1955 *Present :* Gratiaen, J., and Swan, J.

P. M. WALTER LEO *et al.*, Petitioners, *and* THE LAND COMMISSIONER, Respondent.

S. C. 141—APPLICATION FOR A WRIT OF CERTIORARI TO QUASH THE DECISION MADE BY THE LAND COMMISSIONER UNDER L. R. O. APPLICATION No. 3076.

Certiorari—"*Judicial act*"—*Excess of jurisdiction—Burden of proof—Land Redemption Ordinance, No. 61 of 1942 (as amended by Ordinance No. 62 of 1947)—Sections 3 (1) and (4), 8—*"*If the Land Commissioner is satisfied*"—"*Agricultural land*".

If an inferior tribunal making a judicial decision has to be "satisfied" that a certain state of facts exists before adopting a permitted course of action that state of facts must *in fact* exist, and the burden is on the tribunal, whose jurisdiction has been challenged, to prove the facts which give it jurisdiction. If upon the facts the excess of jurisdiction is manifest, or if the material placed before the superior Court is plainly insufficient to justify a conclusion that the limited jurisdiction has not been exceeded, *certiorari* will lie.

A writ of *certiorari* is available against the Land Commissioner if, purporting to act under the Land Redemption Ordinance, he orders the compulsory acquisition of property that is not "agricultural land" within the meaning of sections 3 (1) and 8 of that Ordinance.

The mere existence of coconut trees and plantain bushes on residential property does not automatically convert it into "agricultural land" within the meaning of the Land Redemption Ordinance.

Bandiya v. The Land Commissioner (1950) 52 N. L. R. 95, not followed.

APPLICATION for a writ of *certiorari* on the Land Commissioner.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *S. P. M. Rajendram*, for the petitioners.

Walter Jayawardene, with *H. L. de Silva*, Crown Counsel, for the respondent.

Cur. adv. vult.

November 25, 1955. GRATIAEN, J.—

This is an application for a mandate in the nature of a writ of *certiorari* quashing an order dated 9th January 1953 made by the Land Commissioner for the acquisition of a land, together with the buildings standing on it, under the Land Redemption Ordinance No. 61 of 1942 (as amended by Ordinance No. 62 of 1947). The petitioners are the owners of the property (2¼ acres in extent), and the purported acquisition is resisted on the fundamental ground that it is not "agricultural land" within the meaning of the Ordinance.

The first question which arises is whether *certiorari* can ever lie in cases of this kind. This depends on the validity of Mr. Walter Jayawardene's submission that the Commissioner's functions under the Ordinance are purely administrative in character. The Commissioner is admittedly empowered " to determine questions affecting the rights of subjects " but it is denied that in the process of determining those questions he is under " a duty to act judicially " ; accordingly, (so the argument proceeds) this Court cannot control his administrative acts by way of *certiorari* or prohibition.

The Land Redemption Ordinance certainly empowers the Commissioner to make decisions which interfere with rights of private property, resulting in the owner being divested compulsorily of his title. The initial test of amenability to *certiorari* is therefore satisfied. *R v. The Electricity Commissioners* [1]. The question is whether the exercise of administrative powers resulting in an order for acquisition does involve, at least at the preliminary stages, the performance of a judicial function. Let us therefore examine the process by which the Commissioner's ultimate decision is reached.

The first limitation placed on the Commissioner's statutory powers is that no property other than " agricultural land ", as defined in section 8 of the Ordinance, is liable to be acquired. That is to say, the Commissioner cannot take over on behalf of the Crown any property which, at the time of the acquisition, is not " used or capable of being used wholly or mainly for the purpose of agriculture . . . " (I have omitted the other words of definition as they have no bearing on the present case).

A second limitation is imposed by section 3 (1) (as amended). The Commissioner must be " satisfied " that the " agricultural land " sought to be acquired had been :

either (*a*) " sold in execution of a mortgage decree whether or not that land was subject to the mortgage enforced by the decree ;

or (*b*) " transferred by its owner or his executors or administrators to any other person, or to the heirs, executors, or administrators of any other person in satisfaction or part satisfaction of a debt which was due from that owner or his predecessor in title to that person and which was secured by a mortgage of that land subsisting immediately prior to the transfer ;

or (*c*) " transferred by its owner or his executors or administrators to any other person at the request of a mortgagee of that land, in satisfaction or part satisfaction of a debt which was due from that owner or the predecessor in title to that mortgagee and which was secured by a mortgage of that land subsisting immediately prior to the transfer. "

(*N.B.*—There follows a provision exempting " undivided shares " unless they had been converted subsequently into divided allotments.)

[1] (1924) 1 K.B. 171 at 204.

It is only after the Commissioner has satisfied himself that any "agricultural land" answers one or other of the descriptions specified in section 3 (1) that he is empowered to decide whether such land "should or should not be acquired". Section 3 (4) declares that, "subject to any regulation made in that behalf", the last of these vital questions "shall be determined by (him) in the exercise of his individual judgment, and every such determination shall be final." One observes that, by way of contrast, no statutory sanctity attaches to his preliminary decision that the property is of a kind which he has authority to acquire.

It is apparent from this analysis that the Commissioner's final decision under section 3 (4) is purely administrative in character, and does not involve the exercise of judicial or even "quasi-judicial" functions. He is guided at that stage solely by considerations of policy and expediency and by his "individual judgment", so that the Courts have no power to interfere with that discretion by *certiorari*. This has been made clear by the House of Lords in *Franklin v. The Minister of Town and Country Planning* [1], and by the Privy Council in a recent case from Ceylon. *Nakkuda Ali's case* [2].

The Commissioner's immunity from *certiorari* in respect of that part of his statutory powers does not, however, conclude the question before us. The notable judgment of Parker J. in *R v. Manchester Legal Aid Committee* [3] establishes that the writ does lie in cases where a person vested with statutory authority to determine "questions affecting the rights of subjects" was under "*a duty to act judicially in the course of reaching a final decision which is itself purely administrative*". The preliminary issues on which the Commissioner must satisfy himself under section 3 (1) have to be decided "solely on the facts of the particular case, solely on the evidence before (him) and apart from any extraneous considerations. In other words, (he) must act judicially, not judiciously." (page 431). Parker J. has also explained, by reference to the earlier authorities, that the judicial process, when invoked for the purpose of reaching a consequential administrative decision, does not necessarily require that there should even be a *lis* (in the strict sense of the term) or a "duty to hear two sides". In some contexts the tribunal has authority to act only on its own knowledge and information; in others it may act *ex parte*. The true test is whether, as Sir Hartley Shawcross argued, (see page 422), the tribunal must "apply a legal mind" in reaching a decision "based solely on the facts of the particular case."

One has only to examine the provisions of section 3 (1) (*a*), (*b*) and (*c*) to appreciate that the issue whether any "agricultural land" is in fact qualified to be made the subject of an order for acquisition can never be answered correctly except by application of the judicial process, and without regard to questions of administrative policy or expediency. Sometimes the problem is simple enough, but on other occasions its solution may present formidable difficulties even to persons trained in the law. Consider, for instance, the question under section 3 (1) (*b*) which

[1] (1948) *A. C. 87.*
[2] (1950) *51 N. L. R. 457, also reported in* (1951) *A. C. 66.*
[3] (1952) *2 K. B. 413.*

arose for decision in *Perera v. Unantenne* [1] and the ever-recurring issue as to whether a purported conveyance by way of sale constitutes in truth a mortgage or a trust. *Sethuwa v. Ukku* [2]. I am perfectly satisfied that, at the preliminary stages of the proceedings under the Land Redemption Ordinance, the Commissioner's functions (so far from being purely administrative) are exclusively of a judicial character. Whenever he makes a wrong decision under section 3 (1) with a view to making a consequential order under section 3 (4) he oversteps the limits of his statutory jurisdiction.

Mr. Walter Jayawardene quite properly invited us to consider whether a decision under section 3 (1) can be quashed by *certiorari* if the Commissioner himself was "satisfied" (even erroneously) that the property fell within one of the descriptions specified in paragraph (*a*), (*b*) or (*c*) of section 3. I am aware that Gunasekara J., sitting alone, was inclined to take this view in *Bandiya v. The Land Commissioner* [3], but, with respect, he could not have had the benefit of as complete an argument as we have enjoyed in the present case. As Lord Radcliffe remarked in *Nakkuda Ali's case* (supra, at page 492), "it would be a very unfortunate thing if the decision of *Liversidge's case* [4] came to be regarded as laying down any general rule as to the construction of such phrases." Indeed, Lord Wright conceded in *Liversidge's case* that, if a person must be "satisfied" on any point (even for the purposes of an administrative decision) the word at least means "reasonably satisfied", and "cannot import an arbitrary or irrational state of being satisfied." *A fortiori*, if an inferior tribunal making a judicial decision has to be "satisfied" that a certain state of facts exists before adopting a permitted course of action, that state of facts must *in fact* exist. The objective test is especially necessary in a context where a public officer (not required to possess a legal training) purports to give a decision which, through misdirection, would defeat the intention of the legislature by extending the categories of private property liable to compulsory acquisition.

The petitioners do not challenge the Commissioner's decision that the property sought to be acquired had at an earlier stage been purchased by their vendors "in execution of a mortgage decree" within the meaning of section 3 (1) (*a*). But they protest *in limine* that, at the time of the purported acquisition, the property was not "agricultural land" as defined in section 8; in other words, an essential condition precedent to the Commissioner's power to assume jurisdiction under section 3 (1) does not exist.

The scheme of the Ordinance has already been explained: (1) a certain state of facts (namely, the "agricultural" character of the land) must exist before (2) the Commissioner can enter upon his jurisdiction to decide whether such land falls within one of the alternative categories so as to qualify it for acquisition. Not until then is he empowered (3) to decide that the land so qualified ought to be acquired. If conditions (1) and (2) are objectively satisfied, his administrative decision at stage (3) is unassailable. But, if condition (1) does not exist, he has acted in excess

[1] *(1953) 54 N. L. R. 457.*
[2] *(1955) 56 N. L. R. 337.*
[3] *(1950) 52 N. L. R. 95.*
[4] *(1942) A. C. 206.*

of jurisdiction and his decision becomes amenable to *certiorari*; so also if condition (1) is satisfied, but if he has reached a wrong decision as to condition (2).

The present case is concerned only with the question whether condition (1), namely, the "agricultural" character of the land, is objectively satisfied. "No tribunal of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limits to its jurisdiction depends." *Banbury v. Fuller* [1]; *R v. Commissioner of Income Tax* [2]. This principle was recently reaffirmed by Lord Goddard C.J. in his principal judgment in *R v. Fulham, Hammersmith and Kensington Rent Tribunal* [3]:

> "If a certain state of facts has to exist before an inferior tribunal has jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction *but cannot give themselves jurisdiction by a wrong decision upon them*; and this Court may, by means of proceedings for *certiorari*, inquire into the correctness of the decision."

For these reasons, it is our duty to be satisfied that the property to be affected by the order for acquisition was in fact "agricultural land" at the relevant point of time.

In the *Fulham Rent Tribunal Case* (supra) Devlin J. explained that, in a situation of this kind, the burden is on the tribunal whose jurisdiction has been challenged "to prove the facts which give it jurisdiction". (page 10). The same learned Judge again emphasised in *Christopher Brown, Ltd.'s case* [4] that the the jurisdiction of "inferior tribunals of any sort", when challenged, "has to be proved affirmatively". If upon the facts, the excess of jurisdiction is manifest, or if the evidence before the superior Court is plainly insufficient to justify a conclusion that the limited jurisdiction has not been exceeded, *certiorari* will lie. On the other hand, the dispute may turn on a question of fact about which there is a conflict of evidence: in that event the Court will generally decline to interfere by way of *certiorari leaving it open to the aggrieved* party to challenge the jurisdiction of an inferior tribunal in a regular action where the issue can be more conveniently disposed of.

The Land Commissioner who made the order for acquisition on 9th January 1953 sought to justify his assumption of jurisdiction under the Ordinance by stating very baldly, in his affidavit dated 30th November 1954, that "upon careful consideration of the material before (him) *he was satisfied* that the land was agricultural land within the meaning of the Ordinance." What that material was, has not been disclosed to us; and I have already explained that the mere fact that he was "satisfied" (which is conceded) did not vest him with jurisdiction if in fact the land was not "agricultural" in character. The only other evidence relied on by the Commissioner is the affidavit of the Superintendent of an estate in Lunuwila who described the condition of the property when he visited it in April 1949—that is to say,

[1] *(1853) 9 Ex. D. 29 at 35.*
[2] *(1888) 21 Q. B. D. 313.*
[3] *(1951) 2 K. B. 1 at 6.*
[4] *(1954) 1 K. B. 8 at 13.*

7½ months before the petitioners purchased it, and nearly 4 years before the order for acquisition was made. On that occasion the property consisted of a substantial dwelling house, a brick well, a temporary latrine, and a garden containing "181 coconut trees of various ages and several plantain bushes."

As against this, there is the uncontradicted evidence of the petitioners that they purchased the premises on 9th December 1949 for Rs. 15,000 in order to make it their place of residence. They incurred an additional expenditure of Rs. 2,000 in improving the house and constructing a garage for their motor car, and they have lived there ever since.

Can the entire property, in its improved condition, fairly be described as "agricultural land"? It is common knowledge that people in Ceylon who reside outside congested urban areas generally prefer the amenities of spacious grounds on which some agricultural and garden produce can be cultivated. The question is always, of course, one of degree, but it is certainly quite wrong to say that the mere existence of coconut trees and plantain bushes on a man's residential property automatically converts it into "agricultural land" within the meaning of the Land Redemption Ordinance. The extent so cultivated may well be regarded as ancillary to the main use of the property for purposes of residence. It would be straining the words of definition beyond reasonable limits to say in the present case that the petitioners use their place of residence, which is slightly over 2 acres in extent, "wholly or mainly" for the purpose of a business which is "agricultural". An Ordinance designed to interfere so seriously with the rights of private property should, I think, receive a strict interpretation.

Can it even be said that section 8 is satisfied because the property, though mainly residential in character at the relevant date, was at least "capable of being used wholly or mainly for the purpose of agriculture"? That again is a question of fact. In the present case, at any rate, the substantial house and its appurtenances are clearly not of the kind which would be economically appropriate for occupation by, shall we say, the watcher in charge of a small agricultural holding consisting of 181 coconut trees and some plantain bushes. The buildings cannot therefore be regarded as potentially ancillary to "agricultural land" of such modest proportions. In the result, the entire property in its present condition is beyond the reach of the Commissioner's statutory powers.

On the material placed before us, there is manifestly no evidence from which we can fairly conclude that the Land Commissioner did not exceed the limits of his jurisdiction under section 3 (1). His consequential order for the petitioners' residential property as "agricultural land" cannot therefore be allowed to stand. The order dated 9th January 1953 must be quashed, and the Commissioner must pay the costs of this application which I would fix at Rs. 525.

SWAN, J.—I agree.

Application allowed.