[HIGH COURT OF AUSTRALIA.]

BOULUS . . . . . APPELLANT;

AND

BROKEN HILL THEATRES PROPRIETARY LIMITED AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 29, 30.

Latham C.J., Dixon, McTiernan, Williams and Webb JJ.

Theatres—Town Hall—Licence—Transfer—Transferee neither owner nor lessee—Effectiveness—Exhibition of cinematograph films—Endorsement of licence—Application—"Date" of application—Refusal—Appeal to District Court—Jurisdiction—Certiorari—Theatres and Public Halls Act 1908-1946 (*N.S.W.*) (*No.* 13 *of* 1908—*No.* 27 *of* 1946), *ss.* 9, 11, 12, 13, 13A, 13D—*District Courts Act* 1912-1947 (*N.S.W.*) (*No.* 23 *of* 1912—*No.* 41 *of* 1946), *s.* 51.

The only person who can make an application under s. 13D of the *Theatres and Public Halls Act* 1908-1946 (N.S.W.) for "the prescribed endorsement on a licence" is a person who, at the date of the written application therefor, holds the licence as the owner or the lessee of the building in question, and if, upon an appeal under s. 13D (11), the District Court decides in favour of a person who is not so qualified, certiorari will lie notwithstanding that the Act provides that the decision of that court shall be final.

The words "the date of the application" in s. 13D refer to the date when the application is lodged with the Theatres and Films Commission.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Broken Hill Theatres Pty. Ltd.*; *Re Boulus*, ((1948) 49 S.R. (N.S.W.) 69; 66 W.N. (N.S.W.) 24), affirmed.

APPEAL from the Supreme Court of New South Wales.

For many years the Council of the City of Broken Hill had held, in respect of the Town Hall, Broken Hill, a licence under the *Theatres and Public Halls Act* 1908 (N.S.W.), as amended, and in 1946 it was the holder of a licence, dated 13th August 1946, under that Act for a period of twelve months commencing on 1st August 1946.

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After some negotiations John Boulus, junior, of Broken Hill, on 2nd August 1946, offered to lease the Town Hall for a period of ten years at a rental of £10 per week for the exhibition therein of cinematograph films, and the city council, on 16th September 1946, resolved that, subject to a satisfactory lease being entered into which provided for nights being available to certain organizations and persons who regularly used the hall on other than Wednesdays and Saturdays provided they gave fourteen days' notice, the application by Boulus for the use of the Town Hall be granted but at a rental of £15 for each week in which the hall was used for six nights, and of £10 for each week if the hall were used only on the Wednesday and Saturday evenings. In a letter dated 27th September 1946 to Boulus informing him of the Council's decision, the town clerk stated that it was understood that he, Boulus, was to supply all the seating and other equipment required and would be responsible for the lighting and cleaning of the hall.

On 10th October 1946, Boulus' solicitor notified the town clerk by letter that the offer made by the Council for a lease of the Town Hall at a rental of £15 per week subject to the conditions mentioned above was acceptable to Boulus, that the lease was to be taken by Boulus as a trustee of a company proposed to be formed for the purpose of exhibiting cinematograph films in the Town Hall, that an amount of approximately £6,000 would be spent on equipping the Town Hall with the best seats, furniture and fittings and plant, and that it was desirable to permit Boulus as trustee to apply immediately to the Theatres and Films Commission for an endorsement on the licence held by the Council under the *Theatres and Public Halls Act*, the rental to commence fourteen days after such endorsement.

In a deed executed on 18th December 1946 by Boulus and the Council, it was recited: (*a*) that the Council was prepared to agree to grant to Boulus (therein named "the trustee") a lease of the Town Hall for a term of ten years upon certain terms and conditions some of which had been mutually agreed between the parties but the full terms and conditions had not then been finally agreed; (*b*) that Boulus had requested the Council pending finalization of the terms and conditions and preparation and completion of the lease to transfer to him the licence held by the Council in respect of those premises under the *Theatres and Public Halls Act* 1908-1939, to enable him to make application for the prescribed endorsement of that licence to permit the exhibition of cinematograph films; and (*c*) that the Council had agreed to execute the transfer subject to certain terms and conditions. The deed also contained, *inter*

alia, (i) a declaration that until the execution of the lease Boulus would hold the licence in trust for the Council; (ii) a covenant by Boulus that he would in his own name and at his own expense use his best endeavours to obtain the prescribed endorsement of the licence; and (iii) a proviso that if the endorsement were refused or could not be obtained Boulus might, by transferring the licence back to the Council, terminate the agreement.

In a letter dated 27th December 1946 and addressed to the Under Secretary, Chief Secretary's Department, the town clerk stated that the Town Hall had been leased to Boulus for the purpose of showing cinematograph films and requested that Council's licence, which was enclosed therein, dated 13th August 1946, be transferred into Boulus' name.

The transfer was approved on 8th January 1947, and, on 13th January 1947, it was noted on the back of the licence that the Minister in pursuance of s. 13 of the Act had consented to the transfer and had caused Boulus to be registered as the holder of the licence.

Boulus, on 26th May 1947, applied to the Theatres and Films Commission for an endorsement specially authorizing the exhibition at the Town Hall of cinematograph films to be placed upon the licence of which he was the registered holder.

Objections to the granting of the application were lodged by Broken Hill Theatres Pty. Ltd., Ozone Theatres (B.H.) Pty. Ltd., South Broken Hill Music Hall Co. Ltd. and Johnson's Theatres Pty. Ltd. on the grounds :—(i) that the use of an additional building for the exhibition of cinematograph films was not required for the accommodation of the people in the area which would be served by the building; (ii) that the buildings for the time being in use for the exhibition of cinematograph films provided properly and adequately for the requirements of the area; (iii) that the granting of the application would result in undue competition or economic waste; (iv) that it was not in the public interest that the application should be granted; and, by the two last-mentioned companies, (v) that it was generally considered that the condition of the Town Hall was unsuitable for the showing of pictures.

Boulus' application was refused by the Theatres and Films Commission on 17th October 1947, and on 3rd November 1947 he appealed to the District Court against that decision.

On 19th April 1948, in purported pursuance of the *Theatres and Public Halls Act* 1908-1946, the Colonial Secretary granted to Boulus a licence for the Town Hall, Broken Hill, for general entertainment purposes for a period of twelve months from 1st August 1947.

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On 20th, 21st, 22nd and 23rd April 1948, the appeal by Boulus to the District Court was in course of being heard, and on the last-mentioned day, by consent of the parties, the hearing was adjourned to Sydney to a date to be fixed.

On 19th May 1948, the City Council executed a memorandum of lease under the *Real Property Act* 1900 (N.S.W.) to Boulus of the upstairs portion of the Broken Hill Town Hall, comprising the main hall and being such premises as were comprised in a licence under the *Theatres and Public Halls Act* 1908-1939, with the right to himself, his servants, agents, licensees and invitees to use for foot traffic only the stairway leading to that main hall, and also the main entrance way to the Town Hall, for the term of two years computed from 19th May 1948.

The hearing of the appeal to the District Court was continued at Sydney on 29th June and concluded on 1st July 1948, the decision being reserved. Judgment was delivered on 25th August 1948, whereby the judge ordered that an endorsement specially authorizing the exhibition of cinematograph films be placed upon the licence, and that the costs of Boulus be paid by the objecting companies. His Honour said, *inter alia*, that he had given the matter consideration and had come to the following conclusions:—The Act was not an Act dealing with property rights, but was an Act to regulate public halls, and especially cinematograph film displays. The term " owner or lessee " was used in the Act because, in nine hundred and ninety-nine cases out of a thousand, anybody else would be a complete stranger to the hall, and any application by any such person would be an interference with the rights of other people. But that was not this case. Here, the owner was most anxious that a licence be issued to the appellant. The negotiations took place between them and their relationship was established by documents. He did not think, therefore, that the form the negotiations took should interfere with the right of Boulus to have his licence endorsed, and he therefore directed the indorsement of the licence in accordance with the Act.

Upon an application by the four objecting companies, the Supreme Court (*Davidson* and *Street* JJ., *Jordan* C.J. dissenting) made absolute a rule nisi for a writ of certiorari directed to the District Court Judge, the Registrar of the District Court holden at Broken Hill, the Colonial Secretary of New South Wales (being the Chief Secretary, who administers the *Theatres and Public Halls Act* 1908-1946) and Boulus to remove the proceedings into the Supreme Court to be quashed without further order (*Ex parte Broken Hill Theatres Pty. Ltd.*; *Re Boulus* (1)). During the hearing the court

(1) (1948) 49 S.R. (N.S.W.) 69; 66 W.N. (N.S.W.) 24.

was informed that the prescribed endorsement had not then been made and that the licence granted to Boulus on 19th April 1948 had been extended for a further period of twelve months as and from 1st August 1948.

From that decision Boulus appealed to the High Court.

Cullen (solicitor) admitted service of the notice of appeal on the respondents other than the companies.

Miller K.C. (with him *Kerr*), for the appellant. The Supreme Court judgments rely erroneously upon the original transfer being faulty. That transfer was a ministerial act. It was not competent for the court to review the functions of the Minister. All the court was concerned with was that there was a licence which had to be endorsed. If such a review were open to the court then that court was the District Court. The District Court judge found expressly that the objections raised to the granting of the application were not sustainable and that upon the facts the application was warranted. Regulation 4 is directive and does not confer any subsequent right or impose any subsequent obligation. It is not warranted by s. 12 (1) of the *Theatres and Public Halls Act* 1908-1946. The Act does not specify who shall sign or lodge an application for an endorsement on a licence. In dealing with an endorsement only certain matters have to be considered and those are not matters connected with the identity or character or the title of the licensee. There was no onus upon the appellant to prove a title, either before the commission or before the District Court judge. The question of title was not relevant. It was only incumbent upon the appellant to show that there was a licence issued and current at the date of the application. He was not required to show who, or that he, was the licensee. The decision of the judge is final and conclusive and it was not competent to the Supreme Court to review that decision by writ of certiorari (*The Colonial Bank of Australasia* v. *Willan* (1)). Under the statute the questions as to what was (*a*) the status of the appellant in making the application; (*b*) the nature of the application; and (*c*) what should be done, were matters within the jurisdiction of, firstly, the Theatres and Films Commission and, secondly, on appeal, the District Court. If, therefore, it was competent for either the commission or the court to go behind the licence before it for the purpose of an application for the prescribed endorsement, then the decision of the judge was a decision which decided those preliminary

(1) (1874) L.R. 5 P.C. 417, at pp. 442, 443.

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matters which were essential to the validity of the order but was a decision which may not be interfered with by a superior court, because to interfere with it would be to nullify the express language of the legislature that that decision shall be final and not subject to any appeal (*Tithe Redemption Commission* v. *Wynne* (1) distinguishing *Bunbury* v. *Fuller* (2); *Law Quarterly Review*, vol. 60, p. 250). The essential ingredients which found the jurisdiction, and as prescribed by s. 13D (1) (*b*) of the Act, have been satisfied. All that the Act requires is an application after 1938 for the prescribed endorsement issued under the Part and current at the date of the application. There was a licence so current. The important question is the date of the relevant order. The District Court is merely a ministerial body designated for the purpose of performing the same functions as the Theatres and Films Commission. That commission and the District Court exercised an administrative function and if either of them made an error, even an error in a matter of law, in arriving at a particular conclusion that error cannot be rectified by way of certiorari (*The Colonial Bank of Australasia* v. *Willan* (3)). Even if there were an error made by the judge, it was merely an error made in the exercise of his jurisdiction or his function, and was not an error going to the basis of his jurisdiction. The word "current" in s. 13A (3) should be read as meaning "in existence." The "date" of the application is satisfied if there be a licence in existence at the time when the Theatres and Films Commission or the District Court, respectively, exercised its function. Section 13, if it has any application here, is designed to protect the proprietary right. The court below attached too much importance to the last three words of that section. It is not a function of the court to go behind what the Minister has done. Once lodged, the application for endorsement continues to be an application *de die in diem*. It remains an application on foot right up to the moment of the final order. The "current" "date of application" is satisfied at any point of time, including the point of time when the Theatres and Films Commission or the District Court, respectively, gives its decision. The decision of the District Court is not a judicial decision in the true sense; it is simply a new administrative decision to be substituted for the original administrative decision of the Theatres and Films Commission, and the mere fact that the appellant was ordered to pay costs does not convert the administrative decision into a judicial decision (*Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (4)). The District Court judge was not bound by the rules of

(1) (1943) 1 K.B. 756, at pp. 762-765.
(2) (1853) 9 Ex. 111 [156 E.R. 47].
(3) (1874) L.R. 5 P.C. 417.
(4) (1924) 34 C.L.R. 482, at p. 501.

evidence. Upon the giving of its decision the Theatres and Films Commission and the District Court respectively were *functus officio*. The decision in this case was a decision on a mere question whether the licence should or should not be endorsed. It was not a decision on an issue between parties in the ordinary sense and it did not impose obligations on anyone. An erroneous decision would not give the Supreme Court jurisdiction. These are basic matters for consideration of the question whether or not certiorari is open (*R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (1); *Morgan* v. *Rylands Bros. (Australia) Ltd.* (2); *Bank of New South Wales* v. *United Bank Officers' Association and the Court of Industrial Arbitration* (3)). The question whether the appellant was or was not a lessee was not relevant because the appellant was no longer in the position of being a person to whom a licence had been transferred. At that time the appellant was an original grantee, the period of the transferred licence having expired on 31st July 1947. The Act does not provide only that a licence can be granted to an owner or a lessee. The appellant was clearly a person "duly authorised" within the meaning of s. 9, and being so authorized it was competent for the Minister to issue a licence to him. In the circumstances, the appellant became a licence holder under an original grant or under a new grant "otherwise than as transferee." Section 12 does not provide that a licence must be renewed before its term expires.

Smyth (with him *Kenny*), for the respondent companies. The District Court acted as a court strictly so-called and to such a court certiorari goes. If, in this matter, it was not a court strictly so-called, then it was an administrative body with a duty to act judicially, and therefore had a duty to act within the jurisdiction conferred upon it by the statute. In this matter, the legislature's scheme, in its provisions, is not unlike the statute considered by this Court in *Medical Board of Victoria* v. *Meyer* (4) and the decision in that case applies.

[McTIERNAN J. referred to *Webb* v. *Hanlon* (5). WILLIAMS J. referred to *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (6).]

The District Court was required to decide rights after hearing evidence and opposition, and is amenable to the writ of certiorari (*R.* v. *London County Council*; *Ex parte The Entertainments Protection Association Ltd.* (7)). The statute makes it clear that it is

(1) (1923) 32 C.L.R. 518.
(2) (1927) 39 C.L.R. 517.
(3) (1921) 21 S.R. (N.S.W.) 593.
(4) (1937) 58 C.L.R. 62.
(5) (1939) 61 C.L.R. 313.
(6) (1943) 67 C.L.R. 25.
(7) (1931) 2 K.B. 215, at p. 233.

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the actual existence of the facts upon which the jurisdiction of the court depends. There is nothing in the Act which expressly vests or places within the judge's province the decision of these preliminary matters, which are the existence of (*a*) an application for the prescribed endorsement, and (*b*) a licence current at the date of the application. The opening words of s. 13D constitute a clear expression of the legislative will that the section is only to apply to something which exists in fact, not something which a court might erroneously decide. Support for this view is to be found in the provisions of s. 13D (11). The words " at the date of the application " in s. 13D (1) (*b*) show that the date must be a particular date, not a movable date. From an examination of the section as a whole, and also of the provisions of reg. 106A, it is clear that the application must be in documentary form. The date on the application is not the determining factor. The relevant date is the date on which the application is lodged with the proper authority. That being so, it is plain that there was no valid application because it is clear that the transfer of the licence from the council to the appellant was not in breach of the statute. At that time the appellant was neither the owner not the lessee of the building. The evidence establishes that the essential preliminaries had not been complied with (*The Colonial Bank of Australasia* v. *Willan* (1); *Ex parte Mullen*; *Re Hood* (2)). As he was neither the owner nor a lessee the appellant was not qualified to be the holder of a licence. Even assuming, however, contrary to the above submission, that the essential preliminaries were matters within the province of the judge to decide, he did not in fact decide them, he misunderstood the nature of the jurisdiction which he was to exercise and did not apply himself to the question which the law prescribed (*R.* v. *Connell*; *Ex parte The Hetton Bellbird Collieries Ltd.* (3); *Ex parte Hebburn Ltd.*; *Re Kearsley Shire Council* (4)). That question was: Was there a valid application for an endorsement on the licence current at the date of the application ? There must be an application by an applicant who is the holder of a current licence. Section 13D applies only to certain applications and the subject application is not one of those applications. Therefore, the Minister should not have referred it to the Theatres and Films Commission. Not being an application to which the section applied neither that commission nor the District Court had any jurisdiction to deal with it. Sections 47 to 51 inclusive of the *District Courts Act* 1912-1947 (*N.S.W.*) do

(1) (1874) L.R. 5 P.C. 417.
(2) (1935) 35 S.R. (N.S.W.) 289, at pp. 298, 299.
(3) (1944) 69 C.L.R. 407, at p. 432.
(4) (1947) 47 S.R. (N.S.W.) 416, at p. 420.

not show in very clear terms that removal to quash for excess of jurisdiction was intended to be taken away. Section 51 does not take away from the Supreme Court the right to issue a prerogative writ of certiorari to quash in a case where, as in this case, there has been an excess of the jurisdiction conferred by statute: see *Halsbury's Laws of England*, 2nd ed., vol. 9, p. 862, par. 1458. There is no evidence of any decision that the appellant was the owner or the lessee at the material time and there is no decision that he was the holder of the current licence at any time. Consequently, there is no decision that the application was made by the holder of a licence. That being so, it would still be an outstanding matter for a superior court. The application was not an application *de die in diem*. If it were otherwise the provisions would be unworkable. The material date was the date when the application was lodged, and, on that basis, at the time when the judge made his order, there was nothing on which the order could operate, the licence having then lapsed.

Kerr, in reply. The appellant was authorized by the owner to apply for a licence. Section 9 does give authority for the issue of a licence to a person authorized by the owner or lessee. It does not follow under s. 13 that an owner or lessee can only receive the licence on transfer. Under s. 9 the appellant obtained a valid licence in his own name on 19th April 1948, whatever may have been the position previously. The appellant was an applicant within s. 13D and his application having been refused he was entitled under sub-s. (11) of that section to appeal to the District Court, the decision of that court being " final and shall be carried into effect " : par. (*c*), sub-s. (11). Certiorari does not lie to the District Court. The material date is the date of the hearing. The issues the judge had to decide were issues as at the moment of his decision. That this must be so is emphasized by the fact that relevant conditions may alter considerably as between the date on the application or the date of its lodgment and the date of the hearing and decision.

The following judgments were delivered :—

Mar. 30.

LATHAM C.J. This is an appeal from a decision of the Supreme Court of New South Wales making absolute a rule nisi for a writ of certiorari directed to his Honour Judge *Lamaro*, a judge of the District Court, to the Registrar of the District Court holden at Broken Hill, to Joseph Boulus, junior, and the Minister (the Chief Secretary) who administers the *Theatres and Public Halls Act* 1908-1946. The decision of the District Court, which was ordered

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to be removed to the Supreme Court and quashed, was a decision that a licence under the *Theatres and Public Halls Act* 1908-1946 should be endorsed with an endorsement specially authorizing the exhibition of cinematograph films in the Town Hall at Broken Hill. Such endorsement is required under s. 13D of the Act, which provides that no person shall exhibit a cinematograph film in any theatre or public hall unless the licence held in respect of such theatre bears such an endorsement. Section 5 of the Act provides for the application of the Act in certain localities, and s. 9 provides that on application made as prescribed by the owner or lessee of the theatre or public hall or any person duly authorized by such owner or lessee the Minister may under his hand or under the hand of any person appointed by him in that regard issue a licence under the Act in respect of the same. Section 11 provides that the Minister may refuse a licence if certain things appear to him, as, for example, that the provisions of the Act and the regulations have not been complied with or that the buildings are unsuitable. Section 12 provides that any such licence may be renewed under the hand of the Minister or the person authorized by him at any time as prescribed and on payment of the prescribed fees. The period of such licence is prescribed by sub-s. (2) of this section—such period shall be specified in the licence—a period not exceeding twelve months from the date of issue or renewal. Section 13 is a section which is important for the purposes of the case. Any such licence may be transferred by endorsement as prescribed on a licence. Such transfer shall be forwarded to the officer keeping the register of the licences and shall be entered by him on the register. Every such transfer shall be to a lessee of the building licensed. Section 13D (enacted in 1946) is the section which contains the specific provisions relating to the use of theatres and public halls for the exhibition of cinematograph films. It provides (as already stated) that no person shall exhibit a cinematograph film in any theatre or public hall unless a licence held in respect of such theatre or public hall bears an endorsement specially authorizing such exhibition.

Sub-section (3) of s. 13D provides that an application for the prescribed endorsement of a licence issued under this Part and current at the date upon which the application is made may be made at any time in accordance with the regulations. Some argument was heard on the meaning of the words " at any time." In my opinion, they are intended only to make it clear that an application may be made for the prescribed endorsement upon a licence before the issue of the licence as well as after the issue of a licence. The forms in the regulations are consistent with that

construction of this provision, because the form of application for the prescribed endorsement provides that the capacity of the applicant is to be specified in the following manner—" State whether holder of the licence or applicant for an original licence."

There are other provisions in the Act, such, for example, as s. 13A (5), which show that an application for an endorsement may be made before a licence exists. Section 13A (5) provides that " where an application under this Part for an original licence in respect of a proposed building is made after the commencement of the *Theatres, Public Halls and Cinematograph Films Act* 1937, an application in accordance with the regulations may be made at the same or any other time for the prescribed endorsement on the licence, if and when the same is issued."

Section 13D is perhaps the most important section in relation to this appeal. Its relevant provisions provide, in sub-s. (1)—" This section shall apply to the following applications and to those applications only :— . . . (*b*) an application made after the commencement of s. 4 of the *Theatres, Public Halls and Cinematograph Films* (*Amendment*) *Act*, 1938, for the prescribed endorsement on a licence issued under this Part and current at the date of the application."

It will be observed that this section provides that it shall apply to the following applications and those applications only, including an application for a prescribed endorsement on a licence issued under this Part and current at the date of the application. It will be necessary to consider the meaning of those words " current at the date of the application." On the one hand, it has been argued that the application is a proceeding which continues and is in existence from its initiation until the final decision either by the commission, which carries out certain functions under the Act, or by the District Court judge on appeal. On the other hand, it is argued that the application means the document which is described as an application in the Act and the regulations, and that the date of the application is the date when that application is lodged with the commission.

Section 13D sub-s. (3), provides that the Minister shall refer to the commission every application to which the section applies, together with reports and information, &c. There it is emphasized again that it is only an application to which this section applies which the Minister has the duty and the power of referring to the commission. Sub-section (4) provides for an advertisement in the *Gazette* to the effect that an application has been referred to the

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Minister, and par. (*b*) of that sub-section—which is not unimportant in relation to one matter that has been argued—provides that notice shall be given in accordance with the regulations, shall contain such particulars as may be prescribed and shall appoint a date on or before which objections to the granting of the application may be lodged with the commission.

Other provisions in s. 13D provide for objections to be specified and provide that an objection shall not be valid unless it is made on one or more of the grounds specified.

This commission, which is a commission appointed under another Act—the *Cinematograph Films Act* 1935-1938—if there is a valid objection, or at least if no valid objection is lodged with the commission, determines the application. If a valid objection is lodged, then leave is given to the applicant to answer the objections, and the commission then considers the application and determines whether or not the application shall be granted.

Sub-section (11) provides that an applicant whose application has been refused may appeal to the District Court.

Paragraph (*b*) of sub-s. (11) reads—"The appeal shall be in the nature of a re-hearing of the application." Accordingly, when the District Court upon appeal deals with the matter, it deals with it by way of rehearing, and therefore applies the law as existing at the time of the rehearing so far as relevant and applicable and also takes into account the facts as existing at the time of the rehearing. There is a distinction between a rehearing of this kind and an appeal. Upon an appeal, the appellate tribunal determines whether, on the facts before the lower court, the decision of the lower court was right or wrong. Upon a rehearing, the District Court could take into account, for example, the existing state of the building at the time of the rehearing and any facts which had emerged since the original making of the application which it considers may well apply to the question whether the applicant appealing to the District Court had the necessary qualifications to make the application to the Minister. Paragraph (*c*) of sub-s. (11) of s. 13D provides that "the decision of the District Court upon the appeal shall be final, and for the purposes of this Act shall be deemed to be the final determination of the Commission, and shall be carried into effect." Paragraph (*d*) provides that "the District Court shall have jurisdiction to hear and decide any appeal under this section and the provisions of the *District Courts Act*, 1912, as amended by subsequent Acts shall, with such modifications as may be necessary to give effect to this subsection, apply to and in respect of the appeal."

There are provisions in the *District Court Act* to which it is necessary to make reference. Section 51 of the *District Courts Act* 1912-1936 provides—" Except as in this Act provided, no judgment, order or determination given or made by any judge of a District Court, nor any cause or matter brought before him or pending in his court shall be removed by appeal, motion, writ of error, certiorari, or otherwise into any other court whatever." Section 47, however, provides that " any plaint entered in any District Court " may be removed by writ of certiorari into the Supreme Court by order of any judge upon certain terms. In my opinion it is difficult to describe an appeal under s. 13D of the *Theatres and Public Halls Act* 1908-1946 as being a plaint entered in a District Court. If that be so, then s. 47 is not applicable to these proceedings and it is necessary to consider the applicability of s. 51.

I have now stated the relevant provisions of the Act except, perhaps, that I have not referred to s. 18, which provides that, when any person holds an entertainment in any theatre or public hall which is unlicensed, he is subject to penalty.

The facts of the present case are these. The Council of the City of Broken Hill owns and controls a Town Hall in respect of which it held a licence under the Act which was granted on 13th August 1946. That licence expired on 31st July 1947. The council was in negotiation with the appellant Boulus for the purpose of letting the Town Hall to him for cinematograph entertainment, and an agreement was made on 18th December 1946, which contemplated the granting of a lease for ten years to Boulus for this purpose. The agreement expressly stated that the lease was to be on terms to be agreed and it was not in itself an agreement for a lease; and, further, the council had no power to grant a lease for a term exceeding two years. Accordingly, Boulus had not become a lessee by virtue of this agreement. The council, however, purported to transfer to him the licence which it held under the Act and that transfer was made on 8th January 1947. The transfer was duly registered and recorded in the books of the commission, but s. 13 of the Act provides, in relation to transfers, that " every such transfer shall be to an owner or lessee of the building licensed." Boulus was clearly neither the owner nor the lessee of the Town Hall at the time of what purported to be a transfer of the licence to him. The result is that the transfer was completely ineffective and the City Council remained the licensee, having the rights of and being subject to the responsibilities of a licensee. Boulus, therefore, was neither the owner nor the lessee nor the licensee under the Act.

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On 26th May 1947, Boulus made an application for endorsement under s. 13A so that he could use the hall for the purpose of exhibiting cinematograph films. Objections were lodged and the commission heard the application and on 3rd October 1947 refused to make the endorsement. Boulus appealed to the District Court and the document whereby he declared his intention to appeal bears date 3rd November 1947. The licence was thought to be transferred to him and a renewal was granted in the form of a new licence to Boulus on 19th April 1948. That renewal was made retrospective in terms and it expired on 31st July 1948. The appeal came on for hearing in April 1948 and it was heard in April, June and July. A lease of the hall was granted to Boulus on 19th May 1948, and a renewal of the licence was granted to Boulus which expires in the middle of this year. The appeal from the commission was allowed by the District Court on 26th August 1948.

Now s. 13D provides that the section, and all the provisions of the section therefore, including provisions for appeal, shall apply to the following applications and to those applications only. What then are the applications in relation to which a right of appeal to the District Court is given ? They are applications for an endorsement on a licence issued under this Part and current at the date of the application.

The application must be made, it is reasonably obvious, by a licensee and not by a stranger, and it must be an application for an endorsement on a licence issued under that Part and current at the date of the application. Did Boulus have a licence which was a current licence at the date of the application ? First, what is the date of the application ? Secondly, what licence did Boulus have and when ? It was held by the learned Chief Justice, who dissented from the decision of the majority, that the application was a proceeding which continued *de die in diem* and that, therefore, the application was still being made at the date when the District Court gave its decision in August 1948. At that date Boulus was a lessee and a licensee. It appears to me that there are difficulties in giving this interpretation to the terms of the statute. One thing it would mean is that an application should be regarded as a continuous proceeding at all times until a final decision is reached. An application would then have many " dates "—it would have as many dates as the days occupied in the whole of the proceeding. Further, s. 13D (4) (*b*) provides that the notice shall be given in accordance with the regulations, shall contain such particulars as may be prescribed and shall appoint a date on or before which objections to the granting of the application may be

lodged with the commission. Unless a single and specific date is attachable to an application, it is not a practicable thing to apply these provisions. Further, sub-s. (3) of s. 13D provides that the Minister shall refer to the commission every application to which this section applies. There is an application which the Minister may refer; if an application exists, then it may be referred. That suggests that there is a document of some kind which the Minister may place before or refer to, i.e., bring before, the commission. There are provisions requiring applications to be in accordance with the regulations. Regulation 106A provides that an application for the prescribed endorsement shall (*a*) be in writing; (*b*) be signed by the person in whose name the licence has been issued, or the person making application for the renewal of a licence, or the person who is the applicant for an original licence in respect of the proposed building, as the case may be; (*c*) be accompanied by the licence held in respect of the theatre or public hall, if and when lodged for renewal. Those provisions, in my opinion, are consistent only with the view that, when the Act refers to an application, it is referring to a written application which is identifiable by reference to the date upon which it was made. Of course the provisions of the Act cannot be interpreted by reference to the regulations, but in my opinion the regulations carry out the intention of the Act.

Unless at the date of the application Boulus had a current licence his application could not be an application to which s. 13D could be applied. It would, therefore, not be an application which the Minister could refer to the commission, nor an application the refusal of which could confer a right of appeal under s. 13D. Therefore, in my opinion, for these reasons the commission had no jurisdiction to deal with the application and the District Court had no jurisdiction which it could exercise in relation to an appeal.

It is contended, however, that it is wrong for the Court to give effect to such a view, first, because it is argued that certiorari cannot go to a District Court purporting to act under s. 13D, because that court is not acting as a court discharging judicial or quasi-judicial functions. In my opinion, precisely the same point arose in the case of *Medical Board of Victoria* v. *Meyer* (1). The provisions in the statute that were there considered by the Court were very similar indeed to the provisions in the statute which we are now considering, and in my opinion that case answers the first of the contentions relating to the propriety of directing that certiorari should go in this case. The general principle in relation to courts of limited jurisdiction was stated in the case of *R.* v. *Hickman*;

(1) (1937) 58 C.L.R. 62.

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Ex parte Fox and Clinton (1). "An authority with a limited jurisdiction cannot give itself jurisdiction by a wrong determination as to the existence of a fact upon which its jurisdiction depends, or by placing a wrong construction upon a statute upon which its jurisdiction depends, unless by a valid provision the authority is given power to act upon its own opinion in relation to the existence of the fact or in relation to the construction of the statute."

That is the principle. It has been contended that it is entirely a matter for the District Court to determine whether an application is within the Act or not. But the provisions of s. 13D are particularly strong, it appears to me, in relation to this matter. I have already mentioned more than once the provision that the section shall apply to "the following applications and to those applications only." But reliance is then placed upon s. 51 of the *District Courts Act* to which I have referred. That section, speaking generally, takes away certiorari, but even such a section as that does not prevent the issue of a writ of certiorari in some cases. If a court with a limited jurisdiction fails to pay attention to an initial condition of the exercise of any jurisdiction by it or purports to deal with a matter which is plainly outside the intention of the relevant statute, a provision taking away certiorari is not construed as meaning that the court has unlimited jurisdiction to act according to its own will, irrespective of any limitations applying to its jurisdiction.

In the case of *Baxter* v. *New South Wales Clickers' Association* (2), *Griffith* C.J. said :—"... the jurisdiction of a court to decide a case is not limited to the decision of questions of fact, but extends to the decision of questions of law, including the construction of statutes, and if no appeal lies, the decision, however erroneous, is final between the parties. But there is a distinction in this respect between statutes conferring jurisdiction and statutes relating to matters within the jurisdiction of the court. As was said by *Brett* L.J. in the case of *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (3), the general rule is that misconstruction of a statute as to a point of jurisdiction is matter of prohibition, but misconstruction of an Act of Parliament upon a matter within the jurisdiction is matter of appeal. A grant of limited jurisdiction coupled with a declaration that the jurisdiction shall not be challenged seems to me a contradiction in terms. Effect must be given to the whole statute."

In this case it is true that the statute provides that the decision of the commission (s. 13D (10)) or of the District Court upon

(1) (1945) 70 C.L.R. 598, at p. 606.
(2) (1909) 10 C.L.R. 114, at p. 131.
(3) (1880) 3 Nev. & Macn. Ry. Cases 442.

appeal (s. 13D (11) (*c*)) shall be final and that effect shall be given to it, but all these provisions are introduced by the covering words applying them to certain applications and to certain applications only. Unless an application is an application of the kind specified in the sub-section, the rest of the provisions of the section do not apply.

Accordingly, in my opinion it was rightly decided that a writ of certiorari should issue and the appeal should accordingly be dismissed.

DIXON J. I agree that the appeal should be dismissed. Under the *Theatres and Public Halls Act* 1908-1946, with very limited exceptions, it is not lawful to exhibit moving pictures in a public hall unless in a hall in respect of which two forms of licence have been obtained. The first is a licence for the use of the hall for what may be described as public entertainment. The second is an endorsement on the licence specifically authorizing the use of the hall for the exhibition of films. The Act is one which has grown up by a process of amendment and in such cases it is not always easy to make every provision fit into a perfectly logical and coherent legislative picture so that the whole instrument is made consistent by a process of interpretation.

Attempting the task of construing the provisions of the Act as best I can, after studying it as a whole I have reached two conclusions as to its meaning and they go to the essence of this case. The first is that the Act does not intend that a licence may be obtained except by the owner of a hall or the lessee of a hall. The second is that the endorsement may not be obtained except by a person in whose name the licence is expressed. The justification for the view that a licence can only be obtained by the owner or a lessee lies in s. 9 (1) (*a*) and s. 13. Section 9 (1) (*a*) says that on application made as prescribed by the owner or lessee of a theatre or public hall or any person duly authorized by such owner or lessee the Minister may issue a licence. Section 13, which deals with the transfer of licences, provides that every transfer shall be to an owner or lessee of the building licensed. The words in s. 9 " or any person duly authorized by such owner or lessee " were introduced by the Act of 1946. They appear to me to mean " authorized to apply for a licence on behalf of the owner or lessee " and not to enable a person who otherwise may be a stranger to the building to obtain a licence in his own name.

The provisions which relate to the endorsement, when they are read together, appear to make it quite plain that only the licensee

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could obtain the endorsement. In the present case a licence subsisted in the Broken Hill City Council for the hall which is under consideration, but unfortunately a transfer was attempted to the now appellant at a time when he had no title either as owner or lessee of the building. He was merely a prospective lessee, with perhaps some assurance that, subject to agreement on details, he might eventually become a lessee. The transfer was, in my opinion, ineffectual and the licence remained in the Broken Hill City Council. It was ineffectual because the transfer is prohibited by s. 13 of the Act. The City Council did not take steps to renew the licence. The appellant in the result did take steps to renew the licence, but, as he was not the original licensee and could not then lawfully acquire the original licence by transfer, his attempts to renew it were in law rendered nugatory. While he regarded himself as a transferee of the licence he applied for an endorsement of the licence for the purpose of exhibiting films. His application was incompetent because he was not in law the licensee. Moreover, as he was neither the owner nor a lessee of the hall at that date, he was not qualified to become a licensee.

His application, however, was referred by the Minister to the Theatres and Films Commission. That fact is not clearly stated in the affidavit, but we must take it to be so, otherwise the proceedings would have commenced with a fundamental irregularity. The commission refused the application, though on what grounds we do not know. When the commission refuses an application s. 13D (11) gives an appeal from the refusal to the District Court and provides that the provisions of the *District Courts Act* shall apply to and in respect of the appeal with such modifications as may be necessary to give effect to the sub-section. The appellant attempted to appeal. But by that date there was no existing licence at all. He subsequently obtained a *de-facto* licence by way of renewal. But in contemplation of law he had never been the licensee. He could not in my opinion take the necessary steps under s. 13D, which would result in a reference by the Minister to the commission. The application was incompetent from the inception. Section 13D did not, therefore, give an appeal to the District Court from the refusal. It could not do so because the application to the Minister did not fall within the section. For s. 13D (1) limits the application of the whole section to applications within the categories it sets out. The relevant category is s. 13D (1) (*b*) and in my opinion it does not include a licence that is invalidly issued or transferred or an application that is incompetent. The District

Court, however, entertained the appeal and granted the endorsement. The grant of the endorsement by the District Court is attacked by certiorari. The majority of the Supreme Court has issued the certiorari to bring up the order of the District Court and quash it. In my opinion, the decision of the majority to issue a certiorari was correct. The objections which have been made on the part of the appellant to the issue of certiorari include grounds which are necessarily negatived by the conclusions I have already stated. It is, however, contended that it is enough that an application for endorsement should be made *de facto* by a person holding a licence *de facto*. If such an application is referred to the commission the power of the commission to decide the application attaches and from its decision an appeal lies. The contention depends on the construction of s. 13D (1) (*b*). Section 13D (1) provides that the section shall apply only to the applications set out, and par. (*b*) is concerned with an application for the prescribed endorsement on a licence issued under the part and current at the date of the application.

I consider that the words " application for the prescribed endorsement on the licence " require an application which is competent under the other provisions of the Act for an endorsement upon a licence validly issued and, if transferred, validly transferred. They are not satisfied by a mere *de-facto* application with respect to a mere *de-facto* licence. The reason for that construction is that sub-s. (1) of the section is very clear in limiting the application of the section which gives a reference to the commission and a subsequent appeal to the District Court to specific categories of applications, and it can hardly mean an application which is not lawful under the various sections to which it has implied reference.

Accordingly, the Minister was never in a position lawfully to refer the matter to the commission, the commission had no lawful jurisdiction to grant the application, and the District Court could not, in its turn, obtain jurisdiction over an appeal from the commission's refusal of the application.

Section 51 of the *District Courts Act* contains a provision protecting orders of the District Court from a writ of certiorari and, if s. 13D (11) (*d*) of the *Theatres and Public Halls Act* applied, it might well be that the provisions of s. 51 of the *District Courts Act* would operate in this particular case and so protect the order now challenged. But the application of sub-s. (11) (*d*) at all is contingent upon the case coming within s. 13D (1) (*b*).

I am unable to give to sub-s. (11) of s. 13D the construction which is claimed by the appellant, namely, that it enables the District

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Court to deal with an appeal arising out of any application that is referred independently of its legality or competence and to decide whether it is an authorized one or not. It appears to me that sub-s. (1) is designed to limit the operation of the whole section to authorized applications of the required description. If they fall outside the required description or are not authorized by the legislation, then they fall outside the whole of the provisions of s. 13D, including sub-s. (11). That means that they fall outside par. (*d*) of sub-s. (11), which alone could incorporate s. 51 of the *District Courts Act* and so give protection against certiorari. There is, in my opinion, no statutory protection against certiorari in such a case as this.

It was suggested further that perhaps certiorari would not lie to the District Court exercising this particular jurisdiction or power because it is a jurisdiction or power rather of an administrative or executive nature than of a judicial nature. It is no doubt an appeal from an administrative tribunal or body, but the purpose of the statute is to remove the question whether an endorsement on a licence is to be refused or granted on specific grounds and transfer it from the ordinary administrative process to a judicial tribunal to investigate judicially. It is a typical case falling within the province of certiorari as certiorari has been applied in more recent times.

It is, I think, enough to refer to some of the late cases, particularly to *R.* v. *Hendon Rural District Council*; *Ex parte Chorley* (1); *R.* v. *Boycott*; *Ex parte Keasley* (2) and *R.* v. *Milk Marketing Board*; *Ex parte North* (3).

For these reasons, I am of the opinion that certiorari was properly granted. *Jordan* C.J. thought that perhaps subsequent events might be taken into account by the District Court judge, and he might, so to speak, resume the matter as at a subsequent date and base his decision on the set of facts as they presented themselves at the time when he actually gave his decision. The affidavit is not at all clear, but it would seem that before the actual decision of the District Court the applicant had got a subsisting licence in his name granted after he had become lessee of the building. The two conditions which must concur to enable him to apply for an endorsement would thus exist at the date of the actual decision of the District Court though not at the time the District Court judge reserved his decision.

(1) (1933) 2 K.B. 696.
(2) (1939) 2 K.B. 651.
(3) (1934) 50 T.L.R. 559.

But I think that the construction which I have given to s. 13D (1) and (3) means that, unless there was a valid initial application and a valid reference which fell within those provisions there was nothing for the commission or for the District Court to deal with. On the frame of this statute it does not seem to me to be possible to give effect to the doctrine which *Jordan* C.J. had in mind, namely that, where a tribunal has jurisdiction by way of rehearing in the fullest sense, it may take into account the law and the facts as they exist at the time of its decision and base its decision upon them. To apply this doctrine in the present case would be like dispensing with the necessity in ordinary litigation of the existence of a cause of action at the date of the issue of the writ.

For these reasons, I think that the appeal must be dismissed with costs.

McTIERNAN J. I agree the appeal must be dismissed with costs. I agree generally with the reasons which have been given for that result. I shall briefly state my conclusions about two matters which I think lie at the heart of the case. I think it was a condition precedent to the jurisdiction of the District Court that the licence for which the appellant sought an endorsement was his licence. It does not seem to me that he was validly entitled to the licence. His title to it depended upon the transfer from the council; but the appellant was not a qualified transferee because he was not an owner or lessee of the building. There was therefore no licence current at the date of the application to which he was entitled. Further, I think that the word "application" means a written application and that the "date" at which it was necessary for the licence to be current was the date when the application was lodged with the Minister. For the reasons which have been given by the Chief Justice and my brother *Dixon*, I think that certiorari lies against this tribunal. The District Court is not given, by this legislation, jurisdiction to establish or find conclusively for itself these essential conditions upon which it has authority to institute the inquiry provided for by the legislation.

WILLIAMS J. I also agree that the appeal should be dismissed, and I shall only refer to what I consider to be the root of the matter. I think that the words of sub-s. (1) of s. 13D make it quite clear that the section only applies to applications which are in law applications under the section. I also think that, for the reasons stated by *Dixon* J., the only persons who can make applications

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under the section are persons who are the holders of a licence as the owners or the lessees of the building in question.

Boulus made an application for the prescribed endorsement on 26th May 1947. But he was not the owner or the lessee of the building on that date, so that the license, although it had been transferred into his name in fact had not been validly transferred into his name in law, and he was not a person who could made an application which was authorized by s. 13D (1) (*b*). There was, therefore, no application to which the section applied and in consequence no application which could be forwarded by the Minister to the commission or considered by the commission or in respect of which there could be an appeal to the District Court. It seems to me that the making of a valid application, that is an application in writing lodged by a licensee who is the owner or lessee of the building at the time the document is lodged, is a condition precedent to the exercise of jurisdiction by the commission or by the District Court on appeal under the section. There was, therefore, no appeal authorized by s. 13D before the District Court, and the result is that none of the provisions of sub-s. (11) of that section, including the incorporation of s. 51 of the *District Courts Act* (assuming that s. 51 is incorporated by sub-s. (11)), were applicable to the proceedings. The District Court judge, therefore, acted entirely without jurisdiction and the Supreme Court was right in ordering the issue of the writ of certiorari.

WEBB J. I agree that the appeal should be dismissed and I feel that I cannot usefully add anything to what has been said by the Chief Justice and the other members of the Court.

Appeal dismissed with costs.

Solicitor for the appellant, *E. R. Hudson*, Broken Hill, by *Nicholl & Hicks*.

Solicitors for the respondent companies, *Kevin Ellis & Co.*

Solicitor for the other respondents, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.