1941

Present : **Soertsz J.**

DANKOLUWA ESTATES CO., LTD. *v.* THE TEA CONTROLLER.

In the matter of an application for a writ of *Certiorari.*

Writ of certiorari—*Order of Tea Controller under section 15 (1) of the Tea Control Ordinance (Cap. 299)—Order made in ministerial capacity—Not under duty to act judicially—Tea Controller not amenable to writ—Estoppel by* res judicata—*Courts Ordinance, s. 42 (Cap. 6.)*

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 judicially when he made the order, is not amenable to the writ of *certiorari.*

Where the petitioner's application is barred by the operation of section 7 (3) of the Tea Control Ordinance and by the decision of the Supreme Court in his application for a writ of *mandamus* a writ of *certiorari* does not lie.

THIS was an application for a mandate in the nature of a writ of *certiorari* quashing the order made by the Tea Controller in his letter addressed to the petitioner's agents, Messrs. Whittall & Co. By a return dated July 31, 1933, made in compliance with section 9 (1) of the Tea Control Ordinance, 1933, the agents, on behalf of the proprietor, declared that Dankoluwa Tea Estate was 441 acres in extent and wholly planted in tea at the date and claimed that the yield would be a thousand pounds per acre. They asked for a special assessment, which was granted and the Tea Controller fixed the standard crop for the year of assessment

1933-1934 at 311,500 pounds. The proprietor accepted that assessment as well as the assessments made on that basis for the subsequent years of control under that Ordinance, viz., 1934-1938. The Tea Control Ordinance, at present in force, came into operation on April 1, 1938. By their letter dated August 31, 1938, the agents informed the Tea Controller that they had discovered that their return made in 1933 was erroneous in respect of the extent of the estate and that the correct extent was 411 acres. Thereupon the Controller, purporting to act under sections 15 and 17 of the Ordinance, declared on November 29, 1939, that in respect of the periods 1933-1934, 1934-1935, 1935-1936, 1936-1937, 1937-1938, 1938-1939, 1939-1940, the standard crops would be deemed to have been reduced to the amounts stated in the order, that the over issue that had occurred in consequence of the error in extent would be adjusted in the manner indicated in the order. The petitioner was dissatisfied at the order and appealed to the Board of Appeal. The appeal was considered by the Board and was dismissed.

The petitioner then applied to the Supreme Court for a writ of *mandamus* against the Tea Controller to compel him to issue the coupons he withheld in respect of the amount over-issued. The Supreme Court decided against the petitioner.

L. M. de Silva, K.C. (with him *E. F. N. Gratiaen* and *D. W. Fernando*), for the petitioner.—The proviso in section 15 (1) of the Tea Control Ordinance (Cap. 299) was intended to prevent the Controller from doing what he has done in the present case. As to the history of the legislation, the draft of the present Ordinance appears in the *Gazette* of December 17, 1937, Part II., page 1271. Section 15 appears there without any proviso. Nor was there any such proviso in section 20 of the older Ordinance, No. 11 of 1933. The proviso in section 15 (1) was deliberately and advisedly inserted to surmount the difficulty created by the ruling in *Wijeyesinghe v. Tea Export Controller* [1]. To interpret any portion of a statute, not merely the words but also the history of it may be considered—*Eastman Photographic Materials Co. v. Comptroller-General of Patents* [2], *Babappu v. Don Andris et al* [3].

In the order he made the Tea Controller exercised powers beyond those given to him by the Ordinance. When a public authority acts in excess of jurisdiction writ of *certiorari* would lie. There is no difference in principle between *certiorari* and prohibition. *The King v Electricity Commissioners* [4] deals fully with the scope of the writ and is the foundation of the present application. See also *Frome United Breweries Co., Ltd. v. Bath Justices* [5] and *The King v. Postmaster-General* [6].

Application for *mandamus* was made in connection with this same matter [7], but that would not stand in our way. Where want of jurisdiction is patent, the person aggrieved is entitled to a writ of *certiorari ex debito justitiae—The Queen v. The Justices of Surrey* [8], *Farquharson v. Morgan* [9].

[1] *(1937) 39 N. L. R. 437.*
[2] *(1898) A. C. 571 at 575.*
[3] *(1910) 13 N. L. R. 273 at 277.*
[4] *(1924) 1 K. B. 171 at 206, 192, 194–5, 204.*
[5] *(1926) A. C. 586 at 602.*
[6] *(1928) 1 K. B. 291.*
[7] *(1940) 18 C. L. W. 55.*
[8] *L. R. (1870) 5 Q. B. 466.*
[9] *(1894) 1 Q. B. 552.*

Section 7 (3) of the Tea Control Ordinance which says that the decision of the Board of Appeal shall be final and conclusive would not be a bar to the present application. *Certiorari* can only be taken away by express negative words—*The Laws of England* (*Hailsham*) Vol. 9, *pp. 861—2; Ex parte Bradlaugh* [1]; *Rex v. Jukes* [2].

H. V. Perera, K.C. (with him *J. E. M. Obeysekere* and *P. de Silva*) for the respondent.—Three preliminary objections can be taken against this application.

Firstly, the question involved in this application has already been examined and dealt with by the Board of Appeal, on an appeal taken by the petitioner. The petitioner, having submitted the question for adjudication by that Board, cannot now move this Court for a writ of *certiorari—Queen v. Justices of Salop* [3]; *Queen v. Justices of Leicester & Compton* [4]; *Lakshmanan Chettiar v. Commissioner, Corporation of Madras* [5]; *Lakshmanan Chettiar v. Kannaper* [6].

Secondly, section 7 (3) of the Tea Control Ordinance prevents the petitioner from making this application. The decision of the Board of Appeal is final and conclusive. Consequently, if *certiorari* lies at all, it will be only against the Board and not against the Controller. The effect of "final" and "without appeal" is considered in *Rex v. Nat Bell Liquors, Ltd.* [7]. Section 15 (2) makes the order of the Board *res judicata* as between the Controller and the petitioner—*Spencer Bower on Res Judicata* (1924) *pp.* 102, 115; *Hukm Chand on Res Judicata pp. 29—32; Hoystead et al. v. Commissioner of Taxation* [8]. Further, this Court has, in the application for *mandamus*, held that the Borad of Appeal had jurisdiction to adjudicate on this matter. A previous judgment by a Court of co-ordinate jurisdiction has to be followed—*Cramb v. Goodwin* [9]; *Papworth v. Battersea Borough Council* [10].

Thirdly, and most important of all, the order of the Tea Controller was not an order involving a judicial act but was purely administrative. *Certiorari* will lie against an officer in respect only of an act performed by him in a judicial capacity. In every judicial act there is a requirement by law either to hear some person on application made by him or to give a decision on a matter submitted by *a third party*. For the essential ingredients of a judicial act and the manner in which it has to be exercised, see *Rex v. Electricity Commissioners* [11]; *Rex v. The London County Council* [12]; *Rex. v. Legislative Committee of the Church Assembly* [13]; *Errington et al. v. Minister of Health* [14]; *Rex v. Hendon Rural District Council* [15]. For difference in effect between the words "if it appears to him" and "if it appears to him on sufficient ground shown" *see Rex. v. Kensington Income Tax Commissioners* " and *De Vertenil v. Knaggs et al.* [17].

[1] (1877) 3 Q. B. D. 509.
[2] 8 Term Rep. 542.
[3] 29 L. J. M. C. 39.
[4] 29 L. J. M. C. 203.
[5] (1926) I.L. R. 50 Mad. 130.
[6] I. L. R. 50 Mad. 121.
[7] (1922) 2 A. C. 162 et seq.
[8] (1926) A. C. 155 at 163, 165, 168.
[9] (1919) Weekly Notes 86 at 87.
[10] (1915) L. J. (84 K. B.) at 1885.
[11] (1924) 1 K. B. 411.
[12] (1931) 2 K. B. 215.
[13] (1928) 1 K. B. 411.
[14] (1935) 1 K. B. B. 249.
[15] (1933) 2 K. B. 696.
[16] (1913) 3 K. B. 870 at 889.
[17] (1918) A. C. 557.

In regard to the merits of the application, it is true that section 15 of the original Bill did not contain any proviso, but it did not also contain sub-section (3). Full effect has to be given to section 17 (5), particularly to the words "for any period".

L. M. de Silva, K.C., in reply.—It is not proper in a matter of this kind to raise technical objections, and, unless there is no escape from such objections, relief should be granted—*Rex v. London County Council*[1].

The appeal to the Board of Appeal does not preclude us from asking for *certiorari—Queen v. Justices of Surrey*[2]. Where excess of jurisdiction is patent, writ will issue no matter what the conduct of the petitioner might have been—*Farquharson v. Morgan*[3]. On the question whether the Controller or the Board of Appeal should be the respondent to this application, the order that is outstanding is the order of the Controller; the order of an Appellate Court is deemed to be the order of the lower Court—*K. K. Roy v. R. B. Roy et al.*[4]. The application may be made against the Controller—*London Corporation v. Cox*[5]; *9 Halsbury (Hailsham) p. 836.*

The result of the previous application for *mandamus* cannot operate as *res judicata.* The question at issue on that occasion was quite different and the decision does not contain an adjudication on the point whether we are entitled to the additional coupons or not. *Vide* the citation from Caspersz in *Katiratamby et al. v. Parupathipillai et al.*[6]. The powers of the Board of Appeal under section 15 of Cap. 299 are limited and we had no power to obtain from the Board a decision that the Controller acted outside his jurisdiction.

A judicial act need not always be preceded by an application or the hearing of objections submitted to the statutory authority by a third party—*Rex v. Doherty*[7]. All that is necessary is the power to determine and decide—*Rex v. Legislative Committee of the Church Assembly*[8]; *Rex v. Hendon Rural District Council*[9]; *Rex v. Boycott*[10]; *Reg. v. Nicholson*[11].

Cur. adv. vult.

January 15, 1941. SOERTSZ J.—

In this matter the petitioner, the Dankoluwa Estates Company, Limited, prays for an order absolute quashing the order made by the respondent, the Tea Controller, in his letter dated November 29, 1939, addressed to the petitioner's agents, Messrs. Whittall & Company.

The facts that gave rise to this application are not in controversy, and may be shortly stated: By a return dated July 31, 1933, made in compliance with section 9 (1) of the Tea Control Ordinance of 1933, Messrs. Whittall & Company, acting on behalf of the proprietor, declared that the Dankoluwa Tea Estate was 441 acres in extent, and wholly planted in tea, at the date December 31, 1932. They claimed that "the yield for the full period would, therefore, approximate a thousand pounds per acre", and they asked for a special assessment.

[1] *(1931) 2 K. B. 215.*
[2] *L. R. (1870) 5 Q. B. 466.*
[3] *(1894) 1 Q. B. 552.*
[4] *(1872) 14 Moore's Ind. App. Cases 465.*
[5] *L. R. (1867) 2 H. L. at 280.*
[6] *(1921) 23 N. L. R. 209 at 211.*
[7] *(1910) 26 T. L. R. 502.*
[8] *(1928) 1.K B. at 419.*
[9] *(1933) 2 K. B. at 705.*
[10] *(1939) 2 K. B. 651.*
[11] *(1899) 2 Q. B. at 473.*

Such an assessment was made by a Mr. Lloyd Jones. Acting upon that assessment, the Tea Controller fixed the standard crop for the year of assessment 1933-1934 at 311,500 pounds. The proprietor accepted that assessment, as well as the assessments made upon that basis, for the subsequent years of control under that Ordinance, namely, the years 1934-1938.

The Tea Control Ordinance now in force, came into operation on the 1st of April, 1938. By their letter dated August 31, 1939, Messrs. Whittall & Co. informed the Tea Controller that they had discovered that their return made in 1933 was erroneous in respect of the extent of the estate, and that the correct extent was 411 acres 1 rood and 10 perches and not 441 acres as stated therein. Thereupon, the Controller purporting to act under sections 15 and 17 of the Ordinance, declared on November 29, 1939, that in respect of each of the periods 1933-1934, 1934-1935, 1935-1936, 1936-1937, 1937-1938, 1938-1939, and 1939-1940, the standard crops of the estate would be deemed to have been reduced to the amounts stated in his order; that the over-issue that had occurred in consequence of the error in extent would be adjusted in the manner indicated in that order; and that the issue of coupons for export licences would, from the date of the order, be made on the basis of the revised assessment. The petitioner was dissatisfied and in pursuance of the right given to him by section 15 (2), he appealed to the Board of Appeal, on the following grounds :—

(*a*) The decision of the Tea Controller is contrary, to law, and is inequitable;

(*b*) The previous assessments of the standard crop are correct;

(c) In any event, the alleged error is one of over-assessment, and the Controller had no power to make any order affecting the standard crop . . . . for any period of assessment prior to the date of the order appealed from;

(*d*) The productivity of the estate at all material times exceeded the quantity previously assessed by the Controller.

This appeal was considered by the Board, and was dismissed on March 4, 1940. The Board held, *inter alia*, that " Section 15 of the Ordinance gives the Controller power to correct such errors, and this is what he has done. He has, in no way, interfered with the rate per acre, so that the question of an over-assessment or under-assessment does not arise ".

The petitioner then applied to this Court, on June 11, 1940, for a writ of *mandamus* against the Controller, to compel him to issue to the petitioner the coupons he withheld in respect of the 111,069 pounds which, he alleged, had been over-issued. That application was dealt with by my Lord the Chief Justice, and was decided against the petitioner. In the course of his order, the Chief Justice said (*Dankoluwa Estates Co., Ltd. v. The Tea Controller*)[1]:—

" The petitioner's claim for a *Mandamus* is based on the contention that the respondent, by his order dated November 29, 1939, has under the first part of the sub-section reduced the standard crop of the estate without taking into consideration paragraph (*b*) of the proviso, and in consequence of such illegal order, made deductions under section 17 (5) of the Ordinance. On behalf of the respondent, Mr. Perera

[1] 42 N. L. R. 26.

> contended that a writ of *mandamus* cannot issue inasmuch as the legality of the deductions . . . . including the interpretation of proviso (*b*) to section 15 (1) was a matter for the Board of Appeal under section 15 (2), and had been decided in favour of the respondent. . . . . Ground (c) in the case presented by the petitioner to the Board . . . . raised the right of the respondent to make any order affecting the standard crop . . . . for any periods of assessment prior to the date of the order appealed from. The legality of retrospective action by the Controller and the question of the interpretation of proviso (*b*) to section 15 (1) was, therefore, in issue. Although such an issue was directly raised by the petitioner before the Board of Appeal, his Counsel has contended that the Board . . . . was not vested with any such power. I cannot accept that contention. The words in section 15 (2) that the Board may on appeal (*a*) "confirm the order" seem to me to give the Board power to decide as to whether the Controller has correctly interpreted the provisions of section 15 (1)."

I have quoted at this length from the order made by the Chief Justice, in view of the plea of *res judicata* that was based upon it and advanced by respondent's Counsel. I shall deal presently with that plea. As to the rest of the Chief Justice's order, it is sufficient to say that he came to the conclusion that the application for a writ of *mandamus* was misconceived because the legal right the petitioner sought to enforce by means of that writ was one within the competence of the Board of Appeal to grant.

At this stage, I think, it would be convenient to examine sections 15 and 17 for they, after all, are the origin of the controversy that has arisen between the parties. Section 15 consists of three sub-sections. Sub-section (1) enacts that *if it appears* to the Controller at any time that an error has been made in the assessment of the standard crop of any estate or small holding in respect of *any period* of assessment, whether under the 1933 Ordinance or under "this Ordinance", he may *by order declare* that the standard crop of that estate or small holding *for that period* shall be deemed to have been increased or reduced as the case may be, by the amount in respect of which the assessment was in error; and the exportable maximum of that estate or small holding *for that period* shall be deemed to have been duly increased or reduced. Sub-section 17 (5) carries the scheme to a logical conclusion by enacting (5) (*a*) that "where the exportable maximum of any estate or small holding *for any period of assessment* is deemed, in consequence of an order under section 15 (1), to have been increased or reduced, it shall be lawful for the Controller to cause an amount equivalent to the amount by which that exportable maximum is so deemed to have been increased or reduced . . . . to be added to or deducted from the exportable maximum of that estate or small holding *or of any other* estate or small holding of the same proprietor, for the period of assessment during which that order is made, or for any one or more succeeding periods, in such instalments as he may, in his discretion determine". (5) (*b*) goes on to say that "it shall be lawful for the Controller to cause to be added to or deducted from the exportable maximum . . . . for any period of assessment, any

amount that has been wrongly omitted from or included in . . . . the exportable maximum . . . . for any one or more preceding periods of assessment" . . . .

Shortly stated, these sections say that where owing to an error, standard crops have been over or under-assessed, and consequently the exportable maxima wrongly fixed, the Controller may readjust the standard crops and exportable maxima, and make good the differences that have occurred in the issues of coupons for export licences to the parties concerned by additions to or deductions from those issuable in the period of assessment in which the error is discovered and the order is made and/or in future periods. Such a piece of legislation is, if I may say so, perfectly intelligible. That was, substantially, the position under the Ordinance of 1933, and that was the shape of things foreshadowed in the draft of the present Ordinance published in the *Government Gazette* of December 17, 1937. In the draft, section 15 stood unencumbered by the provisos, and by sub-section (2) (*a*), (*b*), (c), and (3).

There was no discrimination made between errors of over-assessment and those of under-assessment. But, on the very day of the *Gazette* notification, this Court delivered judgment in the case of *Wijeyesinghe v. Tea Export Controller*[1], pointing out that it might create a hardship—so it appeared to that Bench—if in the case of an estate or small holding that had changed hands, the new proprietor should be called upon to suffer a deduction on account of an over-issue made to the old owner. That view appears to have influenced those concerned in putting the new Ordinance on the Statute Book, and they seem to have thought that the addition of proviso (*b*) to sub-section 15 (1) in cases of errors of over-assessment would obviate the hardship suggested in the case of *Wijeyesinghe v. Tea Export Controller* (*supra*). It would appear that the full effect of this proviso on sub-section 15 (1) and sub-section 17 (5) (*a*) and (*b*) was not considered, or at least, was not appreciated. The proviso is in these terms: "provided that where such error is one of over-assessment an order under this sub-section *i.e.*, 15 (1) *shall not affect* the standard crop of any estate or small holding *for any period of assessment prior to that in which the order is made*".

The resulting position is that on the one hand, sub-section 15 (1) says that in cases of errors of over-assessment in respect of *any period*, the Controller may by order declare that the standard crop *for that period . . . . shall be deemed to have been reduced*, by the amount in error; on the other hand, the proviso says that in cases of errors of over-assessment, the standard crops of *periods prior to the order* shall not be affected, that is to say, shall *not* be deemed to have been reduced. Moreover, while sub-section 17 (5) (*a*) and (*b*) says that it shall be lawful for the Controller to make deductions on account of over-issues during *any* periods of assessment, the proviso by enacting that, in cases of over-assessment, standard crops *prior* to the date of the order shall be unaffected, prevents the Controller from doing in respect of those periods what sub-section 17 (1) declares it lawful for him to do. In short, the proviso largely contradicts sub-section 15 (1) and renders sub-section 17 (5) almost completely nugatory in cases of over-assessment.

[1] *39 N. L. R. 437.*

So far as his case is concerned, the petitioner frankly admits that his contention is that although, owing to an error on his part, his estate was assessed on the footing that it was thirty acres larger than it really was, yet his past and future coupons remain completely unaffected by his error. He says he is entitled to retain all the benefit he received in the past, and to go on receiving coupons on the mistaken assumption made at the time of assessment that his estate was thirty acres larger than it is. A happy state of things indeed. It must, however, be said for the petitioner that the good fortune that results to him from, what he contends, is the correct interpretation of these sections of the Ordinance, has caused him some embarrassment, for he seeks to redeem it with the plea that he is only getting back on the roundabouts, what he had lost upon the swings, if I may put it in that way. He protests that his plantation was really more productive than it was treated as being for the purpose of assessment, although that assessment was made by an expert nominated by him, and was accepted by him without demur.

In regard to the interpretation of section 15, another difficulty is created by sub-section (3), which comes in to darken the obscurity. It says that "for the purposes of this section an error in the assessment of the standard crop" . . . . includes an over-assessment of the standard crop" . . . . This is very baffling. I cannot imagine why it was thought necessary to insert a sub-section to say what was perfectly obvious, for in regard to assessment, errors can only be errors of over- or under-assessment, if one disregards clerical or arithmetical errors as being other than errors "in the assessment". Moreover, proviso (*a*) of sub-section 15 (1) begins by saying "where such *error is* one *of over-assessment*".

In view of these difficulties, I have subjected sections 15 and 17 to as meticulous an examination as I am capable of, in search of an interpretation that would reconcile these repugnancies, but I have not been able to find any such interpretation. Nor were Counsel able to assist me to that end. The expenditure of ingenuity and resource that Mr. Perera lavished upon these sections, in an endeavour to harmonize their discordant parts, failed to solve any of my difficulties. It seems to me that a satisfactory solution is possible only by means of legislation, and not by interpretation, "*horrendas canit ambages . . . . obscuris vera involvens*".

This case. I think, affords an instance of what Lord Herschell had in view when he said in *West Derby Union v. Metropolitan Life Insurance Society, Ltd.*[1]: "One knows perfectly well that it not infrequently happens that persons are unreasonably apprehensive as to the effect of the enactment . . . . and accordingly a proviso is inserted to guard against the particular case . . . ., and you have the enactment so construed against the intention of the Legislature as to impose a liability upon a number of people who . . . . were not present and therefore . . . . were not in a position to protect their own interests".

As sections 15 and 17 stand now, it cannot be denied that there appears to be considerable force in the submission of the petitioner that the order of the Controller is *ultra vires* in so far as it disregards proviso (*b*) to

[1] *(1897) A. C. 647 at pages 655–6.*

section 15 (1). But whether that submission is entitled to prevail or not, seems to me to depend on what the correct rule of interpretation is in a case such as this, of repugnancy between a proviso and its main section, and between a proviso and an independent section like section 17. In these circumstances, it is not at all clear that the order of which there is complaint involves a usurpation of jurisdiction, and is not merely an erroneous interpretation by the Controller of section 15, such, for instance, as the interpretation given by the Board of Appeal when it said that "the question of an over-assessment or under-assessment does not arise: because there has been no interference with the rate per acre". If the Controller's order is, on the face of it, no more than an erroneous interpretation of the law, it would, under the old procedure have been a case for error, and, therefore, is not a case for *certiorari*. But there is no occasion for me to address myself to these questions, for after careful consideration of the arguments advanced, and of the cases cited by Counsel during the discussion, I have reached the conclusion that the application fails *in limine* on the grounds:

(*a*) that the Controller was acting in a ministerial capacity, and was not under a duty to act judicially when he made the order in question, and that, therefore, *certiorari* does not lie; (*b*) that the matter involved in this application is *res adjudicata* between the parties, and for that reason, too, this is not a case for the writ of *certiorari*.

This writ of *certiorari* is an ancient writ, and when it is first encountered, and for a long time thereafter, it ran from superior Courts to inferior Courts properly so called, that is to say, to Courts such as we have in mind when we speak of "Courts of Law" or "Courts of Justice". Other tribunals with which a New Despotism as Lord Hewart describes it, has made us familiar, were scarcely known in those days. But when this modern Legislation set up administrative bodies vested with judicial or *quasi*-judicial functions, the scope of this writ was enlarged, and it came to be sent to those bodies as well.

There is a long line of English cases in which it is stated in clear terms that the writ of *certiorari*, unless expressly withheld by Statute, enables superior Courts to examine the proceedings of all inferior Courts and of all Statutory authorities vested with judicial or *quasi*-judicial functions, and if upon such examination it be found that they, under pretence of an Act, proceed to usurp a jurisdiction greater than they have in common law, or greater than the Act warrants, to direct them to have their proceedings returned to the superior Court to the end that it may see that they keep themselves within their jurisdiction. The leading case on this point is that of *Rex v. Electricity Commissioners*[1]. Atkin L.J., as he then was, discussing the writs of prohibition and *certiorari* said "the operation of the writs has extended to control the proceedings of bodies which do not claim to be or would not be recognized as Courts of Justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, *and having the duty to act judicially*, act in excess of legal authority, they are subject to the

1 (*1924*) *1 K. B. 171.*

controlling jurisdiction exercised by these writs". Slesser L.J. in adopting and analysing this dictum in *Rex v. The London County Council*[1] said "Atkin L.J. lays down four conditions under which a rule for *certiorari* may issue. He says: 'wherever any body of persons (first) having legal authority, (secondly) to determine questions affecting the rights of subjects, (thirdly) *having the duty to act judicially,* (fourthly) act in excess of their legal authority, they are subject to the controlling jurisdiction exercised by these writs'". Other very eminent Judges have expressed themselves in similar terms.

From these dicta, it is clear that one essential condition for the issue of this writ is that the authority against whom it is sought *should be under a duty to act judicially.* No amount of affectation of judicial form or of compliance with judicial and legal principles would be to the point unless there is a duty to act judicially. But if there is such a duty, then it is of no consequence to inquire whether the proceeding was conducted with the elaboration with which Courts of Law are familiar, or with the curt directness of method usually adopted by Statutory bodies. As Scrutton L.J. observed "it is not necessary that it (*i.e.*, the tribunal) should be a court in the sense in which this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to *decide* on evidence between a proposal and an opposition; and it is not necessary to be strictly a court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari." In Rex v. Leg Committee of the Church Assembly[2], Lord Hewart C.J. said: "In order that a body may satisfy the required test, it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic that the body *had the duty act judicially.* In the same case, Salter L.J. said: "the person or body to whom these writs are to go *must be a judicial body* in this sense that it has power to determine or decide, and the power carries with it, of necessity, the duty to act judicially. He referred to the dictum of Holt C.J. in *Rex v. Inhabitants of Glamorganshire*[3], that the essential point was that the person or body should have not only an *authority,* but also a *jurisdiction.*

In *Errington v. Minister of Health*[4], Greer L.J. said: "The powers of the Minister are contained in the Act, and under those powers he could, if no objection is taken on behalf of the persons interested in the property, make an order confirming the order made by the local authority; and in so far as the Minister deals with the matter of the confirmation a closing order in the absence of objection by the owners, it is clear to me and I think to my brethren, that he would be acting in a ministerial or administrative capacity. . . .

But, the position, in my judgment, is different when objections are taken".

Section 42 of the Courts and their Powers Ordinance which gives jurisdiction to the Supreme Court to issue mandates in the nature of writ of *mandamus, quo warranto, certiorari,* &c., expressly adopts the view expressed in these and other English cases, for it provides for the

[1] *(1931) 2 K. B. 215.*
[2] *(1928) 1 K. B. 411.*
[3] *(1700) Ld. Rayne 580.*
[4] *(1935) 1 K. B. 249.*

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.

It now remains to examine the position of the Tea Controller when he is acting under section 15 of the Ordinance. The relevant part of that section is in these terms: "the Controller, *if it appears* to him at any time that an error has been made . . . . he may *by order declare* . . . . ." No duty is laid upon him expressly or by implication, to hold an inquiry, and to give the parties concerned an opportunity to be heard, and the section takes care to say that what he is called upon to do is *by order to declare, not to decide* as he is required to do by sections 10 and 11. To my mind the inference to be drawn from this difference in phraseology is that the Legislature contemplates the Controller as acting in a judicial capacity under sections 10 and 11, and in a ministerial or administrative capacity under section 15, for as Lord Loreburne observed in one of the cases I have referred to "to act in good faith and fairly to listen to both sides is a duty lying upon everyone who *decides* anything". It is, of course, undoubted that persons and bodies called upon by statute to perform ministerial and administrative functions, are expected to act, and almost invariably do act "judicially" in one sense of that word, but they are not acting "judicially" in the meaning that word bears in the phrase "under a duty to act, judicially" and in the equivalent phrases found in the speeches, opinions and judgments from which I have quoted.

In regard to this question whether the Controller is under a duty to act judicially under section 15, it is of no little significance that no appeal is given to the party affected, in the direct manner in whicch he is given an appeal from decisions made under sections 10 and 11, but sub-section 15 (2) requires the Controller to serve a notice on the party affected informing him of the order, and it is only thereafter that the appeal is given. The implication of this is that the Legislature contemplates the Controller as acting in the absence of the party affected without holding an inquiry and without giving him a right to be heard, when he by order declares under sub-section 15 (1).

The cases of *Rex v. Kensington Income Tax Commissioners*[1] and *de Vertevil v. Knaggs and another*[2] support this view. In the earlier case, occasion arose to interpret the words "if the surveyor discovers", in the context: "if the surveyor discovers that any properties or profits chargeable to income tax have been omitted . . . . the additional Commissioners shall make an assessment in such sum as according to their judgment ought to be charged on such persons, subject to objection by the surveyor, and to appeal". Bray J. said: "Does it (*i.e.*, the word 'discovers') mean as contended by the applicant, ascertain by legal evidence? He has no right whatever to examine the taxpayer on oath or to require him to give the particulars of his profits and gains and to verify the same, or to call upon anyone to answer questions. It would, therefore, seem most unlikely that the Legislature should have intended by the word 'discovers' that the surveyor was to ascertain by legal evidence. *That Act provides for a later trial, if I may*

[1] *(1913) 3 K. B. 870.* [2] *(1918) A. C. 557.*

call it so, of the question and when there is an appeal. The stage preceding the appeal is not that at which legal evidence is required . . . . In my opinion, it means 'comes to the conclusion from the examination he makes and from any information he chooses to receive' ". The words I have italicized are peculiarly apposite to this case, for here too, the act provides for a later *trial* of the question if and when there is an appeal. The later case assists by way of contrast. The relevant words were " if at any time *it appears to the Governor on sufficient grounds shown to his satisfaction* ", and Lord Parmoor said : " the acting Governor could not properly carry through the duty entrusted to him without making some inquiry whether sufficient grounds had been shown to his satisfaction . . . . Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statements brought forward to his prejudice ".

In the case before me, the words " if it appears " are unqualified, and it seems to follow that in such a case, the person concerned may in the words of Bray J., " come to a conclusion from the examination he makes and from any information *he may* choose to receive ".

The cases Mr. L. M. de Silva relied upon, on behalf of the petitioner, are distinguishable, and do not in any way militate against the decisions given in the cases already referred to. At one stage, the case of *Rex v. Doherty* [1] seemed to me to create a difficulty. But I find that in *9 Halsbury (Hailsham) at page 858*, this case is cited in illustration of the proposition that " the issue of a warrant of commitment by Justices, where it appears on the face of the conviction that the jurisdiction to issue it depends on the non-payment of money by certain date, is a judicial act and *certiorari* will be granted in regard to it " The *ratio decidendi* for granting *certiorari* in that case was that the payment of the money due to be paid put an end to the " jurisdiction " to issue the warrant, and the issue of it thereafter had no " jurisdiction " to support it. In *Queen v. Justices of Surrey* [2] the Justices were acting on an application made to them, and they were under a duty to act judicially. It was a condition precedent to their certifying in the manner they were requested to certify, that they should require certain things to be done. One of the things that had to be done was not done, and it was held that their certificate was liable to be quashed by *certiorari* because they had failed to equip themselves with jurisdiction by complying with legal requirements.

Reg. v. Nicholson [3] is hardly to the point. There licensing Justices granted an emergency licence in respect of a new house to a holder of a licence who applied for it on the ground that the licensed house was going to be demolished. *Certiorari* was asked for on the allegation that the notices given by the applicant for the emergency licence were not in accordance with legal requirements, and that, therefore, the Justices had acted without jurisdiction. Smith L.J. & Vaughan-Williams L.J.

[1] *28 T. L. R. 502.*

[2] *(1870) L. R. 5 Q. B. 466.*

[3] *(1899) 2 Q. B. 455.*

held that the notices were good, and that in any event, they would not exercise their discretion to issue the writ in the circumstances of that case. The Lord Justices regarded the licensing Justices as "persons exercising judicial or what have been called *quasi*-judicial functions".

The case of *Farquharson v. Morgan*[1] was, admittedly, one of action taken in excess of jurisdiction, as distinct from action in excess of authority. The distinction is fundamental. As pointed out by Salter J. in *Rex v. Leg. Committee of the Church Assembly* (*supra*), Holt C.J. said in *Rex v. Inhabitants of Glamorganshire*[2] "this court will examine the proceedings of all jurisdictions erected by Act of Parliament". That was a case in which the question was whether *certiorari* should go to bring up an order of Justices, made under Statutory rating powers, and counsel had argued that no *certiorari* could go, just as no *certiorari* lies to remove orders made by Commissioners of Bankrupts, and upon that, Holt C.J. observed "as to the Commissioners of Bankrupts, they had *only an authority and not a jurisdiction*". *Farquharson v. Morgan* (*supra*) was concerned with a writ of prohibition. Lord Halsbury L.C. and Lopes and Davey L.JJ. held that where the want of jurisdiction of an inferior tribunal is patent, prohibition is "*of course*". The position is different in regard to *certiorari*. (See *Queen v. Justices of Salop*[3]; *Queen v. Justices of Leicester & Compton*[4]; *Lakshmanan Chettiar v. Commissioner, Corporation of Madras & Chief Judge Court of Small Causes*[5]; *Lakshmanan Chettiar v. Kannaper*[6].) In view of the principles enunciated in these and other cases, even if it is assumed that the Tea Controller while acting under section 15 of the Ordinance is acting in a *quasi*-judicial capacity, it is a question whether the petitioner is entitled to ask for *certiorari* against him, in the circumstances of this case, inasmuch as he had submitted his dispute with the Controller to the Board, and they had given their decision upon it.

Rex v. Hendon[7] was a case in which *certiorari* was sent on the ground of bias on the part of one of the members of the local authority. It is quite clear that there the local authority was under a duty to act judicially. To quote from the judgment, "the hearing of the resolution was advertised; objections were invited and considered, and the decision arrived at was a decision which conferred, contingently at any rate, a legal right and affected the rights of subjects". The four conditions laid down in Atkin L.J.'s dictum are present. So too in *Rex v. Boycott*[8] the writ of *certiorari* went to the respondent who was acting in a *quasi*-judicial capacity, and had usurped a jurisdiction which, in veiw of the manifest doubt that existed on the question whether the boy in the case was educable or not, belonged to the Board of Education.

The conclusion to which I find myself driven by an examination of all these cases is that, in this instance, the Tea Controller was under no duty to act judicially, and that, therefore, he is not amenable to the writ of *certiorari*.

[1] *(1894) 1 Q. B. 552.*
[2] *(1700) Ld. Rayne 580.*
[3] *29 L. J. Mag. Cases 39.*
[4] *Ibid p. 203.*
[5] *I. L. R. 50 Mad. 130.*
[6] *Ibid p. 121.*
[7] *(1933) 2 K. B. 696.*
[8] *(1939) 2 K. B. 651.*

This finding disposes of the petitioner's application, but in deference to the long and able argument Counsel submitted on the question of estoppel and *res judicata*, I think I ought to deal briefly with those matters. It was contended for the respondent that the petitioner is barred from making this application by the operation of section 7 (3) of the Ordinance, and by the decision given by this Court on the petitioner's application for a writ of *mandamus* on the respondent. In regard to the effect of section 7 (3), Mr. de Silva conceded that it would have prevailed against the petitioner, if it had been competent for the Board of Appeal to decide the question the petitioner submitted to them, namely, whether the order of the Controller was *intra* or *ultra vires*. But he contended that that question was not within its competence. I am unable to agree with that contention. But for the fact that Mr. de Silva took the point I should have thought it beyond question that the matter submitted to the Board in ground (c) of the appeal was within its jurisdiction. Section 15 (2) gives a right of appeal to the registered proprietor without any qualification or reservation. He "may appeal against that order", and so for as the Board is concerned, it "may on any such appeal (*a*) confirm the order; or (*b*) if it is of opinion that there was no error in the assessment in respect of which the order was made, rescind the order or, (c) if it is of opinion that there was an error in the assessment in respect of which the order was made, but that the error was of an amount other than the amount mentioned in the order, vary the order accordingly". The second ground on which the petitioner based his appeal to the Board, namely, that "the previous assessments of the standard crops are correct", if it is understood to mean that by virtue of the operation of proviso (*b*) to section 15 (1), the Controller was wrong in declaring by his order that there was an error in regard to them and that, they must be deemed to have been reduced, then, on the petitioner's own case, that was a matter which was within power, (*b*) of section 15 (2), and the Board gave its decision on it when it ruled that "Section 15 of the Ordinance gives the Controller power to correct such errors, and this is what he has done". But from the order made by the Board, and in the light of ground (*d*) of the appeal, it would appear that in ground (*b*) of his appeal, the petitioner was submitting that the previous assessments were correct, in spite of the difference discovered in the extent of the estate, because the productivity of the estate was greater than it was supposed to be for the purpose of those assessments. Mr. L. M. de Silva presented his case on that footing, namely, that power (*b*) of the Board did not vest it with the right to consider the question whether the order was *ultra* or *intra vires*. He went on to point out that power (*c*) did not apply to this case. In regard to power (*a*), he contended that by it the Board was given the right to *confirm* the order, but not to set it aside, and that, therefore, the Board had no jurisdiction to decide the question of *ultra vires*, because a finding adverse to the Controller would have been purely academic, in the absence of a right to set aside the order. But in my opinion, the Board was not as helpless as that. It had, at least, the right to refuse to confirm the Controller's order, and in that way, to give the petitioner the relief he sought. In my judgment, therefore, the Board had jurisdiction to decide the question submitted

to it in ground (*c*) of the petitioner's appeal, and it decided that question, —may be erroneously—when it held that the error in this case was not one of over-assessment, for the reason that there was "no reduction made in the rate of pounds per acre". That decision is, by virtue of section 7 (3), conclusive between the parties for the purposes of the present application, even if it were erroneous. (*The King v. Nat Bell Liquors, Ltd.*[1])

But the position is much more to the disadvantage of the petitioner, at the stage at which I am called upon to consider his application, because between the decision of the Board and the present application there is interposed the order of the Chief Justice, on the application for a writ of *mandamus*. I have already quoted at length from that order in which the Chief Justice held that the Board had the power to decide that question, and I am greatly reassured to find myself in respectful agreement with that ruling. But even if it were wrong, as was contended by Mr. de Silva, it would, nevertheless, have bound the parties, provided the subject-matter in dispute between them, then and now, is the same. I cannot agree with Mr. de Silva that an erroneous decision on a point of pure law is not binding between the parties where the *relief* (meaning the form in which redress is asked) sought on one occasion is different from the *relief* (in the same sense) sought or another. Counsel relied on a citation from *Caspersz on Estoppel* which occurs in the course of the judgment of Garvin A.J. in the case of *Katiratamby et al. v. Parupathipillai* et al.[2], and submitted on the strength of that statement, that the relief sought on the *Mandamus* application was different from the relief sought on the present application. But it seems to me that the words "for a different relief" in that context cannot fairly be made to yield as much as Counsel sought to extract from it. In my opinion, those words must be understood to mean relief in respect of a different subject-matter, and not a different way of asking for relief in respect of the same subject-matter. That appears to have been the view of Garvin A.J. too for, in the course of paraphrasing the quotation he had made, he said: "these passages so far they apply to the matter immediately before us, are an authority for the proposition that an erroneous decision on a pure question of law will operate as *res adjudicata quoad* the subject-matter of the suit in which it is given, and no further" The sole question then is whether the subject-matter is the same. I do not think there can be any serious doubt on that point. Clearly the petitioner is seeking to reach the destination he had in view when he asked for a *mandamus*, only by a different road, that of *certiorari*.

For these reasons, I must hold that that application fails, and the rule *nisi* must be discharged with costs.

Rule discharged.

[1] *(1922) 2 A. C. 128.*

[2] *23 N. L. R. 209.*