1956 *Present :* **Basnayake, C.J., Gunasekara, J., Pulle, J., de Silva, J., and Sansoni, J.**

SILVERLINE BUS CO., LTD., *et al.*, Petitioners, *and* KANDY OMNIBUS CO., LTD., *et al.*, Respondents

S. C. 649—Application for Conditional Leave to Appeal to the Privy Council from the Judgment of the Supreme Court in S. C. Application No. 596/1952

*Privy Council—Conditional leave to appeal—*Certiorari *—"Civil suit or action"——Courts Ordinance, s. 42—Civil Procedure Code, ss. 5, 6—Appeals (Privy Council) Ordinance, s. 3.*

Held (SANSONI, J., dissenting), that an appeal to the Privy Council does not lie from a decision of the Supreme Court in an application for a writ of *certiorari*. Such an application does not fall within the ambit of the expression "civil suit or action" in section 3 of the Appeals (Privy Council) Ordinance, even when the application is made by a party aggrieved who has suffered damage by an unwarranted exercise of jurisdiction.

The words "civil suit or action" in section 3 of the Appeals (Privy Council) Ordinance should be construed in their ordinary sense of a proceeding in which one party sues for or claims something from another in regular civil proceedings.

In re Goonesinha (1942) 44 N. L. R. 75 and *Kodakan Pillai v. Mudanayake* (1951) 54 N. L. R. 350, overruled.

APPLICATION for conditional leave to appeal to the Privy Council.

The Kandy Omnibus Company Ltd. complained to the Commissioner of Motor Transport that the Silverline Bus Company Ltd. and certain other omnibus Companies were picking up passengers and setting them down within the limits of Kandy town in violation of its own rights under its route licence. When the Commissioner of Motor Transport made order in favour of the Kandy Omnibus Company Ltd., the Companies aggrieved by the order appealed to the Tribunal of Appeal constituted under the Motor Traffic Act, No. 14 of 1951. In the appeal, the Tribunal of Appeal set aside the order of the Commissioner of Motor Transport. The Kandy Omnibus Company Ltd. then applied for a writ of *certiorari* to quash the order of the Tribunal of Appeal. The Supreme Court quashed the order on the ground that the Tribunal of Appeal had acted without jurisdiction. Thereupon the present application for leave to appeal to the Privy Council was lodged.

H. W. Jayewardene, Q.C., with *G. T. Samerawickrame, D. R. P. Goonetilleke*, and *M. R. M. Daluwatte*, for Petitioner.

H. V. Perera, Q.C., with *C. G. Weeramantry* and *G. Barr Kumarakulasinghe*, for 1st Respondent.

E. F. N. Gratiaen, Q.C., Attorney-General, with *V. S. A. Pullenayegum*, Crown Counsel, for the Crown (with permission).

Cur. adv. vult.

December 14, 1956. BASNAYAKE, C.J.—

This is an application for leave to appeal to the Privy Council under the Appeals (Privy Council) Ordinance (hereinafter referred to as the Ordinance) from an order made by a single Judge of this Court granting a mandate in the nature of a writ of certiorari under section 42 of the Courts Ordinance quashing the decision of a Tribunal of Appeal constituted under the Motor Traffic Act, No. 14 of 1951.

The application is opposed on the ground that the proceedings in which the mandate was granted do not fall within the ambit of the expression "civil suit or action" in section 3 of the Ordinance. The matter was first argued before my brother Weerasooriya and myself and as we failed to agree on the order that should be made it was set down for hearing before a Bench of five Judges constituted under section 51 of the Courts Ordinance.

The Attorney-General appeared at the present hearing and asked that he be permitted to make his submissions on the questions involved as our decision might affect certain Crown appeals pending before the Privy Council although those appeals are not appeals from decisions on applications for writs of certiorari.

It will be convenient if I were to state, as briefly as possible, the facts which led to the application, for a mandate in the nature of a writ of certiorari, by the respondent to the present application for leave to appeal, the Kandy Omnibus Company Limited (hereinafter referred to as the respondent).

The respondent was the holder of eight route licences granted under the Omnibus Service Licensing Ordinance, No. 47 of 1942, all operative within the town of Kandy. In the year 1945 it complained to the Commissioner of Motor Transport that the Silverline Bus Company Limited, the P. S. Bus Company Limited, the Singho Bus Company Limited, the United Bus Company Limited, the Parakrama Bus Company Limited, the W. H. Bus Company Limited, the Sri Lanka Omnibus Company Limited, and the Madhyama Lanka Bus Company Limited (hereinafter collectively referred to as the applicants) who had route licences to ply for hire between Kandy town and places outside it were picking up passengers and setting them down within the limits of Kandy town to its prejudice and in violation of its rights under its route licence.

On 29th September 1950 the Commissioner of Motor Transport after notifying and hearing the other Companies made order that they should not pick up and set down passengers within the limits of Kandy town. The applicants appealed to the Tribunal of Appeal constituted under the Motor Car Ordinance, No. 45 of 1938, against the Commissioner's order, but one of them—the Madhyama Lanka Bus Company Limited—withdrew its appeal at the hearing. The appeals were heard on 18th November 1950 and 9th and 15th December 1950 by a Tribunal consisting of Messrs. S. J. C. Kadirgamar, S. Pararajasingham and T. W. Roberts, but the hearing remained unfinished on 1st September 1951 when the Motor Traffic Act, No. 14 of 1951, which repealed the Motor Car Ordinance, No. 45 of 1938, was brought into operation.

On 26th August 1952 the Minister of Transport and Works made the following order :—

"*Motor Car Ordinance, No. 45 of 1938,*

and

Motor Traffic Act, No. 14 of 1951

It is hereby notified that the Honourable the Minister for Transport and Works has been pleased, under section 4 of the Motor Car Ordinance, No. 45 of 1938, read with paragraph (*c*) of the proviso to section 243 (1) and section 246 (4) (*a*) of the Motor Traffic Act, No. 14 of 1951, to appoint the following to form a panel from which Tribunals of Appeal shall be constituted for the purpose of disposing of the appeals which have been duly preferred under the Motor Car Ordinance, No. 45 of 1938, and the Omnibus Service Licensing Ordinance, No. 47 of 1942 :—

1. Mr. T. W. Roberts
2. Mr. S. Pararajasingham
3. Mr. S. J. C. Kadirgamar, J.P.
4. Mr. P. C. Villavarayan
5. Mr. Fred J. de Saram
6. Mr. M. Shums Cassim, M.B.E.
7. Mr. J. L. M. Fernando
8. Mr. A. E. Christoffelsz, C.M.G.
9. Mr. S. P. Wickremasinha
10. Mr. E. W. Kannangara, C.B.E.

Sgd. J. N. ARUMUGAM,
Permanent Secretary,
Ministry of Transport and Works.

Colombo, August 26, 1952 ".

Of the abovenamed the first three members, who heard the appeal under the repealed law, continued the hearing purporting to do so by virtue of the above order, and on 10th October 1952 made order setting aside the order of the Commissioner of Motor Transport. The respondent thereupon applied for a mandate in the nature of a writ of certiorari to quash the order of the Tribunal, on the ground that the members of the Tribunal who continued the hearing of the appeal under the old law had no jurisdiction to do so. After a hearing which lasted a number of days the order of the Tribunal was quashed on the ground that it had acted without jurisdiction. Thereupon the present application for leave to appeal to the Privy Council was lodged.

As stated at the very outset of this judgment, this application is opposed on the ground that certiorari proceedings do not fall within the ambit of the expression " civil suit or action " in section 3 of the Ordinance.

In order to ascertain whether a writ of certiorari can aptly fall within the ambit of the expression " civil suit or action ", it is necessary first to ascertain the nature and scope of the writ which in our law is in the form of

a mandate and in England, since the abolition of the prerogative writ by section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, is in the form of an "order".

According to Bacon's Abridgment, Volume II, page 9, a certiorari is—

> ". . . . . an original writ issuing out of Chancery, or the *King's Bench*, directed in the king's name, to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause."

Though the 1938 statute abolished the writs, nevertheless the nature and scope of the orders which took their place remained unchanged. In the words of Scrutton, L.J., in *R. v. The London County Council, Ex parte The Entertainments Protection Association Ltd.*[1]—the writ of certiorari is

> ". . . . a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior Court."

It is a writ which can be availed of both in civil and in criminal proceedings. As was observed by Lord Sumner in *R. v. Nat Bell Liquors Ltd.*[2]—

> "The object is to examine the proceedings in the inferior Court to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal convictions, except in so far as differences in the form of the record of the inferior Court's determination or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior Court, and therefore would not have been available as a reason for quashing the proceedings."

The certiorari jurisdiction, if I may so call it for the sake of convenience, of the High Court in England and indeed of this Court in this country is, again in the words of Lord Sumner (page 156)—

> ". . . . to see that the inferior Court has not exceeded its own (jurisdiction), and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, *not of review*, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

[1] *(1931) 2 K. B. 215 at 233.*

[2] *(1922) 2 A. C. 128 at 151-155.*

These principles have recently been re-stated by Denning, L.J., in *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [1]—

> ". . . . the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had."

The dicta I have cited go to show that proceedings in certiorari do not fall within the category of proceedings known as suits or actions. In certiorari the Court exercises its supervisory functions in order to determine whether the inferior tribunal has exceeded its jurisdiction or committed an error of law apparent on the face of the proceedings, and is not called upon to pronounce judgment on the merits of the dispute between the parties before the inferior tribunal.

In support of the contention that certiorari falls within the scope of the expression " civil suit or action " learned counsel relied on the cases of *Abbot v. Sullivan & others* [2], *Lee v. Showmen's Guild of Great Britain* [3], and *O'Connor v. Isaacs & others* [4].

The first of these cases was an action for damages by the plaintiff, a corn porter employed in the London docks, who was a member of a committee formed to protect the interests of corn porters. On account of an incident in which the plaintiff was involved his name was removed from the register of corn porters by the committee. The plaintiff's action for damages was against two members of the committee for wrongfully removing him from the register and against another for procuring his removal. It was held that the resolution by which the plaintiff's removal was decided was ultra vires of the committee, and was invalid; but as the defendants were not actuated by malice or wrong motive the majority of the Court did not award damages.

The second case was an action by a member of the Showmen's Guild of Great Britain against the Guild for a declaration that the decisions of the Committee—

(a) that the plaintiff was guilty of " unfair competition ", and
(b) imposing a fine on him, and
(c) that he had ceased to be a member as he did not pay the fine,

were *ultra vires* and void. The Court held that the Committee had acted *ultra vires* and that their decision to expel the plaintiff was void.

[1] *(1952) 1 A. E. R. 122 at 127.*
[2] *(1952) 1 A. E. R. 226.*
[3] *(1952) 1 A. E. R. 1175.*
[4] *(1956) 2 W. L. R. 535.*

In the third case the plaintiff sued the Justices of the Peace of the Petty Sessional Division of Kingston-upon-Thames, Surrey, fourteen in number, claiming damages for false imprisonment and for acts done by them without jurisdiction while sitting as Justices of the Peace.

All these three cases were regular actions and not proceedings in certiorari. There can be no doubt that these cases would fall within the ambit of our expression " civil suit or action ". But the fact that an action for trespass lies, where a Magistrate or any Judge of an inferior Court assumes jurisdiction, where he has no jurisdiction, as a result of a mistake of law does not afford ground for holding that proceedings in certiorari to have the illegal assumption of jurisdiction examined by the High Court are an action against the Magistrate or Judge.

In the cases cited above the aggrieved parties sought the remedy for the wrong done by suing the wrong doers. If, instead of suing them, they chose to take proceedings in certiorari, it would not be correct to say that the aggrieved parties sought the remedy for the wrong done. But it would be correct to say that they invoked the aid of the High Court to have the errors committed by the authorities concerned corrected. The above cases therefore afford no authority for saying that proceedings in certiorari come within the ambit of the expression " civil suit or action ".

I shall now proceed to examine the meaning and content of the expression " Civil Suit or Action " in section 52 of the Charter of 1833 and in section 3 of the Ordinance. But before I do so I shall briefly refer to the origin and scope of our legislation on the subject of appeals to the Privy Council.

The right of establishing Courts is a branch of the prerogative of the Crown [1]. The Sovereign has the right, by virtue of the prerogative, to review the decisions of all the Courts outside England, except where such right has been expressly parted with [2].

It is open to the Crown to part with its prerogative right to receive appeals either altogether or in respect of certain matters only. It may also regulate the right of appeal by conferring on the local courts the right to grant leave to appeal to the Sovereign in certain classes of cases. It may even grant a statutory right of appeal and regulate the exercise of that by express enactment. In the case of *Queen v. Alloo Paroo* [3] Lord Brougham observed :—

" It might be reasonably contended that the Crown may point out the manner in which the general common-law right of Appeal to it from colonial sentences shall be exercised, by a particular mode of enactment in the Charter. It may say, there is a right to appeal to the Crown generally. That Appeal shall be in civil cases at all times, but that Appeal shall be in criminal cases only in a certain manner and form, and I shall delegate to my Judges below, the right (the Crown may say) to refuse or to grant it, as they see fit . "

[1] *Re Lord Bishop of Natal, (1864) 3 Moo. (N.S.) 115 at 152.*
[2] *The Falkland Islands Co. v. The Queen, (1863) 1 Moo. (N.S.) 299 at 312.*
In re Abraham Mallory Dillet (Brit. Hond.), (1887) 12 A. C. 459 at 466.
Theberge v. Landry (Quebec), (1876) 2 A. C. 102 at 106.
[3] *(1847) 5 Moo. P. C. 296 at 303.*

No reference to the development of the jurisdiction of the Privy Council would be complete without a citation from the judgment of Viscount Cave, L.C., in *Nadan v. The King* [1] wherein the matter is admirably set out.

> "The practice of invoking the exercise of the royal prerogative by way of appeal from any Court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of the law; but if so, the practice has long since ripened into a privilege belonging to every subject of the King. In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King's subjects in those Dominions. The right extends (apart from legislation) to judgments in criminal as well as in civil cases: see *Reg. v. Bertrand* (L. R. 1 P. C. 520). It has been recognized and regulated in a series of statutes, of which it is sufficient to mention two—namely, the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), and the Judicial Committee Act, 1844 (7 & 8 Vict., c. 69). The Act of 1833 recites that 'from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council', and proceeds to regulate the manner of such appeal; and the Act of 1844, after reciting that 'the Judicial Committee, acting under the authority of the said Acts (the Act of 1833 and an amending Act) hath been found to answer well the purposes for which it was so established by Parliament, but it is found necessary to improve its proceedings in some respects for the better despatch of business and expedient also to extend its jurisdiction and powers', enacts (in s. 1) that it shall be competent to Her Majesty by general or special Order in Council to 'provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any Court of justice within any British Colony or Possession abroad'. These Acts, and other later statutes by which the constitution of the Judicial Committee has from time to time been amended, give legislative sanction to the jurisdiction which had previously existed."

In the case of Ceylon, South Africa, and some other countries, the right of appeal to the Sovereign in civil cases was expressly granted and regulated by Charter. The first Ceylon Charter was in 1801. It established a Court of Record called "The Supreme Court of Judicature in the Island of Ceylon" and defined its powers and jurisdiction, and granted a right of appeal to the Privy Council to any person—

> ". . . . . aggrieved by any interlocutory Sentence, or Determination having the Effect of a Definitive Sentence, or by any Definitive Sentence, of the said Supreme Court of Judicature in the Island of Ceylon, in any Civil Cause, Matter, or Thing whatsoever",

[1] *Nadan v. the King* (1926) *A. C. 482 at 491.*

where the matter in dispute exceeds five hundred Pounds. After the annexation of the Kandyan Provinces the Charter of 1801 was replaced by the Charter of 1833, a more comprehensive instrument. It established a Supreme Court and District Courts. The latter were empowered to hear and determine—

> ". . . . all Pleas Suits and Actions in which the Party or Parties Defendant shall be resident within the District in which any such Suit or Action shall be brought or in which the Act Matter or Thing in respect of which any such Suit or Action shall be brought shall have been done or performed within such District."

The Supreme Court was given an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the respective District Courts. By section 52 a conditional right of appeal to the Privy Council was also granted to—

> ". . . . a Party or Parties to any Civil Suit or Action depending in the said Supreme Court . . . . against any final judgment, Decree or Sentence or against any Rule or Order made in any such Civil Suit or Action, and having the effect of a final or definitive Sentence."

The conditions are almost the same as those in force today except for the fact that the decision had to be brought up in review before a Collective Court before the application for leave. It is clear from the Charter itself that the right of appeal granted thereby does not exhaust the Sovereign's right to admit appeals, for, section 53 reserves the right to admit any appeal, "from any Judgment, Decree, Sentence or Order" of the Supreme Court subject to such conditions as may be imposed by the Sovereign. The succeeding legislation did not materially alter the right of appeal granted by the Charter of 1833. In 1889 the Courts Ordinance and the Civil Procedure Code made provision for appeals to the Privy Council. The former Ordinance made the following provision which was repealed in 1909 when the Appeals (Privy Council) Ordinance was enacted—

> "Nothing herein contained shall be held to affect the appeal to Her Majesty in Her Privy Council, graciously granted by the Royal Charter of 1833 to any person or persons being a party or parties to any civil suit or action depending in the Supreme Court, against any final judgment, decree, or sentence, or against any rule or order made in any such civil suit or action, and having the effect of a final or definitive sentence, and which said appeal shall continue to be subject to the rules and limitations by the said Charter prescribed and hereinafter set out, as follows: . . . . "

Chapter LXIII of the Civil Procedure Code (sections 779 to 789), also repealed by the Ordinance, while declaring that it shall be lawful for any party or parties to a civil suit or action, to appeal to the Privy Council against any final judgment, decree or sentence or against any rule or order made in any such civil suit or action, prescribed the procedure to be followed in bringing a judgment in review before the collective court prior to obtaining leave to appeal to the Privy Council.

The expression " civil suit or action " is one that occurs in the instruments granting a similar right of appeal from the decisions of the Courts of other countries which were under the Sovereignty of the British Crown. One such country is South Africa, where the very question has been decided. It will be helpful to examine the view taken by the Courts of that country in dealing with this matter. The first reported decision is *Gillingham v. Transvaalsche Koelkamers, Beperkt*[1]. In that case the applicant's estate had been finally sequestered by order of a Judge in Chambers. From that order he appealed to the Supreme Court, which dismissed the appeal. He then applied for leave to appeal to the Privy Council. It was argued for the applicant that a decree in insolvency was a final and definitive sentence given in a civil suit or action. Innes, C. J., in dealing with the matter says at page 966 :—

> " Our jurisdiction in regard to the present petition is contained in section 39 of Proclamation 14 of 1902, and we cannot grant leave unless we are empowered to do so by its terms. The section says that it shall be lawful for any person or persons, being a party or parties to any civil suit or action depending in the court, to appeal to His Majesty the King in His Privy Council ' against any final judgment, decree or sentence of the said court, or against any rule or order made in any such civil suit or action having the effect of a final or definite sentence '. Clearly, therefore, the only persons to whom this Court can grant leave to appeal are those who are ' parties to a civil suit or action ' here depending. The sequestration proceedings were not an ' action ', and ' suit ' seems to me to be synonymous, or nearly so, with ' action '. ' To sue ' is to bring an action, to demand something— either a declaration of rights or an order that the opposing party shall do something or give something to the plaintiff. The order against which leave to appeal is now sought is not an order in a suit or action. "

In the same case Solomon J. said :—

> " I agree that there should be no order, on the simple ground that the applicant was not ' a party to any *civil suit or action* ' depending in this Court. We must give those words their ordinary meaning, and if we do it is clear that sequestration proceedings are not a civil suit or action. "

The same view was taken by Kotze J.A. in the subsequent case of *Collier v. Redler & another*[2], where he says :

> " It follows, as I mentioned at the outset, that in order to arrive at the meaning of the words ' any suit or action ', occurring in section 50 of the Charter of Justice, we must consider not merely the usual and ordinary meaning of the words in question, but go a step further and inquire into the nature of the subject-matter and the object of the Charter as well. The nature of the Charter is easily ascertainable from a perusal of its various provisions, while two of its main objects are to establish a Supreme Court of Justice for the Colony of the Cape of Good Hope, and to provide for an appeal to the King-in-Council.

[1] *(1905) Transvaal Law Reports Supreme Court 964.*
[2] *(1923) A. D. 640 at 649.*

In section 50 of the Charter such an appeal is allowed, not in every case or instance, but only in certain instances, namely, from any final judgment or sentence, or from any rule or order having the effect of a final definite sentence, in any civil suit or action above the value of £500. An appeal is here given as of right, provided the final judgment or order has been made in a civil suit or action of the prescribed value. There is nothing in this section, nor in the context contained in other sections, to show that we are to construe the words 'suit or action' in a sense different from their usual ordinary meaning, as denoting instances where the proceedings commence with the issue of a writ of summons. The section does not speak of every case or proceeding, but only of any suit or action; and there appears to be no further provision of the Charter indicating that we are here to depart from the recognized rule of construction and are not to assign the ordinary and common meaning to the words employed, in order to arrive at their intention. I find nothing in the Charter, nor in its object, leading to such a conclusion. On the contrary, the object of the Charter is evidently to limit the right of appeal, not merely as to the amount involved in the suit or action, but also in regard to the nature of the cause or dispute. It is clear there is to be no appeal in simple interlocutory or provisional proceedings; and similarly, I do not think that any right to appeal is intended in any matter brought before the Supreme Court by way of motion, petition or application, or in any other manner than by means of a suit or action, however final or definite an order made therein may be. If the intention had been otherwise, it is by no means unreasonble to suppose that language clearly manifesting such an intention would have been used. If we refer to section 51 of the Charter, we find other and wider language employed than in section 50. While section 50 limits the right of appeal to *any civil suit or action*, section 51 reserves the right of the Sovereign in His Privy Council to give leave of appeal to any one '*aggrieved by any judgment or determination* of the said Supreme Court'. It is difficult to hold that the right here reserved is likewise limited to a judgment or determination in a civil suit or action, and has not a wider meaning.

"At the time of the granting of the Charter (1832), the ordinary distinction between a suit or action, that is the procedure commenced by writ of summons, as opposed to matters commenced by motion, application or petition, was well recognised in England, as it still is at the present day, and also prevails in our practice, as we may ascertain from the various Rules of Court, which have been framed by the judges and promulgated under the power conferred by section 46 of the Charter and subsequent Acts, and also from the statute law itself."

Later on, in the course of the same judgment, Kotze J. A. says :—

"No doubt the word petition may, like the term suit or action, have more than one meaning, and the word suit, again, may be used in a sense different from an action at law. Thus we could, with propriety speak of a suit in chancery, where the procedure was by means of a bill, and of a suit in the Matrimonial Court, where the proceedings take place by means of a petition. But that is not the case in the presen

instance. The word *suit occurring in* section 50 of the Charter is synonymous with the word action, and excludes an application by means of a petition. "

In the later case of *Collett v. Priest* [1] in which this very same question came up for consideration, De Villers, C. J., after reviewing the previous decisions says at page 298 :—

" And we are therefore of opinion that the Cape Provincial Division, while freely giving its reasons for holding a different view, should have followed the *ratio decidendi* of *Collier v. Redler, The Master v. van Aardt* and *Bulawayo Municipality v. Roberts*, namely, that the essential feature of a ' suit or action ' under section 50 of the Charter of Justice or under section 39 of Transvaal Proclamation 14 of 1902, or of a ' suit ' under section 24 of Cape Act 35 of 1896, is that it is a proceeding in which one party sues for or claims something from another, and that no proceeding which lacks this feature, such as sequestration proceedings, an application for winding up of a company etc., can be properly described as a ' suit or action ' or as a ' suit ' under any of these sections. "

This matter was further considered in *Solomon v. Law Society of the Cape of Good Hope* [2], where the question whether an application by the Law Society to have an attorney struck off the roll was a civil suit or action came up for decision and Wessels C. J. held that it was not. He said at page 408 :—

" It is difficult to see what the civil suit or action is, in the case of an application by the Law Society which sets before the Court certain facts and asks the Court to strike the Attorney off the roll. The fact that by section 3 of Act 20 of 1916 the Court may order that any question of fact shall be tried by pleadings cannot make the application a civil suit or action. The pleadings are only a means to define the question of fact to be tried by the Court. "

As the South African Reports are not available in most of our law libraries I have cited more extensively than I would otherwise have done.

It is clear from the South African decisions I have examined that in that country the words " civil suit or action ", in a context such as the one we have here, have been consistently understood in their ordinary meaning, viz., a proceeding in which one party sues for or claims something from another.

I shall now examine our decisions on the point. In the earliest of our cases, *In re Ledward* [3], a decision of the collective Court, it was held that section 52 of the Charter of Justice gave no right of appeal to the Privy Council against a judgment of this Court affirming a judgment of the District Judge that an insolvent had not committed a fraudulent preference within the meaning of section 58 of the Insolvency Ordinance. It was argued in that case that the proceedings in which the matter was decided was a regular " suit " between a creditor and the assignees of the

[1] *(1931) A. D. 290.* [2] *(1934) A. D. 401.*

[3] *(1859) 3 Lorenz 234.*

debtor; and that though the matter was discussed in insolvency proceedings it was none the less a "civil suit or action" within the meaning of those words in the Charter of 1833. It was also urged that there was a regular dispute between the two parties regarding certain property, in which evidence was heard, and a judgment given thereon, as in any ordinary suit. In the course of the argument Rowe C.J. observed :

> "The only question is whether this is a 'matter' or a 'suit or action'. The 52nd section of the Charter limits the appeal to 'suits or actions' only."

The application for leave was rejected on the ground that the Charter gave no right of appeal in a case such as that before the Court.

This decision was followed in the case of *Keppel Jones & Co.* [1]. That was also a decision of the collective Court in proceedings under the Insolvency Ordinance in which this Court affirmed an order of the District Court in which the assignee was directed to deliver one half of certain goods found in possession of the insolvent.

Next we have the case of *H. W. de Vos* [2]. In that case the District Judge refused to grant a certificate of insolvency on the ground that the insolvent had not made a full disclosure of his affairs, and that judgment having been affirmed by this Court the insolvent sought to appeal to the Privy Council. He asked for a certificate under section 781 of the Civil Procedure Code that the case fulfilled the requirements of section 42 of the Courts Ordinance. The certificate was refused by the two Judges who heard the case ; Lawrie J. based his decision on the ground that the matter at issue was not of the value of Rs. 5,000, and Brown A. J. on the ground that no case had been submitted to the Court in which the right of appeal to the Privy Council had been recognised in the matter of the refusal of a certificate of conformity.

The next case that is relevant is *Sockalingam Chetty v. Manikam et al.* [4]. That was also a case under the Insolvency Ordinance. This Court held following the previous decisions I have cited above that there was no right of appeal. Drieberg J. observed :—

> "Section 52 of the Charter of 1833 gives a right of appeal against any final judgment, decree, sentence, rule or order in any civil suit or action, and it has been held by the Collective Court in appeal that an insolvency proceeding is not a civil suit or action and that there is no right of appeal against the judgment or order of the Supreme Court made in it.

Next in order of time is the case of *Soertsz v. Colombo Municipal Council* [5]. The question was whether there was an appeal to the Privy Council as of right from the decision of the Supreme Court on a case stated under section 92 (now 94) of the Housing and Town Improvement Ordinance. After referring to the relevant provisions of the Charter of 1833, and the Courts Ordinance, Fisher C. J. went on to say :

> "In dealing with the matter under consideration the Supreme Court was not acting in exercise of the appellate jurisdiction vested in it by

[1] *(1877) Ramanathan 379.*
[2] *(1899) 2 Browne 331.*
[3] *(Repealed by Ordinance No. 31 of 1909.)*
[4] *(1930) 32 N. L. R. 65.*
[5] *(1930) 32 N. L. R. 62.*

the Courts Ordinance, 1889, nor was the District Court acting in exercise of any jurisdiction vested in it by that Ordinance. The District Court was not in fact acting as a Court of law at all but was performing a function vested in it because the alternative tribunal under section 83 of Ordinance No. 19 of 1915 has not been brought into existence, and in the performance of that function it is a final tribunal except when a question of law is involved and the provisions of section 92 (now 94) are put into operation.

" In my opinion, therefore, our decision on the point of law submitted to us was not a judgment or order in ' a civil suit or action '. "

In the case of *R.M.A.R.A.R.R.M. v. The Commissioner of Income Tax* [1], it was argued that a case stated under the Income Tax Ordinnce was " a civil suit or action " within the meaning of that expression in section 3 of the Ordinance. But that argument was not upheld by this Court. In the case of *Settlement Officer v. van der Poorten et al.* [2], it was held that proceedings under the Waste Lands Ordinance did not fall within the ambit of the words " civil suit or action " in section 3 of the Ordinance. The earlier view that civil suits or actions that fell within the ambit of section 3 were only those civil suits or actions which the District Court had jurisdiction to hear and determine, when exercising the jurisdiction conferred on it by the Courts Ordinance, was upheld. Although in *van der Poorten v. The Settlement Officer* [3] the Privy Council set aside the decision of this Court, that an appeal did not lie from the District Court against a dismissal of a petition under section 20 of the Waste Lands Ordinance, No. 1 of 1897, it did not hold that such a proceeding was a " civil suit or action " within the meaning of that expression in the Ordinance.

As against this long line of decisions of this Court which hold that section 3 applies only to civil suits or actions properly so called, we have the decision of *In re Goonesinha* [4] which takes a different view. It was there held that an application for a mandate in the nature of a writ of certiorari constituted an action and therefore came within the ambit of section 3. In that case this Court refused to grant a mandate in the nature of a writ of certiorari to bring up before it the proceedings taken before an election Judge. Moseley J. while conceding that the word " suit " implies the existence of two parties went on to hold that the same cannot be said of an action and based his decision on section 6 of the Civil Procedure Code which reads :—

"Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action. "

He summed up his decision thus :—

" I have little difficulty in arriving at the conclusion that an application for a writ of *certiorari*, being an application for relief or remedy

[1] *(1935) 37 N. L. R. 447.*
[2] *(1942) 43 N. L. R. 436.*
[3] *(1946) 47 N. L. R. 217.*
[4] *(1942) 44 N. L. R. 75.*

obtainable through the Court's power or authority, constitutes an action, and therefore comes within the compass of section 3 of Cap. 85."

With great respect I find myself unable to agree with the conclusion of the learned Judge. A writ of certiorari is not a means of obtaining any relief or remedy through the Court's power or authority. It is a purely supervisory function of the Court, while section 6 of the Civil Procedure Code contemplates an entirely different function. In my view it would be wrong to read section 6 by itself without reference to the other provisions of the Civil Procedure Code. To my mind section 6 when read with the other sections of the Civil Procedure Code leaves no room for the view that a writ of certiorari falls within the definition of action in the Code. Moseley J. relied on the case of *Subramaniam Chetty v. Soysa* [1]. That was a case in which this Court allowed an appeal from an order of the District Judge under section 282 (2) of the Civil Procedure Code refusing to set aside a sale in execution on the ground of a material irregularity in conducting the sale. That section provides that the purchaser at an execution sale shall be made respondent to the petition filed by the applicant under sub-secton (2) thereof seeking to have the sale set aside. It is clear from the section that the proceeding thereunder is an application to the District Court for relief or remedy obtainable through the exercise of the Court's power or authority, and section 6 declares that such an application constitutes an action. When an application for leave to appeal to the Privy Council was made it was contended that the proceeding was not a civil suit or action and that there was no final judgment. Bertram C.J. in dealing with the objections stated :—

"Was this proceeding a suit or action? In determining that question, we must have regard to the nature of Ordinance No. 31 of 1909. It is intended to supplement our Code of Civil Procedure. It would be highly inconvenient if the word 'action' in this Ordinance were given a different meaning from that which is given to it in our Code of Civil Procedure. But there is a further reason. The principal sections of this Ordinance replaced and re-enacted certain repealed sections of our Code of Civil Procedure, and there is a very strong inference that the words used in an enactment so passed should have the same meaning as they bore in the sections which the enactment replaced.

"Now, in our Code of Civil Procedure, a very wide meaning is given to the word 'action'. In section 5 an action is defined as a proceeding for the prevention or redress of a wrong. In section 6 it is said that every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority, or otherwise to invite its interference, constitutes an action. It seems clear to me, therefore, that this application to the Court to set aside the sale instituted by a petition to the Court was an action within the meaning of section 4."

In my opinion *Subramaniam Chetty v. Soysa* (*supra*) is not an authority which supports the view that a writ of certiorari is a civil suit or action. In the case of *Controller of Textiles v. Mohamed Miya* [2] an application for

[1] *(1923) 25 N. L. R. 344.* [2] *(1948) 49 N. L. R. 105.*

leave to appeal to the Privy Council was granted by this Court from an order quashing the decision of the Controller of Textiles who had revoked the licences granted to Mohamed Miya. In that case, however, the question whether the proceeding in which the writ was granted was a civil suit or action did not arise for decision. But the question was raised in the subsequent case of *Kodakan Pillai v. Mudanayake* [1]. In that case Nagalingam J. rested his decision on the following definitions of the term "*action*" *in Justinian and Bracton :*

"*Actio autem nihil aliud est, quam jus persequendi in judicio, quod sibi debetur.*"—An action is nothing else than the right of suing before a Judge for that which is due to us.

"*Actio nihil aliud est quam jus prosequendi in judicio quod aliquo debetur.*"—An action is nothing else than the right of suing in a Court of justice for that which is due to someone."

After citing these definitions he proceeded to say :

"'That which is due to us or someone' is wide enough to include the case of a declaration of status.

"Even on the basis of these general concepts of the term 'action' the order made upon the application for a Writ of Certiorari cannot but be regarded as one relating to an action."

With great respect I am unable to agree with the learned Judge's conclusion or reasoning. When this Court granted a mandate in the nature of a writ of certiorari quashing the order of the Revising Officer it did not make a declaration of status. The conclusion of Nagalingam J. that proceedings for the grant of a writ of certiorari are an action is based on the wrong assumption that it did make such a declaration.

It is clear from what has been said above that the one thing a petitioner does not do in a petition for a mandate in the nature of a writ of certiorari is to ask "for that which is due to him". On a close reading of the decision of Nagalingam J., I am unable to regard his judgment as holding that an applicant for a writ of certiorari is a party to a civil suit or action. He does not go beyond holding that the order made upon the application for a writ of certiorari can be regarded as one *relating* to an action.

I now come to the decision of Gratiaen J. in *Attorney-General v. Ramaswami Iyengar* [2]. It is of little assistance to the petitioner in the instant case. That was a decision under the Estate Duty Ordinance wherein under section 34 an appeal lies to the District Court from an assessment to estate duty. Section 40 provides that—

"Upon the filing of the petition of appeal and the service of a copy thereof on the Attorney-General, the appeal shall be deemed to be and may be proceeded with as an action between the appellant as plaintiff and the Crown as defendant, and the provisions of the Civil Procedure Code and of the Stamp Ordinance, shall, save as hereinafter provided, apply accordingly.

[1] *(1951) 54 N. L. R. 359.* [2] *(1954) 55 N. L. R. 572.*

" Provided that no pleading other than the petition of the appellant shall be filed in any action unless the court by order made in that action otherwise directs ;

" Provided further, that the decree entered in any action shall specify the amount, if any, which the appellant is liable to pay as estate duty under this Ordinance. "

It is evident from the section I have quoted that an appeal to the District Court is not an action, for, if it were, it would be unnecessary to declare by statute that it shall be deemed to be and proceeded with as an action between the appellant as plaintiff and the Crown as defendant.

The Privy Council case of *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan* [1] relied on by Gratiaen J. as a decision in point cannot be regarded as an authority on the question arising in the case, not only because the matter was not fully argued as the Privy Council granted special leave to appeal, but also because the expression which the Privy Council was called upon to interpret was " civil cause " and not " civil suit or action ". On this point this is what Lord MacMillan who delivered the Judgment of the Board says at page 392 :—

" Passing to what has been designated the procedure appeal, their Lordships have to consider whether it was within the competency of the Court of Appeal to grant leave in this case to appeal to His Majesty in Council. In holding the contrary, the learned Chief Justice stated that he did so ' reluctantly and against his own opinion ' in deference to a previous decision of his Court in a case of *The King on the Prosecution of the Income Tax Commissioner v. The Firms of A. R. A. M. and P. A.* in 1922, which he felt himself constrained ' from courtesy rather than conviction ' to follow. Thorne J. shared the reluctance of the Chief Justice, while Sproule S.P.J. alone championed the soundness of the authority so manifestly distasteful to his colleagues.

" Their Lordships did not have the advantage of a full argument on the question, as the respondents, not having any interest in the matter, in view of the special leave to appeal granted by order of His Majesty in Council, did not feel called upon to contest the appellant's submission. The whole ground, however, is adequately explored in the judgment of the learned Chief Justice, whose convincing argument against the decision which he reluctantly reached appears to their Lordships really unanswerable. It is true that the Ordinance in section 80 which deals with appeals from decisions of the Commissioner does not confer a right of appeal to His Majesty in Council. But the Colonial Charter of 1855 provides for leave to appeal being granted by the Court of the Colony from ' all judgments, decrees, or determinations made by the said Court of Judicature in any civil cause '. And section 1154 of the Civil Procedure Code provides that subject to certain conditions ' an appeal shall lie from the Court of Appeal to His Majesty in Council— (*a*) from any final judgment or order. ' Wider language it would be

[1] *(1933) A. C. 378.*

difficult to imagine. Their Lordships do not think it necessary to repeat the reasons adduced by the Chief Justice against excluding the decision of the Appeal Court in the present instance from the scope of these provisions and content themselves with expressing their agreement. The decision against which the Commissioner sought to obtain leave to appeal was in their Lordships' view not a mere award of an administrative character but a judgment or determination made by the Court in a civil cause within the meaning of the Charter and a final judgment or order within the meaning of section 1154 of the Civil Procedure Code, and as such the Court could competently have granted leave to appeal from it to His Majesty in Council."

It would appear from the decisions of this Court referred to above that for over a hundred years this Court had consistently interpreted the words "civil suit or action" in section 3 of the Ordinance in their ordinary sense of a proceeding in which one party sues for or claims something from another. The current of authority in South Africa where similar words in enactments such as our Charter of Justice were interpreted has been the same as in Ceylon till 1942. Even where the proceedings were in the nature of an action the Privy Council in the *Rangoon Botatoung Company Ltd. v. The Collector, Rangoon* [1] refused to give leave to appeal because the proceedings were in the nature of an arbitration and lacked the characteristics of an action as ordinarily understood.

In my opinion the correct approach to the interpretation of the expression "civil suit or action" is to be found in the decisions of this Court prior to *Goonesinha's* case. It is a rule of construction of statutes that the meaning which is to be given to an expression in any particular enactment will depend upon such circumstances as the occasion or purpose for which it is used, the nature of the subject matter, the context of the enactment in which it occurs, and the like. The word "action" has been used by different writers commencing with Justinian down to the present day in so many different senses that it would be unsafe to consider the words "civil suit or action" in the abstract. The meaning given to it in Roman Law or by early Roman, Roman-Dutch, and English writers cannot be applied without regard to the intention of the legislature and the object for which the statute was enacted together with, in the instant case, the previous history of legislation on the subject.

Goonesinha's case not only goes against the current of decisions of this Court from the time of the Royal Charter of 1833, but also goes against the well-known rules of interpretation of statutes. The words "civil suit or action" have been used in legislation regulating appeals to the Privy Council since the earliest times here as well as elsewhere, and by 1907 the year in which the Ordinance was enacted their meaning was well established by judicial interpretation. It is a rule of construction of statutes that when words in an earlier enactment which have been judicially interpreted are used in a subsequent enactment *in pari materia* it must be presumed that they have been used in the sense in which they

[1] *(1912) 39 L. R. I. A. 197.*

have been judicially interpreted. There is nothing in the Ordinance which rebuts that presumption. Besides, where the meaning of a word in an earlier legislative instrument has been well established by judicial interpretation, I do not think that it would be correct to extend it by reference to a definition of that same word in a later enactment not *in pari materia*.

I have stated above why I am unable to agree with *Goonesinha's* case and the subsequent case of *Kodakan Pillai*. I make no mention here of *Mohamed Miya's* case because it does not deal with the particular matter under consideration.

I think I should not omit to refer to the case of *Bradlaugh v. Clarke* [1] especially as Nagalingam J. has relied upon it in his judgment in the case of *Kodakan Pillai*. In that case the Court had to interpret the word "action" in section 5 of the Parliamentary Oaths Act, 1866 (29 and 30 Vict. c. 19) in the context "to be recovered by action in one of Her Majesty's Superior Courts at Westminster". The plaintiff as a common informer claimed that he was entitled to sue for the penalty. His action was opposed on the ground that all penalties imposed by statute belong to the Crown alone unless given in precise terms to an individual. In dealing with this argument Lord Selborne after referring to the authorities stated at page 361 :—

> "These authorities appear to me to prove that a suit to recover such a penalty as that incurred by the appellant might, in and after 1866, have been brought by the Crown in any one of the Superior Courts at Westminster, and consequently that the option given to sue in any one of those Courts cannot be a sufficient reason for letting in a common informer under a statute by which a right of action is not otherwise given to him. I am also satisfied after full consideration that the word 'action' is (as Lord Justice Lush said) a generic term, inclusive, in its proper legal sense, of suits by the Crown, and, therefore, not furnishing any sufficient ground for implying a right of action in a common informer. That it is used as "nomen generalissimum" *in this particular statute* seems probable, from the fact that it stands there alone, without having superadded to it a number of other technical terms, which are usually found associated with it in earlier statutes."

The words I have underlined clearly indicate that the meaning given to the word "action" in that case was meant for the particular context in which it occurred. The learned Law Lord did not attempt to lay down a definition for all purposes. In fact the judgment of Lord Blackburn recognises that the word "action" has more than one meaning depending on the context in which it occurs and that in its ordinary sense an action denotes a mode of procedure commenced by writ of summons.

The learned Attorney-General argued that each application for certiorari should be examined, and if it has the characteristics of a civil

[1] *(1883) 8 A. C. 354.*

suit or action, an appeal would lie; if it has not, there would be no appeal. He also invited our attention to the cases of *Secretary of State for India v. Chelikani Rama Rao* [1], *Rangoon Botatoung Company Ltd. v. The Collector of Rangoon* [2] and *Tata Iron & Steel Co. Ltd v. Chief Revenue Authority of Bombay* [3].

The first of these cases deals with claims to land by two Zamindars under the Madras Forest Act (V of 1882). The claim was rejected by the Forest Settlement Officer. The Zamindars appealed to the High Court which remanded the appeal to the District Judge to determine whether the Crown had a subsisting title at the date of the notification. On the finding of the District Judge the High Court allowed the appeals and decrees were passed excluding the lands from the reserved forest area. The Secretary of State for India then appealed to the Privy Council. Objection was taken to the appeal being entertained by the Privy Council. That objection was over-ruled. The reason is thus stated by Lord Shaw at page 197 :

> "It was contended on behalf of the appellant that all further proceedings in Courts in India or by way of appeal were incompetent, these being excluded by the terms of the statute just quoted. In their Lordships' opinion this objection is not well founded. Their view is that when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders, and decrees the ordinary rules of the Civil Procedure Code apply. This is in full accord with the decision of the Full Bench in *Kamaraju v. Secretary of State for India in Council* (I. L. R. 11 Madras 309), a decision which was given in 1888 and has been acted on in Madras ever since."

Referring to the *Rangoon Botatoung Company* case which the respondents relied on, Lord Shaw said at page 198 :—

> "The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land ; and if the ordinary Courts of the country are seised of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation."

I have already referred to the *Botatoung* case and shall therefore make no further reference to it. The *Tata Iron & Steel Company* case is of some assistance. There it was held that an appeal to the Privy Council does not lie under Clause 39 of the Letters Patent of the Bombay High Court from a decision of the High Court upon a case stated and referred to the Court by the Chief Revenue Authority under section 51 of the Indian Income Tax Act, 1918.

[1] *(1916) 43 L. R. I. A. 192.* [2] *(1912) 39 L. R. I. A. 197.*
[3] *(1923) A. I. R. P. C. 148.*

Lord Atkinson who delivered the Judgment of the Board dealt with the matter in this wise at page 150 :—

" In order therefore that the appeal in this case should be held to be competent, the decision and order of the High Court under section 51 of the Income Tax Act must come within Clause 39 of the Letters Patent. It must be either a final judgment or a final decree or a final order. Now what is a final judgment as understood in English litigation ? In *Ex parte Moore* (1885) 14 Q. B. D. 627, 632), Lord Selborne laid down that to constitute an order a final judgment, nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits.

" In *Onslow v. Commissioners of Inland Revenue* (1890) 25 Q. B. D. 465 it was determined on high authority what it is that amounts to a final judgment. . . .

" Lord Esher delivered the judgment of the Court. After quoting the opinions of several authorities, which as the judgment is printed it is not easy to distinguish from portions of his own judgment, he refers particularly to opinions expressed by Cotton L.J. in *Ex parte Chinery*—(1884) 12 Q. B. D. 342—with which Bowen and Kay, L. JJ. had concurred. He said :

' I think we ought to give to the words " final judgment " in this sub-section their strict and proper meaning i.e. a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained and established, unless there is something to show an intention to use the words in a more extended sense . '

He proceeds—

' Brown, L. J. says there is an inherent distinction between judgments and orders, and that the words " final judgment " have a professional meaning, by which expression I think he meant to say as Cotton L. J. had previously said, that a judgment is a decision obtained in an action, and if that was his meaning, both these learned Lords Justices gave judgment to the same effect, and Fry L. J. agreed with him. A " judgment ", therefore, is a decision obtained in an action, and any other decision is an order. . . . That in my opinion is a proper distinction, and, therefore in the present case the decision is an order and not a judgment, and the appeal should have been brought within 21 days. Under the circumstances, however, we will, as an indulgence, extend the time for appealing. '

" This decision clearly establishes that the decision and an order made by the Court under the 51st S. of the Income Tax Act cannot be held to be a ' final judgment ' within the meaning of the 39th clause

of the Letters Patent, since there is nothing to show an intention in the year 1862 to use those words in a sense more extended than their legal sense."

The above decisions of the Privy Council confirm me in the opinion I have formed that the words "civil suit or action" in section 3 of the Ordinance should be construed in their ordinary sense of a proceeding in which one party sues for or claims something from another in regular civil proceedings and that an application for a writ of certiorari does not fall within the ambit of those words in the context in which they occur.

The objection therefore succeeds and the application is refused with costs.

GUNASEKARA, J.—I agree.

PULLE, J.—

I agree that the application for leave to appeal to the Privy Council should be refused. At one stage of the argument I was inclined to accept as correct the decision of a bench of two Judges in *In re Goonesinha*[1] that an application for a writ of *certiorari* constitutes an action which falls within the ambit of section 3 of the Appeals (Privy Council) Ordinance. This case was followed by a single judge in *Kodakan Pillai v. Mudanayake*[2]. Upon further consideration of the nature of a writ of *certiorari* and the decisions from South Africa cited by my Lord, the Chief Justice, I am convinced that the proceedings taken to quash by *certiorari* the order of the Tribunal of Appeal dated the 10th October, 1952, do not constitute a civil suit or action within the meaning of section 3 of the Ordinance. In my opinion section 3 cannot be read to include a right of appeal to the Privy Council from every judgment or order of the Supreme Court in what may be described as a civil cause or matter satisfying the requirements in Rule 1 of the Schedule to the Ordinance.

There are undoubtedly features in common between a "civil suit or action" and proceedings in *certiorari*. It may happen, in certain instances, that a decision given on an application for *certiorari* would finally dispose of the litigation before the tribunal whose jurisdiction is challenged. But that is not a result that flows necessarily from the exercise of the jurisdiction of the court to grant a writ of *certiorari*. In its essence this jurisdiction is of a limited character the exercise of which does not in the least diminish or take away from an inferior tribunal the power to adjudicate on a matter within its proper jurisdiction.

[1] *(1942) 44 N. L. R. 75.*

[2] *(1951) 54 N. L. R. 350.*

I fully concur in the observations made by my Lord on *Subramaniam Chetty v. Soysä* [1], *Abbot v. Sullivan* [2], *Lee v. Showmen's Guild of Great Britain* [3] and *O 'Connor v. Isaacs and others* [4].

DE SILVA, J.—I agree.

SANSONI, J.—

I should have preferred to wait until I had seen the judgments of the other members of the Court, for such a course may have rendered it unnecessary for me to write a separate judgment. But as I shall be going away on long leave in a few days I am compelled to state my views without delay, and I shall do so very briefly.

Mr. Perera's submission was that no application for a writ of certiorari can ever be a suit or action because on such an application the Court does not adjudicate on the legal rights of parties and it does not therefore decide whether a legal right has been infringed or a wrong committed. He stressed that the petitioner for the writ did not claim that it had a legal right solely to pick up and set down passengers within the Municipal limits of Kandy. He submitted that the only matter which the petitioner had to establish in order to obtain the writ was that it had an interest which went beyond the interests of the public in general, in that it had suffered damage, and that the tribunal had exceeded the limits of its jurisdiction.

The Attorney-General submitted that each application for a writ of certiorari must be examined in order to ascertain whether it was a civil suit or action, and he pointed out that a stranger who applies for the writ on the ground that a Court had exceeded its jurisdiction would not be in the same position as a party aggrieved, in the sense of one who has suffered some damage from the usurpation of jurisdiction.

Mr. Jayawardene submitted that the infliction of damage (which Mr. Perera's client had complained about) coupled with the usurpation of jurisdiction by the tribunal, which were the two elements on which the application for this writ was based, constituted a wrong done to the party complaining. In this case these two elements formed the basis of the petitioner's application, and the proceeding fell within the phrase "civil suit or action".

An action in the narrowest sense is a proceeding, founded upon a legal right, brought by one person against another for the enforcement of that right. But in a broader sense an action may be defined as a proceeding instituted by a person in order to obtain the intervention of a Court of law, when such person is seeking relief through that Court. It is in this sense that I would include this certiorari application within the term action. I think that an ultra vires decision of a statutory tribunal which tries something which it has no jurisdiction to try, or again a decision

[1] *(1923) 25 N. L. R. 344.*
[2] *(1952) 1 All E. R. 226.*
[3] *(1952) 1 All E. R. 1175.*
[4] *(1956) 2 W. L. R. 585.*

made by such a tribunal in contravention of the principles of natural justice, where such a decision causes damage to a person, constitutes a wrong for which that person can seek his remedy by Certiorari, and the application for the writ is an action.

It matters not whether the remedy is sought by injunction or by a declaratory action or by Writ of Certiorari : each such proceeding would be an action. In this matter the petitioner expressly claims to be a party who has suffered damage through an usurpation of jurisdiction by the tribunal, and that is enough to give a Court jurisdiction to hear his complaint and give relief.

I therefore take the view that an application for certiorari falls within the meaning of the word "action" provided such application is made by a party aggrieved who has suffered damage by an unwarranted exercise of jurisdiction. In Volume 2 of Wood Renton's Encyclopaedia of the Laws of England (Second Edition) at page 619 there appears the following passage in the article on certiorari : "Though the writ of certiorari is *a means of preventing the infliction or continuance of any wrong by an unwarranted assumption of jurisdiction*, the granting of the writ at the instance of a private person is a matter of discretion, and not *ex debito justitiae*." In *Abbott v. Sullivan* [1] Denning, L. J., said "In the case of statutory tribunals which depend for their jurisdiction on a statute, it is an actionable wrong for them to usurp more than the statute gives them". After citing certain cases the learned Lord Justice said: "These cases all show that *an invalid usurpation of jurisdiction which causes damage is itself a wrong*". See also *R. v. St. Edmundsbury* [2] where the allied writ of prohibition was considered and it was referred to as a remedy for the injury of encroachment of jurisdiction.

It would therefore seem that damage combined with excess of jurisdiction constitutes a wrong for which the remedy lies in certiorari, and it is not necessary in a case where such damage has been caused that there should also have been a previously existing legal right which has been infringed.

It is true that in an application for certiorari there are not two or more adversaries involved in a dispute over their legal rights, such as one finds in a regular action. In certiorari, one may find that the only parties are the petitioner and the tribunal whose jurisdiction is in question, though other persons whose interests are involved may be added (as Mr. Jayawardene's clients were added). The substantial question to be answered in deciding whether it is an action or not remains the same.

Even if an action be regarded as "a proceeding in which one party sues for or claims something from another" a petitioner in certiorari claims as against the tribunal a declaration that it has exceeded its jurisdiction and that its order should be quashed. The object of the writ is to demolish the order made without, or in excess of, jurisdiction. It

[1] *(1952) 1 A. E. R. 226.* [2] *(1947) 2 A. E. R. 170.*

is put out of the way " as one which should not be used to the detriment of any of the subjects of Her Majesty " per Lord Cairns L. C., in *Walsall Overseers v. L. & N. W. Ry C.* [1].

As I think it is essential that in an action the plaintiff or petitioner must seek some relief and should be in the position of a person who has a grievance, I consider that an application for certiorari by a person who is not a party grieved is not a suit or action, because in such a case the applicant cannot be said to be claiming any relief for himself. If the petitioner in this matter had not been a party who was adversely affected by the tribunal's order, in my opinion it would not have been a party to a civil suit or action.

Mr. Perera submitted that an action needs a cause of action. I think in this case the cause of action comprised the damage suffered by the petitioner taken together with the alleged unlawful exercise of jurisdiction, and it is the combination of these two things which constitutes the wrong for the relief of which the petitioner came into Court.

I would therefore grant this application for leave to appeal, with costs.

Application refused.

[1] *(1879) 4 A. C. 30 at 39.*