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THE PROPER CONDUCT OF THE TRIAL OF AN ACTION.

IT is not often that a superior Court lays down rules for the proper conduct of a civil trial, with emphasis on the part to be taken by the presiding Judge and his duty to observe the rights of counsel in the course of their duty: by not hampering them by judicial interventions in examination-in-chief and in their task of testing evidence by cross-examination. When, however, the judgment of the experienced Lords Justices of the Court of Appeal sets out the standards of a proper trial, almost in text-book fashion, it becomes of considerable interest and importance to all engaged in the Courts.

They ordered a new trial as the result of the non-observance by the trial Judge of his duty in the conduct of the proceedings.

In *Jones* v. *National Coal Board* [1957] 2 All E.R. 155, there was an appeal on three grounds of liability. The fourth ground was as follows:

> "that the nature and extent of the learned Judge's interruptions during the hearing of the evidence called on behalf of the defendants in particular made it virtually impossible for counsel for the plaintiff to put the plaintiff's case properly or adequately or to cross-examine the witnesses called on behalf of the defendants adequately or effectively".

A further unusual feature of the proceedings on appeal was that the respondent's counsel said that, if there was any chance of their Lordships (Denning, Romer, and Parker L.JJ.) being persuaded that the appellant's three points on liability were correct, he wished to give a cross-notice of appeal in similar terms complaining that the trial Judge's interruptions prevented him from properly putting his case. Their Lordships gave him leave to give a cross-notice to that effect.

On the same day and on a similar ground in respect of the same Judge, the Court of Appeal, in *Bunting* v. *Thorne Rural District Council* (unreported) ordered a new trial. Of him the Court there said:

> His mind and his speech were so much at one that, as soon as a thought came to him, it at once found voice.

Both cases are likely to be quoted for their exposition of the respective functions of counsel and Judge.

In the *Jones* case, the Court said that the Judge sits to hear and determine the issues, not to conduct an investigation on behalf of society at large, as happens in some foreign countries. To illustrate this, the Court pointed out that a Judge was not allowed to call a witness in a civil dispute. It was for counsel to examine a witness, and to state his case as fairly and strongly as he could, without undue interruption, "lest the sequence of his argument be lost." On the other hand, the Judge could intervene to clear up a point, to see that the advocates behaved themselves seemly and kept to the rules of practice and to exclude irrelevancies and discourage repetition.

Cross-examination, the judgment continued, loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further, the Court held, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry most likely to elicit admissions or qualifications of evidence given in chief. Excessive judicial interruptions inevitably weaken the effectiveness of cross-examination on both those aspects. An example of the disadvantage to which counsel can be subjected in following his line of inquiry occurred in *Bunting* v. *Thorne Rural District Council*, when the Judge said to the witness who was being cross-examined: "Be careful, or you will find yourself in a trap," and also, "You are walking straight into the trap." Such observations stultify and frustrate counsel in the exercise of their duties, and thereby diminish the effectiveness of our system of justice.

* * * * *

We now proceed to a closer examination of the judgment in *Jones* v. *National Coal Board* [1957] 2 All E.R. 155, commencing with the facts as set out in the judgment.

The widow of a deceased coal-miner, who was killed by a fall of roof in a colliery, brought an action under the Fatal Accidents Act 1846 to 1908 (our Deaths by Accidents Compensation Act 1952) against his employers, the National Coal Board, claiming damages on the ground that the board was in breach of its statutory duties under s. 49 of the Coal Mines Act 1911, and Reg. 2 (2) of the Coal Mines (Support of Roof and Sides) General Regulations 1947, or, alternatively, that the board was guilty of negligence at common law. Hallett J. dismissed her claim. The widow appealed on three grounds based on the facts, and also on the submission, as set out above, that she had not had a fair trial.

The judgment of their Lordships was delivered by Denning L.J. (This was his last judgment as a Lord

Justice before his appointment as a Lord of Appeal in Ordinary.)

After setting out the detailed facts and the grounds of appeal and the notice of cross-appeal, the judgment proceeded :

> We much regret that it has fallen to our lot to consider such a complaint against one of Her Majesty's Judges : but consider it we must, because we can only do justice between these parties if we are satisfied that the primary facts have been properly found by the Judge on a fair trial between the parties. Once we have the primary facts fairly found, we are in as good a position as the Judge to draw inferences or conclusions from those facts, but we cannot embark on this task unless the foundation of primary facts is secure.

Their Lordships then stated the course of the trial.

Mr Mars-Jones of counsel appeared for the widow, and opened the case for her. He relied on s. 49 of the Act, and said it was the duty of the board to make the roof secure, and that the fall showed that they had not done it. In case that approach was wrong, he relied on the Support Regulations and on the common law, and he made several specific criticisms in which he said that the board had failed to do what they ought to have done. He called the widow to give evidence on damages and then an expert, Mr William Charles Davies. This expert had not been down the mine, but he relied on a plan which had been made by the board's surveyor shortly after the accident. This enabled him to make criticisms on the same lines as those opened by counsel for the widow. The Judge intervened on several occasions during the examination-in-chief of Mr W. C. Davies and also during his cross-examination, but this was in order to enable him to understand the technical points of the case, and could not properly be made the subject of complaint. Counsel for the widow then closed his case.

Mr Edmund Davies Q.C., who appeared for the National Coal Board, then called Mr John Kerr. He was the manager of the Llay Main Colliery at the time of the accident and had inspected the spot on January 19, 1953, two days before the roof fell. He was accompanied on that occasion by H.M. Inspector of Mines, who made no complaint of the manner in which the work was being done. Mr Kerr explained to the Judge exactly what was being done to support the roof, and the Judge, naturally enough, intervened from time to time to see that he understood. Then the leading counsel for the board began to ask Mr Kerr to deal with the criticisms which had been made by counsel for the widow, and by his expert witness, Mr W. C. Davies. Now when this happened the Judge clearly intervened far too much. He had himself made a note of the criticisms and, in his anxiety to understand Mr Kerr's replies to these criticisms, he took the examination of the witness out of the hands of leading counsel for the rest of that day and of his junior counsel next morning. Counsel for the widow then cross-examined the witness, but during the cross-examination the Judge intervened on several occasions to protect the witness from what he thought was a misleading question, and to bring out points in favour of the witness's point of view.

Next, leading counsel for the board called Mr Thomas George Davies. He was the deputy who was actually on duty on January 21, 1953, when the accident occurred. He said that he thought that the roof was secure, and that he told the deceased workman and his mate to get the remainder of the coal off, and try to get another rolled steel joist up at this point. His examination-in-chief proceeded on normal lines, but during his cross-examination by counsel for the widow the Judge seemed to be afraid that he was being misled, and intervened at considerable length and in effect stopped his cross-examination on the important points of chocks. When leading counsel for the board re-examined, the Judge cut him short saying : " That is what has been given again and again ".

Then leading counsel for the board called the surveyor, Mr Philip Edgar Roberts, who made the plan. Nothing untoward occurred in his short evidence. Finally leading counsel for the board called Mr Cecil Henry Bates, an expert consultant mining engineer. Now, at this point, the Judge took the examination-in-chief largely out of the hands of counsel. He took the points of criticism made against the board, and went through them with the witness, and appeared to accept his explanations. Counsel for the widow cross-examined the witness, but after a while the Judge disclosed much impatience with him and he brought it to a close.

The judgment continued :

> No one can doubt that the Judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which Judges daily intervene in the conduct of cases and have done for centuries.
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> Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a Judge is not a mere umpire to answer the question : " How's that ? ". His object above all is to find out the truth, and to do justice according to law ; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon L.C., who said in a notable passage that " truth is best discovered by powerful statements on both sides of the question " (see *Ex p. Lloyd*, (1822) Mont. 70, n.) and Lord Greene M.R., who explained that justice is best done by a Judge who holds the balance between the contending parties without himself taking part in their disputations ? If a Judge, said Lord Greene, should himself conduct the examination of witnesses,
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> > " he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict ".
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> See *Yuill* v. *Yuill* [1945] P. 15, 18 ; [1945] 1 All E.R. 183, 189.

Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales—the "nicely calculated less or more"—but the Judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the Judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties; see *Re Enoch & Zaretsky, Bock & Co.* [1910] 1 K.B. 327.

So also it is for the advocates, each in his turn, to examine the witnesses, and not for the Judge to take it on himself lest by so doing he appear to favour one side or the other; see *R.* v. *Cain* (1936) 25 Cr. App. Rep. 204; *R.* v. *Bateman* (1946) 31 Cr. App. Rep. 106; and *Harris* v. *Harris* (Apr. 8, 1952, The Times, Apr. 9, 1952) by Birkett L.J., especially. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost; see *R.* v. *Clewer* (1953) 37 Cr. App. Rep. 37.

The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies.

If he goes beyond this, he drops the mantle of a Judge and assumes the robe of an advocate; and the change does not become him well. Lord Bacon spoke right when he said that:

> "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal".

Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice, our keenness may out-run our sureness, and we may trip and fall. That is what has happened here. A Judge of acute perception, acknowledged learning, and actuated by the best of motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties—nay, each of them—has come away complaining that he was not able properly to put his case; and these complaints are, we think, justified. Their Lordships said they had sufficiently indicated the nature of the interventions already, but there was one matter which they would specially mention:

Leading counsel for the widow made particular complaint of the interference by the Judge during the cross-examination of the board's witnesses by junior counsel for the widow. Now it cannot, of course, be doubted that a Judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief.

Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy, sometimes, to return.

Leading counsel for the widow submitted that the extent of the learned Judge's interruptions was such that junior counsel for the widow was unduly hampered in his task of probing and testing the evidence which the board's witnesses gave. We are reluctantly constrained to hold that this submission is well-founded. It appears to us that the interventions by the learned Judge while junior counsel for the widow was cross-examining went far beyond what was required to enable the Judge to follow the witnesses' evidence and on occasion took the form of initiating discussions with counsel on questions of law; further, and all too frequently, the Judge interrupted in the middle of a witness's answer to a question, or even before the witness had started to answer at all.

In our view it is at least possible that the constant interruptions to which counsel for the widow was subjected from the Bench may well have prevented him from eliciting from the board's witnesses answers which would have been helpful to the widow's case, and correspondingly damaging to that of the board.

The Judge seems to have been under the impression on occasions that counsel for the widow was asking a misleading question. We do not gain that impression ourselves. It seems to us that the case was conducted by counsel on both sides with complete propriety.

Their Lordships concluded by saying that they had not the material on which to determine whether the decision reached by the learned Judge was the inevitable one. In the absence of findings on certain salient facts, it would not be fair to either party to give a concluded judgment. In the whole of the circumstances, they had come to the conclusion that the only thing they could do was to order a new trial. In conclusion they said:

> "There is one thing to which everyone in this conntry is entitled, and that is a fair trial at which he can put his case properly before the Judge. The widow and the National Coal Board stand in this respect on the same level. No cause is lost until the Judge has found it so; and he cannot find it without a fair trial, nor can we affirm it".

SUMMARY OF RECENT LAW.

BAILMENT—BAILEE—BREACH OF DUTY.

Motor-car in Hands of Dealers for Sale for Owner—Thief or Thieves breaking into Dealers' Premises and stealing, and, later, wrecking Car—Reasonable and Proper Care for Due Security and Proper Delivery of Car not shown by Dealers (on whom Onus rested)—Actionable Breach of Duty as Bailee for Reward. The bailee of a chattel for reward, which has been stolen from him, has to show that he took all reasonable and proper care for the due security and proper delivery of the bailed chattel; and the proof of that rests on him. If he can show that he took such care of the chattel, the mere fact that it was stolen is not sufficient to make him liable for negligence: his explanation then is that the thieves must have shown ingenuity and daring against which reasonable precautions could not avail. *Brook's Wharf and Bull Wharf Ltd.* v. *Goodman Brothers* [1937] 1 K.B. 535; [1936] 3 All E.R. 696, followed. In June, 1956, the plaintiff, who was the owner of a motor-car, handed it to the defendant company to be offered for sale on her behalf; she was at that stage content to receive £750 net, and the company was to be entitled by way of commission to any purchase moneys obtained over and above that sum. The car was thereupon garaged by the defendant company in its showroom at Papakura, and only a few days after its delivery it was stolen therefrom. The evidence showed that the thief or thieves had broken into the unlighted building by breaking the staple on an outside padlock fitment on a side door, and, once inside, had opened the front door from within and had driven the plaintiff's car away through the front doorway. The car had been left unlocked with the ignition key in the dashboard. It was later recovered as a total wreck and, as such, was sold for £150 by the underwriters. The plaintiff claimed from the company the value of the car, £700, less the sum of £150 realized by the underwriters, alleging an actionable breach of the company's duty as bailee for reward. It was not contended that it was negligence on the part of the company either to fail to lock the car or to leave the ignition key in place. *Held*, on the facts, 1. That the locking device on the side door through which the thief or thieves broke in to the company's premises was not shown by the company to be one which a reasonable man in all the circumstances would have been content to use in keeping safe his own chattels similar to the one stolen; and *semble*, the company failed to take adequate precautions so to secure the front door to prevent the thief (who had already entered the premises) from driving the car out through the inadequately secured front door. 2. That the company had not discharged the burden of proof on it as a bailee to show that the theft of the car took place notwithstanding it had taken all reasonable precautions to guard against the danger of theft or burglary. *Fletcher Construction Co. Ltd.* v. *Webster* [1948] N.Z.L.R. 514; [1948] G.L.R. 90, applied. *Semble*, The company's failure to maintain an interior light of low power did not, in all the circumstances of the case, in itself amount to negligence; but it was a circumstance which did (though not perhaps weightily) affect the company's duty to take adequate precautions against a burglar from opening the front door from within and stealing a car; as, in the dark premises, such a burglar could work more easily and securely. *Petersen* v. *Papakura Motor Sales Limited* (S.C. Auckland. February 27, 1957. Turner J.)

CONVEYANCING.

Certainty of Commencement of Lease. *101 Solicitors' Journal*, 295.

Voluntary Settlements by Young Persons. *10 Australian Conveyancer and Solicitors' Journal*, 9.

CRIMINAL LAW.

Jurisdiction—Committal for Trial—Court's declining to deal with Offence summarily Sole Condition of Exercise of Jurisdiction to deal with Matter as Indictable Offence—Endorsement and Signing of Certificate not Condition Precedent to Exercise of Such Jurisdiction—Summary Jurisdiction Act 1952, s. 5 (2). Section 5 (2) of the Summary Jurisdiction Act 1952 makes the exercise of the jurisdiction of a Magistrate to deal with the matter as an indictable offence conditional solely upon the Court's declining to deal with the offence summarily. That condition is fulfilled by the Magistrate's announcing his decision so to deal with the matter summarily. The actual endorsement and signing of the certificate is not a condition precedent to the exercise of that jurisdiction. *In re Wright, In re Hicks* [1949] N.Z.L.R. 37; [1949] G.L.R. 1, and *R.* v. *Mitchell, Ex parte Livesey* [1913] 1 K.B. 561, distinguished. *R.* v. *Scott and Others.* (S.C. Auckland, April 29, 1957. Shorland J.)

DEATHS BY ACCIDENTS COMPENSATION.

Claim for Loss of the Society, Care, Guidance, and Affection of Deceased Husband and Father—No Cause of Action disclosed—"Injury"—Deaths by Accidents Compensation Act 1952, s. 7 (1) (a) (b). A claim under the Deaths by Accidents Compensation Act 1952, on behalf of the widow and children as the result of the death of the husband and father, for damages in respect of the loss of the society, care, guidance, and affection of the husband and father respectively, discloses no cause of action under the statute, since damages are recoverable thereunder by members of the family only to the extent of the loss of presumed advantage by the persons for whose benefit the action is brought. *Taff Vale Railway Co.* v. *Jenkins* [1913] A.C. 1 and *Shaw* v. *Hill* [1935] N.Z.L.R. 914, followed. *McCarthy* v. *Palmer.* (S.C. Wellington. 1957. March 27. McGregor J.)

DESTITUTE PERSONS—MAINTENANCE.

Limitation of Action—Moneys in Arrear and unpaid at Death of Person liable under Maintenance Order—Personal Representative of Deceased pleading Limitation Act 1950—Date of Accrual of Cause of Action—Amounts recoverable limited to those accruing due within Six Years of Issue of Proceedings—Destitute Persons Act 1910, ss. 36, 41—Limitation Act 1950, s. 4 (1) (d). An action brought by virtue of s. 36 or s. 41 of the Destitute Persons Act 1910 for moneys payable under a maintenance order is not an "action brought upon a judgment" within the meaning of s. 4 (4) of the Limitation Act 1950, but is "an action to recover any sum recoverable by virtue of [an] enactment", within the meaning of s. 4 (1) (*d*) of that Act. *McCormick* v. *Parkes* (1915) 34 N.Z.L.R. 378; 17 G.L.R. 292, applied. The cause of action under ss. 36 and 41 of the Destitute Persons Act 1910 accrues in respect of a particular amount as soon as that particular payment becomes in arrear and unpaid. Accordingly, whether the action is brought under s. 41 (which provides that arrears are to constitute a debt in the lifetime of the person liable) or under s. 36 (which provides that on his death arrears are to constitute a debt payable out of his estate), the plaintiff is entitled to recover only those arrears which accrued over the period of six years before the issue of the proceedings. *China* v. *Harrow Urban District Council* [1954] 1 Q.B. 178; [1953] 1 All E.R. 1296; *Jones* v. *Foreman* [1917] N.Z.L.R. 798; [1917] G.L.R. 513, and *Aylott* v. *West Ham Corporation* [1927] 1 Ch. 30, applied. *Phillips-Higgins* v. *Harper* [1954] 1 Q.B. 411; [1954] 1 All E.R. 116, and *Arrowsmith* v. *Manning* (1900) 19 N.Z.L.R. 180; 3 G.L.R. 25, referred to. *Lougher* v. *Donovan* [1948] 2 All E.R. 11, mentioned. *Grantham* v. *Gregory.* (S.C. Wellington. March 12, 1957. McCarthy J.)

DESTITUTE PERSONS—REHEARING.

Rehearing Affiliation Proceedings—Supreme Court Practice as to Application for New Trial in a Civil Case applicable—Discovery of New Evidence, as Ground for Rehearing—Destitute Persons Act 1910, s. 38 (1)—Code of Civil Procedure, R. 276. In considering an application for the rehearing of a complaint in affiliation proceedings under the Destitute Persons Act 1910, a Magistrate is bound by the rules and practice which govern the Supreme Court of New Zealand in considering an application for a new trial in civil cases. *Jones* v. *Foreman* [1917] N.Z.L.R. 798; [1917] G.L.R. 513, referred to. Where the evidence given at the trial shows that a witness other than the complainant was guilty of misconduct (such as perjury upon a material matter) affecting the trial, that is a ground (R. 276 (*g*) of the Code of Civil Procedure) for granting a rehearing. The discovery of new evidence is not a sufficient ground for granting a rehearing unless it is "material" within the meaning of that word in R. 276 (*e*). Before a rehearing may be granted, there must be proof of the facts relied on before the Magistrate is justified in going on to the stage of considering whether those facts might give rise to a miscarriage of justice. *Munro* v. *Middleditch* (1912) 32 N.Z.L.R. 140; 15 G.L.R. 189, distinguished. *McDowell* v. *Lusty.* (S.C. Invercargill. March 6, 1957. Barrowclough C.J.)

DIVORCE AND MATRIMONIAL CAUSES.

Damages—Amount of Damages fixed by negotiation between Parties—Non-Disclosure by Petitioner of His "engagement" and Proposed Early Remarriage—No Duty to reveal Facts known to Him and affecting Value of His Claim for Damages—Divorce and Matrimonial Causes—Evidence—Petitioner, not giving Evidence in Disproof of His Own Adultery, not Examinable thereon—Cross-examination as to His Alleged "engagement" and Proposed Early Remarriage, without asking Any Question

LEGAL ANNOUNCEMENTS.

Continued from page i.

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tending to suggest Adultery, permissible—Such Protection not extended to Negotiation of Agreement as to Damages—Divorce and Matrimonial Causes Act 1928, s. 47. The reference at the end of s. 47 of the Divorce and Matrimonial Causes Act 1928 to "the alleged adultery" does not limit to the adultery alleged in the proceedings the protection given to a witness. *Hensley* v. *Hensley* (1920) 36 T.L.R. 188, and *Mourilyan* v. *Mourilyan* (1922) 38 T.L.R. 483, followed. A petitioner, who has not given any evidence in disproof of adultery on his part, can properly be asked in cross-examination if he were already "engaged", or at least if an early remarriage was possible; and this can be done without asking him any questions tending to suggest adultery. Although a petitioner cannot be cross-examined about his alleged adultery, the question can be legitimately asked in a negotiation between the parties to bring about an agreement as to the amount of damages. *Quaere*, As to the relevancy of a petitioner's adultery, except in so far as it may bear on the question of damages, as, for instance, to prove that his earlier adultery had a causal relation to the loss he sustained when his wife formed an adulterous association and deserted him. While non-disclosure may in some instances be a factor vitiating a compromise on the question of damages, there is no general rule which requires a party to an ordinary compromise to reveal all known facts that may affect the value of the claim. In the present case, there was no duty on the petitioner, in a negotiation as to the amount of damages, to disclose an alleged "engagement" and proposed early remarriage, or his alleged adultery. On such matters it was the duty of the co-respondent to protect himself by such inquiries as he might see fit to make. *Bell* v. *Lever Bros. Ltd.* [1932] S.C. 161, referred to. *Jones* v. *Jones and Another.* (S.C. Christchurch. March 6, 1957. F. B. Adams J.)

Practice—Service of Petition on Minor—Respondent a Minor at Date of Hearing—No Guardian ad litem appointed—Step of Proceeding to Hearing not Valid Basis for granting Decree—Minor Coming of Age after Hearing—Petition to be re-served—Matrimonial Causes Rules 1943, R. 59. Where the respondent wife was a minor, both when served personally with the petition and also at the date of hearing, and no guardian had been appointed, the step of proceeding to a hearing being, in direct contravention of R. 59 of the Matrimonial Causes Rules 1943, could not prevail as a valid basis for the granting of a decree. *Carter* v. *Carter* [1946] N.Z.L.R. 29; [1945] G.L.R. 388. The respondent attained the age of twenty-one years sixteen days after the hearing. An order was made that the petition and the appropriate notice be re-served upon the respondent, together with an order authorizing the issuing of a further sealed copy of the petition and of a further notice signed by the Registrar. *McIver* v. *McIver.* (S.C. Auckland. March 21, 1957. Shorland J.)

Practice—Submission of No Case—Party Cited not required to make Election to submit No Case or Call Evidence in Rebuttal—Divorce and Matrimonial Causes Act 1928, s. 17 (2). When, in the course of the trial of a divorce suit, the Judge is asked by counsel for a party cited to dismiss that party from the suit, in exercise of the power given by s. 17 (2) of the Divorce and Matrimonial Causes Act 1928, upon the ground that there is no case against that party, a submission of no case will be heard and determined without counsel's being required to make an election to submit no case or to call his evidence in rebuttal. *Mattina* v. *Mattina.* (S.C. Wellington. March 28, 1957. Gresson J.)

Seven Years' Separation—"Living apart"—Living in Circumstances constituting Determination of Consortium—Divorce and Matrimonial Causes Act 1928, s. 10 (jj). The words "living apart" in s. 10 (jj) of the Divorce and Matrimonial Causes Act 1928 mean living apart in such circumstances as to constitute a determination of the consortium. *Wilson* v. *Wilson* [1955] N.Z.L.R. 175, followed. *McRostie* v. *McRostie* [1955] N.Z.L.R. 632 and *Marriott* v. *Marriott* [1956] N.Z.L.R. 127, referred to. *Henderson* v. *Henderson.* (S.C. Wellington. May 1, 1957. Stanton J.)

FAMILY PROTECTION.

Inheritance Act Applications. *101 Solicitors' Journal*, 293.

HUSBAND AND WIFE.

Deserted Wife in Occupation of Husband's Dwellinghouse—Property Sold with Constructive Notice to Purchaser of Wife's Occupancy—Order to Wife to give up Possession on Court's Discretion—Reasonable Period to be allowed Wife to Vacate if Possession Order Made. Assuming that a deserted wife has the right to remain in possession of a property owned by her husband as against a purchaser thereof with constructive notice of her rights, then those rights, whatever their limits and extent, are not such as to give her a proprietary interest in the property. *Shakespear* v. *Atkinson* [1955] N.Z.L.R. 1011, referred to. The Court has a discretion to make an order for the deserted wife to give up possession to the purchaser, and, if it makes such an order, it should allow a reasonable period to the deserted wife to take appropriate steps to compel her husband to provide another home, or to make other suitable arrangements to compensate her for the loss of her occupation. *Jess B. Woodcock & Sons Ltd.* v. *Hobbs* [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445, followed. *Cochrane* v. *Kneebone.* (S.C. Wellington. April 3, 1957. Stanton J.)

INDECENT PUBLICATIONS.

Importation of Photographs—Immoral or Mischievous Tendency of Imported Matter to be considered from Objective Viewpoint—Mens rea—Knowledge of Offence of Importing Indecent Matter—No Proof of Reasonable Belief in Innocuous Nature of Imported Photographs—"Immoral or mischievous tendency" of Act of Importing—Indecent Publications Act 1910, s. 5. The question whether or not the act of the defendant in importing photographs, which were held, in fact, to be prima facie indecent, was of "an immoral or mischievous tendency", within the meaning of s. 5 (2) of the Indecent Publications Act 1910, must be decided irrespectively of the knowledge or intention of the importer—not what was in his contemplation, but what were the natural consequences of the act in importing them. The act of importation must be considered from an objective viewpoint in regard to its natural effect or tendency and considering the nature of the photographs, even although the importation was at the request of a private individual, whose purpose or intention was unknown. *Galletly* v. *Laird*: *M'Gown* v. *Robertson* [1953] S.C. (J.) 16, applied. In the present case, the act of importation had "an immoral or mischievous tendency", in that the photographs themselves would tend to deprave or degrade the minds of a person or persons who might view such photographs, be that person or persons the customer himself, or guests to whom he might exhibit them, or other persons into whose possession they might pass by gift or loan. The quantity imported was also not without importance in considering this aspect. *Bank of New South Wales* v. *Piper* [1897] A.C. 383, followed. *Technical Books Ltd.* v. *Collector of Customs.* (S.C. Wellington. April 16, 1957. McGregor J.)

INTERNATIONAL LAW.

Egypt, Hungary, and the United Nations. *35 Canadian Bar Review*, 38.

LAND SETTLEMENT PROMOTION.

Land used by Company for Commercial Growing of Pine Trees, and intended to be so used in Perpetuity—Part of Land from which Timber milled held for Second Crop of Trees—Such Land not "farm land"—Land Settlement Promotion Act 1952, ss. 2 (1), 23, 24 (1). The company applied for the Court's consent to the purchase of 1,330 acres of land. The company already owned an area of 1,743 acres, situated in the vicinity of, and at one point adjoining, the area proposed to be purchased, which had been used since its purchase in or about the year 1925 for the growing of pine trees as a commercial enterprise, and was intended to be so used in perpetuity. This area had been planted with trees, and the first of them came to maturity in 1949, from which time from 100 to 125 acres had been milled annually, so that the area of forest mature, or approaching maturity, had been reduced to between 800 and 900 acres. The company regarded the land from which the timber had been milled as at all times an integral part of its pine forest, and claimed that it was producing a second crop of trees, in progressive stages, by natural regeneration. The Crown contended that the milled areas were neglected, and showed little evidence of regeneration, and that the land should be devoted to farming. On the preliminary question whether the company's present property or any part of it was "farm land" within the meaning of the Land Settlement Promotion Act 1952, *Held*, That the land was not "farm land" within the meaning of that term as defined in s. 2 of the Land Settlement Promotion Act 1952, in that it was not being used for agricultural purposes, and no part of it ought to be so used. *In re a Sale, Exton to Grenville* [1951] N.Z.L.R. 636, followed. Accordingly the company did not require the consent of the Court to its proposed purchase of additional land, even though that land might itself be "farm land". *In re A Proposed Sale, Hunt and Another to Nelson Pine Forest Limited.* (L.V.Ct. Nelson. April 2, 1957. Archer J.)

LANDLORD AND TENANT.

Nuisance—Storm-water causing Damage to Stock in Basement occupied by Lessee—Covenant by Lessor "not to do or suffer any act or omission which will be a nuisance to the lessee"—Covenant giving Lessee Right of Action for Landlord's "omission" resulting in Actionable Nuisance—Damage caused by Inadequacy of Corporation Sewer and not due to Deficiency in Lessor's Water-pipes, Gully-traps or Drains—Absence of Emergency Overflow Pipe on Premises—None existing when Lessor took Its Lease—Lessee bound to take Premises as He found Them. The lease of the ground floor and basement of a building gave the lessee thereof the right to use a loading dock at the rear of the building for loading and unloading goods, and a space between the back door of the demised premises and the landing-stage (referred to as "the courtyard") for the carriage of goods by the overhead hoist erected by the lessee. On February 6, 1955, storm-water collected in the courtyard in consequence of its failing to drain from the trap in the courtyard. Such storm-water overflowed into the basement occupied by the lessee, causing damage to stock. It was held that the probable cause of the flooding of the courtyard was the coincidence of heavy rainfall and high tide, resulting in a temporary inadequacy of the City Corporation's storm-water sewer, and not any deficiency in the lessor's storm-water pipes, gully-traps and drains. Clause 16 of the lease was as follows: "The lessor will not throughout the said term permit to be carried on in any part of the building of which the demised premises form part any business or trade in competition with that of the lessee nor do or suffer to be done any act or omission which will be a nuisance to the lessee or the customers of the business carried on by the lessee in the demised premises". The lessee claimed damages from the lessor in respect of the damage caused to its stock, alleging three separate causes of action: breach of covenant on the lessor's part, actionable nuisance, and negligence. *Held*, 1. That the word "nuisance" as used in cl. 16 of the lease was to be construed in its legal technical sense; and the covenant gave an action only for an "omission" which resulted in a legal actionable nuisance. *Harrison* v. *Good* (1871) L.R. 11, Eq. 338, followed. 2. That the purpose and effect of the covenant was to extend the obligations of the lessor in respect of nuisance so as to bind it not to suffer any tenant to create or continue a nuisance; and even though the word "nuisance" be given its technical and legal meaning, the covenant did not add to the normal legal obligations of the lessor; and, as actionable nuisance was not established, the claim on the covenant failed. 3. That the damage did not arise from any neglect of maintenance of the gutters and the downpipes leading into the gully-traps in the courtyard; and the lessee was bound to take the premises as it found them and could not be heard to complain of the absence of an emergency overflow pipe in the courtyard when none existed when it took its lease of the premises. *Kiddle* v. *City Business Properties Ltd.* [1942] 1 K.B. 629; [1942] 2 All E.R. 216, applied. *Bishop* v. *Consolidated London Properties Ltd.* (1933) 102 L.J. K.B. 257, and *A. Prosser and Son Ltd.* v. *Levy* [1955] 1 W.L.R. 1224; [1935] 3 All E.R. 577, distinguished. *British Office Supplies Auckland Ltd.* v. *Auckland Masonic Institute and Club.* (S.C. Auckland. April 18, 1957. Shorland J.)

LIMITATION OF ACTION.

Actions against Public and Local Authorities—Time for bringing Action—County's General Solicitor agreeing with Intended Plaintiff's Solicitor to Extension of Time without Limit, for bringing Action—County, with Knowledge, raising No Objection to giving of Such Consent—Action brought later—Statement of Defence alleging No Notice in Writing and Action brought out of Time—Consent dispensing with Notice and Bringing of Action within Limitation Period—County estopped from denying Its Solicitor's Authority—Leave of Court not required by Plaintiff—Limitation Act 1950, s. 23 (1). On December 18, 1953, the plaintiff suffered injury by lead poisoning while an employee of the County. Before December 10, 1954, the County's general solicitor agreed with the plaintiff's solicitor that it was unnecessary for proceedings to be begun at that stage, and agreed to a general extension of time for the bringing of the proposed action, of which the plaintiff's solicitor had then given notice to him. He informed the County Council accordingly, and the Council received his letter and raised no objection to the course he had taken. On June 13, 1956, the plaintiff issued a writ against the County, claiming general and special damages. The County's statement of defence alleged that no notice in writing, as required by s. 23 (1) (*a*) of the Limitation Act 1950, had been given as soon as practicable after the accrual of the cause of action; and that the action was brought after the time fixed by the statute for bringing such action as of right. On the plaintiff's motion for an order extending the time to bring the action, which, at that stage, had been brought, *Held*, 1. That the consent given by the County solicitor was within the third proviso to s. 23 (1) of the Limitation Act 1950, and, in the terms of the proviso, it excused or dispensed with not only the statutory requirement contained in the main part of the subsection to bring the action within the limitation period, but also the requirement of giving a written notice as soon as practicable after the accrual of the action. 2. That, on the facts, the County, with full knowledge that its general solicitor had given the consent, continued to allow the plaintiff and his advisers to treat and rely upon that consent as one given by an authorized agent on behalf of the County. 3. That the County could not impugn or repudiate the authority which its solicitor purported to exercise; and, as the County, knowing him to have purported to have exercised that authority, stood by and allowed that situation to continue until it filed its defence in the action, it was thereby estopped from denying authority. 4. That, accordingly, the plaintiff, as he was within the third proviso of s. 23 (1), did not need the leave of the Court to bring the action. *Roberts* v. *Uawa County* (S.C. Gisborne. March 8, 1957. Shorland J.)

MASTER AND SERVANT.

Scope of Authority—Bailment—Charter of Aircraft from Club by Club Member for flying it Himself to transact Business for His Employer—Aircraft destroyed in consequence of Such Employee's Negligence—Claim against Employer for Value of Aircraft—True Basis of Claim arising from Relationship of Bailor and Bailee—Employer liable only if Employee had Actual or Ostensible Authority to enter into Such Relationship—No Evidence to support Jury's Finding of Employer's Responsibility—Use of Aircraft for Self-piloted Flight so Radical a Departure from Authorized Mode of Travel as not to be regarded as a Mode of doing what was authorized. S., a member of the plaintiff aero club, chartered from the club an aircraft for the purpose of flying it to Oamaru, where he transacted business for the defendant company, of which he was a sales manager and a director. He carried as a passenger on the flight, W., a salesman employed by the defendant company. On the return flight, the aircraft crashed and was totally destroyed, in consequence of negligence on the part of S.; and S. and W. were both killed. W.'s widow recovered damages from the defendant company, on the ground that, although the flight was unauthorized by the company, S. had authority to direct and control W. in his work, and W. was killed as a result of the negligence of S. in the course of his exercise of such direction and control: *Wright* v. *John H. Stevenson Ltd.* [1953] N.Z.L.R. 708. The aero club now claimed the value of the aircraft from the company. The jury in this action, by a majority of nine to three, answered in the affirmative the following issue: "Was it within the scope of [S.'s] ostensible authority on behalf of the company to adopt the mode of transport which he did adopt?". *Held*, That there was no evidence to support the jury's finding of responsibility on the part of the company. For the reasons: 1. The cause of action relied upon was that S. was negligent as hirer of the aircraft and that the company, as master, was liable for that negligence. The true basis of the claim arose from the relationship of bailor and bailee, and the company was liable only if S. had actual or ostensible authority to enter into that relationship. It was not claimed that he had actual authority, and, on the facts, there was no evidence to support a finding of ostensible authority. 2. Even if the club could seek to support its action on the basis that it was a total stranger whose property was damaged by a casual act of negligence during the performance of work by a servant, the use of an aircraft for a self-piloted flight was so radical a departure from the authorized means of travel that it could not be regarded merely as a mode (albeit a wrongful or improper mode) of doing what was authorized. 3. *Wright's* case, *supra*, was distinguishable, because the factor upon which that decision was based—namely, the actual authority of S. to direct and control W. in his work—was not relevant to the case of the aero club, which must rest on the authority which was proved qua the club. Judgment was entered for the defendant company. *Otago Aero Club (Incorporated)* v. *John H. Stevenson Ltd.* (S.C. Dunedin. March 27, 1957. Henry J.)

SPECIFIC PERFORMANCE.

Laches and Specific Performance. *101 Solicitors' Journal*, 331.

TRUSTS AND TRUSTEES.

Trustee Charging Clauses. *228 Law Times*, 191.

WILL.

Revival of Wills. *107 Law Journal*, 228.

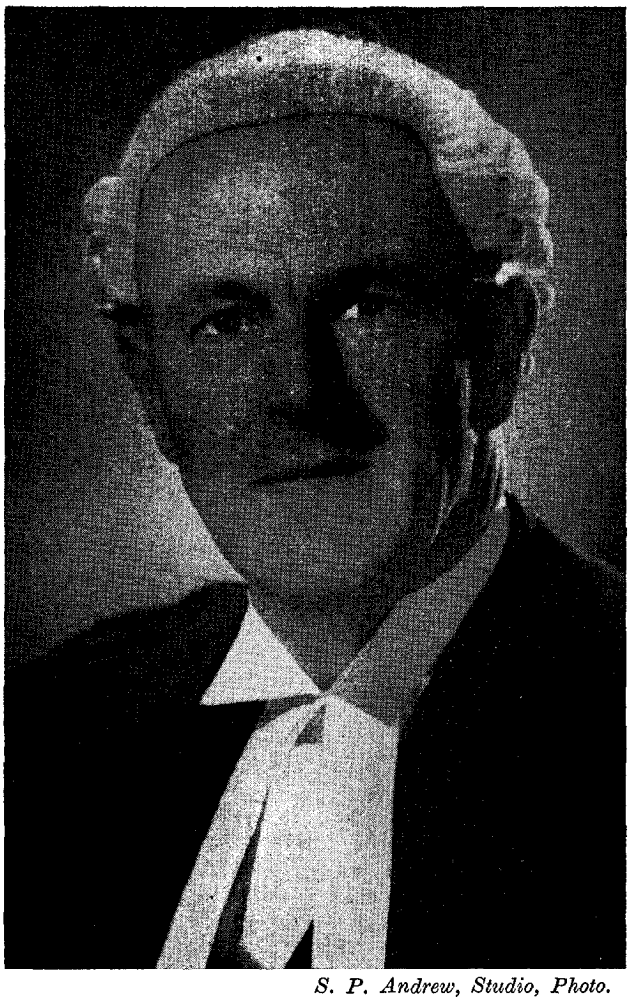
THE OFFICE OF SOLICITOR-GENERAL.

A Retirement and an Appointment.

In 1945, Mr H. E. Evans Q.C. was appointed Solicitor-General. It was then said of him in these columns that he would bring to this high office "not only a thorough knowledge of the law and a capacity to express in clear and analytical form the results of concentrated research into the most abstruse legal problem, but also an ardent desire to do all in his power to uphold the dignity of his office and the fundamental principles of justice and honourable dealings between men".

Now in his 73rd year, Mr Evans has retired. As we look back on the twelve years during which he was Solicitor-General there is no doubt in the minds of all who know him that he fulfilled the high expectations expressed at the time of his appointment. He held the office during the difficult post-war years, and he never spared himself. The *Law Reports* over the period record just one phase of the work he did, and reported arguments and results speak for themselves. He will be missed in the Courts, and he will be missed by all who had dealings with him. As a citizen and as a lawyer, his contribution has been a very fine one; and a younger generation, as well as his own contemporaries, will remember him with affection and respect.

Mr Evans before his appointment, was a member of the firm now known as Messrs Bell, Gully and Co. His successor, Mr H. R. C. Wild, also comes from that firm which over the years has filled many vacancies in high places.



S. P. Andrew, Studio, Photo.

Mr H. R. C. Wild,
The New Solicitor-General.

The appointment of Mr Wild as Solicitor-General has been received with general satisfaction by the profession throughout New Zealand. The profession knows that he is well equipped for this important post, and all are confident that he will live up to the highest standards set by those who have gone before him.

The eldest son of Dr L. J. Wild, Pro-Chancellor of the University of New Zealand, the new Solicitor-General was born in Blenheim in 1912. He was educated at Fielding Agricultural High School, where his father was headmaster, and went on to Victoria University College to graduate LL.M. (Hons.) in 1934.

At University, he was prominent in sport and student affairs. He won a Blue in boxing, played Rugby for Victoria University College for some years in the first fifteen, and represented New Zealand Universities (including a tour of Japan) and Wellington. He was president of the Students' Association, chairman of the Inter-University Easter Tournament Committee, and a nominee for Rhodes Scholarship.

From the firm of Messrs Bell, Gully, Mackenzie and O'Leary, he went as a clerk to Mr H. F. O'Leary when the late Chief Justice took silk in 1935, and he was afterwards senior clerk to the late Mr W. P. Rollings. In 1939, he commenced practice in Wellington on his own account; but, following the outbreak of war, he entered camp and left for the Middle East in 1940. He served with the Second New Zealand Division until 1945, rising to the rank of Major and being Mentioned in Dispatches.

On his return to New Zealand in 1945, Mr Wild joined the firm of Messrs Bell, Gully and Co. as a partner. In the twelve years that have followed, he has had a wide experience in the law, and has been engaged as counsel before a number of commissions and Licensing Authorities, as well as appearing in important litigation in the Supreme Court and Court of Appeal. Among the cases in the Court of Appeal in which he has taken part are *In Re Rayner, Daniell* v. *Rayner* [1948] N.Z.L.R. 455 and *New Zealand Insurance Company Ltd.* v. *Commissioner of Stamp Duties* [1954] N.Z.L.R. 239. He was a member of the Commission of Inquiry into War Pensions in 1950. In the Police Commission of Inquiry in 1953-1954, he represented the former Commissioner, Mr E. H. Compton, and in 1954 he appeared for the prosecution in the trial of the Niue murderers, later arguing the appeal in the Court of Appeal: [1954] N.Z.L.R. 594.

For a time he lectured in Commercial Law at Victoria University College and with Mr D. A. S. Ward was co-author of a students' text-book, *Mercantile Law in New Zealand*. He has been an examiner for the University in various law subjects.

Mr Wild has been a member of the council of the

Wellington District Law Society for four years. In 1947, he was appointed legal adviser to Army Headquarters at Wellington; and, following alterations in the administration of military law, he succeeded Colonel C. A. L. Treadwell as Judge Advocate General.

As this biographical sketch suggests, Mr Wild is a hard worker and possesses powers of concentration and a keen analytical mind. These attributes, together with an understanding of his fellow-men and a sense of humour have brought him well-deserved success. Already steeped in the best traditions of the law, and respected by his brethren of the Bar, he is well fitted to fulfil the important duties of Her Majesty's Solicitor-General.

Mr. Wild's appointment has given great satisfaction and pleasure to his fellow-practitioners, all of whom appreciate his excellent qualities of mind and heart. They wish him many happy years in his high office.

AIR SERVICES LICENSING.

By J. F. NORTHEY, B.A., L.L.M., Dr Jur. (Toronto.)

Portions of the Air Services Licensing Act 1951 have been examined in an earlier article.[1] Certain other and more general questions will now be considered. It is proposed to discuss in turn.

(I) The history of air services licensing.
(II) The jurisdiction of and procedure followed by the Air Services Licensing Authority.
(III) The jurisdiction of and procedure followed by the Air Services Licensing Appeal Authority.
(IV) The considerations to be taken into account by these authorities.
(V) The jurisdiction of and procedure followed by the International Air Services Licensing Authority.
(VI) Conclusions.

I. History of Air Services Licensing.

Licensing of internal air services was provided for in the Transport Licensing (Commercial Aircraft Services) Act 1934. The Transport Co-ordination Board acted as the licensing authority until it was replaced in 1936 by the Minister of Transport.[2] The Minister in charge of Civil Aviation became the licensing authority in 1945.[3] A further change was made in 1948 when the Minister in charge of the Air Department was assigned this responsibility.[4] In 1951, the present authority was created by the Air Services Licensing Act 1951. From decisions of the Air Services Licensing Authority appeals can be taken to the Appeal Authority.

The licensing of international air services was not required by the above legislation. Licensing in terms of the International Air Services Licensing Regulations 1947[5] was replaced by the system established by legislation later that year.[6] The Minister in charge of Civil Aviation is the licensing authority.

It is unlawful to operate an air service without a licence as required by these Acts.

II. The Air Services Licensing Authority.

The Act of 1951 marked an important change in policy towards the licensing of internal air services. Before the coming into force of the Air Services Licensing Act 1951, the Minister in charge of the Air Department, who was the licensing authority, referred all applications for licences to the National Airways Corporation for report before taking a decision. The Minister in charge of Civil Aviation in moving the second reading of the 1951 Bill said that the former system had three disadvantages: [7]

> "First, it threw too great a responsibility on the Minister in issuing licences. Secondly, it did not give an applicant the chance to state his case at an open hearing, or to hear and reply to objections. Thirdly, it carried no right of appeal."

The Bill was justified on these grounds. Admittedly, there was ample precedent in other legislation for the establishment of a tribunal to consider such questions as applications for air services licences. But it was not altogether inappropriate that the Minister should continue as the licensing authority. Among the matters to be taken into account by the licensing authority,[8] is the value of the service and aircraft for the purposes of defence or emergency. This is a question of policy which the Minister should be the best person to judge. But what was probably decisive was the need to establish an appeal authority; and to have the Minister acting as licensing authority beneath an appeal body was doubtless conceived to be inappropriate. No one could gainsay the advantages to be derived from an oral hearing and the existence of appeal rights. On balance then, the change in policy is to be commended.

Jurisdiction.—The Air Services Licensing Act 1951, the terms of which were considerably influenced by the Transport Act 1949, establishes a single Licensing Authority of three persons to consider applications for licences.[9] The Authority is a part-time tribunal which is liable to be asked to conduct a hearing in any part of the country.[10] The remuneration of the chairman (£6 6s.—formerly £4 4s.—per day or part of a day, plus travelling expenses) and members of the Authority (£5—formerly £3 3s.—per day or part of a day, plus travelling expenses) is quite inadequate, having regard

[1] *29 New Zealand Law Journal* (1953), 123, 140, 157.
[2] Transport Licensing Amendment Act 1936.
[3] Statutes Amendment Act 1945, s. 93.
[4] New Zealand National Airways Amendment Act 1948.
[5] S.R. 1947/67.
[6] International Air Services Licensing Act 1947.
[7] New Zealand Parliamentary Debates, November 27, 1951, 1113.
[8] Under s. 18 (1) (*c*). In practice, however, this consideration has not been of major importance. The considerations listed in s. 18 (1) (*a*) and (*b*), are those which have almost decisive effect on the application.
[9] Section 3. Under the Transport Act there are eleven district licensing authorities and four metropolitan authorities. The larger number of applications for road transport licences clearly justifies the decentralization of that class of licensing.
[10] There is no provision compelling the Authority to conduct a hearing in the locality to which the application relates, but it has travelled to that most convenient to the parties. See s. 8 (2).

to the importance of its functions and the qualifications of its members.[11]

The Authority consists of a chairman who is a lawyer[12] and two other members. To date, only four persons have been appointed as members; their previous experience has been gained in accountancy, business or in the Air Force. It is difficult to see how persons better qualified could have been appointed. In fact, in view of the token remuneration offered, it is surprising that it has been possible to secure members ready to act. There are very few persons who possess a knowledge of civil aviation problems, and who are not at the same time interested, in a financial or official capacity, in air services. But members of a tribunal who have acted in that capacity for a number of years acquire, if they did not possess it in the first instance, a sufficient knowledge of the industry and its problems to make informed judgments on applications submitted to it for consideration. Although there have been some criticisms of the decisions of the Authority,[13] it is believed that it enjoys the confidence of those who are concerned with civil aviation.

The term of office of members is three years, but they may be reappointed.[14] Appointments are made by the Governor-General on the recommendation of the Minister in charge of Civil Aviation.[15] These provisions are probably sufficient to protect the independence of the tribunal, but, as a general principle, the shorter the term of office of an officer and the relative ease with which he may be removed, the greater is his dependence on the executive.[16]

The functions of the Authority include the hearing and determining of applications for the grant, and the renewal or transfer of air services licences.[17] It also has the power to fix the charges that may be made for the carriage of passengers and freight. It has the powers of a commission of inquiry under the Commissions of Inquiry Act 1908,[18] and may, therefore, summon witnesses, administer oaths and award costs.[19] The members of the Authority,[20] and counsel and witnesses who appear before it, are protected from actions in respect of what is said or done at a hearing.[21]

An officer of the Air Department acts as secretary to the Authority.[22]

Procedure.—In large measure the procedure of the Authority is determined by the Acts and regulations made thereunder, but it has authority to regulate its own procedure.[23]

Hearing.—Those wishing to secure a licence to operate an air service must apply on the form prescribed[24] to the Air Secretary.[25] Notice of the public hearing must be advertised and given to the applicant at least seven days before the date fixed for the hearing.[26] In practice longer notice is generally given. Other sections also provide for the giving of notice by the Authority.[27] If the Authority proposes to amend or revoke the terms of a licence,[28] or to revoke or suspend a licence,[29] notice must be given to those affected. Notice must also be given to an applicant for a renewal of a licence,[30] or an applicant for a transfer of a licence.[31] It is, therefore, surprising to find that s. 23 (3), which provides for revocation of a licence, if a service has been abandoned or curtailed in breach of the conditions of the licence,[32] makes no provision for a hearing or for the giving of notice to the licensee before the powers are exercised. Though those powers may be used infrequently, it is doubtful if the Authority could or should revoke the licence without giving notice to the licensee.[33]

At hearings to consider applications for a licence or a renewal of a licence,[34] the Authority must hear all evidence tendered and representations made which it deems relevant.[35] The Authority has, in exercise of its discretion under s. 8 (9), adopted a formal procedure. Applicants and other persons interested are usually represented by counsel. The Authority is addressed either as "the Authority" or as "Gentlemen".

The proceedings are conducted in the same manner as a civil case in the Courts; the applicant, whether applying for a new licence, or the amendment of an existing licence, must prove that his case comes within the requirements of s. 18. The applicant opens his case and his witnesses are examined and cross-examined. Depending on the circumstances, either the Authority will question the witness before re-examination or, as is the more usual procedure, the witness will be re-examined and then questioned by the Authority, which always affords counsel the right to ask questions arising out of its own questions. When the application is opposed, the same procedure applies in respect of the objector's case. Counsel are invited to sum up at the end of the evidence.

[11] As to remuneration and travelling expenses, see the Fees and Travelling Allowances Act 1951, ss. 3 & 4.

[12] The practice of appointing a member of the legal profession as chairman of an administrative tribunal is one that should be adopted wherever practicable. Its advantages are obvious, whether the parties are legally represented or not.

[13] Decisions in relation to topdressing have been attacked in the Press.

[14] s. 4.

[15] s. 3 (2). As to removal, see s. 4 (1).

[16] This principle hardly operates here. The remuneration is so poor, and any other benefits so negligible, that the office would not be sought after. In fact, it is merely a form of public service.

[17] s. 11. Except to the extent stated in s. 14, it is unlawful to operate an internal air service without a licence granted by the Authority. See also ss. 15 and 26-29.

[18] s. 12 (1).

[19] Commissions of Inquiry Act 1908, ss. 4 & 11.

[20] s. 7.

[21] Commissions of Inquiry Act 1908, ss. 3 & 9.

[22] See s. 10.

[23] s. 8 (9).

[24] Schedule to the Air Services Licensing Regulations 1952 (S.R. 1952/11).

[25] s. 16. The Air Secretary is required to place before the Authority all relevant information. If this information is not disclosed at the hearing, injustice may result; see p. 174, *post*.

[26] s. 17 (1), (2) & (3).

[27] E.g., ss. 26, 27, 28 & 29 and the Air Services Licensing Regulations 1952, regs. 5-18.

[28] s. 26 requires that seven days' notice be given. As to the meaning and effect of the phrase "every other person who in its opinion is likely to be affected", see *Hyland* v. *Phelan* [1941] N.Z.L.R. 1096.

[29] s. 28 requires that a public inquiry be held and that fourteen days' notice be given.

[30] s. 27 makes s. 17 applicable to such applications. The application must be made not less than twenty-eight days before the expiration of the licence.

[31] s. 29. As to the meaning and effect of s. 29 (3), see the decision referred to in footnote 28, *supra*.

[32] See s. 21 as to the conditions that may be imposed, s. 22 as to the taking out of insurance and s. 23 (2) which requires that the Authority's consent to the abandoning or curtailing of a licence must be secured. See also the Air Services Licensing Regulations 1952, paras. 19 & 20. Presumably, if the operator denied that he had abandoned or curtailed the service, the Authority would take action under ss. 26 or 28 and not under s. 23 (3).

[33] Cf. *29 New Zealand Law Journal* (1953), 125-126.

[34] Other than temporary licences.

[35] s. 17 (4). As to evidence, see pp. 173-174, *post*.

Evidence.—Although witnesses are sworn, the strict rules of evidence are not enforced. Letters from persons not present at the hearing are admitted, although they are not legally admissible evidence. It is doubtful, however, if letters and petitions carry a great deal of weight with the Authority. Their value value cannot be tested by cross-examination. The Authority has accepted information which amounts to hearsay evidence, but it recognizes the dangers inherent in the practice.[36] So long as this is appreciated, no great harm is likely to result from the admission of hearsay. In fact, the deliberations of the Authority may be assisted by this relaxation of the legal rules. Useful information, which can be taken as reliable, despite its being hearsay, may be given to the Authority. Applicants and their witnesses would probably regard any other attitude adopted by the Authority as too narrow or legalistic. Any such evidence that is put in must of course satisfy the test of relevancy.[37] Where a witness tenders evidence that is thought to be hearsay, this can be made apparent by cross-examination and its value determined accordingly. So far as possible, however, applicants should ensure that witnesses are called to establish all relevant facts; as little reliance as possible should be placed on hearsay, i.e., information from persons not present at the hearing.

A distinction must be made between evidence and other information put before the Authority. Reference has already been made to the information supplied by the Air Secretary.[38] Such information is in practice disclosed at the hearing; if this were not done, the applicant might be prejudiced and have grounds for complaint.[39]

Under section 18 (2) (j), the Authority must take into account any evidence or *representations*[40] received at the public hearing and "any representations otherwise made by or on behalf of the New Zealand Government Railways Department, local authorities, or other public bodies, or any persons carrying on transport services of any kind (whether by air, land, or water) likely to be affected, or any officer of the armed forces appointed by the Minister of Defence in that behalf, and any representations contained in any petition presented to it signed by not fewer than twenty-five adult residents of any locality proposed to be served". In respect of such representations, if they are made otherwise than at the public hearing, the Authority must give the applicant, and other persons likely to be affected,[41] a reasonable opportunity of replying to them.[42]

A verbatim record is made of all evidence. Later, it is typed and copies can be secured by those interested in the application. Formerly a charge of 1s. 3d. per page was made. As no fee is paid on application, a charge for the evidence would be reasonable and justified. But the testimony taken in the Bristol topdressing application was so lengthy that a fee of £37 could have been charged for each copy of the testimony. The present practice is to make copies available to those interested either gratis (if there are sufficient copies) or on loan.

Reasons.—The Authority has power, after considering an application, to grant or refuse a licence.[43] Most of the decisions of the Authority are given orally after a short adjournment at the conclusion of the hearing, but some are reserved.

Whether the decision is oral or written, it is the invariable practice of the Authority, through the chairman, to state its reasons. On occasions, when giving an oral decision, the Authority has informed the parties that it reserves the right to amplify its reasons, though not, of course, to vary its decision, by a later written decision. The apparent purpose of this is to inform the Appeal Authority more fully of the reasons for the decision. There is no provision compelling the Authority to state its reasons.[44]

An example of a written decision which was of special interest to those engaged in aerial topdressing[45] is that in relation to the application by Farm Air Services for a licence to operate Bristol aircraft. The Authority, which refused the application, indicates in its written decision that weight had been attached to the following considerations:[46]

(a) The public interest and other considerations listed in s. 18 (1);[47]

(b) The effect upon the aerial topdressing industry and airfields of the introduction of heavy aircraft;

(c) The desirability of defining the area within which a licensee can operate, but at the same time ensuring that a monopoly is not created in any given district;

(d) The views of the Soil Conservation Council and its advisory committee on the aerial topdressing industry and its contribution to the economy;

(e) The persons who were proposing to subscribe the capital required by the applicant;[48]

(f) The market for the applicant's proposed services;

(g) The effect of the granting of the licence on other topdressing operators whose interests should be taken into account.

The advantages of reasoned decisions will be obvious from the above analysis. Not only does the applicant (and others in the industry) know why he succeeded or failed, but those decisions form a body of precedent,

[36] See p. 13 of the decision dated November 26, 1954, delivered by the Authority in relation to the application by Farm Air Services Limited.

[37] s. 17 (4). Cf. s. 37 as to evidence in proceedings before the Appeal Authority.

[38] See s. 16 (2) and footnote 25, *ante*.

[39] See *29 New Zealand Law Journal* (1953), 124.

[40] See also s. 17 (4), under which the Authority must hear all relevant representations as well as evidence tendered. See also the judgment of F. B. Adams J. in *Short* v. *Auckland Transport Board* [1951] N.Z.L.R. 808, 811-812.

[41] As to the meaning of these words, see *Hyland* v. *Phelan* [1941] N.Z.L.R. 1096.

[42] See the remarks of F. B. Adams J. in *Short* v. *Auckland Transport Board* [1951] N.Z.L.R. 808, 811-812, on a similar provision in the Transport Act 1949.

[43] s. 19. As to the conditions that may be prescribed, see ss. 21 and 22 and the Air Services Licensing Regulations 1952, regs. 19 and 20.

[44] In this respect, the Air Services Licensing Act departs from the Transport Act, which requires that reasons be assigned.

[45] See the definition of "air service" contained in the Air Services Licensing Act 1951, s. 2, as amended by the Air Services Amendment Act 1955, s. 2.

[46] See s. 18 and p. 176, *post*, for a discussion of the relevant statutory provisions.

[47] Only if the applicant satisfies the Authority as to compliance with s. 18 (1) will the Authority proceed to examine the questions listed in s. 18 (2); see p. 176, *post*.

[48] In that case, some of the proposed members were stock and station agents who controlled the distribution of fertilizer. They could have influenced its allocation and favoured those farmers who intended to use the applicant's services.

useful to the Authority and to those representing applicants before the Authority. From them it is possible to determine the considerations to which the Authority attaches weight and their relative importance.

The Secretary to the Authority has prepared a six page explanatory note for the guidance of applicants. This is a good practice. It makes it easier for the applicants and their counsel to prepare their submissions. This note indicates the way in which the Authority exercises its functions; taken together with reasoned decisions,[49] it is likely to create confidence in the Authority.

The major work of the Authority has been in relation to the aerial topdressing industry. Formerly, licences were sought for other types of aerial farm work, such as rabbit-poisoning and supply-dropping, but since October, 1955,[49A] licences in respect of aerial farm work are necessary for topdressing only. It has been the policy of the Authority since its inception to restrict licences to given areas which generally include the whole or a substantial part of a provincial district. The Authority opposes monopolies and in every district for which licences have been sought at least two and generally many more operators have been licensed. In cases of new applications or when operators seek to increase their fleets or enlarge their areas, the Authority has laid down three principles as a general guide. It is for the applicant to prove on the balance of probabilities either that there is new business available, not at the expense of existing operators, or that there is reasonable evidence of dissatisfaction amongst the farming community with the licensed operators in the area concerned, or that the area has not been adequately serviced by the existing operators. At the same time, the Authority has emphasized that these principles are intended to be no more than a guide which may be departed from if the circumstances require. In a number of cases the Authority has decided the matter apart from these principles.

III. The Air Services Licensing Appeal Authority.

Jurisdiction.—Appeals from decisions of the Licensing Authority may be taken to the Appeal Authority.[50] The Authority, who must be a barrister and solicitor of not less than seven years' standing,[51] is appointed by the Governor-General.[52] He may hold the office concurrently with another office. The present Authority[53] holds numerous other offices[54] which can, however, be conveniently combined with his functions under the Air Services Licensing Act. Only five appeals have been taken to the Appeal Authority; this shows that the Licensing Authority's decisions give general satisfaction.

Procedure.—Subject to the provisions of the Act, the Appeal Authority has power to determine his own procedure.[55] Pending the determination of the appeal, the licensee may carry on the service in terms of the decision of the Licensing Authority.[56]

Hearing.—There is a right of appeal conferred by s. 40[57] which must be exercised within twenty-one days of the decision appealed against. The appeal must be on the form prescribed[58] and is sent to the Air Secretary. The Licensing Authority must send to the Appeal Authority a copy of any notes of evidence taken by it.[59] The Appeal Authority then fixes a time and place for the hearing and must give not less than fourteen clear days' notice to the public, to the appellant, and to the holder or applicant for any licence to which the appeal refers.[60]

As a general rule, a public hearing takes place before the Appeal Authority, but he may order that the hearing, or part of it, shall be held in private.[61] The place at which the hearing shall take place is at the discretion of the Appeal Authority.[62] An order prohibiting publication of the proceedings may be made by the Authority.[63]

The hearing is a formal one with most of the parties represented by counsel. As it is a rehearing of the original application, the evidence taken before the Licensing Authority must be adduced before the Appeal Authority.

Evidence.—The Appeal Authority has the powers of a Commission of Inquiry,[64] and may, therefore, compel the attendance of witnesses and administer oaths.

The Authority is permitted to receive as evidence materials which are not legally admissible so long as they are likely to assist him to dispose of the issues before him.[65] In other respects, the Evidence Act 1908 shall be as binding on the Authority as if he were a Court.[66] The Authority is required to hear all evidence and representations made,[67] provided they are relevant.[68]

The Appeal Authority has proceeded on the basis that the appellant must discharge the onus of proving that the decision of the Licensing Authority was demonstrably wrong. He has pointed out that the Licensing Authority is a highly qualified and experienced body, whose findings will not be departed from unless they are clearly wrong. The onus on the appellant is such that it will be extremely difficult to discharge.

Reasons.—The Authority has power to confirm, modify or reverse the decision appealed against.[69] He may also decide instead of determining the appeal to direct the Licensing Authority to reconsider the matter.[70] If this course is followed, the decision

[49] Copies of decisions are made available to the parties. Others interested can also secure copies on application to the Secretary.

[49A] Air Services Licensing Amendment Act 1955, s. 2.

[50] s. 36.

[51] s. 34 (1).

[52] s. 33.

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[54] Including that of Appeal Authority under the Transport Act 1949.

[55] s. 39 (4). Reference should be made to ss. 37, 39, 40, 41, 43, 44 and 45 and the Air Services Licensing Regulations 1952, regs. 21 and 22.

[56] s. 42.

[57] Only those mentioned in s. 40 (2) as amended may appeal. It is surprising that a right of appeal is conferred on persons who were parties to the decision appealed from; see p. 178, *post.*

[58] s. 41 (1) and the Air Services Licensing Regulations 1952, reg. 21.

[59] s. 41 (3).

[60] s. 41 (4).

[61] s. 39 (1).

[62] *Ibid.*

[63] s. 39 (3).

[64] s. 37 (3).

[65] s. 37 (1).

[66] s. 37 (2).

[67] As to representations as distinct from evidence, see, *ante*, p. 174.

[68] s. 43 (1).

[69] s. 43 (2).

[70] s. 44 (1).

appealed from has no effect,[71] and the Licensing Authority is to consider the application as if no decision had been made.[72] The Appeal Authority must state its reasons for referring the matter back to the Licensing Authority, which must have regard to those reasons when reconsidering the application.[73]

There is no other provision compelling the Appeal Authority to state its reasons for the decision. In fact, the Appeal Authority does give reasoned decisions which are notified to the parties by the Air Secretary.[74] This practice is commended.[75]

IV. The Relevant Considerations.

The Licensing Authority, and presumably the Appeal Authority,[76] must have regard to the matters enumerated in s. 18 when considering an application for a licence. Before proceeding to consider the questions mentioned in s. 18 (2) the Authority must be satisfied that:

(a) The service is necessary or desirable in the public interest;

(b) That existing transport services are not adequate;

(c) That the proposed service will be valuable in a national or local emergency.[77]

If the Authorities have decided that the service is unnecessary or undesirable on these grounds, the application must be refused.[78] If they have not, they must proceed to take into account:

(a) The financial ability of the applicant to carry on the proposed service;[79]

(b) The likelihood of the applicant's carrying on the proposed service satisfactorily, and, in the case of an existing service, the manner in which it is carried on;

(c) The time-tables or frequency of the proposed service;

(d) The proposed fares and charges for the carriage of passengers or goods;

(e) The transport services of any kind (whether by air, land, or water)[79] already provided in respect of the localities to be served, and in respect of the proposed routes;

(f) The transport requirements of any such localities;[79]

(g) The aircraft proposed to be used in connection with the service;

(h) The type and suitability of the aerodromes proposed to be used, and the facilities thereat for services of the type in respect of which the application is made;

(i) The desirability in the public interest of re-establishing in civil life discharged servicemen within the meaning of Part I of the Rehabilitation Act 1941;

(j) Any evidence or representations received by it at the public hearing, and any representations otherwise made by or on behalf of the New Zealand Government Railways Department, local authorities, or other public bodies, or any persons carrying on transport services of any kind (whether by air, land, or water) likely to be affected, or any officer of the Armed Forces appointed by the Minister of Defence in that behalf, and any representations contained in any petition presented to it signed by not fewer than twenty-five adult residents of any locality proposed to be served;[80]

(k) Such other matters as may be prescribed by regulations in that behalf.

Applicants must establish a prima facie case under s. 18 (1) for the grant of a licence and then lead evidence as to the considerations listed in s. 18 (2).

Charges.—When granting a licence, the Authority has power to fix the charges to be made for the carriage of passengers and freight.[81] It is manifest, however, that the Authority has been reluctant to become a price-fixing tribunal. This is apparent, particularly in the aerial topdressing industry. Initially, and largely because of representations made at the time by existing operators, the Authority imposed a maximum of £14 10s. 0d. and a minimum of £11 0s. 0d. per flying hour for light aircraft in the North Island. In the South Island, by reason of the different circumstances there, these limits were £15 0s. 0d. and £11 0s. 0d. respectively. In more recent years, however, the industry has changed over to a substantial extent to more modern and medium aircraft, and as yet no charges have been prescribed in respect of these aircraft. In the cases of the few large twin-engine aircraft authorized to be operated in aerial topdressing work, the charges have been prescribed.

In the case of ordinary passenger and freight services such as those carried out by National Airways Corporation or feeder services, the Authority relies mainly on the evidence submitted by the applicant[82] and, in general, conditions relating to these fares and charges are included in the licence.

The charges are fixed with a view to giving the average efficient operator a reasonable return on his capital after costs have been met.

The recent decision of the Authority, after its review of the conditions attaching to the licences granted to National Airways Corporation and Straits Air Freight Express Ltd. for the carriage of freight across Cook Strait, contains a thorough examination of the powers of the Authority in relation to charge fixing. It was argued by the New Zealand Shipowners' Federation that as the charges made by the operators were unfair and uneconomic, those offering sea freight services were

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[71] The air service may, however, be carried on in terms of s. 44 (3).

[72] s. 41 (3).

[73] s. 44 (4).

[74] s. 45. See also the *Air Services Licensing Regulations* 1952, reg. 22.

[75] See, *ante*, pp. 174-175.

[76] There is no express provision making s. 18 binding on the Appeal Authority, but that is clearly the intention.

[77] This is a paraphrase of s. 18 (1).

[78] See p. 3 of the decision referred to in footnote 36, *ante*.

[79] The decisions delivered by the Authority show that particular attention should be directed to those questions by applicants. The relevance of other transport services was discussed in the decision of November 7, 1956, given after the review of the licences of National Airways Corporation and Straits Air Freight Express Ltd.

[80] The proviso to this paragraph reads:

"Provided that, before taking into consideration any adverse representations made otherwise than at the public hearing, the Licensing Authority shall give the applicant and all other persons likely to be affected a reasonable opportunity to reply to the representations."

See the judgment of F. B. Adams J., referred to in footnote 40, *ante*.

[81] s. 21 (1) (*e*).

[82] s. 30 and the Air Services Licensing Regulations 1952, reg. 20, require that accounts be kept and returns made to the department by all operators.

at a competitive disadvantage. The Authority was asked to direct that the cost structure of National Airways, and the method of calculating rail-air freights, be determined on, or related to, the principles accepted for the sea services. Although the Authority possessed the power under s. 21 (*d*) to prescribe charges, it considered that its powers were far too limited for it to deal effectively with the important national issues raised by the shipowners. It acknowledged that sea transport was of paramount importance in the carriage of freight between the North and South Islands. It decided that, although the subsidy payments to the air services permitted lower freight rates to be charged, this was a matter of Government policy outside the jurisdiction of the Authority. It also decided that the sea services had not proved that their loss of freight was of significant proportions having regard to development of air services. It ordered only a slight modification in the discounts granted by the air services. The decision was probably disappointing to the shipowners, but it showed that the question of rate-fixing is a complex one. The Authority was reluctant to inquire into the allegations of unsound costing principles, or to intervene in other questions of internal management. This reluctance stems not from any acknowledged weakness in the Authority itself but from a recognition that its function is to fix minimum and maximum charges, and for the air service operators to decide within the limits set how its tariff is to be prepared.

V. International Air Services.

The licensing of international air services is governed by the International Air Services Licensing Act 1947.[83] All persons wishing to operate an international air service, to and from New Zealand, must secure a licence[84] from the Minister in charge of Civil Aviation.[85] It is not necessary to examine in detail the provisions of the above Act, partly because many of its provisions are similar to those contained in the Air Services Licensing Act 1951, but more especially because few applications are received. In fact, licences are granted to air lines incorporated abroad only if a bilateral agreement between New Zealand and the country concerned has been made in relation to the service.[86] The overseas air lines that have been licensed are Canadian Pacific Airways and Pan-American World Airways. National Airways Corporation and Tasman Empire Airways have also been licensed, but they are incorporated in New Zealand.

The Minister, when granting a licence, may impose such conditions, including the amounts and rates of fares and charges, as he thinks fit.[87] The traffic rights enjoyed by the operator are stated in the licence, but, in fact, those have already been determined in the case of an overseas air line by the bilateral agreement. It is natural that the licensing of international air services should be retained in the hands of the Minister, and that he should act in terms of an existing bilateral agreement. His duties are not onerous, and he is merely acting as the instrument of Government policy. New Zealand is simply adopting the same attitude as overseas governments which only grudgingly concede the right to operate an international air service, and then as a rule only on the basis of reciprocity, i.e., a quid pro quo is exacted as the price of the concession.

VI. Conclusions.

The Courts have not yet been required to review a decision given by any of the air services licensing authorities. The Court's powers of review are curtailed by statutory provisions,[88] which are similar to the provisions in other statutes creating administrative tribunals.[89] Provisions such as these raise a number of questions, but two main problems arise—first, what is the meaning of the phrase "lack of jurisdiction," and secondly, does the existence of an appeal right to an administrative tribunal under the Air Services Licensing Act 1951 affect the right of a party to secure a judicial remedy at common law.[90]

The importance of civil aviation and air services is increasing. According to a recent statement,[91] for the year ended March 31, 1956, 85,554 hours were flown by those engaged in aerial topdressing, or other agricultural services, as against 60,252 hours flown by commercial scheduled air services. In 1950, 5,000 tons of superphosphate was spread from aircraft, as against 400,000 in the past year. Only five firms were engaged in the industry in 1949-1950, but there are now sixty firms engaged, and about 680 aircraft employed in the industry. The value of the service provided has already been demonstrated.

There are a number of provisions which deserve mention. Those who may appeal against a decision of the Licensing Authority are enumerated in s. 40 (2). This is a curious section in that it confers a right of

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[83] As amended by the International Air Services Licensing Act 1951.

[84] s. 4.

[85] s. 5.

[86] Because of this fact, some of the provisions of the Act are virtually inoperative, and were based upon the legislation in relation to road transport services. Consider, e.g., the relative unsuitability of s. 6 (which provides for a payment of a fee of £3 when the application is lodged), s. 7 (providing for the giving of public notice of the application), s. 12 (as to the keeping of a register of licences), and s. 15 (as to renewal of licences).

[87] s. 9.

[88] The Air Services Licensing Act 1951, s. 32, as to the Licensing Authority provides:

"Proceedings before the Licensing Authority shall not be held bad for want of form. Except on the ground of lack of jurisdiction, no proceedings or decision of the Licensing Authority shall be liable to be challenged, reviewed, quashed, or called in question in any Court, but any decision of the Licensing Authority may be appealed against in accordance with the provisions of Part III of this Act."

s. 38 (as to the Appeal Authority) provides:

"Proceedings before the Appeal Authority shall not be held bad for want of form. No appeal shall lie from any order of the Appeal Authority and, except on the ground of lack of jurisdiction, no proceeding or order of the Appeal Authority shall be liable to be challenged, reviewed, quashed, or called in question in any Court."

The International Air Services Licensing Act 1947, s. 19, provides:

"(1) Proceedings before the Minister under this Act shall not be held bad for want of form.

"(2) No appeal shall lie from any decision made by the Minister under or for the purposes of this Act, and, except upon the ground of lack of jurisdiction, no proceeding or decision as aforesaid shall be liable to be challenged, reviewed, quashed, or called in question in any Court."

[89] The exact scope and effect of such privative clauses is a matter of some doubt, but *cf. 29 New Zealand Law Journal* (1953), 125-126, 140-142, 157-158, and the authorities there cited.

[90] This too is a general question, but *cf. 11 Halsbury's Laws of England*, 3rd ed., 84-85 (mandamus), 140 (certiorari), 115 (prohibition) and *Barnard* v. *National Dock Labour Board* [1952] 2 Q.B. 18; [1953] 1 All E.R. 1113 (declaration). It is clear, however, that non-compliance with the statutory provisions will be treated as depriving the Authority of jurisdiction, e.g., if the provision as to notice (which is presumably mandatory) was not satisfied, the Authority would be without jurisdiction.

[91] *Auckland Star*, October 8, 1956.

appeal on certain persons or groups who were not necessarily entitled to appear before the Licensing Authority at the hearing of the application. This is illogical; appeal rights are usually restricted to those who are parties to the decision appealed against. It is also significant that a successful applicant, who has weathered the storm of opposition from those already holding licences, soon makes his peace with his former opponents and is likely to resist equally strenuously any new application.[92]

The most serious question concerning the Act is the assumption that licensing is justified by reason of being the best method of controlling the carriage of passengers and freight by air.

Although this assumption is probably valid, it would be preferable if it could be demonstrated. Certain factors favour some form of licensing, e.g., the relatively high capital expenditure involved; the desirability of protecting existing licences while experimental work (aerial topdressing) is being carried out; the large contingent liabilities involved in carriage by air; and the need for regular passenger and goods services. But some of these factors themselves operate to control the number of entrants into the industry, even without a system of licensing. The capital expenditure on aircraft and high maintenance costs would discourage the entry of mere speculators. The conclusion reached is that though licensing is probably justified in the interests of the industry and the general public, it should not be taken for granted as the best or only method.

Aerial topdressing has developed to such an extent that it has become an integral part of farming operations, and properly organized companies with permanent staff and maintenance facilities have been established by licence-holders. Experience in North America has shown that unrestricted competition can result in grave instability within the particular industry; it then becomes possible, in due course, for the industry to get into the hands of a few persons who would thus be able to dictate their terms. A stable and an economic industry is as important to farmers, and to the welfare of the country, as to operators.

A system of licensing inevitably tends towards monopoly, but not necessarily a monopoly in the hands of a single person, or small group of persons. In the case of air services, those who have licences are enjoying most of the advantages of a monopoly because of the protection accorded to them by the air services legislation. Those already in the field have a vested interest in keeping newcomers out. Although conditions in this industry are superior to those in, say, the taxi industry, where the "goodwill" attaching to a taxi licence is worth as much as £2,200, an air service licence constitutes a valuable piece of property. There is no evidence of trafficking in licences, as there is in the taxi industry, but it will need to be watched very carefully. The Authority, itself, can of course exercise some control because its approval of transfers of licences is required by s. 29. But the Transport Licensing Authorities also have this power,[93] and have been unable to control the price charged for "goodwill". Only by refusing to agree to the transfer can this practice be discouraged.[94]

Though there is no general agitation directed to the abolition of air services licensing, there is a move to have aerial topdressing services reviewed. There is some support, both among the consumers of these services and among the operators themselves, for the termination of licensing in respect of aerial topdressing. This is surprising, but it would seem that some of the operators complain of undercutting by their competitors, while the farmers are concerned at the possibility of a "price ring" operating to maintain unduly high charges. When the licences come up for renewal, or if the Authority decides before that date to review aerial topdressing licences, an opportunity will be provided for these allegations to be examined.

Subject to these comments, the licensing of air services has been conducted efficiently. The Authorities and their staffs have succeeded in gaining the confidence of those interested in the industry. Control by an administrative tribunal can be said to have justified its introduction and continuance.

[92] This phenomenon is not confined to air services licences. It also applies to the road transport industry where each new application is resisted on the basis that the industry cannot absorb another entrant.

[93] Under the Transport Act 1949, s. 114.

[94] Under s. 29 (and s. 114 of the Transport Act 1949), it is doubtful if the Authority has power to attach conditions to its approval of the transfer.

Intention Versus Delegation.—I have shown that the theory I offer you is based on a natural virtue in words themselves. Let me state this theory of interpretation dogmatically before I turn the coin over to show that it conforms with the actual practices of draftmanship.

Words in legal documents—I am not now talking about anything else—are simply delegations to others of authority to apply them to particular things or occasions. The only meaning of the word meaning, as I am using it, is an application to the particular. And the more imprecise the words are, the greater is the delegation, simply because then they can be applied or not to more particulars. This is the only important feature of words in legal draftsmanship or interpretation.

They mean, therefore, not what their author intended them to mean, or even what meaning he intended, or expected, reasonably or not, others to give them. They mean, in the first instance, what the person to whom they are addressed makes them mean. Their meaning is whatever occasion or thing he may apply them to or what in some cases he may only propose to apply them to. The meaning of words in legal documents is to be sought, not in their author or authors, the parties to a contract, the testator, or the Legislature. but in the acts or the behaviour with which the person addressed undertakes to match them. This is the beginning of their meaning.

In the second instance, but only secondarily, a legal document is also addressed to the courts. This is a further delegation, and a delegation of a different authority, to decide, not what the word means, but whether the immediate addressee had authority to make them means what he did make them mean, or what he proposes to make them mean. In other words, the question before the Court is not whether he gave the words the right meaning, but whether or not the words authorized the meaning he gave them. (Charles P. Curtis, *It's Your Law* (1954), pp. 65-66.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Our Sensitive Law Clerks.—"It occurs to me to mention," says Harlow S.M. in *Devonshire* v. *Purcell* (1956) 9 M.C.D. 124, 128, "that the circumstances of this case are reminiscent of those which confronted the late Mr Bartholomew S.M. in *Police* v *Hunter and Burns* (1919) 14 M.C.R. 165, when he declined to convict two Dunedin waterside-workers of using as a common gaming-house, a room provided by the Otago Harbour Board for the communal use of all such workers during lunch breaks and the like, on the ground that defendants had only the same right to the use of those premises as other members of their trade union. It is probable that some of the authorities cited by the late learned Magistrate in his decision would today be classed as not binding in this jurisdiction, but this is not to say that the decision itself is now assailable. I can still vaguely recall, as a very young man then on the fringe of the law, sensing the air of dismay which greeted this decision and the expressions akin to horror, of the consequences thereof unless the police be forthwith empowered to stamp out the growing evil of sing tai-loo on the wharves; many watersiders' wives had received next to nothing from their husbands for weeks and their families would surely starve unless something was done, and that right promptly. It is evident that means, within the framework of the existing law, to put a stop to the practice were quickly found because, just as quickly, the complaints died away." Scriblex can vividly recall, as a very young man then on the fringe of the law, his expression (akin to terror) when he heard E. C. Jellicoe, on being interrupted in his argument on a point of pakapoo, say to the late F. K. Hunt, "There you are again, Your Worship, giving off your old blunderbuss and missing with both barrels."

The Immigrant and the Law.—The problem of the immigrant in conflict with the law is amusingly illustrated by "Richard Roe" in a recent number of the *Solicitors' Journal* (London). In England, he says, there are no carabinieri, but there are many foreign citizens, yet even when foreign exuberance and originality produce a Continental situation our stolid police always manage to tie it up in a neat commonsense bundle. The case of the meeting of three interesting immigrants, two Hungarian refugees and a Chinese goose, illustrates the point. Walking homewards through St. James's Park with a bottle of whisky in their possession, the two young men sang by the tree-shaded waterside, and attracted the attention of the Chinese goose who had settled with her mate in the bird sanctuary there. With female curiosity she allowed herself to get into conversation with them and they offered her bread which they had in their pockets. As their acquaintance warmed, they offered her better refreshment and spilled a little whisky on the bread. The delicious flavour, so different from that of the water of the lake, delighted the goose and inspired her to indiscreet demonstrations of affection. The lonely strangers responded. "I suddenly felt she wanted to come away with us," said one of them afterwards. "She seemed to be fed up with the lake." So he lifted her up, gave her more whisky, put her under his coat and walked away. In Carlton Gardens they met a police inspector who asked what they had there. They told him, with simple truthfulness, a goose. He seemed cross, they said afterwards, and took them to the police station, where Chinese goose and Hungarian refugees, happy with whisky, slept the night. Next morning, the young men pleaded guilty to stealing a goose, the property of the Ministry of Works, and were each fined £2. The goose ("Richard Roe" concludes) returned to the simple, sober, domestic realities of life with her mate.

Family Solicitors.—In passing judgment upon a family solicitor who drew him up a contract that proved to be inadequate, Ben Travers in *Vale of Laughter: An Autobiography* (Bles, 1957) has this comment to make. "He is dead now and I will not say anything derogatory about him except that I wish he had been dead then."

Pre-trial Publicity.—Many will feel a sense of satisfaction at the news that in England a committee under Lord Tucker has been appointed to inquire whether any restraint should be placed upon the publication of proceedings before examining justices. It is thought that an endeavour will be made to mould the law to combine the advantage both of the present English practice and that of Scotland and Northern Ireland, these preliminary proceedings to be in public and reported in the Press unless the defendant objects; if he does, then public and Press remain in Court, but there is no published report. Should the Magistrates commit for trial, the proceedings remain unreported; but if there is no case to answer, publication of the report would then be permissible.

Low.—The recent autobiography of David Low, New Zealand's greatest cartoonist, declares his caricature of Hewart L.C.J. to be one of his major triumphs. But Hewart himself was furious: he had been caught coming home late in the tube from a party that all too clearly had been good. Probably Low's outstanding triumph was Colonel Blimp; and, in describing him as "a vast excuse for deriding authority and justifying disobedience", he went very close to pinpointing one of our national characteristics.

Casual Cohabitation.—"The circumstances of life, such as business duties, domestic service, and other things, may separate husband and wife, and yet, notwithstanding, there may be cohabitation," says Jeune P. in *Huxtable* v. *Huxtable* (1899) 68 L.J.P. 83, 85. The female petitioner in a divorce case before T. A. Gresson J. at the last sessions in New Plymouth may have had this definition in mind. "Do you swear that since the agreement was signed you have never cohabited with your husband?" asked her counsel (L. A. Taylor). "No, Sir, only once." "And when was that?" "In the Stratford Court," she replied. *That* is what she said: it is anybody's guess what she meant.

Tailpiece.—From Paris, where custom requires that usherettes in movie theatres be tipped, comes this story of an absentminded gentleman who failed to observe the custom. Her revenge was calculated and subtle. No sooner had the main picture of the evening—a thriller—commenced than she crept up to his seat. "It was the butler," she hissed, "who did it."

"A REAL SON OF NAPIER"

Hawke's Bay Bar Welcomes Mr Justice McCarthy

The opening of the May sessions of the Supreme Court in Napier was marked by an unusual but felicitous prelude when a welcome was extended to Mr Justice McCarthy by the Hawke's Bay Bar on his first appearance in his native city in his capacity as "the Queen's Judge". He was congratulated on his appointment, and on the comparatively early age at which the distinction descended upon him, and in reply he expressed the peculiar pleasure that was his in presiding at Sessions in the city where he was born of parents who were themselves natives of Napier, and of ancestors who had "played their part in the development of the city".

The President of the Hawke's Bay Law Society, Mr J. Tattersall, while insisting that it would be inappropriate that he should interrupt at any length the business of His Honour's Court, emphasized that members of the Bar in Hawke's Bay felt that it would be even less appropriate if they permitted the occasion to pass without tendering His Honour their congratulations and felicitations on his appointment.

Expressing the respectful good wishes of the Bar, Mr Tattersall said:

"This is the first time that your Honour has sat in Napier, and we hope that it may be the forerunner of many visits in the future. We take great pleasure in the fact that a man of your Honour's eminence at the Bar has been appointed to this high judicial office, and particularly at your Honour's comparatively early age—I believe that your Honour is still on the sunny side of fifty, be it not so far on that side. But, apart from those considerations, we take special pride in welcoming the first Napier-born Judge. It must be a very great satisfaction to you to return here in such a capacity.

"On occasions like this", said Mr Tattersall, "it is almost inevitable to think of the late Mr Justice Alpers, who after some forty-five years returned to Napier, where he had landed as a child unable to speak the English language. But, in spite of his great gifts as a lawyer and as a man, we can claim him only as a foster-child, whereas we welcome you today as a real son of Napier. It is, therefore, with very great pride, indeed, that I offer respectful congratulations on behalf of the members of the Bar in Hawke's Bay. May I again express our sincere congratulations and our constant hope that you may enjoy a long and eminent career on the Bench".

His Honour, in reply, said he was genuinely moved by Mr Tattersall's kind and gracious words. As Mr Tattersall had said, he was of that city. He was born there.

"I lived here until I went to the University", said His Honour, "and my parents were born here—both my mother and my father—and they lived out their lives here. My ancestors have played their part in the development of this city; and, though I have been away from Napier now for many years, my affection for it, and my loyalty to it, remain as strong as ever. You will understand then with what great pleasure I preside at these sessions today".

Later, what may be described as a lay gesture was made by the foreman on behalf of the Grand Jury after the completion of their deliberations.

"Your Honour asked us to make it known if we had any recommendation in regard to matters generally", he said. "We have no such recommendation, but we feel that it might not be improper to offer to your Honour the same respectful congratulations which were expressed so eloquently by Mr Tattersall on behalf of the Bar earlier this morning."

His Honour expressed special gratification at this unexpected tribute.

Full Many a Gem of Purest Ray Serene. . . . All this can be accomplished by legislation that empowers the Courts to determine as a question of fact, having regard to all the circumstances including the nature of the highway and the amount and nature of the traffic that might reasonably be expected to be upon it, whether or not it would be negligent to allow a domestic animal to be at large upon it.

It is now over 200 years since Thomas Gray wrote his famous lines descriptive of rural England at eventide, 'The lowing herd winds slowly o'er the lea'. The lea no doubt included such highways as then traversed the landscape. As I read the modern English cases, the herd may still wander along those same highways without the owner being subject to civil liability for the injuries they may cause. No longer in this Province does 'the ploughman homeward plod his weary way'. He goes now in his tractor, ofttimes along the highway. The farmer whose lands adjoin the King's Highway can in this modern era, scarcely know the meaning of 'the solemn stillness' of which Gray wrote. No longer can he be conscious of the beetle wheeling his droning flight. What he hears, instead, is the whir of motor cars wheeling their way at legalized speed along the adjoining highway. The common law of England may have been adequate in Gray's day. The Courts in England have held that it is still adequate, but surely it must be apparent that today in this Province it is not. (Per Roach J.A. in *Atkinson* v. *Fleming* [1956] O.R. 801, 822; [1956] 5 D.L.R. (2d) 309, 323-324.)

The Sense of Community.—The legal history of man is an age-long struggle with his own weaknesses—weaknesses which at intervals threaten to overpower him. The present is a time of crisis, because these weaknesses have now been armed with weapons that are rapidly developing towards total destructiveness. Law is our collective name for what is perhaps the most important set of institutions by which man has sought to reinforce his reason against his passions. It presupposes a consensus upon certain values or desiderata to which the immediate demands of the individual are to be subordinated. It consists of the rules and mechanisms by which these agreed values are protected against the explosive impatience of the human animal. (Percy E. Corbett, *Morals, Law, and Power in International Relations* (1956) p. 28.)