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APPEALS FROM ADMINISTRATIVE TRIBUNALS

THE EXISTING JUDICIAL EXPERIENCE

Should a person aggrieved by a decision of an administrative tribunal have a right of appeal to the courts?[1] The purpose of this paper is, first, to canvass some of the existing experience of such appeals, second, to compare that experience with the existing system of non-statutory judicial review of the decisions of administrative tribunals, and finally, to make some suggestions.

Discussion is limited to review of the merits of the tribunal's decision; no attention is given to claims of usurpation of power or of procedural error as they may arise on appeal. But it is submitted that in these areas a statutory appeal right would have, if any, only marginal advantages when compared with non-statutory review: depending on the legislation, the powers of the appellate court *may*[2] be more flexible and apt to the problem. But the substantive issues would not differ: e.g. Was the tribunal properly appointed? Did the appellant (plaintiff) have a fair hearing?

I. An Analysis of the Judicial Decision

The law relating to appeals and review, the practice of appellate and review courts and proposals for reform all distinguish between law, fact and discretion and draw further lines (e.g. primary facts and inferences from the facts). An attempt has to be made to indicate

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1. For comprehensive discussion and suggestions see the first report of the Public and Administrative Law Reform Committee 1968 (noted briefly in [1968] N.Z.L.J. 97) which led to the enactment of the Judicature Amendment Act 1968, establishing an Administrative Division of the Supreme Court. For earlier discussions see Orr, "An Administrative Court—Its Scope and Purpose" (1966) 28 (2) N.Z.J.P.A. 1; report of a Special Committee of the New Zealand Law Society to Consider Appeals from Administrative Tribunals (1966) discussed by Aikman and Clark, "Some Developments in Administrative Law (1966)" (1967) 29 (2) N.Z.J.P.A. 48, 49-51; and Robson (ed.), *New Zealand* (2nd ed. 1967) 170-176.

2. But cf. the discretion which the courts have in issuing the common law remedies. Thus, in *Lamond* v. *Barnett* [1964] N.Z.L.R. 195, Barrowclough C. J., having held that the Licensing Control Commission had acted in breach of the rules of natural justice but that the plaintiff had not been prejudiced, refused in his discretion to issue a writ of *certiorari*. See also Crimes Act 1961, s. 385(1) proviso, *Whiting* v. *Archer* [1964] N.Z.L.R. 742, 747. Note, further, the flexibility inherent in the declaration procedure. And compare also the restricted powers of some appellate courts, e.g. the English Court of Criminal Appeal which could only affirm or quash.

what is meant by these categories.[3] There are two preliminary points.

First, precise, generally acceptable definitions are beyond reach. Indeed some say that such definitions would be highly undesirable.[4]

Second, definitions which are used or useful in one context may not be used or useful in another. Thus, as in England, the major authorities used in tax cases on the fact-law distinction are tax decisions which are, moreover, rarely used in other contexts.[5] Definitions in the abstract, in any event, must always be suspect; they should relate to some purpose.[6] The purpose here is to achieve an appropriate distribution of power between the lower and appellate courts. What is appropriate in one area—say tax—may not be appropriate in another—say trade practices. In other words, a particularistic analysis of the distinctions in respect of specific tribunals is almost inevitable.

The various distinctions which are used in this paper can be illustrated by a recent case[7] concerning an alleged "goods service vehicle" defined in the legislation as a vehicle "designed exclusively or principally for the carriage of goods". The truck in question was used to carry and install insulfluff, a form of insulation, in house ceilings. This, together with the details as to the actual construction and operation of the truck, constituted the *primary facts:* assertions that a phenomenon has happened, is happening or will happen, independent of and anterior to any assertion as to its legal effect.[8] Second, there was a pure question of law: the meaning of the word "designed" in the statute. Finally, the statute, as interpreted, had to be applied to the primary facts as found. This final step creates many difficulties of analysis when the powers of review courts are concerned: in the present case, the Supreme Court deciding an appeal from the Magistrates' Court on law only. The step can be seen as a single one: the drawing of inferences from the primary facts in the language of the statute as interpreted. Second, it can be seen as two: (i) are the primary facts

3. See de Smith, *Judicial Review of Administrative Action* (2nd ed. 1968) 113-126; Jaffe, *Judicial Control of Administrative Action* (1965) Chs. 14 and 15, especially 555-556; Hart and Sacks, *Legal Process Materials* (tent. ed. 1958) 369-385; Weiner, "The Civil Jury Trial and the Law-Fact Distinction" (1966) 54 Calif. L.R 1867, 1876, 1918 ff; id. "The Civil Non-jury Trial and the Law-Fact Distinction" (1967) 55 id. 1020; Whitmore, "O! That Way Madness Lies: Judicial Review for Error of Law" (1967) 2 Fed. L. Rev. 159; and for illuminating anthology see Gellhorn and Byse, *Administrative Law* (4th ed. 1960) 490-503.
4. E.g. Green quoted in Gellhorn and Byse, op. cit., 503, n.3.
5. De Smith, op. cit., 115; *Walker* v. *Commissioner of Inland Revenue* [1963] N.Z.L.R. 339, C.A.; *Levin & Co. Ltd.* v. *Commissioner* [1963] N.Z.L.R. 801, C.A. But note that *Edwards* v. *Bairstow* [1956] A.C. 14 (a tax case) is often used in other contexts, and see e.g. *Transport Department* v. *John H. Brown Insulfluff Insulation (N.Z.) Ltd.* [1965] N.Z.L.R. 157, 8-9, discussed below.
6. E.g. Fuller, *The Morality of Law* (1964) 82 ff.
7. *Transport Department* v. *John H. Brown Insulfluff Insulation (N.Z.) Ltd.* [1965] N.Z.L.R. 157.
8. Jaffe, op. cit., 548.

reasonably capable of falling within (or outside) the statutory language as interpreted? (ii) do they *in fact* fall within (or outside) it. The judge in the insulfluff case used this second analysis, or one very like it, and held that since the court below clearly *could* have reached the decision it did (that the vehicle was not principally designed for the carriage of goods) there was accordingly no error of law and its decision should not be disturbed. The only other step in the decision (whether the facts *in fact* fell outside the statute) was said to be one of degree, of fact, outside the scope of an appeal limited to questions of law.

In some circumstances, this final step is characterised in yet a third manner: as the exercise of a discretion. Thus judges dealing with custody matters have said that they are exercising a discretion rather than applying statutory language to basic facts.[9] But it does not follow that thus characterised the step either is completely reviewable or completely unreviewable. Rather, as will be seen, reviewing and appeal courts often draw a line and review part, but not all, of the exercise of the discretion.

This model and a reading of the cases[10] on which it is based underline the point that no precise lines separate the various categories.

> [It has been well said that questions of law and questions of fact] are not two mutually exclusive kinds of questions, based upon a difference of subject-matter. Matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law.[11]

Consider an application for custody of a child. The legislation does not attempt to spell out precise rules, although the courts have over the years tried to delimit their discretion. Insofar as a court attempts to spell out further rules it can be said—until some undefined point is reached—that it is dealing with a pure question of law. Equally there can be no difficulty in classifying the basic physical data as facts. But then the law is brought into closer contact with the facts, the law is further refined with reference to the facts, inferences are drawn from the facts and an order is made. How much of this process is law, fact, inferences from the facts, reviewable discretion, unreviewable discretion?[12]

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9. E.g. *Palmer* v. *Palmer* [1961] N.Z.L.R. 129, 702, C.A.
10. E.g. *White* v. *St. Marylebone B.C.* [1915] 3 K.B. 249, D.C., and other cases mentioned in de Smith, op. cit., 118 and n.86; *Edwards* v. *Bairstow* [1956] A.C. 14, 35; *Griffiths* v. *J. P. Harrison (Watford) Ltd.* [1963] A.C. 1, 19; *Walker* v. *Commissioner of Inland Revenue* [1936] N.Z.L.R. 339, 360, C.A.; *Benmax* v. *Austin Motor Co.* [1955] A.C. 370; *Commissioner of Taxes* v. *McFarlane* [1952] N.Z.L.R. 349, C.A.; *Walton* v. *Holland* [1963] N.Z.L.R. 729, S.C. & C.A.; *Universal Camera Corpn.* v. *N.L.R.B.* (1951) 340 U.S. 474; *N.L.R.B.* v. *Hearst Publications, Inc.* (1944) 322 U.S. 111.
11. Dickinson quoted in Gellhorn and Byse, op. cit., 496; *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 345, C.A.
12. See further sections III (iii) and IV below.

II. Three Preliminary Issues

Statutory appeal provisions vary considerably: general, law only, as from a discretion; as of right, with leave; by a *de novo* consideration, by rehearing, on the record; leading to affirmances or reversal only or involving more flexible powers. In this statutory context, three questions can be asked. First, it is useful to ask the reasons for limiting appeals—obvious and well known as they may be: (i) recognition that the tribunal below will, if it uses a proper procedure, be better, or at least as well, suited to determine factual issues; (ii) litigation should at some point be ended, or at least limited; (iii) the greater general interest in clarification of the law as opposed to determining the facts of a particular case; (iv) recognition of the respective expertise of two bodies. Second, in what case is leave usually granted when appeals are not of right? The short answer is when questions of law rather than of fact are involved.[13] The reasons for this preference are those already noted as bearing on the legislative choice.

Third, how do the courts dispose of arguments that a particular decision does not come within the scope of an appeal provision? The answer may[14] indicate their views of the appropriate range of appellate powers. Thus a refusal by a Lands Board to approve the transfer of a Crown lease was held by Sir Robert Stout not to be a "decision" which could be appealed against under a generally worded appeal provision: no questions of fact or law were involved; the decision was purely discretionary.[15] But when, in a later case, the Board exercised its power of deciding which of several applicants could purchase Crown land questions of fact as well as of policy were said to be involved and Wilson J. considered himself competent to hear the appeal.[16] The legislation laid down the factors the Board was to consider. (This case and subsequent legislative action are further discussed below.) When asked to hear an appeal from the refusal of a magistrate to grant a partial exemption from an order disqualifying the appellant from driving, however, the same judge denied that he had jurisdiction.

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13. E.g. *Hogg* v. *Coleman* [1931] N.Z.L.R. 520.

14. Of course it may not: the decision may turn on the precise language of the statute without reference to broader principle, e.g. *Wong* v. *Hatton* [1958] N.Z.L.R. 955; *Transport Dept.* v. *Cole* [1966] N.Z.L.R. 609.

15. *Lascelles* v. *Marlborough Land Board* (1904) 23 N.Z.L.R. 651.

16. *Re Lee's Appeal* [1965] N.Z.L.R. 507. Wilson J. also referred to the *obiter* suggestion in *In re McCosh's Application* [1958] N.Z.L.R. 731, 733-734 that a refusal of consent by the Board to a sale of an interest in Crown land on the ground of undue aggregation would have been appealable but for a privative clause. *Lascelles'* case was distinguished on the ground that the legislation stated the factors to be considered in aggregation cases: the policy or discretionary element was, accordingly, less.

Among the factors was the broad discretion given to the magistrate; the transport legislation did not state the principle which he was to apply.[17]

Hutchison J. has made the same distinction. A magistrate's decision to exempt a shop from Sunday closing was not appealable, *inter alia*, because the issues were wide; there were no precise, objective standards; general community interest had to be consulted: he pointed to the wide notice requirements.[18] But he was prepared to suggest, in a later case, that he could decide an appeal against a magistrate's refusal to reverse a local authority's order for demolition of a building on the ground of its dangerous state. The decision of the magistrate was, he said, unfortunately without giving reasons, a judicial and not a legislative act.[19] It can be suggested that the issues there are factual and legal rather than purely discretionary, and that the standards to be applied are more precise.

One would expect that the feeling articulated in these cases—that if a matter is one of policy, of unfettered discretion rather than of fact or law, of a legislative nature rather than judicial, it should not be the

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17. *Banyon* v. *Police* [1966] N.Z.L.R. 922. The other three factors he mentioned—that there was only one party, that no hearing had to be given, and that a further application could be made in three months—are hardly very persuasive: many matters dealt with by the courts do not involve two disputing parties, e.g. the original sentence including disqualification, see e.g. Jennings, *The Law and the Constitution* (5th ed. 1959) 286-288; courts deal with many matters without a hearing; moreover, a hearing is not excluded here; and, finally, a magistrate's family law jurisdiction involves the possibility of successive applications.

18. *New Zealand Shop Assistants Industrial Assn. of Workers* v. *Lake Alice Stores Ltd.* [1957] N.Z.L.R. 882, discussed by Sim, "When is the Court not a Court?" (1958) 34 N.Z.L.J. 295. Compare the rejection by the Minister in charge of a Bill which transferred the jurisdiction to a one-man Shops and Offices Exemption tribunal of a proposal to allow an appeal: an appeal would merely permit the substitution of one individual's discretion for another's: (1959) 320 N.Z. Parl. Debates 1262-78, 1528-9.

    Hutchison J. also argued that the magistrate's power was legislative, not adjudicative, and therefore not subject to appeal. (For a similar conceptual argument in the appeal context see *George* v. *Hore and Brown* (*No. 2*) [1952] N.Z.L.R. 50.) He cited the dictum of Strong J. (dissenting: not for the court as Hutchison J. states, following Davidson J. in *Ex parte Coorey* (1945) 45 S.R. (N.S.W.) 287, 314) in the *Sinking Fund* cases (1878) 99 U.S. 700, 761:

    > [The judicial act] determines what the law is and what the rights of the parties are, with reference to transactions already had. [The legislative act] prescribes what the law shall be in future cases arising under it.

    Such a definition of adjudication is obviously inadequate; consider, say, the matrimonial jurisdiction of the Magistrates' and Supreme Courts, and the famous *dictum* of Atkin L.J. in *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, 215; see further Jennings, op. cit., Appendix I and de Smith, op. cit., 41-45. Compare also *Hookings* v. *Director of Civil Aviation* [1957] N.Z.L.R. 929 where a similar power to waive a prohibition was held to be administrative, not legislative.

19. *Lower Hutt City* v. *Leighton* [1964] N.Z.L.R. 558, 560.

subject of an appeal to the courts[20]—might influence the exercise of clearly created appeal powers. Whether such an expectation is justified is considered below.

III. APPEALS FROM FINDINGS OF LAW, FACT AND MIXED QUESTIONS OF LAW AND FACT

These preliminary matters aside, the practice of appellate courts in considering, first, matters of law and fact and, second, exercises of discretion must now be considered in turn: the statutory language is never self-defining or self-applying.[21]

Two separate but interacting questions arise: on whom is the onus, and how much of the decision appealed against can be reviewed. The model of the decision-making process sketched above will be used: (i) basic or primary facts; (ii) legal questions (usually statutory interpretation); (iii) application of the law to the facts.

(i) *Primary facts.* With one exception (mentioned below), primary facts cannot be reviewed when appeals are limited to questions of law. But the contrast with general appeals is not so great as this suggests, for appellate courts hearing such appeals are reluctant to review basic findings especially when the lower court has observed the witnesses.[22] In a recent outstanding instance the Court of Appeal affirmed that it would not lightly disregard a Supreme Court judge's findings of fact despite his assertion that he was unable, from seeing the witnesses, to conclude which evidence deserved the greater credibility:

> that does not mean that some impressions were not obtained which were of material assistance . . . . [23]

The courts are, of course, similarly reluctant to set aside a jury's findings of facts.[24] But the power to intervene, the Court of Appeal stressed, varies with the circumstances. Thus the fact that a judge spells out his reasons whereas a jury does not tends to make his findings more vulnerable, although the power to review is stated in the same language.[25] On the other hand, the absence of reasons may incline the appeal court to see its powers as if they were original.[26]

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20. See also the discussion by Lords Guest and Devlin (dissenting) in *United Engineering Workers Union* v. *Devanayagam* [1967] 3 W.L.R. 461, 479-80; [1967] 2 All E.R. 367, 380-1, J.C. of cases where a power to decide regardless of the law has been held not to result in judicial decisions admitting of appeal.
21. For valuable discussions of the New Zealand authorities, see McMullin, "Appeals from Magistrates: Principles Applicable" (1958) 34 N.Z.L.J. 183, 201, 263; [1964] id. 54; and Paterson, *Introduction to Administrative Law in New Zealand* (1967) Ch. 14.
22. E.g. Sim, *Practice and Procedure of the Supreme Court and Court of Appeal* (10th ed. 1966) 462-465; Weiner, loc. cit., n. 3 supra (1967).
23. *McCullagh* v. *Wallis* [1963] N.Z.L.R. 956, 959. See also *K.* v. *K.* [1968] N.Z.L.R. 292, 299, 301, 304.
24. For a recent discussion see *Ward* v. *James* [1966] 1 Q.B. 273, C.A.
25. Idem.
26. *Hammond* v. *Hutt Valley and Bays Metropolitan Milk Board* [1958] N.Z.L.R. 720, 728, C.A.

Other relevant factors are the procedures of the original and appellate body,[27] the precise language of the legislation and its history.[28] The interaction of these factors is shown in judgments of the Supreme Court on general appeals from criminal convictions in the Magistrates' Courts.[29] The legislation in force before 1957 provided for an actual rehearing viva voce of the witnesses.

> . . . what those witnesses had said on oath to the Magistrate in the Court below was of no moment (except in cross-examination). It was what those witnesses deposed to in front of the Judge on appeal and how they struck him as witnesses of truth that mattered and one of the very practical reasons for the introduction of the new law was that so often, although bound over to give evidence on appeal, the witnesses had disappeared by the time the matter came on for hearing in the Supreme Court, so that that Court by no means necessarily heard the same evidence as the Magistrate had.

In dealing with an appeal[30] under the new legislation, Hardie Boys J. summarised the old law in the above words and continued:

> In my view it was no mere procedural variation which took place in 1957 but a change in the law as to criminal appeals which applied to them principles of law well known and long applied in civil cases. The new Act . . . ordained that, except in special circumstances, appeals, though by way of rehearing still, shall now be conducted on the basis of the Magistrate's notes of evidence, the burden of any appeal therefrom must lie on the appellant. . . .

Whilst this cannot be the basis upon which to interpret a statute, it can be said with confidence that no one who was in practice in 1957, when the new provisions for appeal came into force, was in any doubt about the change in law which was being effected.

He accordingly agreed that Lord Atkin's well-known dictum applied:

> The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial Judge. But the Court is still a Court of Appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognise the onus upon the

27. E.g. *Straven Services Ltd.* v. *Waimairi County* [1966] N.Z.L.R. 996; McCarthy J. in *Palmer* v. *Palmer* [1961] N.Z.L.R. 129, 130; see also Gresson P. in the Court of Appeal, 702, 707, but cf. North J. 721-22; *Whiting* v. *Archer* [1964] N.Z.L.R. 742. See further below, 149-150.
28. See e.g. *McCormack* v. *Wine Cellars (N.Z.) Ltd.* [1966] N.Z.L.R. 756, discussed below, 147.
29. See McMullin, op. cit., 183 (1958).
30. *Page* v. *Police* [1964] N.Z.L.R. 974, 975. See similarly *Toomey* v. *Police* [1963] N.Z.L.R. 699. Why should the learned Judge be reluctant to use his knowledge of the purposes behind the change in statutory language? Surely basic canons of interpretation require reference to such purposes. *Heydon's case* (1584) 3 Co. Rep. 7a; Acts Interpretation Act 1924, s. 5(j).

appellant to satisfy it that the decision below is wrong: it must recognise the essential advantage of the trial Judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellate Court can never recapture the initial advantage of the Judge who saw and believed.[31]

Wilson J. has held that similar changes in the liquor licensing legislation have limited the appellate powers of the Licensing Control Commission (and presumably of the Supreme Court as well) in respect of factual findings.[32]

(ii) *Questions of law.* Whether the appeal is general or limited to questions of law, appeal courts consistently express the view that they can and will substitute their own opinions on the law for those of the court or other authorities below. But there are qualifications even here. First (and this is perhaps not a real qualification, but rather within (iii) below), when the statutory language is vague and there is no clear line between interpretation and application, an appellate court may defer to the lower authority in limited cases. In dealing with an appeal from a disciplinary decision of the Medical Council, where the legislation spoke of "professional misconduct", K. M. Gresson J. was obliged to acknowledge that the legislation which provided for a rehearing required him to consider the matter independently. But he was very reluctant; members of the Medical Council were peculiarly qualified of their own knowledge to form a judgment as to whether the treatment in question was proper. He was not so qualified.[33] As noted, this decision could be said to fall within (iii), but it also involves, it is submitted, a pure question of law: the interpretation of the broad statutory language.

Second, even in cases where a clear line between interpretation and application can be drawn, the courts have very occasionally deferred to expert opinion on the law. Thus an outstanding American judge in discussing the meaning of the word "officer" in labour legislation said:

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31. *Powell* v. *Streatham Manor Nursing Home* [1935] A.C. 243, 255. See also Lord Wright at 265-8.

32. *McCormack* v. *Wine Cellars (N.Z.) Ltd.* [1966] N.Z.L.R. 756 discussed below. See also *Whiting* v. *Archer* [1964] N.Z.L.R. 742 in respect of a similar change in the Transport Act; *Walton* v. *Holland* [1963] N.Z.L.R. 729, 735 (Leicester J.); *Gillard* v. *Cleaver Motors Ltd.* [1953] N.Z.L.R. 885; *Re Lees Appeal (No. 2)* [1965] N.Z.L.R. 1002, 1003; McMullin, loc. cit., 184.
But cf. *Walton* v. *Holland* [1963] N.Z.L.R. 729, 749, C.A.
See also IV below.

33. *In re Mears* (unreported 1955, mentioned in *In re Mudie* [1957] N.Z.L.R. 689, and in Aikman, "Recent Developments in Administrative Law" (1960) 22 No. 2. N.Z.J.P.A. 53, 59-60). The learned judge's reluctance was noted and acted on by the legislature: appeals are now usually on the record and witnesses are not recalled: Medical Practitioners Act 1950, s. 45(3) as substituted by the Medical Practitioners Amendment Act 1957, s. 8. See also *Grammer* v. *N.Z. Veterinarians Association* [1968] N.Z.L.R. 179, 182.

> But if the word be deemed to have a peculiar connotation for those intimate with trade-union affairs, it is incumbent upon us to give the word its technical meaning, for para 9 (h) is an integral part of a statute whose sponsors were familiar with labor organization and labor problems and which was doubtless drawn by specialists in labor relations. If such be the case, then of course the Board's expertness comes into play. We should affirm the [National Labor Relations] Board's definition if that definition does not appear too far-fetched. . . . [34]

Third, the courts will at times, in deference to expertise, take a narrow view of the scope of a question of law. Thus the New Zealand Court of Appeal has held that the interpretation of an industrial award is not a question of law which can be referred to it by the Arbitration Court.[35] The judges stressed the special and expert knowledge of the Arbitration Court. Such deference is, of course, only consistent with a basic rationale of judicial review and its limits: that the lawyers should have the final say on those matters with which they customarily concern themselves and for which their procedures are appropriate; other questions should be allocated similarly.[36]

These, however, are limited exceptions to the general and decisive competence of appellate courts in respect of questions of law.

(iii) *Application of the law to the facts.* This stage merges with the previous two: any summarising of the facts will tend to take account of the law, any interpretation of the law will tend to take account of the facts.

The first two analyses of this law-applying step should be recalled; either there is a single process: do the facts as found fall within the rule of law as established? or there are two: (i) are the facts *reasonably capable* of falling within the rule? (ii) do they *in fact* so fall? Briefly, the courts, in dealing with general appeals, tend to use the former approach, while in deciding appeals on law only, they use the latter, and restrict themselves to the first question. In hearing general appeals the courts have time and again stressed that they will more readily form an independent opinion in the case of inferences from basic facts (which will often be in the language of the relevant rule of law) than

34. *N.L.R.B.* v. *Coca-Cola Bottling Co.* (1956) 350 U.S. 264, 269. See similarly Lord Denning in *R.* v. *Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 Q.B. 574, 585; Griffiths, "Tribunals and Inquiries" (1959) 22 Mod. L.R. 125, 140-143.
35. *Inspector of Awards* v. *Fabian* [1923] N.Z.L.R. 109, 113 (Stout C.J.), 120 (Salmond J.) 121-2 (Reed J.); see also *Lyttelton Harbour Board* v. *Inspector of Awards* [1944] G.L.R. 107 (Arb. Ct); cf. *New Zealand Harbour Boards Industrial Union* v. *Tyndall* [1943] G.L.R. 458.
36. Landis, *The Administrative Process* (1938) 152-154 quoted in part below and in Gellhorn and Byse, op. cit., 496-497.

in the case of those facts themselves.[37] But, as in the case of appellate evaluation of primary facts, it does not necessarily follow that there will be a completely independent *de novo* decision. Such a power is the exception.[38] Usually the appellant will have to establish that the decision below is wrong. Second, considerable weight may be given to the original decision. Thus in trade mark appeals, the Supreme Court has stressed that in deference to the Commissioner's experience his original decision will be given great weight and will not be lightly disturbed.[39] (If the issue is, as in one recent case,[40] whether the applicant's mark so resembles another as to be likely to deceive the question can be asked whether the matter is one of expertise, where experience is relevant; surely it is based on one's own personal impression.[41] It does not follow from this comment that appeal powers should be viewed extensively. Rather, the fact that *any* decision on the merits is based on personal impression and not on objective standards suggests that no particular decision is likely to impress as being any better than the other, and that there is no point in obtaining a series of such opinions; one is enough.) Similar deference to experience and knowledge and the resulting self-imposed limitations on general appeal powers can also be seen in appeals from professional disciplinary bodies.[42]

The courts in hearing general appeals—especially from lower *courts* —do however generally adhere to a broad review power of the application of the law to the facts. As we saw in the insulfluff case, however, a narrower power is exercised in respect of appeals limited to questions of law. In general terms, the courts limit themselves to the question— are the facts as found *reasonably capable* of falling within the rule of law as found. They do not go on and express their view on whether they do *in fact* so fall. Thus Lord Radcliffe, in an oft-quoted dictum, dealing with appeals on questions of law from the Tax Commissioners, said:

> When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is,

37. E.g. *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370; *Powell* v. *Streatham Manor Nursing Home* [1935] A.C. 243; *Wheat* v. *E. Lacon and Co. Ltd.* [1966] A.C. 552, 568-570; *O'Callaghan* v. *Galt* [1961] N.Z.L.R. 673; Goodhart, "Appeals on Questions of Fact" (1955) 71 L.Q.R. 402; McMullin, loc. cit., 184-185. The *Benmax* and *Powell* cases were applied in *In re an Application by Boots the Chemists (New Zealand) Ltd.* [1963] N.Z.L.R. 268, an appeal from a decision of the Pharmacy Authority.
38. See below as to e.g. Town and Country Planning and Family Protection appeals, 150, 151.
39. *Duckworth, Turner & Co. Ltd.* v. *Commissioner of Trade Marks* [1959] N.Z.L.R. 1341.
40. *New Zealand Breweries Ltd.* v. *Heineken's Bier Browerij Maatschappij N.V.* [1964] N.Z.L.R. 115, S.C. & C.A.
41. E.g. Turner J. id. at 139.
42. See e.g. Gresson J. in *In re Mears* quoted above; *McCoan* v. *General Medical Council* [1964] 1 W.L.R. 1107, 1112-3 (J.C.).

> obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.[43]

With respect, Lord Radcliffe's third sentence should be preferred to his final test. The latter seems to require the court to look for the *only correct* conclusion; this is not consistent with the more limited appellate power envisaged by the rest of the passage and the other judgments.

New Zealand courts have applied this test. Thus North J., in a tax case, said that appeals on questions of law lie in respect of decisions which are bad in law *ex facie*, or where the result is so wholly inconsistent with the facts that a misconception of law must be assumed.[44]

Such an interpretation seems completely reasonable. Going further would make an appeal on law alone virtually as wide-ranging as general appeals. This would hardly be compatible with the legislative intent, say, to discriminate against the Crown in granting rights of appeal in criminal matters. But the distinction is obviously rather vague in the abstract and might lead to inconsistent views in practice of the scope of the appeal. Two New Zealand cases point up the vagueness of the lines. In the first,[45] an experienced magistrate held that the earnings from betting of a jockey were taxable income. In an appeal on law

43. *Edwards* v. *Bairstow* [1956] A.C. 14, 36.
44. *Walker* v. *C.I.R.* [1963] N.Z.L.R. 339, C.A. See also e.g. *Levin & Co. Ltd.* v. *C.I.R.* [1963] N.Z.L.R. 801, C.A.; *C.I.R.* v. *Frethey* [1961] N.Z.L.R. 245 (a very clear statement of the rule by McCarthy J.); *McKimmie* v. *Thomson* [1962] N.Z.L.R. 963 (whether a particular area was a "road": it was open to the magistrate to reach the decision he did and his judgment was accordingly not disturbed); *Re McKeague's Appeal* [1964] N.Z.L.R. 682 ("locality"); *Broome* v. *Hutt Valley Consumers' Coop. Society Ltd.* [1964] N.Z.L.R. 207 ("neighbourhood"). Note that Whitmore suggests that this limited meaning of question of law applies only to statutory language which either has a common meaning or involves questions of degree, loc. cit., 170-173.
45. *Commissioner of Taxes* v. *McFarlane* [1952] N.Z.L.R. 349, C.A.

only, his decision was reversed by the Supreme Court as erroneous in law, but restored by a two-one majority in the Court of Appeal.[46] The majority judges said that the jockey *could* be carrying on business as a bettor. Whether in the particular circumstances he was or not depended on the scale of his operations, his methods and his organisation, and this could be determined only by the tribunal of fact. On the other hand, K. M. Gresson J. having stated much the same test as the majority's ("if on the facts such a conclusion is reasonably open and the matter is one of degree, the question is one of fact"), nevertheless held that:

1. The magistrate's final conclusion (that the respondent's betting was organised as part of his business) was in essence a conclusion of law;
2. Or at least the finding was a mixed finding of fact and law;
3. Or that even if the decision was a finding of fact only there was *not* evidence upon which that finding could properly be made.

(The question can be asked whether the learned judge is not applying a more stringent test here than that which he stated.)

The second case concerns an attack on the legality of a disqualification order made by the Racing Conference.[47] Leicester J. (who had, when counsel, often appeared for defendants before the Conference's organs) considered, in a very detailed manner, the evidence relating to the charge of administering drugs and concluded that the evidence was not (reasonably) capable of sustaining the charges.[48] He therefore made a declaration that the disqualification order was illegal. The Court of Appeal, in a comparatively brief judgment, took a narrower and more formal view of the court's power, and held that the courts could not interfere. The disqualification order therefore stood. Marked variations between different judges and courts in the United States in applying a similar rule for the review of administrative action only underline this point.[49]

But the question can be asked whether the previous two paragraphs do not overstate the problem. As will be seen in the final section, recent experience suggests that in practice the drawing of these lines may not cause overwhelming difficulties.

IV. Appeals from a Discretion

It was noted earlier that the step in the decisional process of applying the law to the facts is, on occasion, characterised as the exercise of a

46. See also the differences between Scottish and English Courts deciding tax appeals before *Edwards* v. *Bairstow*: (1955) 71 L.Q.R. 467.
47. *Walton* v. *Holland* [1963] N.Z.L.R. 729 S.C. & C.A. The proceedings were by way of declaration, not by appeal. Whether the court's powers differ is touched on below in Parts V and VI.
48. He depended on *Edwards* v. *Bairstow*, presumably seeing no difference between appeal on law alone and declaration proceedings.
49. Cooper, "Administrative Law: the Substantial Evidence Rule" (1958) 44 A.B.A.J. 945 extracted in part in Gellhorn and Byse, op. cit., 470-471.

discretion. The writer is not aware of any judicial decision on the relation of these two characterisations, although both have been mentioned in the same judgments.[50] A reading of the cases suggests that the matter is more likely to be said to be one of discretion where

(i) the area for personal appreciation by the decider is large;[51]
(ii) the lower tribunal is not a regular court;[52]
(iii) the "inference", if that language is used, is as to the future—e.g. the future welfare of the child; the movement of prices.

It is not even clear whether the use of one analysis rather than the other would lead to a different result; often the language used by the courts is the same: could the man exercising the discretion (applying the law to the facts) reasonably have come to the conclusion he did if correctly informed on the law. But this is not always so. Further conclusions as to the relation of the two can await the following discussion of appellate review of the exercise of discretions. The same relationship arises in the law of common law review: at times the court will talk of review of errors of law, at others of abuse of discretion. How are the two related?[53]

The suggestion was made above (in II) that if the attitude of the courts to the question whether a right of appeal in respect of the exercise of a discretion even exists (where there is an ambiguity in the statute) is any guide, the courts will often be reluctant to review, by appeals, the merits of a discretionary decision. And the courts have, in general, seen their appellate role in respect of the exercise of discretions in rather limited terms. Thus, in an oft-quoted dictum Viscount

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50. E.g. *McCormack* v. *Wine Cellars (N.Z.) Ltd.* [1966] N.Z.L.R. 756.
51. E.g. custody matters, *Palmer* v. *Palmer* [1961] N.Z.L.R. 129, 702.
52. To the writer's knowledge the only case of an appeal from an administrative tribunal in which the law application rather than a discretion analysis has been clearly used is *In re an Application by Boots the Chemists (New Zealand) Ltd.* [1963] N.Z.L.R. 268.
53. It may be that in most cases both arguments will be available. Thus in *Yukich* v. *Sinclair* [1961] N.Z.L.R. 752 the refusal of the defendant magistrate to grant a wine seller's licence was attacked on the ground of error of law on the face of the record. Hardie Boys J. held, however, that the magistrate considered a factor which, in terms of the statute, he should have ignored. Accordingly, Hardie Boys J. issued mandamus to compel the magistrate to reconsider the application. He might equally have said that the magistrate had erred in law—in construing the statute so as to allow consideration of a factor not mentioned there—and that the error was apparent and ordered *certiorari*. A declaration might also have been available—even if the error was not apparent: see V below.

    If both arguments are in fact often equally available, we may here have at least a partial answer to Wade's assertion that in the American system of judicial review "judges and authors seem to overlook the whole question of discretion", "Anglo-American Administrative Law: More Reflections" (1966) 82 L.Q.R. 226, 247. Given that the Federal Courts already have extensive and *relatively* uncomplicated powers of review over the legal and factual elements of administrative decisions, few cases will arise where a power equivalent to that exercised in *Roberts* v. *Hopwood* [1925] 1 A.C. 578 is needed. In terms of the analysis in I above the discretion element might be called a law-application element to which the powers of review of law and of fact will apply. Wade's "obvious *tertium quid*" (loc. cit., 247, n. 85) might be law-application rather than (or, indeed, as well as) discretion.

Simon L.C., in considering the role of a court hearing an appeal against the Divorce Court's exercise of its discretion in favour of a petitioner who has committed adultery, said:

> If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached. because the court's discretion will have been exercised on wrong or inadequate materials, but, as was recently pointed out in this House in another connexion . . . the appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations . . . then the reversal of the order on appeal may be justified.[54]

The Lord Chancellor also made the point that the proper exercise of the discretion in such a matter largely depends on the observation of witnesses, and on a deduction as to the matrimonial relations and future prospects which can be best made at the trial.[55] There have been suggestions that this "wrong principle" approach to appellate review of discretions has been "exploded". Thus, Lord Denning has claimed:

> The true proposition was stated by Lord Wright in *Charles Osenton & Co.* v. *Johnson.* This court can and will, interfere if it is satisfied that the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him. A good example is *Charles Osenton & Co.* v. *Johnson* itself, where Tucker J. in his discretion ordered trial by an official referee, and the House of Lords reversed it because he had not given due weight to the fact that the professional reputation of surveyors was at stake. Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him, or not weighed so much with him, as in *Hennell* v. *Ranaboldo.* It sometimes happens that the judge has given reasons which enable this court to know the considerations which have weighed with him; but even if he has given no reasons, the court may infer, simply from the way he has

54. *Blunt* v. *Blunt* [1943] A.C. 517, 526-527. The quoted case is *Charles Osenton* v. *Johnston* [1942] A.C. 130.
55. Id. at 527.

> decided, that the judge must have gone wrong in one respect or the other, and will thereupon reverse his decision.[56]

But note, first, that the principle he states does not appear to be basically different from Viscount Simon's,[57] and, second, that, following a lengthy statement of the principles relevant to the exercise of the discretion in issue, Lord Denning found that the judge below had exercised his discretion in the light of the considerations *then* current,[58] and said, without more, that his decision should not be upset. On the other hand, the precise language in which the power is stated is not all important, a vigorous spirit is also significant, and Lord Denning's view that the appellate court has a slightly wider power than was once held has a growing number of adherents.[59]

Such a limited "wrong principle" conception is not, however, always adhered to. In some cases, an appeal court will go to the other extreme, will give the appeal language its full, extensive meaning and will substitute its own discretion. Thus, the Court of Appeal has held the view that in appeals under the Family Protection Act 1955 its discretion is to be substituted for the Supreme Court's:

> [it] is free to deal with the whole matter as the interests of justice demand.

The judgment below will be given due weight but the Court of Appeal is in no way fettered by it. The reasons for this position have never been spelled out.[60]

These two approaches—full and limited—to appellate review of the exercise of discretion are shown by two cases where decisions of administrative tribunals were appealed to the Supreme Court. The appeal provisions were in unrestricted and, interestingly, virtually identical terms.

In the first, Finlay J. was concerned with an appeal from the decision of the Motor Spirits Appeal Authority which had reversed a

56. *Ward* v. *James* [1966] 1 Q.B. 273, 293 C.A.
57. Which is, moreover, still often referred to: e.g. *Robson* v. *Hicks Smith and Sons Ltd.* [1965] N.Z.L.R. 1113, 1115.
58. I.e. the judge below may well have erred in law if Lord Denning's restatement of the law were applied.
59. E.g. Myers C.J. and Smith J. in *Auckland Hospital Board* v. *Marelich* [1944] N.Z.L.R. 596, 601, 607; *Palmer* v. *Palmer* [1961] N.Z.L.R. 129, 702; *Thompson* v. *Turbott* [1963] N.Z.L.R. 71, 79, C.A.; *Lawrence* v. *Bishop & Co. Ltd.* (1964) 11 M.C.D. 245, L.C.C.; *Wellington Hotels Assn.* v. *Wellington Provincial Wholesale Wine and Spirits Merchants Assn.* (1963) id. 4, L.C.C.; *Short* v. *Attorney-General for Sierra Leone* [1963] 1 W.L.R. 1427, J.C. See also *Commissioner of Stamp Duties* v. *International Packers Ltd.* [1954] N.Z.L.R. 25, C.A.
60. *Rose* v. *Rose* [1922] N.Z.L.R. 809, 815, but see *In re Blyth* [1959] N.Z.L.R. 1313, 1314 and *Pay* v. *Pay* [1968] N.Z.L.R. 140, 154, C.A. In a number of other cases appeal courts have substituted their discretion for the lower courts' without mentioning the present question: e.g. *Howey* v. *Truth (N.Z.) Ltd.* [1962] N.Z.L.R. 573, S.C. and C.A.; [1963] N.Z.L.R. 775, J.C.; *The Queen* v. *Elliott* [1964] N.Z.L.R. 158, C.A.; *Lochhead* v. *Mulholland* [1964] N.Z.L.R. 751. See further below, 151, and especially *Re Woods* (1966) 59 D.L.R. (2d) 357.

decision of the Licensing Authority granting the appellants a licence to operate a petrol pump.[61] The Supreme Court could receive evidence, its procedure was to be in accordance with its usual procedure, and the Appeal Authority was bound to follow the court's decision and to reverse, modify or confirm its own decision in accordance with it. As in a number of other cases considered in this paper,[62] the role of two successive appellate bodies had to be considered: that of (i) the Appeal Authority and (ii) the Supreme Court. The Supreme Court conceivably could reverse the decision below (a) if it holds that the Appeal Authority misconceived its role or (b) if, in exercise of its *own* appellate powers, it considers the decision below should be reversed.[63] Finlay J. at the outset, in an oft-quoted passage, stated his opinion of his own role:

> The subject-matter of the appeal is essentially a matter of administration involving the exercise of discretion by an ad hoc body. The Licensing Authority must be assumed to have and no doubt has a knowledge of the whole business of the vending of petrol, including a knowledge of all its incidents. The exercise of the functions of the Authority necessarily postulates its possession of that knowledge. A similar knowledge must be attributed to the Licensing Appeal Authority. Any question concerning the sale of petrol which comes before the Authority or the Appeal Authority comes, therefore, before a tribunal having an instructed mind qualified, in consequence, by special knowledge to reach a wise and just conclusion on all questions of administrative discretion or policy. None of the regular Courts of the country can have that special knowledge and must always feel under some disability in determining questions in which policy and discretion are involved.

And later, speaking of a conflict of decisions, he said:

> It is, to say the least, unlikely that the Legislature intended to clothe the Supreme Court, which has no specialized knowledge of the matters involved, with jurisdiction to determine in respect of matters of policy or administration, which of two Authorities having that specialized knowledge has exercised the statutory discrimination the more wisely or properly: besides, the judgment of the Appeal Authority is made paramount in all circumstances, and final and unassailable in all save one particular set of circumstances. Clearly, therefore, it is the discretion of the Appeal Authority which generally speaking, is in case of conflict, to govern.[64]

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61. *Central Taxi Depot (Rotorua) Ltd.* v. *N.Z. Retail Motor Trade Assn.* [1959] N.Z.L.R. 1167.
62. E.g. *Blunt* v. *Blunt* above; *Thompson* v. *Police* [1966] N.Z.L.R. 639.
63. In one sense, (a) is included in (b): an error by the Appeal Authority as to the scope of its power would be an error of law which the court could act on by allowing the appeal.
64. [1959] N.Z.L.R. 1167, 1168, 1169.

Moreover, the Act, he said, was of little assistance in establishing his role. The matters which can be taken into account by the Licensing Authority are many and various and cover a wide "but not unlimited field".

> But it is noteworthy that even the general and undefined matters which can be considered are limited to such as bear some relation to the purposes of the Act.

The appeal provision must, notwithstanding the limits which he referred to, have some meaning:

> There must, in consequence, be some limitation outside questions of policy and administration of which the Court can take cognizance in determining whether the discretion exercised by the Appeal Authority was rightly or wrongly exercised. In other words, there must be some condition susceptible of examination by the Court subject to the fulfilment or non-fulfilment of which the judgment of the Court is to be governed. That limitation or condition can, in the circumstances, find its existence only in the proposition that the discretion of the Appeal Authority is to be paramount if *properly exercised*. That is, if the Appeal Authority has proceeded in accordance with the principles by which all appeal tribunals are required to govern themselves. It is, it seems to me, upon that footing and only upon that footing that this Court can entertain this appeal.[65]

Thus, if the Appeal Authority had reversed the Licensing Authority upon a point of principle the court could properly interfere if it disagreed on that point of principle. In the result, Finlay J. found that there was such an error: the Appeal Authority had misconstrued the Act. Accordingly the appeal was allowed.[66]

The other issue before the court was the power of the Appeal Authority itself; could it decide the matter before it *de novo*. Finlay J. was in some doubt. Passages quoted above suggest that the Appeal Authority could substitute its decision for the Licensing Authority's. But, on the other hand, if the issue in dispute is a question of fact, said Finlay J., then the question will arise whether the Authority gave sufficient consideration to the principles upon which an appellate tribunal should act when an appeal is on fact.[67] So far as the discretionary element of the decision was concerned Viscount Simon's test might be relevant.[68] There is thus at least a suggestion that Finlay J. would have reversed the Appeal Authority's decision if the Authority

65. [1959] N.Z.L.R. 1167, 1169
66. It is interesting to speculate whether the Appeal Authority's decision could have been quashed by *certiorari*. A privative clause would have prevented an argument based on error of law on the face of the record, but there are some indications that an argument that irrelevant factors had been considered may (i) attract *certiorari* and (ii) avoid the privative clause. See e.g. Cleary J. in *Corbett* v. *Social Security Commission* [1962] N.Z.L.R. 878, 913, citing *Seereelall Jhuggroo* v. *Central Arbitration and Control Board* [1953] A.C. 151, 160-1, J C
67. See also [1959] N.Z.L.R. 1167, 1171, ll. 52-55.
68. Idem.

had claimed power to substitute its discretion for that of the Licensing Authority's. If this is so, the strictures which have been directed at Finlay J. for a near abdication of function on the basis of special knowledge, "which he assumed the Appeal Authority (one lawyer) to have", appear less justified.[69] In any event the Appeal Authority, even if a mere lawyer, would appear to have special knowledge: thus by 1966, the Authority had dealt with more than three hundred motor spirits licensing appeals.

Moreover, and more importantly in the present context, the Appeal Authority's practice is consistent with Finlay J.'s suggestion that its role on appeal is limited. According to a recent valuable study, the Authority will find for the appellant, notwithstanding the width of the appeal provision, only when the decision of the Licensing Authority is "manifestly" or "demonstrably" wrong or against the weight of evidence.

> In appeals dealing with questions of the policy followed by the Licensing Authority, the function of the Appeal Authority is to consider whether the Licensing Authority is exceeding its jurisdiction or applying a policy which contravenes the provisions or purposes of the legislation. . . .[70]

In the second case,[71] by contrast, Wilson J. saw himself as having a much wider power: to decide *de novo* an appeal from a decision of a Land Settlement Committee (i) to refuse to allow the lessee (appellant) of Crown land to purchase it and neighbouring property, (ii) to refuse to renew the lease when it terminated a year later, and (iii) to offer the neighbouring property to three other applicants. (The first phase of this case—whether under the statute there was a right of appeal against such a decision—was discussed above.) The Committee had not, as required by the Act, recorded in its minutes the ground for its decision. Instead of allowing the appeal for that reason alone[72] and, in effect, requiring the Committee to consider the matter again, Wilson J. decided to exercise his power to receive evidence and to enter into the merits of the case. He stated his role thus:

> It is now suggested that all that this Court is entitled to do, if it concludes that the Committee's decision was erroneous, is to

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69. Wild, *The Place of the Administrative Tribunal in 1965* (paper delivered to the Third Commonwealth and Empire Law Conference, Sydney, 1965) 5 and n. 17.
 Such criticism also does not seem to take adequate account of the fact that Finlay J., for all his judicial restraint, *reversed* the Appeal Authority. There is more than one way to skin a cat. The legislature apparently was not happy even with such a limited appeal to the Supreme Court. The Motor Spirits Distribution Amendment Act 1958, s. 5, added to s. 31 of the principal Act a prohibition on appeals to the Supreme Court in cases where (as in the *Central Taxi* case) the Appeal Authority reverses a decision granting a new licence.
70. Upton, *Aspects of New Zealand Motor Spirits Licensing Legislation* (LL.M. thesis V.U.W. 1966) 151, 159; see also Ch. 5. *passim*.
71. *Re Lee's Appeal (No. 2)* [1965] N.Z.L.R. 1002.
72. As in *Givaudan and Co. Ltd.* v. *Minister of Housing and Local Government* [1967] 1 W.L.R. 250 (an *appeal* against the Minister's decision). Presumably mandamus and/or a declaration could have achieved the same objective.

refer the applications back to the Committee for reconsideration. I do not think that is the law. Subsection (5) of s. 18 says:

> After hearing the parties the Court shall give its decision, and cause the same to be certified in writing by the Registrar of the Court to the Board, and the Board shall be bound to follow that decision, and shall reverse, alter, modify, or confirm its own decision in accordance therewith.

If that means what it seems in plain language to mean, it is that it is necessary for me, sitting here on appeal, to make my own decision upon what the decision of the Board, should have been on 11 June 1963, and that it would not be right for me merely to say, having heard all the evidence which any interested party seeks to place before me, that it is now for the Committee to reach its view of what should be done, rather than for the Court. It may be that the Committee, composed as it is, is technically better able to reach a proper conclusion on a matter such as this, lacking as I do experience in farming and experience in the administration of land. Nevertheless, I take it that the Legislature has placed this duty upon me and I propose to perform it.[73]

Wilson J. then outlined the factors which the Committee, and, therefore, he, should consider:

(a) The purpose for which the land is suited or intended to be used:

(b) The ability, having regard to his experience, financial resources, and any other relevant matters, of the applicant to use the land for the purposes for which it is suited or intended to be used:

(c) The land which the applicant already holds or in which he has an interest within the meaning of section 175 of this Act.[74]

"Underlying all these considerations is this basic one—what in the interests of the public at large should be the disposition of the property . . . ?"

He then looked at the facts in the light of his list of considerations. The first was not decisive: all applicants wanted to use the land for the same purposes. As to the second, the appellant was inferior both in experience and finance and he would not be able to bring the land into maximum production immediately as would the other applicants. But

> I think that they are adequate to enable him to pursue the course which he has followed in the past of gradually improving it; and, if it were his own freehold land instead of being leasehold land terminable at the end of any year of the

73. [1965] N.Z.L.R. 1002, 1003, see also 1004, ll. 33-36. Section 18(5) is for all practical purposes indentical to s. 31(4) of the Motor Spirits Distribution Act 1953.

74. Id. 1004.

> lease without compensation for the improvement of the reserve that he would be making, then I think he would have an inducement which he had not in the past, to use greater endeavours to make the utmost use of the land. I think that he has the will to do it and that he has the application and sufficient ability with the advice of which he is availing himself. Consequently I find that all three applicants qualify under that particular consideration.

(The comment can be made that since the decision is comparative, or competitive, surely the question to be answered is who is *best* able, not whether they all qualify under some unstated principle.)

The third factor was not very clear. But Wilson J. accepted the argument of the appellant's counsel:

> the holding which Mr. Lee [the appellant] has apart from this area is inadequate for his effective farming operations whereas the other two applicants have adequate land for their requirements although not as much as they could usefully use.
>
> There is, therefore, I think an advantage which Mr. Lee has in the state of his need of further land which is not possessed in the same degree by the other two applicants. Looking at the matter from the broader view-point of the community's interest, it seems to me that the man whose very livelihood depends on his effectively making the best use of this land is likely in the long run to make a greater increase in production than the man who can usefully employ it but does not need it with the same degree of urgency.[75]

He therefore allowed the appeal and decided that the appellant's application to buy should be granted and that the land should be sold to him by the Board at such price and subject to such conditions as the Board should decide. It is perhaps not facetious to ask whether in the view of Wilson J. price and conditions should not come within the scope of an appealable decision. In addition to that question, this robust approach, especially when compared with the restraint of Finlay J., suggests the following:

(i) Can a judge really weigh effectively, or as effectively as an experienced Land Settlement Committee, the comparative ability of several applicants to use land for farming or other purposes; or, more broadly, the interests of the community at large?

(ii) How would a judge interrelate the various tests? For instance, what would be the position if Wilson J. had found, as perhaps he should have, the other applicants superior so far as ability was concerned? How would he measure that against Lee's superiority under the third head?

(iii) What is the position if the Board has decided on a general policy —e.g. to prefer the experienced farmer—and is attempting to pursue it? Can it be inhibited and hampered by *ad hoc*,

75. Id. 1005.

haphazard and uncoordinated forays of individual judges into the field of policy.[76]

(iv) Inevitably the court's powers are limited: (i) it cannot, as Wilson J. acknowledged, determine the price and conditions of sale; (ii) it does not have *continuing* concern for the whole problem and the particular piece of land. Should it then, displace the Board in the business of allocating Crown land?

It is not suggested that the court should necessarily completely withdraw. It may quite properly intervene where the Board or Committee errs in law, or, as here, fails to give reasons. But that is not to say that the court should go further and exercise the Board's power of allocating Crown land.

Whatever the answer to these questions may be, it is difficult to see why, given the similarity of language the approaches of Finlay J. to motor spirits licensing and of Wilson J. to land allocation should have been so different. Certainly questions such as the above exercised the minds of the Crown's advisers for they, first, lodged an appeal (later withdrawn) and, second, prepared and had enacted amending legislation making clear what all, it was said, had accepted in the past: that there were no appeals in respect of allotment and administrative decisions.[77]

Wilson J.'s broad approach does, however, gain some support from a decision of the Court of Appeal[78] concerning the scope of a magistrate's powers on appeal from a decision of a milk board allocating milk rounds. Again the appeal provision was general. The magistrate took a view of his powers consistent with that of Finlay J.

> In my opinion, it is not for me to weigh with any precision the gravity of such a complaint. The Board may not have made the ideal choice among the many applicants, but it had seventy-two applications to consider and it properly delegated to its experienced officers the task of making a preliminary selection before the Board's ultimate choice. Unless the Board or those officers acted upon a wrong principle, or with clearly manifest unfairness in reaching its

76. Note also s. 13(2) of the Land Act 1948 which requires the Board (and the court?) to have regard to Ministerial representations and to give effect to any Government decision.

77. Land Amendment Act 1965, s. 5; see also s. 4 extending rights to a rehearing *by the Board*. The National Government and the Labour Opposition found themselves in the interesting position of respectively opposing and supporting both the Law Society and Federated Farmers. The Opposition wanted broad appeal rights retained. 345 Hansard 3307-3328, 3352-3353, 3523-3524 (1965). The non-lawyers revelled in legal debate: "there was no question that the original [Lascelles] decision was correct", *Lee* was at variance with it, Mr. Gerrard, id. 3328, 3329; Wilson J., by "a rather devious interpretation" had failed to give the provision the meaning given to it for 60 years; the provision meant exactly what it said, Mr. Dick id. 3316 and see Mr. Rowling id. 3319-3321 citing relevant authorities.

78. *Hammond* v. *Hutt Valley and Bays Metropolitan Milk Board* [1958] N.Z.L.R. 720, S.C. and C.A.; see *contra* another appeal under the same provision, *Albany Dairy Ltd.* v. *Christchurch Metropolitan Milk Board* (1962) 10 M.C.D. 260. The *Hammond* case was not mentioned.

decision, it is not, I apprehend, the Court's province to interfere. Furthermore, a difficulty recognized by counsel is that, even if the Court considered that some qualification of the appellant was overlooked or some criticism overstressed, the Court does not have the successful applicants before it and would still not be in a position to say that the appellant was more deserving of a zone than those to whom they were allotted. It is not just a question of fitness or unfitness of the appellant; it is a matter of allotting a limited number of five zones among seventy-two applicants.[79]

The Court of Appeal pointed to the fact that on appeal the magistrate had a wide range of powers: reverse, vary or confirm either absolutely or with conditions the decision or make such other orders as he thinks fit.

It has been held in England that, where an appeal from the decision of an administrative body has been conferred in somewhat similar language, the appellate tribunal is bound to form an opinion of its own as to the merits of the matter, and is entitled to substitute its opinion for that of the administrative body: *Fulham Borough Council v. Santilli* [1933] 2 K.B. 357; *Stepney Borough Council* v. *Joffe* [1949] 1 K.B. 599; [1949] 1 All E.R. 256.

. . .

we think that an appeal under s. 71 of necessity calls for a hearing afresh for the purpose of determining the merits of the matter as in *Santilli's* case and *Joffe's* case, *because there has been nothing in the nature of a formal hearing by the Board, there are no reasons for its decision and there is no record of the proceedings for examination on appeal.* But whereas in the two cases just mentioned the only question on appeal was the suitability of the applicants to hold the licence applied for, in the present case the inquiry on appeal would necessitate not only a consideration of the appellant's fitness to hold a licence but also an assessment of the comparative merits as between the appellant and the successful applicants. In other words, the element of competition comes into the matter: *R.* v. *Frazer* [1945] N.Z.L.R. 175, 178; [1945] G.L.R. 16, 17. We have made the foregoing observations as to the nature of the appeal contemplated by s. 71 because, although the point was in substance conceded by Mr. Relling, we think it is of some importance that where a right of appeal has been conferred from an administrative body to a Court the nature of the rehearing to which the appellant is entitled should be made clear lest it be whittled down.[80]

In accordance with this statement of principle (and the concession) the Court of Appeal had little difficulty in holding that the magistrate, in

79. Quoted in judgment of Haslam J.: [1958] N.Z.L.R. 720, 722.
80. Id. 728 (emphasis added).

the circumstances, by limiting himself as indicated above and by not considering the comparative merits of several applicants, had in effect refused to exercise the powers conferred on him. Accordingly mandamus issued. Several comments are in order:

1. The Board's concession that the magistrate was obliged to consider the matter *de novo* on the merits, reduces the value of the holding.
2. Judicial practice has made it clear that apparently broad appeal provisions are often construed and applied narrowly: the broad language is not the only factor and other factors (mentioned below) explain the English cases cited.
3. The comparative, competitive, allocative element tends to weigh *against* judicial hearings (as is indeed shown by the informal procedure followed—quite properly, according to the magistrate, by the Board). A court may be appropriate for determining whether a particular individual is qualified. But allocation to a few of many applicants is a different matter. For one thing, the hearing becomes unwieldly: in the present case all 72 applicants would presumably be entitled to appear, to present evidence and argument and to cross examine one another's witnesses. For another, it has often been found difficult to establish criteria on which to base a judicial reasoned choice between several applicants.[81]

On the other hand, the words emphasised in the above quotation stress factors that have frequently been accepted as requiring a broader appeal power.

These conflicting views, and some of the factors bearing on the choice of role, can be seen in the attitudes of the Supreme Court to the general appeals provisions under liquor licensing legislation. The current legislation[82] provides for the following *general* appeals:

(i) appeal from a licensing committee direct to the Supreme Court when a licence has been refused or cancelled on grounds of character;[83]
(ii) subject to (i), appeals from all decisions of the committee to the Licensing Control Commission;
(iii) appeals from the Commission in its original and appellate jurisdiction to the Supreme Court. This general appeal is limited, on the whole, to licensed and other persons disadvantaged by a decision as opposed to an individual whose position is unchanged: e.g. a policeman whose application for cancellation of a liquor licence is unsuccessful.[84]

There are also rights of appeal on questions of law to the Supreme Court.[85]

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81. See especially the debate in the U.S. about the regulatory agencies involved in economic allocation. E.g. Fuller, *The Morality of Law* (1964) 170-76. But cf., say, the grant of taxi licences in New Zealand.
82. Sale of Liquor Act 1962.
83. See also s. 227 (1) (c).
84. Part IX.
85. Sections 53, 226.

The procedure for all general appeals, whether to the Commission or to the Court, is substantially the same:

(i) the right to appeal is stated without qualification;
(ii) the appeal is by way of rehearing on the notes of evidence, affidavits and documentary evidence adduced below;
(iii) the appeal body may, in its discretion, rehear the whole or any part of the evidence and may receive further evidence;
(iv) the Supreme Court may confirm, modify or reverse the decision.[86]

The Commission in addition has power to refer the matter back for reconsideration.[87]

Earlier licensing legislation provided that appeals to the Supreme Court shall be by way of rehearing of the original proceedings, in like manner as if the proceedings had been properly and duly commenced in the Supreme Court.[88]

This language, the Supreme Court held,

> contemplates a hearing *de novo* on evidence adduced before this Court; and it follows, I think, that the duty of this Court is to form an independent decision, as is done in the case of appeals under the Justices of the Peace Act. . . .[89] There is in such cases no presumption in favour of the decision against which the appeal is brought.[90]

The legislation was amended in 1961[91] and, in effect, took its present form. Notwithstanding the change in language—a rehearing of the witnesses was not required, the matter did not have to be considered as if it had been duly commenced in the Supreme Court—Perry J. held

86. But see s. 229 (6).
87. Sections 227 (4)-(11), 228 (4) (5), 230.
88. Section 65A of the Licensing Amendment Act 1948 as enacted by s. 28 of the Licensing Amendment Act (No. 2) 1953.
89. See now above 128-130.
90. *Alford* v. *Licensing Control Commission* [1954] N.Z.L.R. 479, 480; approved *Embassy Liqueurs* v. *Licensing Control Commission* [1955] N.Z.L.R. 734, 747; cf. 742. Compare the restricted view taken by the Licensing Control Commission of its appellate function under s. 65 of the 1948 Act. Note, however, that the final clause of the Supreme Court section ("in like manner . . . ") did not occur in s. 65: *In re New Zealand Loan and Mercantile Agency Co. Ltd.'s Appeal* (1953) 8 M.C.D. 16, 18-21; see similarly *Wellington Hotel Assn.* v. *Wellington Provincial Wholesale Wine and Spirits Merchants Assn.* (1963) 11 M.C.D. 4, 8, citing, *inter alia, Evans* v. *Bartlan, Osenton* and *Palmer* above; the *Alford* and *Embassy Liqueurs* cases were not mentioned.
    The Inland Revenue Department Amendment Act 1960, s. 18 (2) provides that in hearing and determining any objection the Taxation Board of Review
    > shall have all the powers, duties, functions, and discretions of the Commissioner in making the determination.

    Further, there are ample powers for the receiving of evidence. Consistently with the *Alford* and *Embassy* cases (which were not, however, cited), Perry J. in *Legarth* v. *Commissioner of Inland Revenue* [1967] N.Z.L.R. 312 held that the Board should not restrict its role as is usually the case for appeals against discretions, but should feel itself able to substitute its own opinion for that of the Board. The appeal from Perry J.'s decision is reported at [1969] N.Z.L.R. 137.
91. Licensing Amendment Act 1961, s. 76 and the Licensing Appeals Regulations 1963, S.R. 1963/65.

to the old broad view: the *power* to rehear and to receive further evidence contemplated a fresh and independent approach. He then qualified this somewhat:

> No doubt this Court will give full weight to the decision of the Licensing Control Commission on most matters because of its great experience in those matters: see Barrowclough C.J. in *Embassy Liqueurs Limited* v. *Licensing Control Commission* [1955] N.Z.L.R. 734, 742 lines 25 to 32 and McGregor J. (ibid.) 749 lines 29 to 31 and I do so on the question of the "demand" for a licence and on its Review decision but this selection of a licensee was only the second occasion it had had this task and consequently those remarks are not so applicable in this present decision. The Commission did however have the advantage of seeing and hearing the appellant and his wife and their witnesses and the officers of the Licensing Trust and their witnesses. It will be very familiar with designs and plans of licensed premises and the requirements of the customer and it will have a vast fund of knowledge of the trade generally from its hearings over a number of years and throughout New Zealand. I would not lightly disturb its finding but am compelled to do so by the fact that I regard its reasons for selection as being in conflict with its previous decision.[92]

But both Wilson and Henry JJ., in hearing cases in which the appeal function of the Commission was concerned, refused to accept this view.[93] (It will be recalled that the appeal provisions in the licensing legislation apply equally to the Commission and the court.) Wilson J. made the following points:

(i) the statutory language had changed (the earlier authorities could therefore be distinguished);
(ii) the appeal tribunal would not, save in exceptional circumstances, see and hear the witnesses;
(iii) the Supreme Court had recognised its limited role in dealing with criminal appeals on factual issues from the Magistrates' Courts;
(iv) Perry J. had erred. Accordingly the appellant had to satisfy the Commission that the decision appealed against was wrong. The Commission had not, therefore, erred in law in refusing to treat the matter as a trial *de novo*.

In the other case, Henry J. was asked to reverse the decision of the Licensing Control Commission to allow an appeal by the Police against a Licensing Committee's refusal to cancel a hotel keeper's license. Henry J. agreed that that Committee had a discretion not to cancel the licence even if one of the grounds for cancellation were made out, and went on to consider and uphold the following propositions:

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92. *Mitchell* v. *Mt. Wellington Licensing Trust* [1964] N.Z.L.R. 353, 365-6.
93. *McCormack* v. *Wine Cellars (N.Z.) Ltd.* [1966] N.Z.L.R. 756, *Thompson* v. *Police* [1966] N.Z.L.R. 639. See on the similar change in transport legislation *Whiting* v. *Archer* [1964] N.Z.L.R. 742. (See also Ministerial statement on Transport Policy, 1959 App. J.H.R. H40 A, 9.)

1. that the Commission had viewed its function too widely;[94] it was not in as good a position to decide as the Committee and was not entitled to substitute its discretion for that of the Committee;

2. that the Commission had misinterpreted the Act.

For both reasons the Commission's decision was reversed and the original refusal reinstated.[95] So far as the first is concerned, Henry J. stressed the composition of the Committee: the four members other than the magistrate who is Chairman are lay members elected by local authorities. It is this predominantly lay body which has the discretionary power of cancellation or suspension.[96]

The cases reviewed and cited above and other relevant authorities suggest several factors relevant to the scope of appellate review of the exercise of a discretion. It will be noted that several are equally relevant to the scope of appellate review of application of the law to the facts.

1. *The Legislative Language*. If the legislation provides in all cases for a rehearing and states that the appeal is to be dealt with as if originally before the court the legislative intent is clear.[97] But the legislative intent will often not be clear; such provisions are rare and when there is not a clear intent, the legislature's meaning may appear differently to different (and even the same) judges although the same language is used. Thus, compare, on the one hand, Finlay J. in the motor spirits case and Wilson and Henry JJ. in the licensing cases with, on the other hand, Wilson J. in the Crown land case and Perry J. in the licensing case.

If the appeal provision relates to a narrow grant of jurisdiction rather than to, say, all decisions of the Magistrate's Court or of the Land Board the appeal court is more likely to give it a broad reading. Thus in the milk distribution case and in family protection matters, the legislature has specifically decided that those comparatively narrow range of decisions should be appealable. If this grant of power is to be meaningful, if in the first case it is going to allow any wider review

94. One must sympathise with the Commission. Under the pre-1961 legislation it considered its appellate function as limited; the Supreme Court (under a slightly differently worded section) considered its role wide, and at first refused to give any weight to the change in statutory language; but, only at first, for *some* judges saw the new jurisdiction as narrower. The decision under attack here appears to be uncharacteristic since the Commission has said that under the new legislation, as under the old, it should not substitute its discretion for that of the Committee. *Lawrence* v. *Bishop and Co. Ltd.* (1964) 11 M.C.D. 245.

95. It is not always clear which argument is being discussed; see e.g. [1966] N.Z.L.R. 639, 643 line 27 ff.

96. Cf. however the strongly worded view of the Commission that because of their local connections lay members of licensing committees were *undesirable* people to decide licence cancellation questions: Report of the Commission, 1965 App. J.H.R. H3, paras. 108-9.

97. *Alford* v. *Licensing Control Commission* [1954] N.Z.L.R. 479, the procedure on criminal appeals from Magistrates' Courts before 1957, see *Page* v. *Police* [1964] N.Z.L.R. 974, 975, and in the Transport Act 1948 (as amended), see *Whiting* v. *Archer* [1964] N.Z.L.R. 742.

that is already available under non-statutory review,[98] the grant should be construed broadly.

The legislative history, as in the licensing and criminal appeals fields, may also assist. So, knowing that the legislature has for various reasons become disenchanted with their handling of obscenity cases, or has, at least, preferred a specially constituted tribunal, the Supreme Court is unlikely to see its appellate role as extensive.[99]

2. *The Composition, Experience and Independence of the Original Body*. The first factor, it will be recalled, was stressed by Henry J. in deciding that the Licensing Control Commission should have deferred to a mainly lay, locally representative Licensing Committee on the question of licence cancellation. Finlay J., of course, stressed the second in the motor spirits case,[1] but Wilson J.'s decision in the Crown land case, and extra-judicial statements of Wild C.J. show that deference to experience is not a unanimous view of the judges. Finally, the courts are more willing to extend their appellate review in respect of local authorities deciding matters in which they are directly interested.[2]

3. *Nature of Appellate Body*. This factor correlates with the previous one: a lay appeal body could not be expected to limit its appellate functions to legal issues such as the sufficiency of evidence and matters of principle;[3] nor would a specially constituted expert body be expected to consider matters not falling within its field of competence.[4] But a court could be reluctant to review the merits of the decision of an experienced tribunal when that experience is relevant;[5] *aliter* where the experience is not relevant—e.g. on questions of law. Thus the Supreme Court might be expected to exercise more stringent review in hearing appeals against the cancellation of a licence for character reasons as compared with cancellation, say, for economic reasons.[6]

4. *Form of Proceedings of Original Authority*. If there is no hearing below and no reasons given, the courts are likely to decide the

98. See e.g. Cleary J. in the *Hammond* case [1958] N.Z.L.R. 720, 727-728 referring to *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.* [1948] 1 Q.B. 223, C.A. Compare Lord Greene in n. 51 below.
99. See Indecent Publications Act 1961, s. 19 (2) and *Robson* v. *Hicks Smith and Sons Ltd.* [1965] N.Z.L.R. 1113, F.C. discussed below. See also C. K. Allen on workers' compensation, *Administrative Jurisdiction* (1956) 9.
1. See also e.g. Barrowclough C.J. and McGregor J. in the *Embassy Liqueurs* case above (thus derogating to some extent from their original position that they were unfettered); *Mitchell's* case, above; *Dobson* v. *Commissioner* (1943) 320 U.S. 489; *Fleming* v. *Transport Coordination Board* [1935] G.L.R. 641.
2. E.g. *Croydon Corpn.* v. *Thomas* [1947] 1 K.B. 386, D.C.
3. *Stepney Corpn.* v. *Joffe* [1949] 1 K.B. 599, D.C. See especially Humphreys J. *arguendo* at 601.
4. *Police* v. *Sterritt* [1961] N.Z.L.R. 310, 318-319, C.A.; *Wednesbury Corpn.* v. *Ministry of Housing and Local Government (No. 2)* [1966] 2 Q.B. 275, C.A.
5. See note 1.
6. See e.g. *Mitchells* case, and the dicta in the *Embassy Liqueurs* case, nn. 92 and 90 above.

matter *de novo.*[7] Thus Macarthur J.[8] recently distinguished the licensing[9] and criminal[10] appeals cases and held that the Town and Country Planning Appeal Board was obliged to exercise full powers, with no presumption in favour of the decision appealed from and with the original onus: there had been no hearing, there were no notes of evidence, and facts rather than discretion were involved. He accordingly issued *certiorari* to quash the Board's decision for error of law on the face of the record: it had exercised too narrow a power. One reason for this broader approach is that, in the absence of written reasons, the wrong principle approach will usually be valueless. Further, the legislature may have intended that the individuals involved should have a full hearing of their cases in the event that they considered unsatisfactory the decisions reached by *purely administrative* methods.

5. *Form of Proceedings of Appeal Court.* If the court is obliged to or does actually, hear or see the witnesses, it is likely to feel less restrained. Thus there is some support for the view that if an appellate court sees the parties to custody litigation it can review more freely the decision attacked.[11]

But, on the other hand, if, as is usually the case, there is no hearing the appellate authority will often restrict its role:[12] the appellant may, for instance, have to establish that the decision below was manifestly wrong.[13]

6. *The Interests Involved.* The Court of Appeal has said that it should be more ready to review a discretionary decision in a custody matter, than a Supreme Court decision on a procedural question.[14] The legislature, of course, recognises this basic point: there is a *general* right of appeal *direct* to the Supreme Court from the refusal of a licensing committee to grant or renew a licence. *If* a licence is *granted* the appellant must go first to the Licensing Control Commission, and his further appeal to the Supreme Court is *limited* to questions of law.[15]

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7. *Fulham B.C.* v. *Santilli* [1933] 2 K.B. 357; *Stepney Corpn.* v. *Joffe* [1949] 1 K.B. 599 D.C.; *Croydon Corpn.* v. *Thomas* [1947] 1 K.B. 386; *Whiting* v. *Archer* [1964] N.Z.L.R. 742, 743; *Hammond* v. *Hutt Valley and Bays Milk Board* [1958] N.Z.L.R. 720, 728.
8. In *Straven Services Ltd.* v. *Waimairi County* [1966] N.Z.L.R. 996.
9. *McCormack's* case above, 147.
10. *Page* and *Toomey* above, 129.
11. *Palmer* v. *Palmer* n. 27 above. See also e.g. *Re Lees Appeal (No. 2)* [1965] N.Z.L.R. 1002, 1003; *Whiting* v. *Archer* [1964] N.Z.L.R. 742. See McMullin, loc. cit., 185-186 for a brief discussion of the circumstances in which the appeal court will order a rehearing of the witnesses.
12. E.g. id., *Blunt* v. *Blunt* above.
13. E.g. id., Transport Licensing Appeal Decision No. 1212.
14. *Palmer* v. *Palmer* above; see further Inglis "The Hearing of Matrimonial and Custody Cases" in Inglis and Mercer (ed.), *Family Law Centenary Essays* (1967) 35, 48-49, and s. 31 (3) of the Guardianship Act 1968. See also e.g. Lord Goddard's emphasis on the right to trade in *Stepney Corporation* v. *Joffe* [1949] 1 K.B. 599, D.C.
15. Sale of Liquor Act 1962, s. 53 and Part IX. For two recent instances see *Milne Bremner Ltd.* v. *South Canterbury Hotel Assn.* [1967] N.Z.L.R. 473; and *Invercargill Licensing Trust* v. *Don Lodge Motel Ltd.* [1967] N.Z.L.R. 433 respectively.

Perhaps the importance of the interests is a factor in the width of review in family protection matters.

7. *Uniformity of Administration.* The operation of this factor will depend, of course, on whether the appellate or original body is single or many. Thus there might be a case for saying on this ground[16] that individual Supreme Court judges should be reluctant to review broadly decisions of the Licensing Control Commission which are based on a policy, say, to increase the standards of the hotels.[17] On the other hand, the requirement of a uniformity hardly bears on the scope of Supreme Court review of a decision that the licensee is not a proper person, for character reasons, to hold a licence.

8. *Width of Discretion Conferred.* This factor can operate both ways. Especially if an appeal right is specifically granted, the appeal court may reason that a limited, "wrong principle" approach would nullify Parliament's intent: if the discretion is broad the entire jurisdiction tends to be discretionary and there is little chance of error of principle. For this reason the Canadian Supreme Court has concluded that a court hearing family protection appeals can substitute its discretion on the question whether the testator has made proper provision and, if not, what provision would be proper.[18] But on the other hand, the more usual approach, as we have seen (especially where the appeal provisions apply to a broad range of decisions), is to limit appellate review of discretionary decisions to error of principle. As indicated, so limited, such review narrows in scope as the discretion widens. This approach is consistent with the reluctance which we have already noted to find that an appeal right even exists where a broad discretion is involved.

Since the mix of these factors will vary, there is no single precise answer as to the extent of appellate review of the exercise of a discretion. Moreover, there can clearly be approaches falling between the two possibilities stated at the outset—"wrong principles" and complete substitution. Accordingly, providing for a general appeal in respect of such decisions will be only a short first step in the working out of the appropriate scope of review, the relation between the appeal court and the tribunal. More precise articulation of the line will normally have to come from the courts, although the legislature can help—e.g. by *requiring* a hearing of evidence and a determination of the matter as if it were *originally* before the appeal court. But such provisions are rare[19] and hardly generally desirable—at least where there has been a hearing below. (This is further pursued in the final section.)

The legislature has, in addition, in a number of cases, expressly directed the appeal court to take a narrow view of its appellate powers

16. And at least on one other: comparative expertise: 2 above.
17. Compare the stress in the 1965 Report of the Commission on its overall review function: App. J.H.R. H 3, paras 104-107; and see *Mitchell's* case and the dicta in the *Embassy Liqueurs* case, nn. 92 and 90 above.
18. *Re Woods* (1966) 59 D.L.R. 2d. 357.
19. Note their abolition in criminal appeals from magistrates, licensing cases, and transport licensing appeals.

over the exercise of a discretionary power. Thus under the Indecent Publications Act 1963 an appeal from the Tribunal to a Full Supreme Court of three judges is to be heard as if the Tribunal's decision had been made in the exercise of a discretion.[20] This is a curious provision: first, is not the Tribunal's decision on the merits basically discretionary;[21] the language of the Act suggests not;[22] second, to say that the decision is to be treated as if made in the exercise of a discretion is hardly a precise direction to the court: we have seen that appeal courts in such cases have taken greatly varying views. But undoubtedly the legislature intended that the court's role should be narrow: if not dissatisfied with recent judicial efforts in the obscenity field, it clearly considered that a single "specialised body of informed opinion in the field of literature"[23] was to be preferred. It could not have intended to allow judicial censorship to return through the back door. In fact in the only case[24] considered by it the Full Court has stressed its limited role: it was not to adjudicate upon the book in question. In the circumstances, it was concerned only with a question of statutory interpretation: could the tribunal consider a factor which it had taken into account. In thus circumscribing his role, one of the judges referred to Viscount Simon's classic statement of principle quoted earlier.[25] The point can be made that the legislative limitation was possibly unnecessary: Viscount Simon's principle was stated in a case where the appeal right was given in general, unrestricted terms.

Although this is anticipating a little, the point can also be made that, if the appeal provision is so narrowed, the court's appellant power is hardly different—if at all—from its review power: in the next section, we will see that mandamus and perhaps *certiorari* will issue in the event, to use Viscount Simon's language in the *general appeal* case quoted above, of a showing that the court "gave weight to irrelevant

20. Section 19 (2).
21. It is submitted that the unsuccessful struggles of judges and legislatures to obtain meaningful, precise definitions of obscenity show that the matter is one of personal impression in an area in which narrowly articulated standards and compelling, objective reasoning is beyond reach. For evidence of the lack of success consider (i) the several shifts in the attitude of the U.S. Supreme Court in just the past ten years, e.g. *Roth* v. *United States* (1957) 354 U.S. 476; *Jacobellis* v. *Ohio* (1964) 378 U.S. 184; *A Quantity of Books* v. *Kansas* (1964) 378 U.S. 205; *Ginzburg* v. *United States* (1966) 383 U.S. 463; (ii) the comment of Justice Stewart of that court that he doubts whether he can intelligently define hard core pornography, but that he knows it when he sees it, *Jacobellis* at 197; (iii) the progressively briefer and virtually unreasoned decisions of the Indecent Publications Tribunal, compare e.g. those on *Another Country* (16 March 1964) 1965 Gazette 21. and on *Lolita* (11 August 1964) id. 21 with those on *Nexus* and *Plexus* (16 December 1965) 1965 id. 2344, *The Perfumed Garden* (14 February 1966) 1966 id. 279, *Penthouse* (1 August 1966) id. 1242 and *The Nude Who Never* (25 August 1966) id. 1419.
22. Cf. the criticism by the Court of Appeal of the use in statutes of the word "deemed": *Hawke's Bay Milk Producers Ltd.* v. *New Zealand Milk Board* [1961] N.Z.L.R. 218. 224.
23. Hutchison J. in *Robson* v. *Hicks Smith and Sons Ltd.* [1965] N.Z.L.R. 1113, 1118 F.C.
24. Idem.
25. In *Blunt* v. *Blunt*; see 136-137.

matters or omitted to take into account matters that are relevant. . . . "

At this point, the relation between the two analyses of the decisional process used in the two sections (III and IV) should also be considered. The choice between the two analyses *does* appear significant: in the bulk of the decisions considered in the present section (IV) the appeals have been general and not limited to law alone. For the most part we have seen that the courts, having decided that the matter is one of discretion, have *not* gone further than using the wrong principle approach: they have, in other words, limited the scope of their review of the exercise of the discretion, of this third element in the decisional process. Compare this, however, with the attitude of courts deciding general appeals when the case is, instead, classified as one of applying the law to the facts (III above): they *will go* further than merely determining that the decision is reasonable; they *will* substitute their view of the *only* proper inference for that of the court below.

The characterisation of this third stage of the decisional process is, therefore, clearly most important: The fact that appeals from administrative tribunals are usually characterised as appeals in respect of discretions and not as appeals in respect of law application means that the general appellate power is correspondingly narrower.

V. Common Law Review: A Brief Comparison

The previous sections have hardly shown a clear and precise system of rules regulating statutory appeals; depending on the circumstances, there are varying individual approaches to the legislation which is usually rather general in its terms. Equally the courts have developed flexible powers in reviewing, under common law, administrative action. This flexibility makes comparison between statutory appeal and non-statutory review doubly difficult. This comparison is undertaken in an effort to determine what—if any—difference to the powers of the courts over administrative tribunals, the creation of statutory rights of appeals would make.

The scope of non-statutory review of the factual, legal and discretionary (or law applying) elements of administrative decisions will now be very briefly summarised and compared with the scope of appellate review as established in the previous two sections. It will be assumed that the distinctions between the various elements suggested in I above are equally valid in the non-statutory review context. This assumption may well be invalid. Indeed it was suggested that the distinctions or definitions may not even remain constant for all *appeals*.

(i) *Questions of Law.* Judicial review has long been bedevilled by the concept of jurisdiction: only those errors of law (and of fact) which go to the jurisdiction of the tribunal, and not those within its jurisdiction, can be reviewed. So far as tribunals are concerned (at least if they give reasons for their decisions), the significance of this

uncertain and difficult distinction has been reduced[26] in recent years by the resurrection of the rule that errors of law on the face of the record of a tribunal can be quashed by *certiorari*.[27] Its importance could be further reduced, even nullified,[28] by the development by the courts of their declaratory judgment jurisdiction. The New Zealand legislation[29] provides for declarations on all questions of construction of documents and legislation, i.e. arguably on all questions of law which arise in an administrative law context. A restrictive concept of jurisdiction is nowhere mentioned, and, indeed, the legislation expressly provides that a declaration may be given although the court has no power to give relief and notwithstanding that the subject matter is within another court's exclusive jurisdiction.[30] Further, the legislation arguably meets the concern that there will be two inconsistent decisions—the original and the declaratory—and that that latter will have, unlike *certiorari*,[31] no effect on the former, by providing that the declaration "shall be binding" on the parties.[32]

The possibility of complete review by way of the declaration of *all* legal questions decided by administrative tribunals has hardly been explored in New Zealand, but three cases show the possibilities and problems associated with such a development. In the first a decision of the Native Land Court was challenged.[33] There was some question whether the error in question was jurisdictional but the Court of Appeal said this was not significant, pointed to the power of the court to give a declaration although the matter was within another court's exclusive jurisdiction and, notwithstanding a strong privative clause, made the declaration. But declarations do not issue as of right: the court has a discretion whether it gives a declaration.[34] Presumably the fact that Parliament has set up a special tribunal to make the relevant decisions might persuade the court to limit its intervention. The second

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26. See also the discussion below of judicial control of the exercise of a discretion.
27. E.g. *Straven Services Ltd.* v. *Waimairi County* [1966] N.Z.L.R. 996 which shows that the power can be equivalent to a power to hear appeals on questions of law. Cf. e.g. the judgment there with the appeal judgments in *Thompson* v. *Police* [1966] N.Z.L.R. 639 and *McCormack* v. *Wine Cellars (N.Z.) Ltd.* [1966] N.Z.L.R. 756. See also e.g. *R.* v. *Deputy Industrial Injuries Commissioner ex parte Humphreys* [1966] 2 Q.B. 1, C.A.; Whitmore, loc cit.,
28. As in U.S. administrative law, at least at the federal level. Cf. also the courts' jurisdiction over domestic tribunals.
29. Declaratory Judgments Act 1908, s. 3.
30. Section 11.
31. Cf. *Yukich* v. *Sinclair* [1961] N.Z.L.R. 752 when Hardie Boys J., while refusing to order the issue of *certiorari*, and therefore to quash the decision attacked, issued mandamus to compel the defendent magistrate to make a (second) decision. See also Akehurst, (1968) 31 Mod.L.R. 1, 8-10 who notes many cases where a declaration which is not in England expressly stated to bind the parties—has been given in respect of a decision which was only voidable and not void.
32. Declaratory Judgments Act 1908, s. 4. Cf. *Healey* v. *Minister of Health* [1955] 1 Q.B. 221, 228: *Punton* v. *Ministry of Pensions and National Insurance (No. 2)* [1964] 1 W.L.R. 226, 238, C.A.
33. *Hardy* v. *Te Aka Pairama* [1918] N.Z.L.R. 492.
34. Underlined by s. 10 of the Act.

and third cases bear on this suggestion.[35] In the former a decision of a Military Service Board that the applicant was resident in New Zealand was challenged in declaration proceedings. Herdman J. ruled:

> Whether a person is "resident in New Zealand" within the meaning of s. 3(2) of the Military Service Act, 1916, must depend upon the special circumstances of each case. To admit that this Court can or should decide whether the plaintiff is "resident in New Zealand" and thus liable to be enrolled in the Expeditionary Force Reserve and to be called up for service as a member of the Expeditionary Force, would be to concede that this Court can and should perform functions which, under s. 18 and the other sections of the Military Service Act, 1916, dealing with appeals, have been specially entrusted to Military Service Boards.
>
> By the proceedings initiated by the plaintiff this Court is being asked to do what the Legislature has empowered Military Service Boards to do. I am asked to declare upon the facts stated in the plaintiff's affidavit that he is not resident in New Zealand within the meaning of the Military Service Act, 1916. If I accept this invitation then it follows that in every case in which a man's claim to immunity from military service depends upon the construction of any part of the Military Service Act, a party to an appeal under that Act can successfully avoid a Military Service Board and call upon this Court to discharge functions which the Legislature has directed a Military Service Board to perform.[36]

The Board was created for the very purpose of deciding such questions. Accordingly Herdman J., in the exercise of his discretion, refused to make a declaration.

In the final case, in which the Supreme Court was asked to rule on the continued validity of an industrial award and was referred to its express power to decide matters exclusively within another court's jurisdiction, the court refused to make a declaration. It underlined its discretion, and said that this was

> eminently a case in which this Court should not adjudicate upon the questions put. To do so would, in my opinion, be an improper encroachment upon the special jurisdiction created by the Industrial Conciliation and Arbitration Act.

A cheap and simple procedure before the Magistrates' and Arbitration Courts was provided by the Act, the Arbitration Court was specially

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35. *Mullins* v. *Attorney-General* [1918] N.Z.L.R. 506; *Greymouth Wharf Labourers' Industrial Union of Workers* v. *Anchor Shipping and Foundry Co. Ltd.* (1914) 17 G.L.R. 192.
36. [1918] N.Z.L.R. at 508.

fitted to deal with the dispute, and, moreover, appeals from it went to the Court of Appeal, not to the Supreme Court.[37]

Clearly the policy basic to these decisions is that the legislative determination that certain issues should be decided by special tribunals should be respected.[38] Equally clearly this policy is a sound one. Thus the courts should be very reluctant indeed to decide the very question which Parliament has concluded should be decided by the tribunal. Thus, in England, it would hardly be consistent with Parliament's rejection of the common law courts in the field of worker's compensation for the courts to intervene in a wideranging manner in the merits of such cases by way of declaration or of *certiorari* for error of law on the face of the record.[39] But if the question put is narrower, more properly within the court's rather than the tribunal's competence,[40] the courts might well decide to answer it. Thus in the course of argument in the Native Land case mentioned above Edward J. remarked with reference to an argument based on the privative clause—

> This is merely a question of the construction of a statute, not of reviewing the jurisdiction of the Native Land Court. . . . [41]

Such a line between intervention and non-intervention is clearly a vague and shadowy one. But so is the jurisdiction concept which it replaces and it at least allows *direct* consideration of the real question: how much of the decision should be reviewed? Answering such a question should ideally involve consideration of the issues involved in the decision—law or policy, statutory interpretation or merits—Parliament's reasons for establishing the tribunal and the tribunal's and court's composition, experience and procedures. Such, of course, are factors which courts consider in determining the scope of their *appellate* powers, and the vigorous use of the declaration jurisdiction in this way could well render statutory appeal rights unnecessary. This is further considered below.

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37. 17 G.L.R. at 193-194.
Cf. *Sneddon* v. *Thomas Borthwick and Sons (Australasia) Ltd.* [1966] N.Z.L.R. 524 where McGregor J. held that he had no option but to decide an action for 2/6, an alleged deficiency under an industrial award. Magistrates' Court's proceedings would have been more appropriate: there could have been an appeal to the Arbitration Court which was much more conversant with the conditions and background. *Contra* Turner J. in *New Zealand Dairy Factory Union* v. *Cooperative Dairy Co. Ltd.* [1959] N.Z.L.R. 910, where, however, the remedies were a declaration and injunction. But should this matter? Turner J. does not mention s. 11.
38. See to the same effect *Punton* v. *Ministry of Pensions and National Insurance (No. 2)* [1964] 1 W.L.R. 226, C.A., and especially Phillimore J. in the court below [1963] 1 W.L.R. 1176.
39. Allen, *Administrative Jurisdiction* (1956) 9.
40. Note the change in the questions in the *Punton* case made in the course of the proceedings. At first the High Court was asked to declare that the plaintiffs were entitled to the benefit in question. Later the question was narrowed: had the commissioner (whose decision was not originally directly attacked) come to the correct decision in point of law?
41. *Hardy* v. *Te Aka Pairama* [1918] N.Z.L.R. 492, 496, C.A. See also the distinction made by Viscount Simonds in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260, 287.

(ii) *Primary Facts.* Factual determinations are subject to judicial review in two different ways: (a) if they go to jurisdiction; and (b) if it can be said that, as a result of insufficiency or complete lack of evidence, there is an error of law which appears on the face of the record. Errors in (b) could equally be corrected by either a general or law only appeal. (Case (a) points to the need to consider whether the introduction of statutory review should involve the abrogation of non-statutory review: as in this case, the latter may be available when the former is not.) It is interesting to note, however, that even here, as in the case of general appeals, the court will defer to the factual determinations of the tribunal below.[42]

(iii) *Application of the Law to the Facts.* The question here is whether the courts will, in exercise either of their declaratory jurisdiction or of *certiorari* for error of law on the face of the record, go beyond pure errors of law, e.g. mistaken interpretations of a statute. Will they also find a reviewable error if, for instance, no reasonable tribunal, which had properly interpreted the statute, on the facts as found, would have reached the decision given? Or to put a more extreme case, if there was no evidence on which the tribunal might have reached the decision it did? It is clear that courts hearing appeals on law alone will intervene in such cases. If they are willing to find an error of law in such cases, should they not also be prepared to discover an error of law for the purposes of *certiorari* and the declaration? It is difficult to see that there should be any difference. Lord Denning[43] has at times suggested that *certiorari* and the declaration have this role, but the question has not yet been conclusively determined.[44]

(iv) *Discretion.* The courts have retained a great amount of freedom in reviewing the exercise of discretions. In extreme cases, by use of their power to hold decisions *ultra vires* because of reliance on irrelevant factors or non-consideration of relevant factors or because of unreasonableness, the courts have managed to impose their own policy decisions.[45] At the other extreme, judges have, in some cases, virtually abdicated such a role.[46] McGregor J. in a recent case shows the possible extent of judicial intervention. He was asked to issue mandamus against the Registrar of Companies for his refusal to register

42. E.g. *Manawatu-Oroua River Bd.* v. *Barber* [1953] N.Z.L.R. 1010, 1037, C.A.
43. E.g. *Lee* v. *Showmen's Guild* [1952] 2 Q.B. 329, 346, C.A.; *D.P.P.* v. *Head* [1959] A.C. 83, 112; *R.* v. *Medical Appeal Tribunal ex parte Gilmore* [1957] 1 Q.B. 574, 582 C.A.
44. In New Zealand see e.g. *Walton* v. *Holland* [1963] N.Z.L.R. 729. It is true that the *Punton* case and *Anisminic Ltd.* v. *Foreign Compensation Commission* [1967] 2 All E.R. 986, C.A. suggest some limits on the declaration's role. But in New Zealand the statutory background is basically different.
45. The usually cited cases are, of course, *Roberts* v. *Hopwood* [1925] A.C. 578; *Prescott* v. *Birmingham Corporation* [1955] Ch. 210; see also *Isitt* v. *Quill* (1893) 11 N.Z.L.R. 224, C.A., and Sir Robert Stout's criticism of it in *Thatcher* v. *Cook County* [1916] G.L.R. 674. See also the useful discussion in Benjafield and Whitmore, *Principles of Australian Administrative Law* (3rd ed. 1966) 175-86.
46. See especially Lord Greene M.R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 228, C.A., and note that such an argument is rarely successful in respect of Ministerial decisions.

a change of company name on the ground of possibility of deception. The remedy was available, the learned judge said, if the plaintiff could show one of three things:

> either that the Registrar had not in fact exercised any discretion in the particular case, or that he had exercised it upon some wrong principle of law or that he had been influenced by extraneous considerations which he ought not to have taken into account.[47]

Failure to consider relevant factors is sometimes included in such a list; it could be considered to fall, in any event, within the first or second grounds.[48] McGregor J. turned to the facts:

> Whether the name "Airlines of New Zealand Limited" so nearly resembles the name "New Zealand National Airways" is to a large extent a *matter of opinion. . . . In my opinion* in the present case there is a close similarity. "Airlines of New Zealand" has two distinct features implying that the company operates an airservice and describing its territorial operations. The same two descriptive features are contained in the name "New Zealand National Airways". The territorial and air service descriptions are common to both. The only distinction is that in "N.A.C." as it is commonly known, the word "National" may imply state of government connection or control. But in the same way the common adoption of "New Zealand" as part of the name may to the uninitiated imply a similar connection with government or State.
>
> The matter is centred on the similarity of names, *a question of fact or opinion. . . . It seems to me* that there is a distinct probability of confusion in the adoption of the suggested new name by the plaintiff. While there is no intention on its part to deceive, the similarity may well cause deception of customers unfamiliar with the rival operation of air services. National Airways conduct a trunk service throughout New Zealand with subsidiary services to smaller centres. The plaintiff, while not licensed to operate direct trunk services, conducts services to main centres with intermediate stopping places in some cases at airports not serviced by National Airways. Both companies operate from Auckland to Invercargill, and the only important airports not serviced by the plaintiff seem to be Blenheim and Dunedin. *It would seem to me* that many travellers, and more especially overseas travellers, offered bookings with a company called "Airlines of New Zealand" would fail to appreciate that they were

This case has been quoted at length to show first that, in practice, despite an original statement of restrictive principles the difference between review and appeal can disappear. Indeed the learned judge

47. *S.P.A.N.Z.* v. *Registrar of Companies* [1964] N.Z.L.R. 1, 2-3 quoting Avory J. in *R.* v. *Registrar of Companies* [1912] 3 K.B. 23, 34.
48. E.g. id. 2, lines 37-40.

here does not even mention the weight usually accorded in *appeals* in dealing with an organisation other than the National Airways Corporation.[49]

such cases as the present to the judgment of an experienced official.[50] Second, if the judge had limited his role to that indicated in the first quotation from his judgment, his role would appear the same as that usually exercised by appellate judges considering the exercise of a discretion: recall especially Viscount Simon's statement.[51] Third, the case underlines the nagging doubt *expressed earlier*: that in the fields of review and appeal the various formulae as to the scope of power may be mere words, of little consequence in the final analysis. McGregor J. does come back to the "wrong principles" etc. language at the end, but the substance of his judgment is surely a wide ranging *de novo* consideration; even more wide ranging than some general appeals.

VI. CONCLUSIONS

The comparison in the previous section has shown that the distinction between appeals, especially appeals on law alone, on the one hand, and judicial review on the other, can and often does disappear. This is particularly true of the review of the decisions of tribunals which put their reasons in writing[52] and when decisions are not protected by a privative clause. The courts can review all errors of law and some purely factual errors and can go a considerable distance in reviewing the exercise of a discretion, a power as wide as that exercised by many appeal courts. The question may, therefore, be asked whether all the talk of legislative reform is not wasted, whether it should not be left to the courts to exercise and develop their *already existing* powers of

49. Id. 3, 4 (emphasis added).
50. See e.g. *Duckworth, Turner & Co. Ltd.* v. *Commissioner of Trade Marks* [1959] N.Z.L.R. 1341.
51. Pp. 135-136 above. Compare Lord Greene in *Minister of National Revenue* v. *Wright's Canadian Ropes Ltd.* [1947] A.C. 109 where he stressed that the right of appeal (from a discretion) must have been intended to be an effective right, but went on to point out that the limits within which the court was able to appeal were strictly limited; he then quoted Lord Halsbury's famous statement in *Sharp* v. *Wakefield* [1891] A.C. 173, 179; this case is, of course, a case stated on a question of law; not a general appeal. See also *Legarth* v. *Commissioner of Inland Revenue* [1967] N.Z.L.R. 312, 318-319.
52. It has been suggested that tribunals, on request, should provide written reasons. Cf. Tribunals and Inquiries Act 1958, s. 12 (U.K.). See e.g. Orr, *Administrative Justice in New Zealand* (1964) para. 299; Law Society Committee report para. 22. As Orr recognises, however, this may be too onerous an obligation in some cases. Consider e.g. the position of the Social Security Department which rejects about 8,000 applications a year. The proposal also assumes that decisions can always be reasoned, but consider e.g. the very brief decisions of the Indecent Publications Tribunal and more generally Freund quoting Holmes quoting Lord Mansfield "Rationality in Judicial Decisions" in *Rational Decision* (Nomos no. VII, 1962) 109, 120-1. Consider also the view that the question whether a hotel is needed in an area is a matter of personal opinion and not of ascertainable fact on which men will differ extremely; the need for referring it to some special tribunal—here an elective committee—is obvious: *Hamilton* v. *Fraser* (1887) N.Z.L.R. 5 S.C. 1, 5.

review. Cannot the relevant factors best be weighed in the particular circumstances of a single case; even if legislation allowing appeals is enacted, the courts will, as we have seen, still have to spell out the precise rules. One could point to the United States experience. There, from the same legal background, the Federal courts have developed the declaration to the point where they will set aside the decisions of administrative agencies if they are unsupported by substantial evidence, are an abuse of discretion, or are erroneous in law.[53]

But on the other hand, the New Zealand courts, in exercising their non-statutory review powers, may not and often do not see their role in such extensive terms; and, on the other hand, they may exercise a more wide ranging statutory appeal power. Second, the New Zealand courts rarely take the lead in law reform; the doctrine of parliamentary sovereignty, the lack of written constitution and the comparative ease of legislative reform perhaps explain this. The courts would probably prefer a clear lead from Parliament. Third, if fifteen Supreme Court judges are left to make the common law of review, haphazard and non-uniform development in respect of the same and different tribunals can hardly be avoided. The wide variations in the scope of review, illustrated in cases discussed in V above, evidence this prediction. The point is taken that even if appeal provisions are enacted, the cases[54] show the probability of their uneven application. Partial answers are (i) that the statutory language can reduce this possibility (see further below) and (ii) the appeals would logically go to the smaller group of judges in the Administrative Division. Fourth, appeals tend to refer the courts to the real issue: how much of the decision below should they review, taking into account the procedures, composition and experience of the tribunal and the nature of the issue in dispute. Common law review, on the other hand, tends to raise artificial issues: thus whether the alleged error is jurisdictional (and therefore reviewable) may depend on whether Parliament, inadvertently perhaps and surely without reference to the present issue, said that the matter in issue should be decided "in the course of the proceedings"[55] or at some other time. Fifth, procedural difficulties relating to review, although not serious in New Zealand, would be avoided.[56] Sixth, appeal remedies are usually more flexible, and may allow a final disposition of the matter. The prerogative writs, however, usually present the court with

53. See e.g. the Administrative Procedure Act 1946, s. 10 (e), which is considered, for the most part, to be declaratory.
54. Compare e.g. the motor spirits and Crown lands cases discussed above in section IV.
55. Cf. *Hami Paihana* v. *Tokerau District Maori Land Board* [1955] N.Z.L.R. 314, 321.
56. Compare Davis' famous criticism of the common law system of remedies, *Administrative Law Treatise* (1958) ch. 24. 01. In New Zealand all the remedies can usually be sought in one proceeding in the one court, discovery is permitted in prohibition and *certiorari* proceedings and there is no time limit for seeking these remedies. In all respects the position differs from that in England. See Aikman and Clark, "Some Developments in Administrative Law (1965)" (1966) 28 (2) N.Z.J.P.A. 96, 107-117.

a difficult choice: allow the decision to stand, or quash it and/or require the tribunal to deal with the matter *de novo*.

This conclusion that there should be a statutory right of appeal on questions of law from administrative tribunals to the regular courts or the Administrative Division is also supported by the basic reason for further review: greater competence of the reviewing body, in this case, the regular courts or the Administrative Division.

But should there be more extensive appeal rights? There is a preliminary point which has already been made but which is worth underlining: a general appeal provision—especially if there is no history of legislative changes—can be interpreted very differently by different judges. It can be seen as authorising a wide ranging *de novo* investigation of the merits of the whole question, or it can be read narrowly as permitting no more than a determination whether the tribunal has erred in law, or made a mistake of principle.

Such a difference is clearly of vital practical importance, and is basic to the role of the appellate court or tribunal. It goes without saying that it is a matter which should be carefully considered when any reforms to the present appellate structure are made. Further it might also be desirable if the legislature were to attempt to give a direction to the appeal court as to which role it should adopt. There are several ways in which this could be done. Possible legislative language in order of increasingly wide review might be as follows:

(i) appeals on all questions of law;[57]
(ii) (general) appeals (as if) from the exercise of a discretion;[58] (This might not differ in practice from (i));
(iii) general appeals from a decision which is characterised as one of law application;
(iv) appeal by way of a *de novo* rehearing as if the proceedings had been properly and duly commenced in the appeal court.[59]

(iii) would differ from (ii) in that the court would be invited to draw its own inferences from the facts; and (iv) in turn will be wider than (iii) in that, first, the court would make its own findings on the facts and, second, the onus would be as in the original proceedings: there would be no presumption in favour of the original decision.

57. There are many precedents; see *Citizen and Power* (1965) 43-47.
58. E.g. Indecent Publications Act 1963, s. 19; Broadcasting Authority Act 1968, s. 23 (3).
59. See e.g. the now repealed licensing, transport and justices of the peace legislation discussed in sections III and IV above. See also the Inland Revenue Department Amendment Act 1960, s. 18 (2) mentioned in n. 90 above. Statutory language as wide as this will not always achieve a complete rehearing of the issues without any weight being given to the decision under appeal, e.g. the *Embassy Liqueurs* case and *Mercer* v. *Pharmacy Board of Victoria* [1968] V.R. 72, 80 lines 12-16, 85 citing *Bhattacharya* v. *General Medical Council* [1967] 3 W.L.R. 498, 502, P.C.
See also clause 16 of the draft Evidence Amendment Bill, Report of the Torts and General Law Reform Committee, *Hearsay Evidence* (1967) 33, and s. 31 (3) of the Guardianship Act 1968.

The discussion above does show that the courts have taken notice of factors other than the language of the appeal provision—especially the procedures of the original and appeal bodies, and the legislative history—but, first, these factors will not always be helpful and, second, it is probably more desirable for the legislature to address itself directly to this problem if it is attempting an overall reform, rather than to leave such a basic question to be inferred.

Whether the legislature should go beyond (i) and (ii) and allow wider appeals is a policy question which can only be answered in specific cases. The following more general points do, however, bear on it:

1. Some, perhaps most, administrative tribunals have been established, in part, because as single expert bodies with narrow functions they can handle the issues more competently than the regular courts: the Indecent Publications Tribunal, the Trade Practices Commission and the Shops and Offices Exemption Tribunal are amongst recent examples.[60] It is hardly consistent with that original Parliamentary decision, to allow general appeals on the merits from such tribunals to the courts or indeed to any tribunal of general jurisdiction; (the force of the argument reduces as the appeal tribunal's jurisdiction narrows). Thus the Franks Committee, in rejecting the proposal for an Administrative Court, said, in part,

> a general tribunal could not have the experience and expertise in particular fields which, it is generally accepted, should be a characteristic of tribunals. Appeals would thus lie from an expert tribunal to a comparatively inexpert body, and we see little advantage in this.[61]

More positively *all* review of the merits of a decision is *prima facie* wasteful. The taking of effect of the original decision is usually delayed, and the time of possibly highly qualified people is taken up going through the same material and reaching a second decision.[62] Positive reasons for this waste, for taking a second or third opinion, must be adduced. The major reason justifying a further opinion is that it is likely to be better; that it is likely to be as good is no reason for seeking it. Almost by definition, if Parliament decided to establish the administrative tribunal for reasons of expertness, the tribunal's decision on the merits should, as a general proposition, be preferred to a regular court's view on the merits.

2. A very closely related factor—perhaps it is the same point in another guise—is discussed in the report of the special committee of the New Zealand Law Society: one reason that major justiciable issues should not be dealt with by the ordinary courts (*semble*, either originally or an appeal).

60. See e.g. the discussion in Robson, op. cit., 155-158.
61. Cmnd 218, para. 121.
62. E.g. *Fletcher* v. *Archer* [1960] N.Z.L.R. 815, 821; Transport of Goods by Road: Statement of Policy by the Minister of Transport, App. J.H.R. 1959 H 40A, 9; Abel, "Appeals from Administrative Decisions: III In Search of a Basic Policy" (1962) 5 Canadian Public Administration 65.

This argument is consistent with the attitude of courts, first, to contentions that they do not have jurisdiction to hear appeals under ambiguous appeal provisions and, second, to the scope of their review of discretions.

> would be the fact that the relevant Act left such a wide discretion to the tribunal that the latter was forced to become a policy-making body. . . . to ask the Courts to venture into such controversial spheres [as determining the public interest in licensing cases] might be to risk jeopardizing their "image" as, above all, impartial holders of the scales between opposing interests.[63]

The comment might be made that such a limitation on appeals would extend to a wide area of administrative tribunal jurisdiction. The committee instances road and air transport licensing and price fixing as cases where the legislation speaks of the public interest. But the legislation relating to liquor licensing, motor spirits licensing, cinematograph films licensing, pharmacy licensing, conscientious objectors to trade union membership, shops and offices, local government reorganisation, town and country planning, and trade practices is in similarly wide terms. If all these areas either were excepted from any new appeal provisions or were subject to limited appellate review only, there would be very little appellate work for the Administrative Division or other appeal court.

In addition to concern about the courts becoming involved in matters of political controversy, the argument that there should be no or only a limited right of appeal from the exercise of a discretion is supported by another factor: that judgment in such cases is preeminently a matter of personal opinion and that there is, other things being equal, no reason for preferring one man's opinion to another's.

3. The particular merits issue may not, however, be one peculiarly within the competence of the special tribunal: consider the cancellation of a publican's licence because of moral unfitness. In such a case more extensive review can clearly be justified.[64]

4. Any such general appeal right will undermine the other group of reasons for establishing administrative tribunals: expedition, informality and comparative cost.

5. The procedure in the tribunal below is clearly important. If the first real hearing is at the appellate level the appeal right should be more extensive.

6. The number of rights of appeal is clearly important. If the regular Court or Administrative Division is the *first* level appellate

63. Report, para. 30.
64. The existing legislation recognises this distinction in that it allows a direct appeal to the Supreme Court in the case of cancellation of a liquor licence by a Committee. The expert Commission is bypassed. But cf. *Thompson* v. *Police* [1966] N.Z.L.R. 639 (discussed above) where it was held that the Commission had only limited appellate powers in such a case; note, however, that there the Committee had *rejected* an application for cancellation and that the Commission had reversed.

body it should, as a general proposition, have wider powers than if it were the second appeal court.

7. The uniform and consistent development of the law would suggest that when possible there should be a single appellate tribunal—or at least fewer appeal bodies than original bodies.[65] Thus it would be hardly satisfactory if the efforts of the Licensing Control Commission to develop a particular policy were to be interrupted by the *ad hoc* forays of one or other of the fifteen Supreme Court Judges.[66] The Judges have in fact taken this point[67]—even before the recent legislative changes narrowing their role—but the result may be that apparently wide appeal rights are to that extent illusory.

The above discussion might suggest that appeal rights or extensive appeal rights can only be rarely justified. But, it will be countered, the legislature has almost consistently recognised a right of appeal from the decisions of courts and tribunals. It is suggested that this practice is to be explained by, amongst other reasons, the following: the first and most obvious is the greater competence of the appeal body. Second, apparently wide grants of appeal rights from the courts are often not what they appear: appellate review of factual findings and of the exercise of discretions is frequently very limited. Third, the issues in dispute may be more precisely stated, and therefore more fully and directly considered the second time around; the decision below will often focus discussion. Fourth, appeals from several to one body or even to fewer bodies will promote uniformity. A fifth factor, often related to uniformity, is the judicial role of generalising, of laying down rules. The role of the appeal court is usually thought of in such terms, rather than as a function of deciding what the appropriate decision in a particular case was or what actually happened in a particular case.[68] Here we return to the basic consideration of comparative competence: thus we have seen that appeal courts consider the original courts equally or better able to determine the facts or to exercise a discretion. But they also hold that they, the appeal courts, are better qualified to determine questions of law.

An outstanding American administrative lawyer sums up this fundamental point in the following words:

> Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions. It is from that very desire that the nature

65. Uniformity has been amongst the reasons for the establishment of at least two special tribunals in lieu of the regular courts in recent years: the Shops and Offices Exemption Tribunal and the Indecent Publications Tribunal; Robson, op. cit., 156-158.
66. One of the reasons for creating a single Commission (by the Licensing Amendment Act 1948) was to introduce some consistency into Liquor Licensing which had formerly been governed exclusively by local committees. See also the Report of the Royal Commission on Licensing 1946 App. J.H.R. H 38. Consider also Orr's emphasis on the *positive* pursuit by such administrative bodies of their objectives. The courts' role is, by comparison, passive.
67. See e.g. pp. 150-151 above.
68. E.g. Weiner, loc. cit.

of questions of law emerges. For, in the last analysis, they seem to me to be those questions that lawyers are equipped to decide.

To view "law" in this fashion seems to me to bring reason into our conception of the supremacy of law. It seems to afford some guide to molding the process of judicial review over both legislative and administrative action. It explains the variances in the scope of judicial review over administrative agencies of different compositions and charged with the disposition of different subject matters. It lends emphasis to the insistence of Mr. Justice Brandeis that differences in treatment should be accorded to findings of fact by different administrative officials, because of differences in the facts and in the qualities of the administrative to be expert in finding the facts. It removes nothing from the insistence that policy plays a commanding role in the shaping of judicial review, but in the place of a simple theory of economic determinism, or of a barren logic, it substitutes a sense of emphasis upon intellectual quality and discipline as related to a particular problem. The line of demarcation will then speak in terms of reality, in terms of an appreciation of the limitations and abilities of men, rather than in terms of political dogma or of righteous abstractions.

Of course, such a conception of law as related to spheres of judicial and administrative activity affords no definite answers. It must not do so, for the capacities of men and the nature of disciplines will vary. But it does point to the elements that should control judgment. And from the standpoint of affording conceptions of liberty real meaning, one can ask little more than to have issues decided by those best equipped for the task.

. . .

The power of judicial review under our traditions of government lies with the courts because of a deep belief that the heritage they hold makes them experts in the synthesis of design. Such difficulties as have arisen have come because courts cast aside that role to assume to themselves expertness in matters of industrial health, utility engineering, railroad management, even bread baking. The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts.[69]

These factors have been listed and discussed mainly in the context of the scope of appellate review, but they also, of course. bear on the question whether there should even be a right of appeal and on the nature of the appellate tribunal. So far as the latter issue is concerned,

69. Landis, *The Administrative Process* (1938) 152-153, 154-155.

the above arguments would suggest, especially if extensive appellate review is desired, that a special administrative appeal body is to be preferred to the regular courts and probably also to the new Administrative Division of the Supreme Court. But that question is not pursued here.[70]

Almost inevitably the proposals finally adopted will provide for appeals on questions of law in some circumstances. The point has been made that such a provision could create confusion and give rise to preliminary disputes.[71] It is true that difficulties have arisen, but it is equally true that the difficulties have, given the large numbers of such limited appeal rights in the statute book, been amazingly few.[72] Appeals from one court to another are often limited to questions of law and the Justice Department's survey of Administrative Tribunals[73] lists more than forty statutory provisions allowing a tribunal to state a case on questions of law for the Supreme Court or Court of Appeal and a number of provisions allowing such appeals. More specifically, in only a handful of the multitude of tax cases[74] (where appeals are usually limited to questions of law) has the limitation caused problems, and the English courts appear to have had little difficulty on this score since 1958 when the Tribunals and Inquiries Act widened the rights of appeal on law from administrative tribunals.[75] Further, these courts have succeeded in dealing with this problem without the draftsman trying his hand at a definition.

Finally, the question must be asked whether, if an extensive system of statutory appeals (even if limited to questions of law) is created, the present common law review remedies should remain. Surely they should not: statutory rights of appeal are, with two exceptions,[76] at least as extensive; the double system would be unnecessarily complex; and finality of decisions would not be attained as quickly; appeals must be lodged within a short, specified period; there is no time limit on the

70. See the Judicature Amendment Act 1968 and the first Report of the Public and Administrative Law Reform Committee 1968, especially paras 35-40, and Mr. Orr's dissenting statement.

71. See e.g. Judge Archer's address to the A.N.Z.A.L.S. conference citing *In re Hawke's Bay Motor Company and the Minister of Railways* [1949] N.Z.L.R. 445 and Professor Northey's unpublished paper to which he refers. The report of the Public and Administrative Law Reform Committee mentions the problem, para. 41.

72. See also the Arbitration Court cases, p. 131, n. 35 above.

73. *The Citizen and Power* (1965) XLVII-LVI.

74. See e.g. the cases discussed above 132-134. *Edwards* v. *Bairstow* discussed above would appear to have resolved the difficulties at least for tax cases.

75. The Law Reports Index lists no cases relevant to the Tribunals and Inquiries Act 1958 where there has been dispute about the meaning of questions of law. See *Luke* v. *Minister of Housing and Local Government* [1967] 3 W.L.R. 801 where a line was drawn between matters of fact and of opinion.

76. First, an appeal on questions of law would not allow review of a jurisdictional error which is factual rather than legal; and, second, the injunction and prohibition can be used to prevent proceedings continuing.

prerogative writs. There is now the further factor that appeals from tribunals subject to its jurisdiction go only to the Administrative Division while all the members of the Supreme Court bench can issue the common law remedies in respect of those same tribunals unless the Chief Justice otherwise decides.

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