for election as Members of Parliament. In order to discover those qualifications it is necessary to read s.48 which his Lordship regarded as clearly expressed as subject to s.49. No reading of those two sections together would allow a public officer to be qualified for election. Ward CJ stated the following principle:

> If the principle definition is qualified itself, a subsequent reference to it must take it in the same form unless there is express intention otherwise . . .

Here there was no such contrary intention.

With regard to the presumption against interference with common law rights the Chief Justice regarded the principle as quoted by Counsel for the respondent to be incomplete. The presumption was, in his view, better expressed in *Re Cuno*,[6] where Bowen LJ said:

> . . . in the construction of statutes, you must not construe the words so as to take away the rights which already existed before the statute was passed unless you have plain words that indicate such was the intention of the Legislature.

The Chief Justice regarded it as perfectly clear that the intention of the legislature when passing the Constitution was to limit the rights of certain people including holders of public

---

4. Counsel for the respondent cited 7 Halsbury's Laws, 3rd ed., para 417.
5. Civil Case No. 42 of 1982, at 3. Authority for these propositions were not given by his Lordship, but can readily be found e.g. *Grey* v *Pearson* (1857) 6 HLC 61 and *Attorney-General* v. *Prince Augustus of Hanover* [1957] AC 436.
6. (1889) 43 ChD 12 at 17.

office. Thus the proviso stated in *Re Cuno* was applicable here. With regard to the declaration sought in paragraph (c) his Lordship regarded this as seeking declarations on two separate matters:

(i) that the Speaker has no jurisdiction in law to determine the Attorney-General was disqualified from standing for election of a Speaker, and

(ii) that the Speaker's ruling on that matter contravened s.83 of the Constitution.

With regard to (i), his Lordship pointed out that the position of Speaker was embodied in the Constitution but that the Statute was silent on his duties and powers save to state that "he shall preside at any sitting of Parliament".[7] Proceedings of Parliament are governed by Standing Orders made by Parliament under s.62 of the Constitution. If the Speaker is to preside over and control Parliament he must rule, whenever necessary, on matters relating to those Standing Orders. Standing Order 82 provides that:

> Where any matter arises which is not provided for in these Orders or the resolution of any other matter causes doubt, the usage and practice of the Common House of Great Britain . . . shall be followed so long as it is not inconsistent with the order or practice of this Parliament.

His Lordship stated that it was clear that the Speaker in the Westminster Parliament had the power to make rulings in answer to questions raising points of order on current business and, indeed, that these rulings provided the main source of the practice of that Parliament.

The procedure for electing a new Speaker is covered by Standing Order 5 (2), which states:-

> Every citizen of Solomon Islands over the age of twenty-one and who is otherwise qualified for election as a Member shall be eligible for election as Speaker.

Ward CJ pointed out that this clearly follows, and is subject to, the provisions of the Constitution. If a person nominated appears not to fall within Standing Order 5(2), the Speaker must rule on the point. When he ruled on the validity of the nominations, he was within his power and no question of acting ultra vires arose. His Lordship therefore declared that the Speaker did have such jurisdiction.

With regard to (ii) the applicant argued that a ruling as to qualification to stand for election as Speaker involved interpretations of ss.64(1)(a), 48 and 49 of the Constitution, and that such interpretation was the exclusive province of the High Court.

The proper procedure in such cases was, according to the applicant, an application under s.83 of the Constitution. As far as relevant, s.83 reads as follows:

(1) If any person alleges that any provision of this Constitution has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for a declaration and for relief under this section.

(2) The High Court shall have jurisdiction, in any application made by any person in pursuance of the preceding sub-section or in any other proceedings lawfully brought before the Court, to determine whether any provision of this Constitution (other than Chapter II) has been contravened and to make a declaration accordingly . . .[8]

His Lordship pointed out that many actions by public bodies are based on interpretation of the Constitution. Such actions are clearly not a usurpation of the Court's powers. Section 83 provided a remedy for anyone who felt his Constitutional rights had been contravened. The Speaker's ruling could not be seen as taking over any such rights (as the present

---

7. S.64 (5).
8. This subsection is subject to a proviso as to locus standi.

application proved). He therefore viewed this part of the application as misconceived and declined to rule on the same. With regard to paragraph (d), s.42(4) of the Constitution states as follows:

> If the Minister responsible for justice is not a person entitled to practise in Solomon Islands as an advocate or as a barrister and solicitor, the person holding the office of Attorney-General shall be entitled to take part in the proceedings of Parliament as adviser to the Government:
> Provided that he shall not be entitled to vote in Parliament or in any election for the office of Prime Minister.

The Chief Justice adopted a literal interpretation of the words and concluded that the Chief Legal Officer is not such a person. Accordingly he made the declaration sought.

With regard to paragraph (f), referring to his rulings on paragraphs (b) and (c) the Chief Justice ruled that, given that there was no suggestion that the election which followed was not properly conducted, the election was valid and he declined to make the declaration.

The second constitutional challenge brought before the High Court also concerned the holder of a public office who had, in this case, actually been elected to the position of Governor-General. The challenge sought to invalidate not only the appointment, but also acts carried out in pursuit thereof. The appointment itself, as already mentioned, took place prior to the general election, but the challenge was not made until after a change of Government, the election of a new Prime Minister, and appointment of new Ministers.

The challenge was brought by way of Originating Summons .[9] The facts behind the case were that on 17 June nominations for the new Governor-General of Solomon Islands closed with eight candidates having been nominated, one of whom was Mr George Lepping, who was then the Permanent Secretary in the Ministry of Finance.

On the same day Mr Lepping went to the office of the acting Under-Secretary in the Ministry of Public Service and discussed with him the question of leave of absence without salary, in view of his intention to contest the election for Governor-General.

The acting Under-Secretary wrote a memorandum confirming their conversation in the following terms:

> 1. I refer to our discussion on the above matter today and wish to confirm that you are permitted to contest the forthcoming election for the Governor-General.
> 2. Consideration for unpaid leave will be given if your election is successful.

Unfortunately, after the election no further steps appear to have been taken to consider the matter of the unpaid leave until the Governor-General's position was brought up in a memorandum from the Secretary to Cabinet, dated 14 November 1988, and addressed to the Permanent Secretary, Ministry of Public Service. This stated:

> *REVOKING PS/MOF'S APPOINTMENT*
> I am directed to inform you that Sir George Lepping's appointment as Permanent Secretary of Ministry of Finance should be revoked immediately with effect from the date of his election as the Governor General of Solomon Islands.

A few days later, on 29 November, the Governor-General wrote to the Permanent Secretary, Ministry of Public Service. The operative part of the letter stated as follows:

> Just before the Governor-General election on 21st June 1988, after discussions with Mr B Newyear, under Secretary/MPS, your office confirmed my release from the Public Service. However, the permission only covered the election period.
> I now would like to confirm to you my desire to be at the Governor-General post,

---

9. In the Matter of ss.27(2), 48 and 49(1) of the Constitution. Civil Case No. 24 of 1989.

> on leave without pay. This would mean that my service with Government as a Public Servant at the Permanent Secretary level will continue, while holding the post.

In fact, as his Lordship pointed out, Sir George's recollection of his discussion as stated in the first paragraph, did not agree with that of the acting Under Secretary. There was no suggestion that he be released from the public service for the election and, indeed it is clear that he was only granted permission to contest the election.

A further memorandum was sent by the Secretary to Cabinet to the Permanent Secretary, Ministry of Public Service on 13 December 1988 enquiring whether Sir George's appointment as Permanent Secretary should be revoked from the date of his election from the date of his appointment to the post of Governor-General.

The acting Under Secretary replied that a final decision had yet to be made. No further action was taken and the Governor-General's queries about leave without pay and the earlier limited permission from the Ministry of Public Service went unanswered.

Evidence was also adduced that on 21 July and each pay day thereafter, Sir George Lepping was paid $908.62 from head 011 which is the salary for Governor-General (although it was not until 1 September that deductions of tax ceased).

Against the background of these facts, the applicant in this case, Mr Andrew Nori the elected Member of Parliament for West Are Are[10] challenged the validity of Sir George's appointment and sought the following declarations:

(a) a declaration that the present occupant of the Office of Governor-General of Solomon Islands, Sir George Lepping was not validly appointed to that post in accordance with ss.27(2), 48 and 49(1) of the Solomon Islands Constitution and that his appointment was null and void;

(b) a declaration that the election of Honourable Solomon Mamaloni, Member of Parliament for West Makira Constituency, as Prime Minister was null and void on the grounds that the calling of, the conduct of and the presiding at the said election was done by a person who was not a Governor-General as required by paragraphs 1 and 6 of schedule 2 to the Constitution;

(c) a declaration that all appointments of persons as Ministers of the Crown by Sir George Lepping and any advice given by the Honourable Solomon Manaloni precedent to those appointments in accordance with s.33(2) of the Constitution are null and void and of no effect;

(d) a declaration that any payments, benefits or privileges (or the cost of such benefits and privileges) given or accorded to Honourable Solomon Manaloni as Prime Minister or to any persons appointed as ministers of the Crown are without legal basis and therefore un-lawful.

After disposing of the issue of locus standi in favour of the applicant, the Chief Justice went on to consider the principal question, being whether or not the Governor-General had been validly appointed.

Section 27(1) of the Constitution provides for a Governor-General to be appointed by the Head of State as her representative in Solomon Islands. Section 27(2) provides:

> A person shall not be qualified for appointment to the office of Governor-General unless he is qualified for election as a member of parliament under Chapter VI of this Constitution.

The qualification under Chapter VI referred to is containd in s.48 which has been set out in full above. In fact s.48 is qualified by s.145 (2) (a) which provides:

---

10. Since the decision in this case Mr Nori has been appointed Leader of the Opposition.

> For the purposes of this Constitution a person shall not be treated as holding, or acting in, a public office by reason only that he:
> (a) is on leave of absence pending relinquishment of a public office, or is on leave of absence without salary from a public office;

This section was not discussed in any detail in the earlier case, as it had been admitted by the applicant that Mr Kabui had not brought himself within it.

It was not disputed that Mr Lepping was the holder of a public office as defined by s.144[11] and the applicant contended that he was still a public officer at the time of his appointment as he was not on leave of absence without pay and, therefore, was disqualified from election.

The question of how the holder of a public office obtains leave of absence without pay when standing for election to parliament was the subject of a previous decision in *Saemala* v. *Gatu*,[12] wherein Daly CJ stated:

> . . . The relationship between the Solomon Islands Government and its employees is governed by General Orders. Chapter J s.1 deals with the general principles relating to leave and makes it clear that leave "unless otherwise stated will be granted by the Government at its discretion." Chapter C s.5 paragraph 504 deals with leave for the purpose of standing for election to the National Legislature. Sub-paragraph 2 reads:
>
> > an officer wishing to stand for election to (the National Parliament) is required to apply for permission to do so in writing to the Secretary for the Public Service through his Responsible Officer. (The subparagraph then sets out certain duties of the Responsible Officer).
>
> Sub paragraph 3 provides:
>
> > If an officer . . . is given permission to stand, he will . . . be granted leave of absence without salary from his office with effect from the day that his nomination paper is signed to the day prior to the date of the declaration of the results of the election.
>
> It has been suggested that these provisions are confusing; I do not agree. What stands out clearly is that permission must be sought and must be granted before a person becomes entitled to say that he is on leave of absence without salary from his office. Such a provision accords with common sense in that a person can only cease to attend to his undertaken employment as a person on leave with the consent of his employer. The very words "leave of absence" to my mind makes it obvious that the consent or "leave" of the employer is essential to the process.

The Attorney-Generals' officer sought to rely on this authority and contended that, as it was clear from the correspondence that Mr Lepping had sought and obtained permission to stand for election, he then became entitled to rely on GO C504(3). In the words of Daly CJ, he became "entitled to say he is on leave of absence without salary." It was also contended that, permission having been granted, the evidence showed that on the date of appointment to the office (7 July) Mr Lepping had ceased to receive salary for the position of Permanent Secretary and was therefore within s.145(2)(a).

This argument was not accepted by Ward CJ. He pointed out that there was a distinction between the position of Ministers of Parliament and that of Governor-General. In the latter's case there are two separate and distinct processes: election and appointment.

The Attorney-General's officer's contentions regarding election were irrelevant in the case of the Governor-General as there was in fact nothing in the Constitution which prevents

---

11. Set out above.
12. [1980-81] SILR 196, 201.

a person being nominated and elected to the post whilst still holding a public office. What s.27 requires is that, if successful, he must either resign from the public service or bring himself within s.143(2)(a) before appointment by the Head of State.

His Lordship found from the evidence that the permission given to Mr Lepping was only to contest the election. The answer to the request for unpaid leave of absence was deferred, to be considered only if Mr Lepping was elected. He did not consider that the change in salary necessarily meant that the proper authority had taken a decision as to Mr Lepping's status. In any event the first payment of the new salary was not received until 21 June, well after his appointment. Neither could such a change of status be implied from a request from one side and silence and inactivity from the other.

His Lordship therefore concluded that Mr Lepping still held public office at the time of his appointment and that it was therefore invalid. The Attorney-General's representative advanced a second line of argument, being that even if Mr Lepping was not qualified, the Queen, as Head of State was exercising her prerogative, and this could not be questioned in any Court.

In considering this submission Ward CJ, looked at the Queen's position under the Constitution. S.1(2) provides that Her Majesty shall be Head of State of Solomon Islands. S.30 provides:

> (1) The executive authority of the people of Solomon Islands is vested in the Head of State.
>
> (2) Save as otherwise provided in this Constitution, that authority may be exercised on behalf of the Head of State by the Governor-General either directly or through officers subordinate to him.

Ward CJ held that s.27, dealing as it does with the appointment of the Governor General, is a part of the Constitution that provides otherwise from s.30(2). He went on to consider the suggestion of the Attorney-General's representative, that that power is a part of the Queen's prerogative.

His Lordship cited Professor Wade who describes prerogative power as legal power which appertains to the Crown but not to its subjects. Professor Wade quotes Blackstone's view that the term can ". . . only be applied to those rights and capacities which the King enjoys alone in contradistinction to others and not to those which he enjoys in common with any of his subjects . . .".[13]

The Chief Justice also cited Professor Bradley, who suggests that a modern definition would stress that prerogative has been maintained not for the benefit of the Sovereign but to enable the Government to function and that prerogative is a matter of common law and does not derive from statute. Thus Parliament may not create a new prerogative although it may confer on the Crown new rights or powers which may be similar in character to prerogative powers:

> Both the Sovereign, as Head of State, and the Government, as personified for many purposes by the Crown, need powers to be able to perform their constitutional functions. The rule of the law requires that these powers are grounded in law, and are not outside or above the system of law which the courts administer. In Britain the powers of the Sovereign and the Crown must either be derived from Act of Parliament or must be recognised as a matter of common law, for there is no written constitution to confer powers on the executive.[14]

---

13. Wade, "Administration Law", (5th Edn) at 214.
14. Wade and Bradley "Constitutional and Administrative Law", (10th Edn) at 245.

Ward CJ stated that it has long been established that, where an act of Parliament covers a matter that is otherwise a prerogative power, the prerogative is, thereafter, subject to that statute and any rules it contains.

He cited *Attorney-General* v. *De Keyser's Royal Hotel*,[15] wherein Lord Dunedin stated:

> . . . it is . . . certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: "What use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on prerogative?"
>
> The prerogative is defined by a learned constitutional writer as "The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown". In as much as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

He also cited Lord Atkinson, who in the same case said:

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative the prerogative is merged in the statute. I confess I do not think the word "merged" is happily chosen.
>
> I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent; that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can henceforth only be done by and under the statute and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.[16]

Ward CJ accepted this as good authority for concluding that, as the powers of the Head of State in Solomon Islands are defined and covered by the Constitution, they are subject to the Constitution.

His Lordship stated that the power under s.27 to appoint the Governor-General must be exercised in a way that observes and is bound by the restrictions imposed by the same instrument. He declined to decide how much true prerogative was left. What he thought was important was that the Constitution made it clear that power to appoint the Governor-General was subject, inter alia, to the person appointed being qualified under s.27(2).

He pointed out that by ss.83 and 138, the High Court has jurisdiction, with some exceptions that were not relevant to this case, to determine whether any provision of the

---

15. [1920] AC 508 at 526.
16. *Ibid.* at 539.

Constitution had been contravened. As the power under s.27 could only be used by and under the Constitution, the High Court had jurisdiction to enquire into it.

His Lordship held that the purported appointment was void ab initio and cited in support of this contention the authority of the case of Monopolies where it was said:

> Where by misinformation or inadvertence [the King] grants a franchise . . . repugnant to the Common law or prejudicial to the Community . . . and the law declares that the Sovereign has been deceived in his grant . . . such a grant is void.

Having made the declaration sought in paragraph (a) his Lordship went on to consider the remaining declarations which questioned the validity of acts carried out by Sir George in pursuit of the office. His Lordship found that the appointment was made in good faith and that whilst Sir George could not be considered to have been Governor-General de jure, he was Governor-General de facto. The Chief Justice cited the case of *R* v. *Bedford Level Corporation*[17] wherein Lord Ellenborough CJ explained "An officer de facto is one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law."

He also referred to two leading cases from amongst a number of authorities from the United States of America, which were largely provoked by the Civil War. First, *The State of Connecticut* v. *Carroll*[18] where Butler CJ gave what has become one of the classic definitions of an officer de facto:

> An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons where the duties of the office are exercised:
> First. Without a known appointment or election but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.
> Second. Under colour of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like.
> Third. Under colour of a known election or appointment void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise such ineligibility, want of power, or defect being unknown to the public.

His Lordship also cited *Norton* v. *Shelby County*[19] wherein Field J. said:

> Where 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 the office, and exercises its powers and functions.

The Chief Justice pointed out that a similar conclusion had been reached in *Re Aldridge*[20] and recent cases in England also affirmed the earlier decisions.[21]

Mr Nori did not accept those decisions as having any force in Solomon Islands and concluded that there was nothing in the law here which suggests that the doctrine of de facto office has any place. Whilst conceding that s.76 and Schedule 3 of the Constitution incorporated the common law and equity into the law of Solomon Islands, he pointed to the proviso, that this was save insofar as they are inconsistent with the Constitution or any

---

17. (1602) quoted: Hood Philips "Constitutional and Administrative Law", (4th Edn) at 244.
18. (1805) 56 East 356.
19. (1871) 38 Conn 449.
20. (1893) 15 NZLR 361.
21. E.g. *Adams* v. *Adams* [1971] P. 188; *Re James (an Insolvent)* [1977] 1 All ER 364.

Act of Parliament. In this case the Constitution required a Governor-General de jure and any acts performed by an unqualified person would be void.

The Chief Justice considered that this was taking the proviso too far. The application of the common law doctrine of de facto office did not mean that the Governor-General could act outside the Constitution or ignore the law.

His Lordship stated that:

> I cannot accept that the subsequent discovery that an earlier and, to all appearance, lawful act, was carried out by an officer who through some inadvertence was not lawfully appointed can invalidate the act.
>
> To do so would create an impossible situation. One only needs to ask how far back this would apply to realise the impossibility of such a view.

His Lordship therefore refused to make the declarations sought in paragraphs (b), (c) and (d) of the Summons.

He went on to take the matter a stage further, pointing out that, as it had now been concluded that Sir George's appointment was invalid, any further acts done by him under colour of the office would be unlawful. However there was no suggestion that his election or Parliament's address to Her Majesty was invalidated by the continuance in public office. His Lordship therefore recommended that, as soon as Sir George had ensured that he was properly qualified under s.27, Her Majesty should be requested to make the appointment according to the address from Parliament.

This recommendation was adopted and Sir George was validly appointed by Commission.

This second case highlights a section of the Constitution which might have been utilised by the Attorney-General. As it is only necessary for a candidate to be qualified at the time of election, rather than nomination, the objection to his candidacy could have been avoided by taking leave without pay on the day of the election. He would then have been able to rely on the proviso in s.145(2)(a).

It would seem that the technical requirements of the Constitution regarding qualification for election and, in the case of the Governor-General, appointment, have often been overlooked in the past. These cases will no doubt have the effect of tightening and formalising procedures within the Public Service. Both cases, and in particular the latter, have raised, and resulted in rulings on, a number of interesting legal points and they will no doubt serve as precedents in a wide variety of future actions.

Finally, it might also be pointed out from an interest point of view that this was not the only litigation following the National Election. There were a total of seven election Petitions issued and disposed of by the High Court, sitting on circuit, at a similar time.[22]

---

22. *John Maetia Kaliua* v. *Bartholomew Ulufa'alu*; *William Haomae* v. *Alex Bartlett*; *John Sio* v. *Francis Saemala*; *Symone Peter Leyinga* v. *Michael Maena*; *Benedict Kinika* v. *David Sitai*; *John Moffat Fugui* v. *Alfred Maetia*; *Alfred Biliki* v. *Caleb Kotasi* (unreported).