1954 *Present :* Sansoni J.

KANDY OMNIBUS CO., LTD., Petitioner, *and*
T. W. ROBERTS *et al.*, Respondents

S. C. 596—In the matter of an application for a mandate in the nature of a Writ of Certiorari *under section 42 of the Courts Ordinance (Cap. 6)*

Certiorari—*Petitioner must be a person aggrieved—Necessary parties—Delay—Jurisdiction—Acquiescence to patent want of jurisdiction—Difference in effect between patent and latent want of jurisdiction—Estoppel—Duty of applicants to disclose all material facts—Difference between judicial function and administrative function—Omnibus Service Licensing Ordinance, No. 47 of 1942, ss. 6 (2), 13 (4)—Motor Traffic Act, No. 14 of 1951, ss. 243 (1), 246 (1) (4) and (7)—Interpretation Ordinance (Cap. 2), s. 6 (3) (c).*

Although a person applying for a writ of *certiorari* is required to be a person aggrieved, it is sufficient if he has a substantial interest in the decision in respect of which the writ is sought.

Whether there has been unreasonable delay or not in making an application for a writ of *certiorari* depends on the circumstances of each case.

When an aggrieved party applies for *certiorari* in respect of an order made by a quasi-judicial body in a matter where it totally lacked jurisdiction, he is entitled to the writ as of right ; but where there was only a contingent want of jurisdiction, acquiescence or waiver or similar conduct would place even an aggrieved party in the same position as a stranger and the grant of relief is discretionary. It is only in the latter case that the applicant is bound to make a full and fair disclosure of all material facts.

The petitioner and the 4th to 9th respondents respectively were the holders of certain road service licences issued by the Commissioner of Motor Transport under the Omnibus Service Licensing Ordinance, No. 47 of 1942. In consequence of certain complaints made by the petitioner to the Commissioner to the effect that the 4th to 9th respondents were picking up and setting down passengers within the Municipal Limits of Kandy to the prejudice of the petitioner, the Commissioner, after holding due inquiry, made order under section 6 (2) of Ordinance No. 47 of 1942, that the conditions attached to the licences of the 4th to 9th respondents should be varied so as to debar them from picking up and setting down passengers within the Municipal Limits of Kandy.

The 4th to 9th respondents appealed to the Tribunal of Appeal against the Commissioner's decision. All the appeals were heard together and on the 10th October, 1952, the Tribunal of Appeal reversed the decision of the Commissioner. Thereupon the present application for a writ of *certiorari* was filed by the petitioner on the 22nd December, 1952, stating that the Tribunal of Appeal consisting of the 1st to 3rd respondents had no jurisdiction to hear the appeals in question after Ordinance No. 47 of 1942 was repealed by the Motor Traffic Act, No. 14 of 1951, which came into operation on the 1st September, 1951.

Held, (i) that the Tribunal of Appeal had a duty to act as a quasi-judicial, and not purely administrative, body and was, therefore, subject to *certiorari* if it acted in excess, or usurpation, of jurisdiction.

(ii) that the Tribunal was competent to hear only appeals preferred against a decision granting or refusing an application for a road service licence, but not against a decision of the Commissioner varying the conditions attached to a licence. The Tribunal suffered, therefore, from a total and patent want of jurisdiction over the subject-matter of the appeal. As this was a case of total want of jurisdiction and not a case of irregularity or want of contingent jurisdiction, the fact that the petitioner had waived objection to the jurisdiction of the Tribunal and taken part in the proceedings thereafter could not disentitle him, despite his acquiescence, to object later that the order made by the Tribunal was void.

(iii) that the petitioner was sufficiently aggrieved by the order of the Tribunal to entitle him to apply for a writ of *certiorari*. It was not necessary that he should have had a statutory right to appear either before the Commissioner or the Tribunal.

(iv) that the failure to make the Commissioner a party was not fatal to the application.

(v) That the joinder of the 4th to 9th respondents in one application for *certiorari* was not improper, although they had shown cause separately and filed separate applications before the Tribunal.

(vi) that the interval of about two months in filing the application for *certiorari* did not constitute unreasonable delay, as the case involved many difficult questions of law which could only be considered after an exhaustive examination of the relevant statutes and numerous precedents.

APPLICATION for a writ of *certiorari* to quash certain proceedings of the Tribunal of Appeal constituted under the Motor Car Ordinance, No. 45 of 1938.

H. V. Perera, Q.C., with *E. G. Wikramanayake, Q.C.*, *E. R. S. R. Coomaraswamy* and *L. Mutulantri*, for the petitioner.

H. W. Jayewardene, Q.C., with *G. T. Samarawickreme, D. R. P. Goonetilleke* and *J. N. Arumugam*, for the 4th and 5th respondents.

H. W. Tambiah, with *R. A. Kannangara* and *V. Ratnasabapathy*, for the 6th respondent.

S. Nadesan, Q.C., with *K. Shinya*, for the 7th, 8th and 9th respondents.

Cur. adv. vult.

November 12, 1954. SANSONI J.—

The petitioner has applied for a writ of *Certiorari* to quash certain proceedings of the Tribunal of Appeal constituted under the Motor Car Ordinance No. 45 of 1938 and consisting of the 1st, 2nd and 3rd respondents, and to quash the order made by the said Tribunal on 10th October, 1952. The matter arises in the following way : The petitioner and the 4th to 9th respondents respectively were the holders of certain road service licences issued by the Commissioner of Motor Transport under the Omnibus Service Licensing Ordinance, No. 47 of 1942. In consequence of certain complaints made by the petitioner to the Commissioner to the effect that the 4th to 9th respondents were picking up and setting down passengers within the Municipal Limits of Kandy to the prejudice of the petitioner, an inquiry was held by the Commissioner into those complaints. The petitioner and the 4th to 7th and 9th respondents took part in the inquiry. The Commissioner thereafter served a notice on the 4th to 9th respondents under section 6 (2), Ordinance No. 47 of 1942, requesting them to show cause, if any, why a condition should not be attached to their road service licences to the effect that the same passenger should not be picked up and set down within the Municipal Limits of Kandy. Certain objections were put forward by the respondents. The Commissioner thereafter made order imposing the condition he had proposed to impose. He notified them of this condition and called upon them to transmit their licences to him to enable him to insert that condition in their licences.

The respondents concerned appealed to the Tribunal of Appeal against the Commissioner's decision. The petitioner and the 4th to 9th respondents were represented by counsel before the tribunal which heard all the appeals together between 18th November, 1950, and 4th October, 1952. On 10th October, 1952, it made order setting aside the Commissioner's order and directing that the licences of the 4th to 9th respondents be renewed as before without the condition imposed by the Commissioner. The present application was filed on 22nd December 1952. The ground on which it is based is that the 1st to 3rd respondents had no jurisdiction to continue to hear the appeals in question after Ordinance No. 47 of 1942 was repealed by the Motor Traffic Act, No. 14 of 1951, which came into operation on 1st September, 1951. It is the petitioner's case that the Tribunal of Appeal consisting of the 1st to 3rd respondents which was appointed thereafter was competent to hear only appeals preferred against a decision granting or refusing an application for a road service licence, but not against the decision varying the conditions attached to a licence.

Mr. Jayewardene who appeared for the 4th and 5th respondents raised certain preliminary objections which were argued before the petitioner's case was heard. The preliminary objections were :

(1) the petitioner has no status to make this application.

(2) the failure to make the Commissioner a party is fatal to the application.

(3) 4th to 9th respondents have been wrongly joined together in one application.

(4) there was unreasonable delay in filing this application.

(5) the petitioner acquiesced in the proceedings before the Tribunal and is therefore disentitled to make this application.

(6) the application is lacking in bona fides.

(7) the Tribunal of Appeal did not act as a quasi-judicial body and therefore Certiorari does not lie.

I shall now deal with these objections in the above order.

(1) The short point is whether the petitioner is a person aggrieved by the order of the Tribunal. It was submitted by Mr. Jayewardene that the petitioner had no legal right to be heard by the tribunal, it was not a necessary party to the appeal proceedings before the Tribunal, and was merely one of a number of persons who made representations to the Commissioner and supported the variation of the conditions of the licences; though the petitioner may have been affected financially by the non-imposition of the new conditions, and therefore was the prime mover in the initiation of proceedings to have that condition imposed, that would not make it a person aggrieved. Mr. Perera, on the other hand, contended that the petitioner was the only party aggrieved by the Tribunal's order ; it had been affected financially since its business was being taken away through the acts of the 4th to 9th respondents in picking up and setting down passengers in Kandy town, and had therefore made representations to the Commissioner to intervene and impose the condition on the respondent's licences ; it had attended the preliminary inquiry held by the Commissioner and also the proceedings before the Tribunal, and made its representations at such proceedings. One of the earlier cases on this question as to who is a person aggrieved in this sense is *R. v. Justices of Surrey*[1] which was a case dealing with an application for Certiorari. Blackburn, J., there quoted Lord Ellenborough, C.J., who said in *R. v. Taunton St Mary*[2], " Certainly a person does not answer to the character of a person grieved who is only in common with the rest of the subjects inconvenienced by the nuisance ; but here it appears that those persons have by reason of their local situation, a peculiar grievance of their own ". The learned Judge then decided that the applicant for the Certiorari was, by reason of his residence in the neighbourhood of the highways concerned in that case, which the justices had certified were unnecessary, a person aggrieved. The petitioner in these proceedings is much more directly affected by the Tribunal's order than the applicant in that case was by the justices' certificate. Lord Ellenborough, C.J., also said in the judgment cited that the petitioner in that case had "a peculiar grievance beyond that which affects the public at large ", which was another way of defining

[1] *(1870) 39 L. J. M. C., 145.* [2] *105 E. R. 685.*

the test to be applied. In a later case, *R. v. Groom*[1], Lord Alverstone, C.J., speaking of the sense in which persons applying for a writ of Certiorari are required to be persons aggrieved said : " It is sufficient if they have a real interest in the decision of the justices ". Mr. Jayewardene stressed the fact that the petitioner had no legal right to appear either before the Commissioner or the Tribunal. But I do not think that this is a necessary condition. It cannot be denied that the petitioner is the person who is most affected by the order of the Tribunal, for he is directly prejudiced by the removal of the condition from the respondent's licences, a condition which was inserted at the petitioner's instance and for its benefit. If there had been a statutory requirement that the petitioner should be heard by the Tribunal that would no doubt have strengthened the petitioner's position, but I have not been referred to any authority which makes this an essential requirement. The decision of the Court of Appeal in *R. v. Nicholson*[2] and *R. v. Justices of Surrey*[3] indicate the contrary. The applicants for the writ in the former case were held not to be persons aggrieved because they " failed to show that they have a real practical grievance " and for that reason their application was dismissed. This case was followed in *R. v. Richmond Confirming Authority*[4] which was also a case of Certiorari. The applicant there was a rival licensee and it was on this ground, and for the reason that he had a substantial interest in the subject matter, that his application succeeded.

(2) Is the Commissioner a necessary party to the proceedings ? It must be remembered that the present application is to quash the order of the Tribunal made on an appeal against the decision of the Commissioner. Mr. Jayewardene urged that the Commissioner made the order, he could have supported it before the Tribunal, and was entitled to be heard by the Tribunal for that purpose. But once the Tribunal has made its order the Commissioner's decision is superseded by that of the Tribunal and in an application such as this, which challenges the validity of the Tribunal's decision, I cannot see what interest the Commissioner has. Certainly he has no interest such as the 4th to 9th respondents have. They would be adversely affected if the Tribunal's order is set aside, and it is for that reason that they are necessary parties. The Commissioner, however, will not be adversely affected if the petitioner succeeds ; on the contrary, his order will be restored : while if the petitioner fails, matters will lie where they were before this application was filed and the Commissioner will be in no worse position. Nor do I see what the omission of the Commissioner to state a case for the opinion of this Court has to do with this question. Presumably he chose deliberately not to take that course.

(3) Mr. Jayewardene submitted that as the 4th to 9th respondents showed cause separately and filed separate appeals before the Tribunal, there should have been six separate applications filed by the petitioner for Certiorari. I think he recognised the difficulty caused by only one order

[1] *(1901) 2 K. B. 157.*
[2] *(1899) 68 L. J. Q. B. 1,034.*
[3] *(1870) 39 L. J. M. C., 145.*
[4] *(1921) 90 L. J. K. B. 413.*

having been made by the Tribunal in respect of all the appeals, which were consolidated and heard together. Mr. Perera pertinently asked whether the objection of non-joinder would not have been raised if he had made 6 separate applications against each of the 4th to 9th respondents leaving out the other five parties affected by each application. It was not suggested that any prejudice whatever has been caused by the respondents having been joined together.

(4) Whether there has been unreasonable delay or not is largely a matter of opinion and depends on the circumstances of each case. When a case involves many difficult questions of law which can only be considered after an exhaustive examination of the relevant statutes and numerous precedents, I hardly think that an interval of about two months, such as we have here, is an unreasonably long time.

(5) The arguments on the objection based on acquiescence by the petitioner in the proceedings before the Tribunal occupied a great deal of time and they have very considerably assisted me in arriving at a decision. The objection itself arises for consideration because on 27th October, 1951, counsel then appearing for the present petitioner suggested that it was doubtful whether the Tribunal had any jurisdiction to hear the particular appeal because the new Act No. 14 of 1951 provided for only certain appeals filed under the Ordinance No. 47 of 1942 to continue to be heard. On the next date, however, the petitioner's counsel withdrew his objection and the hearing of the appeal continued. It is argued for the respondents that the petitioner is not now entitled to be heard on the question of lack of jurisdiction, having waived its objection to the jurisdiction of the Tribunal and taken part in the proceedings thereafter. Mr. Perera for the petitioner contended that this is a case of total want of jurisdiction and not a case of want of contingent jurisdiction : he submitted that it is apparent on the face of the proceedings that the Tribunal had no jurisdiction to deal with this appeal, and where such defect of jurisdiction is patent, acquiescence in the jurisdiction exercised by the Tribunal does not disentitle the party acquiescing to come in later and object that the order made by it is void. He relied on the following passage in Spencer Bower on Estoppel by Representation (1923) page 187 : " Even the most plain and express contract or consent, *a fortiori*, therefore, any mere conduct or inaction or acquiescence of a party litigant from which a representation may be implied such as to give rise to an estoppel, cannot confer judicial authority on any of His Majesty's subjects not already invested with such authority by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal. Any such attempt to create or enlarge jurisdiction is in effect the appointment of an officer of the judiciary by a subject, and, as such, constitutes a manifest usurpation of the Royal prerogative, or (in the old phraseology) ' contempt of the Crown ', just as much as if a subject were to purport to appoint an officer of the Executive or of the Legislature ". He submitted that it is only in a case of want of contingent jurisdiction that a party can preclude himself, by such conduct as taking part in the proceedings, from objecting to the jurisdiction at a later stage.

The earliest of the many cases cited, dealing with a similar point, is *R. v. Committee men for South Holland Drainage* [1]. It was, to quote the summary of the case given by Spencer Bower, " a statutory compensation case, in which the claimant moved for a certiorari to quash the proceedings on four grounds, (1) that he had not received the prescribed 40 days' notice to treat for the company, (2) that the jury had ordered a fence to be erected, besides awarding compensation, which they had no statutory jurisdiction to do, (3) that the estate was copyhold, and the jury had not awarded compensation to the lord, as required by the statute, and (4) that he held the right of his wife, and no compensation had, as required by the statute, been awarded to her ; but it was held that he barred himself from the right to complain on any of these grounds, and had waived all four objections—the first, by his conduct in requesting the inquisition to be held at a date too early to admit of the 40 days having expired ; the second, by his conduct in assenting to the erection of the fence, and discussing with the company the amount of compensation on the footing that this was to be done ; the third, by his express representation to the company that the land was freehold ; and the fourth, by a like representation that it was absolutely his own ". The next case cited was *R. v. Manchester and Leeds Railway Co.*, [2] which was a similar case where the claimant was held to have waived the statutory requirements as to notice to treat. Lord Denman, C.J., who had also decided the earlier case said : " But it is clear that we must exercise a discretion as to granting a Certiorari. The conduct of the party applying may be such as to preclude him from being entitled to it. On a recent occasion we would not allow a party to take advantage of a defect on the face of the inquisition which arose from his having himself requested that the provisions of the Act should be deviated from ". A good deal of the argument concerned the exact meaning of this passage, which is in substance repeated in later decisions. For example, in *R. v. Justices of Surrey* (*supra*), Blackburn, J., said : " Where the party grieved has by his conduct precluded himself from taking an objection, the Court will not permit him to make it, as in *The Queen v. The South Holland Drainage Committee*. In other cases where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think that it ought to be treated, like a writ of error, as *ex debito justitiae* ". Another case where a party was held to have precluded himself by his conduct from applying for a writ was *R. v. Justices of Salop* [3]. The statute concerned in that case provided that the jurisdiction of the justices could be ousted by a party disputing the validity of a rate which he had not paid. When the party was summoned before the justices no objection to their jurisdiction was taken, and witnesses were called and cross-examined. At a later stage of the inquiry objections to the validity of the rate were submitted. In deciding that the party was not entitled to a Certiorari Crompton J. said : " I think that it was the intention of the statute that the person disputing the validity of the rate should at once give notice to that effect to the justices, not that he should first lead the justices to decide the question and then dispute

[1] *112 E. R. 901.* [2] *112 E. R. 895.*

[3] *121 E. R. 146.*

their jurisdiction to decide it". This case was followed in *Cordery v. Greaves* [1] where a Magistrate made an order on a dispute between the secretary of a friendly society and the representative of a member of the society, although the rules of the society provided that such a dispute should be decided by arbitrators. The rules were put in evidence but the Magistrate's attention was not called to the particular rule. The Court of Queen's Bench refused the writ of Certiorari on the ground that the Magistrate was misled by this omission. It was strongly urged by Mr. Jayawardene that in addition to these cases *R. v. Williams* [2] was also a clear authority for the view that a party who takes part in proceedings cannot later object to their validity. In that case the applicant for Certiorari was convicted of selling bread other than by weight. One of the justices who had sat on the Bench was concerned in the business of a baker, and therefore disqualified by Statute from acting as a justice in such a case. In his affidavit applying for the writ the applicant did not state that at the time of the hearing he was ignorant of the facts disqualifying the particular justice. The Court held that Certiorari should not be granted. Channel, J., said "It is a rule of practice not to grant a writ of Certiorari where the applicant does not negative knowledge of the fact constituting the disqualification when he was before the Court below. That rule has been established on good grounds. It does not depend on whether the decision of the justices was void or voidable. If an objection to a conviction is taken by a member of the public, the granting of the writ by the Court is discretionary ; but if it is taken by a party aggrieved, then a Certiorari ought to be granted *ex debito justitiae ;* but even in that case if the applicant has by his conduct precluded himself from taking the objection, the Court will not permit him to take it. The authority for the exception where an applicant has so precluded himself is *R. v. South Holland Drainage Committee* which is referred to by Mr. Justice Blackburn in *R. v. Surrey Justices*. Where therefore a party aggrieved has by his conduct precluded himself from taking an objection, the Court has a discretion". Rowlatt, J., agreeing said, "If (the applicant) is a party aggrieved *R. v. Surrey Justices* shows that he can debar himself from taking this objection. The affidavits do not show that he was unaware of the disqualification of the Justice on the hearing of the summons". Atkin, J., said, "There is a rule that the applicant must satisfy the Court that he has not by his conduct precluded himself from applying for a Certiorari, and the present applicant has not done so".

Now what is the *ratio decidendi* of these cases? I think it is the rule enunciated by Mr. Spencer Bower in his book at page 187 where he says, in continuation of what I have already quoted: "Where it is merely a question of irregularity of procedure, or of a defect in 'contingent' jurisdiction, or non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that, if one of the parties be allowed to waive, or by conduct or inaction to estop himself from setting up, such irregularity or want of 'contingent' jurisdiction or non-compliance, no new jurisdiction is thereby impliedly created, and no existing jurisdiction is thereby impliedly extended beyond its existing

[1] *20 L. T. 972.* [2] *(1914) 83 L. J. K. B. 538.*

boundaries, the estoppel will be maintained, and the affirmative answer of illegality will fail, for, the Royal prerogative not being invaded, and the State therefore not being injured, nor any of His Majesty's subjects for whom that Royal prerogative is held in trust, there is no ground of public policy, or other just cause, why the litigant, to whom alone in that case the statutory benefit belongs, should not be left free to surrender it at pleasure, or why having so surrendered it, whether by contract, or by conduct or inaction implying consent, he should be afterwards permitted to claim it. Accordingly, in all cases of the first class, that is, of *defectus jurisdictionis* the representor has been held incapable of estopping himself from resisting the usurped authority; whereas in all those of the other class, that is of mere *defectus triationis*, the affirmative answer has been rejected, and the representor has been held estopped from objecting to the irregularity". We thus have the two classes of cases covering want of jurisdiction and the effect of a party's conduct in either class explained by the learned author in these two passages. It is beyond doubt that a sharp distinction exists between cases of patent and latent want of jurisdiction, as the two classes are also called. The right of a party aggrieved to apply for relief in either case by way of Prohibition is clearly dealt with in Shortt on Mandamus (1887) page 447 where he quotes Lord Mansfield as having said :—" If it appears upon the face of the proceedings that the Court below had no jurisdiction, a prohibition may issue at any time, either before or after sentence, because all is a nullity : it is *coram non judice*. But where it does not appear upon the face of the proceedings, if the defendant will lie back and suffer that Court to go on, under an apparent jurisdiction, it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the Court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the Court below". Acting on this rule in the case of a patent want of jurisdiction in *Farquharson v. Morgan* [1], Lord Halsbury said :—" In this case, with every disposition to decline to interfere with the course of litigation, and with a strong desire to visit an unreasonable and persistent litigant with the consequences of the course which he has pursued, I have earnestly striven to see whether I could, according to the well known and ordinary practice of the Court, refuse the application for a prohibition. I think, however, that the writ must go so far as those portions of the plaintiff's claim which are outside the Agricultural Holdings (England) Act, 1883, are concerned. It has been well settled for many years that when the objection to the want of jurisdiction on the part of an inferior Court appears on the face of the record or proceedings (and it is immaterial by what means that objection was brought to the knowledge of the Court) it is the duty of the Court to interfere and protect the prerogative of the Crown, and in the due course of the administration of justice prohibit the inferior Court from entertaining a matter which is outside its jurisdiction". The other two judges of the Court of Appeal in their judgments explain the principle upon which a party acquiescing in the proceedings, where it is a case of latent defect of

[1] (*1894*) *63 L. J. K. B. 474.*

jurisdiction, disentitles himself to relief even in cases of prohibition. Lopes, L.J., in his judgment quoted the opinion of the Judges delivered by Willes, J., to the House of Lords in the *Mayor of London v. Cox* [1] :—

" Where the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Court is not taken away, for mere acquiescence does not give jurisdiction—yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ though of right is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant ". Davey, L.J., in his judgment emphasised what I consider is the keynote of this passage when he said : " It will, however, be observed that the learned Judge's statement is confined to cases where the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he might have brought forward in the Court below, but has kept back without excuse—that is, when the applicant has been guilty of some misconduct in the proceedings, and has in a sense misled the Court ". In a later passage in his judgment he used language which seems particularly appropriate to the matter I have to deal with : " In the present case the jurisdiction invoked is the creation of a statute not even conferring jurisdiction in general terms, but confined to a particular defined subject matter. The first question which a Judge has to ask himself when he is invited to exercise a limited statutory jurisdiction is whether the case falls within the defined ambit of the statute ; and it is his duty to decline to make an order as Judge if, and so far as, the matter is outside the jurisdiction ; and if he does not do so he may (if a Judge of an inferior Court) be restrained by prohibition . . . . . In *Jones v. Owen* . . . . it was held by Mr. Justice Patteson that when there was a total want of jurisdiction no consent could be given, and that learned Judge said, ' It is said that the attorney for the defendant did not object to the jurisdiction ; but that is not admitted on the other side. At all events, there was total want of jurisdiction which no assent could cure' ".

The principle—that estoppel by conduct does not preclude a party who took part in the proceedings from raising the question of jurisdiction, or give jurisdiction in a case where the want of jurisdiction appears on the face of the proceedings and the Judge must or ought to have known that he was acting beyond his jurisdiction—has been applied in later cases. In *Simpson and Latton v. Crowle* [2], a party raised the question of jurisdiction in appeal, though he had failed to raise it in the lower Court and it was held that the principle of *Farquharson v. Morgan* (*supra*) should be applied, as the principle should not be confined to cases of prohibition. But the operation of the principle of estoppel must not be misunderstood and its limits are clearly stated in Halsbury's Laws of England

[1] *(1867) 36 L. J. Ex. 225.* [2] *(1921) 90 L. J. K. B. 878.*

(3rd Edition) Vol. 9, paragraph 824: " Where by reason of any limitation imposed by statute, charter or commission, a Court is without jurisdiction to entertain any particular action or matter, neither the acquiesence nor the express consent of the parties can confer jurisdiction upon the Court, nor can consent give a Court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. When the Court has jurisdiction over the particular subject matter of the action or the particular parties, and the only objection is whether, in the circumstances of the case, the Court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case, or a defendant by appearing without protest, or by taking any steps in the action may waive his right to object to the Court taking any cognisance of the proceedings ". When a Court has jurisdiction in particular cases which depend on the existence of a certain state of facts a person who admits, or does not challenge, the existence of those facts can estop himself from denying their existence at a subsequent stage of the proceedings. But where a Court has jurisdiction in a particular class of cases, not depending on the existence of any fact but limited to particular subject-matters, estoppel or consent does not arise because there is total lack of jurisdiction in respect of matters outside those limits. Spencer Bower draws attention to the two types of cases at page 236 : " So when a party litigant, being in a position to object that the matter in difference is outside the local, pecuniary, or other limits of jurisdiction of the tribunal to which his adversary has resorted, deliberatedly elects to waive the objection, and to proceed to the end as if no such objection existed, in the expectation of obtaining a decision in his favour, he cannot be allowed, when this expectation is not realized, to set up that the tribunal had no jurisdiction over the cause or parties, except in that class of case already noticed, where the allowance of the estoppel would result in a totally new jurisdiction being created. The like estoppel is raised by a party's attendance at the hearing and taking part in the proceedings without raising any objections to the personal disqualification of a member of the tribunal, or to the non-compliance of any notice, summons, or service of process, with statutory requirements or rules of court, or to the informality of a writ, or to the irregularity of a verdict in a statutory compensation case on matters which by statute the tribunal is not authorized to take into consideration." " The class of case already noticed " which he refers to, is the class where there is a total want of jurisdiction, and to which the passage on page 187 already cited refers.

The rule has been expressed in many different ways and the most recent authority brought to my notice is *Madhava Rao v. Surya Rao* [1], decided by a Full Bench of the Madras High Court. The petitioners in that case applied for a writ of Certiorari to quash an order made by a Deputy Registrar of Co-operative Societies (which had set aside the election of Directors of a Co-operative Bank) on the ground that the Deputy Registrar had no initial jurisdiction to deal with the matter. A preliminary objection to the application was raised on the ground that as no exception was taken by the petitioners before the Deputy Registrar regarding the exercise of jurisdiction by the Deputy Registrar, but they

[1] *(1954) A. I. R. Madras 103.*

had on the contrary acquiesced in the exercise of jurisdiction by him, they were precluded from now raising their objection. The objection was supported by reference to the case of *Laxaman Chettiar v. Commissioner of the Corporation of Madras* [1] —which, I should add, is one of the authorities relied on by Mr. Jayewardene in support of his preliminary objection. The objection was overruled, the judgment stating, " No amount of consent would cure the initial want of jurisdiction. It is not open to a person to confer jurisdiction by consent and no amount of acquiescence would confer jurisdiction upon a tribunal or Court where such jurisdiction did not exist. The contention raised by the petitioner if well founded would go to the root of the matter, and it would be a case of total lack of jurisdiction, which cannot be cured by consent or acquiescence ". The case of *Laxaman Chettiar v. Commissioner of the Corporation of Madras* was distinguished as not being a case of initial want of jurisdiction. It seems to me that the principles on which the Court acts are the same in the case of Prohibition as in the case of Certiorari, where there is a want of jurisdiction pleaded. There is much to be said for the view that the only difference between Prohibition and Certiorari is that the former " can be brought at an earlier stage of the proceedings complained of: it is preventive rather than remedial "—C. K. Allen, Law in the Making, (5th Edition), page 548. This view is supported by the judgment of Atkin L.J., who said in *R. v. Electricity Commissioners* [2], " I can see no difference in principle between Certiorari and Prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matter which would result in its final decision being subject to being brought up and quashed on Certiorari, prohibition will lie to restrain it from so exceeding its jurisdiction ". Thus it seems clear that if the Tribunal of Appeal laboured under an initial want of jurisdiction to hear the appeals of the 4th to 9th respondents, the acquiescence of the petitioner has no bearing on the question of its validity or invalidity on the ground of want of jurisdiction.

(6) The objection based on the alleged lack of bona fides depends on the materiality of the averments which, it is said, should have had a place in the affidavit filed by the petitioner. The particular averments which Mr. Jayewardene and Mr. Thambiah claim should have been made are (1) that the petitioner's counsel was present on October 10, 1952, when the order of the Tribunal was delivered especially in view of the " suggestio falsi " contained in the averment that the petitioner received a copy of the order on November 15th, 1952, and (2) that the petitioner raised the objection of want of jurisdiction and later withdrew it and continued to take part in the proceedings. Now it is undoubtedly true that the petitioner in an ex parte application for relief, whether in the shape of an injunction or a rule nisi for a writ of Certiorari or any other discretionary writ must be frank with the Court, and must not suppress material facts or practise anything like deception. The rule was referred to by Scrutton, L.J., in *Rex v. Kensington Income Tax Commissioners* [3] in the following terms :—" It has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that

[1] *50 Madras 130.* [3] *(1924) 1 K. B. 171.*
[2] *(1917) 86 L. J. K. B. 257.*

when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts—it says facts, not law. He must not misstate the law if he can help it, the Court is supposed to know the law. It knows nothing about the facts, and the applicant must state fully and fairly the facts ; and the penalty by which the Court enforces that obligation is that if it finds out that the facts have been fully and fairly stated to it the Court will set aside any action which it has taken on the faith of the imperfect statement ". I would, however, stress the words " material facts, " and I need hardly add that their materiality must depend on the particular circumstances of each case. I have tried to show that acquiescence is not a relevant matter in a case of total want of jurisdiction: it follows that it is immaterial whether the petitioner raised an objection based on the lack of jurisdiction and withdrew it or not, for it has no bearing on the invalidity of the proceedings. How then could its non-disclosure in the affidavit come within this rule of the Court? Even if the petitioner's counsel was present when the order of the Tribunal was delivered I do not think that makes any difference, because I have already held that there has been no inordinate delay between that date and the date of filing this application.

But it is also necessary in this connection to consider whether the petitioner is entitled to relief—assuming there are no other obstacles in his path—as of right or merely as a matter of discretion, for the rule enunciated by Scrutton, L.J., applied to cases where a discretion has to be exercised by the Court. Mr. Perera's proposition was that when an aggrieved party applies for Certiorari in respect of an order made by a quasi-judicial body which had acted in the particular matter where it totally lacked jurisdiction, that party is entitled to the writ as of right ; but where there was only a contingent want of jurisdiction, acquiescence or waiver or similar conduct would place even an aggrieved party in the same position as a stranger and the grant of relief is discretionary. I consider, after examining the many authorities cited, that this is the correct position. The opinion of Willes, J., in the *Mayor of London v. Cox* (*supra*) points out the distinction between the two cases :—" There is indeed a distinction after sentence between a patent and a suggested defect, for if the party below, whether plaintiff or defendant, thinks proper, instead of moving for a prohibition to proceed to trial in the special or inferior Court and is defeated, then if the defect be of power to try the particular issue only the right to move for a prohibition is gone. If the defect be of jurisdiction over the cause and that defect be apparent upon the proceedings a prohibition goes after sentence ". This decision was followed by the full Court of Appeal in *Broad v. Perkins* [1], which was a case where the defect in the jurisdiction of the inferior Court was not apparent but depended upon some fact in the knowledge of the applicant for prohibition which he had an opportunity of bringing in the Court below—but did not. In such a case the grant of the writ was discretionary as contrasted with a case such as *Farquharson v. Morgan* (*supra*) where there is a total absence of jurisdiction to deal with the particular matter ; in the latter case I am satisfied that the Court is bound to grant the writ, if it is applied for by a person

[1] *(1888) 57 L. J. Q. B. 638.*

aggrieved, notwithstanding the existence of consent or acquiescence, and I do not therefore see how it is necessary for an applicant is such a case to set out facts which have a significance only where there is a discretion to be exercised. The cases of *R. v. The Justice of Surrey* (*supra*) and *R. v. Williams* (*supra*) already cited also deal with this distinction.

(7) Was the Tribunal of Appeal under a duty to act judicially in hearing the appeal in question ? Mr. Jayawardene submitted it had no such duty and was acting as a purely administrative body, in which case of course Certiorari could not issue. Slesser L.J., in *R. v. London County Council* [1], sub-divided the celebrated dictum of Atkin L.J., in the case of *R. v. Electricity Commissioners* (supra) to read : " Wherever any body of persons "—firstly—" having legal authority "—secondly—" to determine questions affecting the rights of subjects, " and—thirdly—" having the duty to act judicially "—fourthly— " act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs ". It is the third necessary characteristic that I am now considering. It must be emphasised that this application is not to quash the order of the Commissioner of Motor Transport and it is therefore hardly necessary to consider whether he was under a duty to act quasi-judicially or not when he made his order imposing a condition on the licences of the 4th to 9th respondents. But I would point out, in passing, that the case of *Errington v. Minister of Health* [2] shows that a proceeding may be administrative at one stage and quasi-judicial at another—depending on whether there are objections to be considered or not—even though the same authority may be acting throughout. When there are objections to be considered and the authority has to decide whether an order should be made in spite of the objections raised, he may then be regarded as exercising judicial functions. We have, however, to consider the position which arose when the Commissioner's order was appealed from, and the duty of deciding the appeal devolved upon the Tribunal. Had it the duty to act judicially ? Kania C.J. said in *Province of Bombay v. Khushaldas* [3] : " The true position is that when the law under which the authority is making a decision itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided that in coming to the decision the well recognized principles of approach are required to be followed ". In the same case Mukherjea, J., said, " Every judicial act presupposes the application of the judicial process. There is a well marked distinction between forming a personal or private opinion about a matter and determining it judicially. In the performance of an executive act, the authority has certainly to apply his mind to the materials before him : but the opinion he forms is a purely subjective matter which depends entirely upon his state of mind. It is of course necessary that he must act in good faith, and if it is established that he was not influenced by any extraneous consideration, there is nothing further to be said about it. In a judicial proceeding, on the other hand, the process or method of application is different. ' The judicial process involves the application

[1] *(1931) 100 L. J. K. B. 760.* [2] *(1935) 104 L. J. K. B. 49.*
[3] *A. I. R. (1950) S. C. 222.*

of a body of rules or principles by the technique of a particular psychological method '—Robson's Justice and Administrative Law, p. 33. It involves a proposal and an opposition, and arriving at a decision upon the same on consideration of facts and circumstances according to the rules of reason and justice. Vide *R. v. London County Council* [1]. It is not necessary that the strict rules of evidence should be followed ; the procedure for investigation of facts or for reception of evidence may vary according to the requirements of a particular case. There need not be any hard and fast rule on such matters, but the decision which the authority arrives at must not be his ' subjective ', ' personal ' or ' private ' opinion. It must be something which conforms to an objective standard or criterion laid down or recognized by law, and the soundness or otherwise of the determination must be capable of being tested by the same external standard. This is the essence of a judicial function which differentiates it from an administrative function ; and whether an authority is required to exercise one kind of function or the other depends entirely upon the provisions of the particular enactment. Where the statute itself is clear on this point, no difficulty is likely to arise, but where the language of the enactment does not indicate with precision what kind of function is to be exercised by an authority, considerable difficulties are bound to be experienced ".

Mr. Jayewardene contended that before the Commissioner there were no two parties, nor were there a proposal and an opposition, and before the Tribunal the position was the same. He relied on the dictum of Scrutton, L. J., in *R. v. London County Council* (*supra*) that " it is enough if it (the Tribunal) is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition". But in *R. v. Manchester Legal Aid Committee* [2], Parker, J., stressed the word " enough " in this passage and said : " The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable to attempt to define exhaustively ". Mukherjea, J., in the judgment from which I have already quoted pointed out that a proposal and an opposition merely meant a point in controversy or a " lis ". It may consist of the interest of the public on the one hand and the interest of the party affected on the other. " No formal array of parties, " he said, " is necessary. It is enough that there is a point in issue which has got to be decided between parties having conflicting interests in respect to the same ". In the case of *R. v. Electricity Commissioners* (*supra*) the only parties were the Commissioners who proposed the scheme and the companies who objected to it. The Commissioners had to make an order after hearing the objections, but since they had a duty to act judicially they were held to be subject to Certiorari. Nor, again, is the hearing of evidence a necessary pre-requisite of a quasi-judicial proceeding. It is at the earlier stage of a proceeding that evidence is taken, before the hearing of the appeal is reached. Lord Haldane, L.C., said in *Local Government Board v. Arlidge* [3], " When the duty of deciding an appeal is imposed, those whose duty it is to decide must act judicially. They must deal with the question

[1] *(1931) 100 L. J. K. B. 760.* [2] *(1952) 2 Q. B. 413.*
[3] *(1915) A. C. 120.*

referred to them without bias, and they must give each of the parties the opportunity of adequately presenting the case made. The decisions must be come to in the spirit and in the sense of responsibility of a tribunal whose duty it is to mete out justice ". The point decided by the Privy Council in *Shell Company of Australia v. Federal Commissioner of Taxation*[1] was that " an administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called ", so that case has no bearing on this issue. When I consider the position of the Tribunal of Appeal in the light of the Regulations governing its procedure, and its powers after it has heard an appeal, I cannot see how it can be regarded as anything but a body which is required to act quasi-judicially. I think the Chairman of the Tribunal fully appreciated this position when he said in his order, overruling an objection to the petitioner being heard at the appeal: " In the ordinary course of business and of justice it is right to hear the parties who are affected by an order . . . . I have no doubt that the legislature would wish us to hear all parties affected by any conditions proposed to be attached to such a licence ". Of course it does not follow that if he had decided not to hear the petitioner, because the Regulations gave the petitioner no right to be heard, the tribunal would not have been a body acting quasi-judicially; the test is not whether it did in fact act in a judicial manner but whether it had a duty to act in a judicial manner.

At this stage it is convenient to consider a submission made by Mr. Nadesan. His point was that even if the condition imposed by the Commissioner has been wrongly deleted by the Tribunal, the passing of the Motor Traffic Act, No. 14 of 1951, had made the Commissioner's order void; therefore the order of the Tribunal was also void; in the result, he submitted, no practical purpose is served by the present application and this Court should not therefore make an order which is unnecessary. The argument is attractive but lacks substance; it overlooks the reason for granting certiorari, viz., an act done in excess of or in usurpation of jurisdiction. As Slesser, L.J., said, in *R. v. London County Council* (*supra*), " To argue that because an authority was usurping a jurisdiction or acting contrary to their judicial powers, therefore certiorari would not lie would be to defeat the whole purpose of the writ. But the question is, have they purported under the statute, and have they a duty under the statute, to perform a judicial function ?". Mr. Nadesan raised his objection before I had heard Mr. Perera on his application, and his argument may have had to be considered more carefully if this case was one where there was only a latent want of jurisdiction in the Tribunal. In such a case, as I have tried to show, even when an aggrieved party applies, the grant of the writ is discretionary and he can preclude himself by acquiescence. But here the petitioner has attacked the order as being void on the ground that the Tribunal suffered from a patent want of jurisdiction to make it; in such a case Certiorari is granted as of right, and the void order is quashed. In the view I take of the Tribunal's power to make the order it is, strictly speaking, unnecessary for me to go into the question of the effect the Commissioner's order had upon the licences of the 4th to 9th respondents.

[1] *(1931) 100 L. J. P. C. 55.*

The objection was taken on the basis that the Commissioner's order of variation ceased to have any effect when the Ordinance No. 47 of 1942 was repealed. I accept Mr. Nadesan's contention that the word "licence" is used in very many parts of the Ordinance No. 47 of 1942 to refer to the written document of authority, but it is not always so used. For example, when the Ordinance refers to an order revoking or suspending the licence it surely refers not to the written document but to the authority conferred by that document. It is permissible to give different meanings to the same word, even in the same section of an Ordinance, if the context so requires it, and that has become necessary in this case. Now the point we are concerned with in this case is in section 6 (2) which enacts :—

> "The Commissioner may at any time, by notice served on the holder of a road service licence, vary the conditions attached to a road service licence, and require the production of the licence for the purpose of such variation."

Does this sub-section mean that the conditions cannot be varied except by a writing on the document, or does it mean that the serving of a notice on the holder *ipso facto* affects the variation ? I take the latter view, and I also take the view that the words "for the purpose of such variation" do not mean "for the purpose of giving effect to such variation", but "for the purpose of implementing such variation". The variation takes effect when the notice is served, or is deemed to have been served under section 17. It is from such notice that the holder is given the right of appeal by section 13 (4). But it is said that no such variation can take effect until it is entered on the written document, because the Regulations require the Commissioner to so enter it. The logical effect of this argument would be that a holder of a licence can completely nullify any order of variation by refusing to produce the document for the necessary alteration. I do not think a person can, by his own act, be allowed to defeat the object of an Ordinance in this way, and I should be reluctant to interpret section 6 (2) so as to permit of such an evasion of the provisions of the Ordinance, unless it is necessary. I would hold that the order varying the licences of the 4th to 9th respondents took effect as soon as the Commissioner gave them notice of such variation, and the licences therefore had the new condition imposed on them though it was not actually written on the documents. Since they are deemed to be stage carriage permits granted under Act 14 of 1951 (see section 246 (1)), they would be such permits containing this condition.

I shall now deal with the application of the petitioner. As I have already indicated, it is made on the basis that there was a total want of jurisdiction in the Tribunal of Appeal to deal with the appeal of the 4th to 9th respondents against the Commissioner's order varying their licences by imposing a particular condition. If this is the position it follows, in the view I take of the authorities already cited, that the writ must go. If the law had remained as enacted in Ordinance No. 47 of 1942, there would have been no question as to the Tribunal's jurisdiction to make the order it did, but on September 1st, 1951, the Motor Traffic Act came into operation. By section 243 (1) the Act repealed the Motor Car Ordinance No. 45 of

1938 and the Omnibus Service Licensing Ordinance No. 47 of 1942; provisos (*b*) and (*c*) however kept those Ordinances in force for particular purposes as follows :—

(*b*) the provisions of the Omnibus Service Licensing Ordinance, No. 47 of 1942, shall continue in force for the purpose and only for the purpose of enabling the provisions of section 246 of this Act to have effect ; and

(*c*) the provisions of the repealed Ordinance relating to the constitution and powers and functions of the Tribunal of Appeal and to appeals to the Tribunal of Appeal or appeals from decisions of the Tribunal shall continue in force but only for the purpose of enabling the provisions of section 246 of this Act to have effect.

What is the effect of the repeal and of these two provisos read together ? I think they mean that nothing further could be done under the repealed Ordinance by reason of the repeal beyond what was expressly saved in the provisos. Mr. Thambiah submitted that under section 6 (3) (*c*) of the Interpretation Ordinance, Cap. 2, the appeal before the Tribunal continued as though there had been no repeal. But I think that this would have been the position only if the two provisos had been absent. The provisos have expressly laid it down that nothing beyond what is preserved in section 246 shall continue in force. No more emphatic words could have been used to indicate that. The Tribunal therefore had no powers left to it beyond those conferred on it by section 246 (4) which is the only part of section 246 which deals with the matter of appeals and their consequences. Section 246 (4) reads as follows :—

" In any case where an application was made to the Commissioner of Motor Transport under the Omnibus Service Licensing Ordinance, No. 47 of 1942, for a road service licence, or under the repealed Ordinance for a licence for a lorry, and the Commissioner has given a decision granting or refusing the application—

(*a*) all the provisions of sections 13 and 14 of Ordinance No. 47 of 1942, or as the case may be, sections 50 to 54 of the repealed Ordinance shall apply in relation to the right of appeal against such decision, and in relation to any appeal which may have been duly preferred thereunder prior to the date of the commencement of this Act ;

(*b*) if the decision is that the application should be granted, and no appeal is or has been preferred against it, effect shall be given to the decision as provided in sub-section (5) or in sub-section (6) of this section ;

(*c*) if an appeal is or has been preferred against the decision, and the final determination upon such appeal, whether by a tribunal of appeal or the Supreme Court or by His Majesty in Council, is that the application should be granted, effect shall be given to such final determination as provided in sub-section (5) or in sub-section (6) of this section. "

Mr. Perera submitted that nothing more was necessary to ensure that the only decisions of the Commissioner to which the sub-section applied are those either granting or refusing an application for a licence; and, therefore, a decision attaching any condition to a licence or varying the conditions of a licence, which was the decision in this case, is not provided for in the sub-section and no appeal then pending before the Tribunal was saved by sub-section (4) (*a*). There can be no doubt that under section 13 (4) of Ordinance No. 47 of 1942, a holder of a licence could appeal against such a decision to the Tribunal, and section 14 (4) provided for the order the Tribunal could make on such an appeal. The omission in section 246 (4) of any reference to such a decision of the Commissioner is significant and was stressed by Mr. Perera.

The main submissions of the respondents' counsel were (1) that since the Commissioner had granted the respondents licences within the meaning of the words " the Commissioner has given a decision granting or refusing the application ", paragraph (*a*) made all the provisions of sections 13 and 14 of Ordinance No. 47 of 1942 applicable in relation to the appeal filed by the 4th to 9th respondents, since their appeal was filed prior to 1st September 1951 ; (2) that the operation of paragraph (*a*) was not confined to appeals against decisions granting or refusing applications for licences but to " any appeals " against any decision of whatever kind such as is provided for by section 13, Ordinance No. 47 of 1942, including a decision varying a licence ; (3) stress was laid on the reference to " all the provisions of sections 13 and 14 " of that Ordinance and the absence of words which confined the class of appeals to appeals against decisions granting or refusing applications for licences ; (4) it was submitted that since section 13 does not provide for an appeal against an order granting a licence, paragraph (*b*) could only be given a meaning by extending the operation of sub-section (4) to appeals in all cases against any decision made by the Commissioner ; (5) support was sought to be derived from the Amending Act No. 1 of 1952 which added sub-section (7) to section 246 of the main Act, and in which the holder of a licence was mentioned as a possible party to an appeal. In replying to the submissions Mr. Perera argued (1) that sub-section (4) dealt only with two classes of decisions, viz., those granting licences, (but which had not been implemented by the issue of licences), and those refusing licences ; he submitted that decisions granting licences which had been implemented were dealt with in sub-section (1) ; (2) that sub-section 4 (*a*) conferred the right of appeal against only those two classes of decisions, and laid down the conditions which applied to the filing of appeals against only such decisions, the words " any appeal " not having the effect of enlarging the classes but only meaning " any appeals of the classes specified " ; (3) the reference to all the provisions of sections 13 and 14, Ordinance No. 47 of 1942, did not enlarge the classes which had already been defined, but was merely to require that there should have been due compliance with the provisions of those sections ; (4) an appeal against a grant of a licence is possible where there have been two or more applicants for a licence and one of them is granted, and the others are refused the licences ; (5) the Amending Act No. 1 of 1952 can be given effect to without enlarging the scope of section 246 (4) ;

(6) not only does section 246 not provide for an appeal against an order varying the conditions of a licence, it does not provide for an appeal against an order suspending or revoking a licence, nor does it provide the machinery to give effect to any order made on such appeals. The absence of administrative provision for such cases, he submitted, indicates that no right of appeal in such cases was intended to be preserved.

The arguments for the respondents were ingenious but I cannot accept them. They do violence to the wording of section 246 (4) because they seek to give the words "a decision granting or refusing the application" an unreasonable interpretation ; they overlook the situation of the words "in relation to any appeal which may have been duly preferred" in the sub-section, for I cannot believe that any draughtsman who intended to confer such a right of appeal as that contended for by the respondents' counsel would have done so by merely tacking on the words to complete the sentence that comprises paragraph (*a*) ; they fail to convince, whereas Mr. Perera's explanation of the scope of section 246 (4) is reasonable and gives due weight to all its provisions so that they form a coherent scheme. It was also submitted by Mr. Thambiah that the Act should be so interpreted as to preserve, if possible, the right of appeal which had vested in the respondents before the Act came into operation. While I accept the force of his argument which is based on the proposition that it is a serious thing to deprive a person of the right of appeal to a superior tribunal which had accrued to him, I think the cumulative effect of the provisions of section 243 and section 246 (4) is just that.

The consequence of my findings on the points of dispute is that the Tribunal acted without any jurisdiction in hearing the appeal and making an order since the appea was not against an order granting or refusing a licence. The Tribunal suffered from a total and patent want of jurisdiction over the subject matter of the appeal ; the petitioner has not therefore precluded himself, by taking part in the proceedings, from making this application. I therefore grant the prayer of the petitioner and quash the order made by the Tribunal of Appeal. The 4th to 9th respondents will pay the costs of the petitioner.

Application allowed.