1947 *Present:* **Howard C.J., Keuneman, Wijeyewardene, Canekeratne JJ. and Nagalingam A.J.**

ABDUL THASSIM, Petitioner, *and* EDMUND RODRIGO (Controller of Textiles), Respondent.

167—Application for a Writ of Certiorari against the Controller of Textiles

Writ of certiorari—Regulation 62 of Defence (Control of Textiles) Regulations, 1945—Judicial nature of Textile Controller's duty—Courts Ordinance (Cap. 6), s. 42—Meaning and effect of words "or other person or tribunal" and "according to law"—Scope of the rule of ejusdem generis.

The Controller of Textiles, when he exercises functions under Regulation 62 of the Defence (Control of Textiles) Regulations, 1945, is a "person or tribunal" within the meaning of section 42 of the Courts Ordinance. The fact that he can only act when he has "reasonable grounds" indicates that he is acting judicially and not exercising merely administrative functions. He is, therefore, amenable to a mandate in the nature of a writ of *certiorari*.

The *ejusdem generis* rule cannot be applied in the interpretation of the words "or other person or tribunal" which appear in section 42 of the Courts Ordinance.

The writs specified in section 42 of the Courts Ordinance are unknown to Roman-Dutch and Ceylon law and should be issued according to English law.

CASE heard by a Bench of Five Judges of the Supreme Court on an order made by Soertsz A.C.J. under section 51 of the Courts Ordinance in a matter referred to His Lordship by Wijeyewardene J. by the following judgment :—

"This is an application for a mandate in the nature of a Writ of Certiorari against the Controller of Textiles.

"The Attorney-General takes a preliminary objection that the Supreme Court cannot grant this application, as he contends that the Controller of Textiles is not 'a person or a Tribunal' within the meaning of section 42 of the Courts Ordinance, when he exercises functions under Regulation 62 of the Regulations published in the *Government Gazette* No. 9,388 of March 28, 1945. He contends further that the jurisdiction of this Court is not so extensive as that of the English Courts and that this Court cannot issue such writs even against persons or tribunals exercising quasi-judicial functions, and that the words 'person or tribunal' in the Courts Ordinance would refer only to such persons or tribunals as are referred to in section 9 of Ordinance No. 1 of 1897 or in section 85 of the Housing and Town Improvement Ordinance. The Counsel for the petitioner contests the soundness of this argument.

"The intepretation of the words 'other person or tribunal' in section 42 of the Courts Ordinance has been the subject of conflicting views and as this question arises often on applications made under that section I direct that the matter be submitted to His Lordship the Acting Chief Justice for such action as he may wish to take under section 51 of the Courts Ordinance.

"The Attorney-General desires me to note that he does not concede that the Controller of Textiles exercises quasi-judicial functions and that his submission will be that the functions of that official are purely executive.".

H. H. Basnayake, K.C., Acting Attorney-General (with him *Walter Jayawardene, C.C.*, and *H. Deheregoda, C.C.*), for the respondent.—The question for determination is whether the Controller of Textiles acting under regulation 62 of Defence (Control of Textiles Regulations, 1945), published in the *Government Gazette* No. 9,388 of March 28, 1945, is amenable to the Writ of Certiorari.

The Supreme Court is empowered to issue various writs under section 42 of the Courts Ordinance (Cap. 6). Section 42 contemplates the issue of the writs therein mentioned including certiorari only against "any District Judge, Commissioner, Magistrate or other person or tribunal". The Controller of Textiles exercising powers under regulation 62 aforementioned does not come within the category of "other person or tribunal" as contemplated by section 42. The "other person or tribunal" there contemplated must be of the same class, category, or genus as the District Judge, Commissioner, or Magistrate.

The power given to the Supreme Court to issue writs of this kind is a limited power given by statute. See *In the matter of election of a member to the Local Board of Jaffna*[1].

The scope of the writ of certiorari in Ceylon is not so wide as in the English law. The words "according to law" in section 42 must be construed to mean according to the law of Ceylon. In this respect it would be useful to trace the history of section 42 of the Courts Ordinance.

Section 82 of the Charter of 1801 dealt with issue of writs, including certiorari, to Advocates Fiscal, Justices of the Peace, Fiscals, and Peace Officers. Later by section 36 of the Charter of 1833 writs were confined to the District Court. Then the Charter of 1868, by section 22, introduced the words "according to law" for the first time. The writ of *Quo Warranto* was introduced by Ordinance No. 4 of 1920. Under section 337 of Criminal Procedure Code a mandamus may be issued on a magistrate. The writs were to be issued according to the law of Ceylon and not according to English law though recourse could be had to the English law to find out the nature of the writs. The history of the enactments before section 42 shows that writs contemplated by section 42 are not so extensive as the writs under the English law. The Legislature has thus limited the issue of such writs to courts as such and to persons and tribunals hearing causes according to the procedure laid down for Magistrates, Commissioners and District Judges. See *Application for Prohibition to be directed against members of a Field General Court Martial*[2]; *Dankoluwa Estates Company Ltd. v. Tea Controller*[3]; *Wijesinghe v. Tea Export Controller*[4].

[1] *(1907) 1 A. C. R. 128 at 132.*
[2] *(1915) 18 N. L. R. 334 at 336.*
[3] *(1941) 42 N. L. R. 197 at 206.*
[4] *(1937) 39 N. L. R. 437.*

A tribunal which regulates its own procedure is not a court. See *Shell Company of Australia Ltd. v. Federal Commissioner of Taxation*[1]; *Local Government Board v. Arlidge*[2]. In Ceylon no certiorari will lie even against such a tribunal, which regulates its own procedure.

The Controller under regulation 62 was performing executive or ministerial duties. See *Liversidge v. Anderson et. al.*[3] and Ministers' Powers Report by Committee on Ministers' Powers, p. 63.

H. V. Perera, K.C. (with him *C. Suntheralingam* and *Anton Muttukumaru*), for the petitioner.—The *18 N.L.R. 334* case (*supra*) as a decision may be correct but the grounds given for that decision have to be cautiously examined. The decision may be justified on the ground that the prohibition was sought against a Court-Martial which was a court established not by an Ordinance of Ceylon but by some other extraneous authority and was not a judicial tribunal in any legal sense. See *Clifford v. O'Sullivan*[4].

"According to law" in section 42 means according to English law. See *(1873) 2 Grenier's Reports, Part III, 122 at 125*; *Gooneratnayake v. Clayton*[5]; *Wijesekera v. Assistant Government Agent, Matara*[6].

If the ejusdem generis rule is given its strict meaning and writs under section 42 are to be issued only to courts as such, then, in the first place the use of such writs is practically nil and in the second place such a decision would be against the practice of the Supreme Court, for some considerable length of time, to issue writs of various kinds to various public bodies or persons other than courts. Indeed it is hard to believe that these writs were meant to be issued to courts only. *Quo Warranto* can only in the rarest case of usurpation of a judicial office by some one be issued to a court, while mandamus very rarely issues to a court. It is impossible to find such a common factor, in the writs mentioned in section 42, as is necessary to apply the ejusdem generis rule to all the writs taken together. Therefore it would be more reasonable to take each writ separately and consider what "other person or tribunal" would be amenable to each particular writ, applying English law principles.

H. H. Basnayake, K.C., in reply.—When the writ of *Quo Warranto* was introduced to Ceylon it had fallen into disuse in England and Information of *Quo Warranto* had taken its place. See *The King v. Speyer*[7]. "According to law" in section 42 of the Courts Ordinance means according to the law of Ceylon.

Cur. adv. vult.

March 27, 1947. HOWARD C.J.—

The question raised in this case has been referred under section 51 of the Courts Ordinance (Chapter 6) to a Bench of five Judges. It arises as a preliminary point out of an application for a mandate in the nature of a Writ of Certiorari against the Controller of Textiles. On the hearing of this application the Acting Attorney-General took the preliminary

[1] *L. R. (1931) A. C. 275 at 296.*
[2] *L. R. (1915) A. C. 120 at 132.*
[3] *L. R. (1942) 2 A. C. 206 at 219.*
[4] *L. R. (1921) 2 A. C. 570.*
[5] *(1929) 31 N. L. R. 132 at 133.*
[6] *(1943) 44 N. L. R. 533.*
[7] *L. R. (1916) 1 K. B. 596 at 608.*

objection that the Supreme Court cannot grant the application as he contends that the Controller of Textiles is not "a person or a tribunal" within the meaning of section 42 of the Courts Ordinance when he exercises functions under Regulation 62 of the Regulations published in the *Government Gazette* No. 9,388 of March 28, 1945. The Acting Attorney-General has raised the same contention before this Court. He maintains further that the jurisdiction of this Court is not so extensive as that of the English Courts.

In his petition the petitioner complains that the Controller of Textiles has acted without jurisdiction in making an order revoking all the licences in his hand. This order was made under Regulation 62 of the Defence (Control of Textiles) Regulations, 1945, which is worded as follows :—

> "Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence or textile licences issued to him."

In view of the contention put forward by the Attorney-General we have given very careful consideration to the phraseology employed by the Legislature in section 42 of the Courts Ordinance, the first paragraph of which is worded as follows :—

> "The Supreme Court or any Judge thereof, at Colombo or elsewhere, shall have full power and authority to inspect and examine the records of any courts, and to grant and issue, according to law, mandates in the nature of writs of mandamus, quo warranto, certiorari, procedendo, and prohibition against any District Judge, Commissioner, Magistrate, or other person or tribunal."

The remaining part of the section vests in the Supreme Court or a Judge thereof certain powers in regard to the inspection of records and the transfer of causes. The Attorney-General has in regard to the interpretation of this provision of the law made two points as follows :—

(*a*) The words "according to law" must be interpreted as meaning "according to the law of Ceylon" and in view of such meaning no reference to the law of England is permissible ;

(*b*) The words "or other person or tribunal" must be read as ejusdem generis with the words "District Judge, Commissioner, Magistrate."

With this interpretation the Attorney-General contends that the Mandates referred to in the section can only be issued to tribunals vested with similar procedure as, and functioning in like manner to, a District Judge, Commissioner, or Magistrate. The Attorney-General maintains that they must enjoy semi-judicial functions. The first point to consider is whether an ejusdem generis interpretation must be given to the words "or other person or tribunal." The doctrine of "ejusdem generis" was examined by McCardie J. in the case of *Maginhild (SS) v. McIntyre Bros. & Co.*[1]

[1] *(1920) 3 K. B. 321.*

In his judgment the learned Judge cites some passages from Maxwell on the Interpretation of Statutes. I do not think I can do better than invite attention to certain extracts from the 7th edition.

At pp. 284-285 the learned author says—

"But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words. In other words, it is to be read as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was intended."

At pp. 288-289 he says—

"Of course, the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the Legislature as gathered from the larger survey.

Again on p. 290 he says—

"The general principle in question applies only when the specific words are all of the same nature. Where they are of different general the meaning of the general word remains unaffected by its connection with them."

McCardie J. in his judgment, after citing the passages from Maxwell, referred to the complexity of the rule. At p. 330 he cited the following passage from the judgment of Lord Loreburn L.C. in *Larsen v. Sylvester*[1]:—

"Those words follow certain particular specified hindrances which it is impossible to put into one and the same genus."

McCardie J. on the same page states that the rule of ejusdem generis cannot be applied unless there be some broad test for the ascertainment of genus. So far as he could see the only test seemed to be whether the specified things which precede the general words can be placed under some common category. He then proceeds to examine the question as to whether in the case before him a genus could be found and on p. 332 says—

"Upon the best consideration I can give to this case, I come to the view that the ejusdem generis rule does not here apply. I cannot create a genus (whether scientific or otherwise) out of the specific words. I see no common or dominating feature of such words."

The Attorney-General in developing his line of argument has placed considerable reliance on the judgment of Soertsz J. in *Dankoluwa Estates Company, Ltd. v. The Tea Controller.* In that case the learned Judge held that an order made by the Tea Controller under section 15 (1) of the Tea Control Ordinance is one made by him in an administrative or ministerial capacity and the Tea Controller, not being under a duty to act

[1] *(1908) A. C. 295.* [2] *(1941) 42 N. L. R. 197.*

judicially when he made the order, is not amenable to the writ of certiorari. The fact that the Tea Controller was not exercising any function of a judicial character was the basis of this decision. At p. 206 the learned Judge, however, stated as follows :—

> " Section 42 of the Courts and their Powers Ordinance which gives jurisdiction to the Supreme Court to issue mandates in the nature of writs of mandamus, quo, warranto, certiorari, &c., expressly adopts the view expressed in these and other English cases, for it provides for the issue of these writs " against any District Judge, Commissioner, Magistrate or *other person or tribunal.*" " Other person or tribunal." in this context must, in accordance with the ejusdem generis rule, be understood to mean person or tribunal under a duty to act judicially. "

The question as to whether the ejusdem generis rule was to be applied in the interpretation of section 42 of the Courts Ordinance does not appear to have been argued and in any event the application of such doctrine in that case was merely an *obiter dictum.* Another case relied on by the Attorney-General is that of an application for a Writ of Prohibition[1]. It was held in this case that the Supreme Court has no jurisdiction to issue a mandate in the nature of a Writ of Prohibition to a Court Martial. In his argument the Attorney-General argued that the words " other person or tribunal " must be construed to refer to a person ejusdem generis with a District Judge, Commissioner, &c. In his judgment holding that the mandate could not issue to a Court Martial, Wood Renton C.J. did not uphold the contention of the Attorney-General that the ejusdem generis doctrine applied, but held that the proviso to section 4, (now section 3), of the Courts Ordinance and the provisions of section 46 (now section 42) viewed in their entirety excluded the idea that a Writ of Prohibition to a Court Martial could have been intended by the Legislature. It is true that de Sampayo A.J. in his judgment did find that the ejusdem generis rule applied. The relevant passage is on page 339 and is worded as follows :—

> " It is clear to my mind that it refers to persons and tribunals ejusdem generis with District Judges, Commissioners, and Magistrates, and that the Courts here contemplated are the Courts established in the Island (to use the words of section 5 of the former Ordinance and section 4 of the latter Ordinance) 'for the ordinary administration of justice', and not Courts Martial, which exercise not an ordinary but an extraordinary jurisdiction under circumstances of paramount necessity of State. This is made more clear by the structure of the entire provision. "

Although holding the ejusdem generis rule applied de Sampayo A.J. emphasised the fact that Courts Martial do not exercise an ordinary jurisdiction but an extraordinary jurisdiction under circumstances of paramount necessity of State. Moreover, that it was inconceivable that, if such extraordinary Courts as Courts Martial were intended to be affected, they would not have been mentioned especifically by name. The judgments in the Courts Martial and Tea Controller cases were considered by de Kretser J.

[1] *18 N. L. R. 334.*

in *Wijesekera v. Assistant Government Agent, Matara*[1], and so it would appear by Wijeyewardene J. in *de Silva v. de Silva*[2]. In the second of these cases it was argued that the Court had no power to issue a mandate in the nature of a Writ of Quo Warranto against the respondent as he was not one of the persons mentioned in section 42 of the Courts Ordinance. The learned Judge was not prepared to assent to dicta in certain judgments that the "other person or tribunal" mentioned in the section referred to are intended to mean person or tribunal under a duty to act judicially. In the case against the Assistant Government Agent, Matara, de Kretser J. doubted the correctness of the interpretation put on the word "other person" by Soertsz J. To sum up the position, it would appear that the authority for this interpretation is an *obiter dictum* by Soertsz J. and an expression of opinion by one of the judges in the Court Martial case. On the other hand to hold that the doctrine of ejusdem generis applies will in my opinion render the first part of section 42 meaningless. The section as enacted in Ordinance No. 1 of 1889 did not specifically vest the Supreme Court with the power to issue mandates in the nature of the writ of quo warranto. In the matter of the *Election of a member for the Local Board of Jaffna*[3], it was held that the Supreme Court had no such power. This case was decided in 1907 and by Ordinance No. 4 of 1920 the law was amended by including in section 42 the words "quo warranto". This is a writ that does not issue to a person acting judicially but is used to question the validity of elections. If the ejusdem generis rule applies and the writ can only issue to a tribunal functioning similarly to a District Court, Commissioner or Magistrate the writ can never issue and the Legislature must be assumed to have inserted in the law a provision having no operative effect. It is true that writs of certiorari only issue to persons exercising judicial or quasi-judicial powers, but writs of mandamus issue to persons who are exercising administrative powers. They have been and are frequently issued in Ceylon. If, however, by the applications of the ejusdem generis rule they can only issue to judicial officers then the practice followed over a number of years by the Courts in issuing such writs has no legal authority. In my opinion it is clear that the Legislature intended that, although the general words follow particular words, the general words are to be construed generally. In this connection it must also be borne in mind that although the words "District Court, Commissioner, Magistrate" constitute a particular genus the various types of writ have no common factor or genus. One cannot issue the writ of quo warranto to a Court, whilst a writ of certiorari issues only to persons exercising judicial functions. A mandamus issues to those exercising administrative functions and not generally to Courts from whose decisions other remedies by way of appeal are provided.

There now remains for consideration the interpretation of the words "according to law" which appear in section 42 of the Courts Ordinance. The Attorney-General contends that these words must be construed in a strictly limited sence to mean "according to Ceylon law". Moreover, that although recourse to English Common Law and English decisions is

[1] *(1943) 44 N. L. R., p. 533.* [2] *(1941) 42 N. L. R. 531; 21 C. L. W. 41.*
[3] *(1907) 1 Appeal Court Reports, 128.*

not infrequent in the interpretation applied by the Ceylon Courts this provision being statutory must be deemed to refer only to the law of Ceylon and with such an interpretation he maintains that the law as compared with English law limits the power of the Courts to issue mandates in the nature of the writs mentioned in the section. I cannot agree with this contention. The writs specified in the section are unknown to Roman-Dutch and Ceylon law and without calling in aid English law the mandate could not issue and the Legislature must be deemed to have enacted a meaningless provision. The Courts of Ceylon have also held that the words "according to law" in section 42 direct the Court to issue the writs according to English law, *vide* the following passage from the judgment of Creasy C.J. reported at p. 125 of Grenier's Report :—

> "The writ of certiorari is one well known to the English law, and it cannot be doubted that when this clause bids us issue these writs of Mandamus, Certiorari, Procedendo and Prohibition "according to law", it bids us to issue these writs according to English law ; and it gives these writs validity according to English law, the only law to which such writs were known. As to the power to issue those writs, we are in a position similar to that of the Court of Queen's Bench in England and of the Judges of that Court. By Certiorari the superior Court can (among other things) bring before it the proceedings of an inferior Court, can quash them if substantially wrong, and can order in its discretion what course shall be taken as to their subject-matter."

Again, de Kretser J. in his judgment in *Wijesekere v. Assistant Government Agent, Matara, at p. 538* stated as follows :—

> "It seems to me that section 42 is drafted compendiously, and was intended to give the fullest powers to this Court and not to limit its powers. The writs mentioned were writs known to the English law, and we have hitherto gone to that law for direction and guidance. The section seems, in the first part, to give this Court (1) authority to inspect and examine the records of any Court and (2) to grant and issue, according to law, mandates in the nature of writs of mandamus, quo warranto, certiorari, procedendo and prohibition. What did the Ordinance mean by the phrase "according to law". It must only mean, in the circumstance, the English law ; that means that the writs would issue in the circumstances and under the conditions known to the English law. These would include the persons against whom the writs would issue."

In applying English law in regard to mandates it would appear that the application of such law has never been challenged either in the Courts in Ceylon or by the Judicial Committee of the Privy Council. In this connection I would invite attention to the fact that in the appeal to the Privy Council in *Goonesinghe v. de Kretser*[1] their Lordships' judgment proceeded on the assumption that English law was applicable.

Once again I would refer to the principle stated by Maxwell. I think the restricted meaning of "person or tribunal" must be rejected because there are adequate grounds to show that the words have not been used in the

[1] *(1944) 46 N. L. R. 107.*

limited order of ideas to which their predecessors belong. A larger survey indicates the intention of the Legislature to which effect must be given. In this connection I have not been unmindful of the latter part of section 42 in regard to inspection of records and transfer of cases nor of the fact that de Sampayo A.J. in the Court Martial case held that the section conferred, not separate powers, but one power to do several things, which are all mentioned *uno flatu;* namely, to inspect records, issue mandates, and transfer cases. The powers conferred in the latter part of the section would not be operative in the case of the Textile Controller. But having regard to what must have been the intention of the Legislature as to the issue of mandates, the fact that the latter half of the section cannot be applied to various tribunals and persons must not in my opinion limit the operation of the first part of the provision.

One other question requires consideration. In Robertson's book on Civil Proceedings by and against the Crown (1908) edition p. 127 a writ of Certiorari is stated to be the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. Such bodies need not be such as are ordinarily considered to be Courts, nor need such acts be strictly judicial acts; the only limitation is that such acts must not be purely ministerial acts. In this connection see *R. v. Woodhouse* [1].

Is, therefore, the Textile Controller, when he uses his powers under Regulation 62, under any duty to act judicially, or are his powers purely administrative? The fact that he can only act when he has "reasonable grounds" indicates that he is acting judicially and not exercising merely administrative functions. It is true there is no appeal from his decisions, nor are there provisions in regard to the keeping of records and the procedure to be followed. In spite of the absence of such provisions the duty to act judicially remains and having regard to the English law mandates in the nature of a writ of certiorari will lie. In my opinion the decision of the House of Lords in *Liversidge v. Sir John Anderson* [2], is not applicable. The following passage from the judgment of Lord Maugham appears at pp. 219-220:—

> "My Lords, I think we should approach the construction of reg. 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention. My Lords, I am not disposed to deny that, in the absence of a context, the prima facie meaning of such a phrase as "if A. B. has reasonable cause to believe" a certain circumstance or thing, it should be construed as meaning "if there is in fact reasonable cause for believing" that thing and if A. B. believes it. But I am quite unable to take the view that the words can only have that meaning. It seems to me reasonably clear, that if the thing to be believed is something which is essentially one within the knowledge of A. B.

[1] *(1906) 2 K. B. 507.* [2] *(1942) A. C. 206.*

or one for the exercise of his exclusive discretion, the words might well mean if A. B. acting on what he thinks is reasonable cause (and, of course, acting in good faith) believes the thing in question."

Lord Maugham subsequently held that the Court could not go into the question as to whether the Secretary of State had acted on "reasonable cause" because the latter can decline to disclose the information on which he has acted on the ground that to do so would be contrary to the public interest and that this privilege of the Crown cannot be disputed. No such plea could be put forward by the Textile Controller in this case.

For the reasons given the preliminary objection that this court has no jurisdiction is overruled and the case is remitted for hearing by a single Judge. There will be no order as to costs which will abide the result of such hearing.

KEUNEMAN J.—I agree.

WIJEYEWARDENE J.—I agree.

CANEKERATNE J.—I agree.

NAGALINGAM A.J.—I agree.

Preliminary objection overruled.