# *CARTE BLANCHE* TO THE CROWN?

## SUMMARY PROCEEDINGS AMENDMENT ACT 1967

In 1967 Parliament enacted an amendment to the Summary Proceedings Act 1957 designed to prevent private summary proceedings being brought against one Gardner, an Auckland company director, who was being extradited from England to face numerous charges of false pretences in New Zealand. The legislation was passed so that New Zealand could give an assurance to the United Kingdom Government that Gardner would not be dealt with in respect of offences other than those for which his return was sought. This guarantee was required by section 4 (3) of the Fugitive Offenders Act 1967 (U.K.) which contains the extradition law principle of specialty and provides that no person shall be returned to any country unless provision is made by the law of that country for securing that he will not be dealt with in respect of any offence other than the offence for which his return is requested or any lesser offence proved by the facts proved before the court of committal. Such a guarantee could be given in respect of indictable prosecutions since the Crown has an unrestricted power to file a *nolle prosequi*.[1] But no such power existed in respect of all summary prosecutions. The new section 77A fills this gap:

> The Attorney-General may, at any time after an information has been laid against any person under this Part of this Act and before that person has been convicted or otherwise dealt with, direct that an entry be made in the Criminal Record Book that the proceedings are stayed by his direction, and on that entry being made the the proceedings shall be stayed accordingly.

As a result of the new section the Attorney-General and the Solicitor-General[2] now have the power to stay all summary proceedings.

The power of the Attorney-General to stop criminal proceedings by entering a *nolle prosequi* has had a long though somewhat uneventful history. The entry of a *nolle prosequi* does not have the effect of an acquittal and a fresh indictment may be preferred.[3] A stay can be

1. See Crimes Act 1961, s. 378 and Summary Proceedings Act 1957, s. 173 (infra).
2. The Solicitor-General can exercise or perform any power, duty, authority or function imposed upon or vested in the Attorney-General in virtue of his office; Acts Interpretation Act 1924, s. 4 and the apparently redundant s. 27 of the Finance Act (No. 2) 1952. It is interesting to note that the Crimes Act 1908 which contained a provision similar to that of s. 398 of the Crimes Act 1961 also gave the Attorney-General authority to delegate his powers in any particular court to any counsel nominated by him; Crimes Act 1908, s. 435 (2). This sub-section was not repeated in the 1961 Act.
3. *Goddard* v. *Smith* (1704) 6 Mod. 261, 87 E.R. 1008; 11 Mod. 56, 88 E.R. 882, *R.* v. *Ridpath* (1712) 10 Mod. 152, 88 E.R. 670, *R.* v. *Mitchel* (1848) 3 Cox C.C. 93, 119.

entered where the original information was laid by a private prosecutor and not by the Crown.[4] Since at common law an information was in the nature of an action instituted by the sovereign acting through the office of the Attorney-General the entry of a *nolle prosequi* corresponded to the discontinuance of a civil action. There are other less dramatic, though sometimes no less controversial, methods by which proceedings can be brought to an end at the discretion of the prosecutor.[5] He can either ask the judge to allow the case before him to be withdrawn or he can simply offer no evidence and obtain a directed verdict of not guilty from the jury. In the former instance the judge must consent to the withdrawal, unlike the entry of a *nolle prosequi* where the decision of the Attorney-General cannot be questioned by the court.[6] The significance of this lack of judicial control will be discussed later.

In England prior to 1915 the power was, in practice, often exercised to quash technically defective indictments so that amended forms could be presented. After 1915 the Indictments Act simplified amendment procedure and made the use of the power unnecessary in such cases. A *nolle prosequi* also issued where the proceedings against one of a number of defendants jointly charged were terminated in order to call him as a prosecution witness. Today the power is often used, both in England and New Zealand, to dispose of an indictment where, after it has been signed, it becomes evident that the accused will never be fit to stand trial (e.g. where he has been committed to a mental hospital). In such cases it will generally be impossible for the accused to be put in charge of a jury. It should, however, be emphasised that these are only examples of the previous practice of the Attorney-General and cannot in any way limit him in the exercise of his discretion.

In New Zealand the prerogative power takes statutory form in a provision which was intended to declare existing law.[7] In respect of criminal offences section 378 of the Crimes Act 1961 provides that:

> The Attorney-General may at any time after any person has been committed to the Supreme Court for trial or for sentence, or after an indictment has been presented against any person for any crime, and before judgment is given, direct that an entry be made in the Crown Book that the proceedings are stayed by his direction, and on that entry being made the proceedings shall be stayed accordingly.

Section 173 of the Summary Proceedings Act 1957 gives the Attorney-General the same power in respect of the preliminary hearing of indictable offences at any time after an information has been laid against any person and before that person has been committed to the Supreme Court for trial or sentence. The use of the words "the proceedings" in both sections, the absence of any provision to the contrary and the

4. See *R.* v. *Allen* (1862) 1 B. & S. 850, 121 E.R. 929 and Edwards, *Law Officers of the Crown* (1964) 229-230.
5. See e.g. The Campbell Case in Edwards op. cit., 199.
6. See *R.* v. *Allen* (supra).
7. See excerpts from the Report of the Criminal Code Bill Commission of 1878 in Garrow, *Criminal Law in New Zealand* (3rd ed. 1950) 323.

declaratory nature of the provision all indicate that, as at common law, a fresh indictment may still be presented for the same offence. Examples of the entry of a *nolle prosequi* in New Zealand include cases where the jury disagree and the prosecution feel that there is good reason why there should not be a second trial, and where the jury fails more than once to agree.[8] The power is also sometimes used to stay criminal prosecutions in cases of infanticide.

Before section 77A was enacted, although the Attorney-General had no power to stay summary proceedings as in England, an information could be withdrawn by the prosecution with the leave of the court before conviction or dismissal or, if the defendant had pleaded guilty, before sentence.[9] In New Zealand a large proportion of summary prosecutions are not instituted by the central government and it was felt by some that there was a need for an extension of the Attorney-General's power to cover these non-governmental proceedings. In this respect it is worth comparing the situation in England with that in New Zealand. In England under the Prosecution of Offences Act 1908[10] the Director of Public Prosecutions can take over private criminal proceedings and apply for leave to withdraw. There is no such provision in New Zealand but section 77A has now extended the power to enter a *nolle prosequi* over all criminal proceedings without making a stay dependent on the leave of the court.

This discussion of past practice in the use of the power to enter a *nolle prosequi* indicates that it can be used in many other circumstances besides those which existed in the Gardner case. Was this amendment the only way our law could be changed so that the required guarantee could be given to the British Government? Surely the first place one would look for an answer to this question would be in the law of extradition itself. The Fugitive Offenders Act 1881[11] which governs the rendition of fugitive offenders between New Zealand and other Commonwealth countries contains no relevant sections. However, sections 5 (2) and 14 of the Extradition Act 1965 give effect to the principle of specialty and limit detention or trial to those offences disclosed by the facts on which surrender is granted. Such provisions were precisely what the Minister of Justice needed to deal with the circumstances with which he was concerned.[12] The extension of section 14 to cover Commonwealth as well as foreign countries would have enabled him to give the required guarantee and would have avoided any of the wider problems raised by an extension of the Attorney-General's power. The problem which arose in the Gardner case highlights the need for a revision of our extradition law as to Commonwealth countries to deal with the vast changes which have occurred since the Imperial legislation of 1881. An

8. See Instructions issued to Crown Solicitors on 29 January 1945 in *Crown Law Practice in New Zealand* (1961) 18.
9. Summary Proceedings Act 1957, s. 36.
10. 8 Edw. 7, c. 3, s. 3.
11. 44 & 45 Vict. c. 69.
12. See also Fugitive Offenders Act 1967 (U.K.), ss. 4 (3) and 14 (2), Extradition (Commonwealth Countries) Act 1966 (Australia), ss. 11 (3) and 22 and Shearer "Recent Developments in the Law of Extradition" (1967) 6 M.U.L.R. 186.

excellent prototype for new legislation is provided by a scheme formulated in 1966 at a meeting of Commonwealth Law Ministers in London to provide the basis of legislation governing the rendition of offenders within the Commonwealth.[13] Although it seems unlikely that the separate statutory treatment of Commonwealth and foreign countries will be abandoned, the Gardner case is fresh evidence of the need for common safeguards in both areas.

The extension of the Attorney-General's power to stay proceedings under section 77A was, it is submitted, a much wider measure than was necessary to deal with the particular problem at which it was aimed. It does not seem too fanciful to suggest that political rather than judicial considerations could influence the use of the power to prevent politically controversial summary prosecutions from being judicially determined. The power could be used to avoid embarrassing attempts to enforce outmoded laws, for example, if numerous private prosecutions were brought against companies for technical infringements of the Companies Act 1955. The Police Offences Act 1927 contains some anachronistic offences which if enforced could prompt the Attorney-General to exercise his power to stay proceedings. A stay might also be entered to end private proceedings against high government officials or proceedings which might reveal embarrassing conditions or practices in state institutions (e.g. penal institutions or mental hospitals).

The wide-ranging scope of this power to stop *all* prosecutions is emphasised by the fact that in some specific statutes the legislature has thought it necessary for particular reasons to limit the otherwise unfettered right of individuals to bring private prosecutions. Thus in a number of cases leave of a judge, magistrate or the Attorney-General must be obtained before a prosecution is brought.[14] It would be very odd if once this leave had been given the Attorney-General could step in and stop the prosecution. It is also inconsistent with this selective and very limited approach to the interference with the otherwise unfettered right to bring private prosecutions, to adopt a provision of completely general application.

It is certainly worth debating whether this ability of the executive to insulate itself from vulnerability to court process or to interfere with apparently private matters is desirable. The power to prevent disputes between individuals from being dealt with by a court would not seem a wise one for the lawmakers to present to the administrators of the law, devoid of any safeguards or conditions as to its use whatsoever. The Attorney-General remains responsible to Parliament for the exercise of his power but it is highly unlikely, given the party system, that Parliament would interfere with a particular exercise of the power short of wholesale abuse. No other member of the government would be likely to criticise the Attorney-General for his use of the power and opposition

13. Cmnd. 3008. Clause 13 of the Scheme contains the specialty rule.
14. See e.g. Mental Health Amendment Act 1935, s. 6 (2), Defamation Act 1954, s. 16 (3), Police Offences Act 1927, s. 30 (6), Continental Shelf Act 1964, s. 7 (4), Crimes Act 1961, s. 400 and Adams, *Criminal Law and Practice in New Zealand* (1964) 472.

criticism would be likely to unite the government in support of the Attorney-General's action. Finally, it is not sufficient to say only on the basis of former practice, that such abuse would not occur.

In civil cases the court itself has an inherent power to stay an action which it regards as frivolous, vexatious or an abuse of the court's procedure. In 1965 the Judicature Act 1908 was amended so that on the application of the Attorney-General the Supreme Court could make an order that no civil proceeding or no civil proceeding against any particular person or persons should be instituted by a particular person.[15] The important characteristic of this new anticipatory power, as far as we are concerned, is that its exercise is at the judge's discretion and that it is for the Attorney-General to satisfy the judge that the necessary conditions for its exercise exist. This approach of giving the court the final say seems an attractive alternative to leaving the power to stay proceedings to the discretion of the Attorney-General untrammeled by any control by the courts.

It might be suggested that the circumstances in which the bill became law smack of retroactivity in that extradition proceedings had already been instituted in England to secure Gardner's return for offences which he was alleged to have committed before the bill was introduced. Against this is the argument that the legislation related to a procedural rather than a substantive matter.[16] Thus section 38 of the 1881 Act provides that the Act shall apply to offences committed, before the commencement of the Act or, in the case of Part II of the Act, before its application to a British possession or to the particular offence. The Extradition Amendment Act 1967 is also strongly retroactive in character.[17]

Potential utilisations of the new wider power should have at least been discussed during the passage of the bill but instead concern with the urgency of the particular situation enabled it to become law in a single day. The lack of deliberation in this instance would seem to give some support to those who still favour the reintroduction of a bicameral legislature in New Zealand or alternatively some requirement of a delay in the process of the enactment of bills. Delay and debate may at least have revealed hidden implications which were evidently not apparent to the supporters of the bill.

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15. By s. 3 of the Judicature Amendment Act 1965, which inserted s. 88A in the principal Act, see Barton, "Judicature Amendment Act 1965" (1966) 2 N.Z.U.L.R. 229.
16. See *Davies* v. *Public Trustee* [1957] N.Z.L.R. 1021 and note in (1957) 2 Victoria University of Wellington L.R. 213.
17. Cf. *Clinton* (1845) 6 L.T.(N.S.), 66 and Clarke, *The Law of Extradition* (1903) 131-133.