1969 *Present :* **H. N. G. Fernando, C.J., Samerawickrame, J., and Weeramantry, J.**

D. L. JAYAWARDENE, Petitioner, *and* V. P. SILVA (Assistant Collector of Customs), and 2 others, Respondents

S. C. 532/68—In the matter of an Application for a Mandate in the nature of a Writ of Certiorari

Customs Ordinance—Export of desiccated coconut—Export licence issued by Manager of Ceylon Coconut Board—Specification of Halifax as port of destination—Shipments landed at port of New York—Forfeiture under s. 130 of Customs Ordinance for exporting restricted goods—Whether Certiorari *lies in respect of such forfeiture—Scope of* audi alteram partem *principle—Whether the forfeiture was valid—Customs Ordinance (Cap. 255), ss. 7, 8, 9, 12, 33, 43, 44, 47, 50, 58, 65, 75, 125, 129 to 133, 142, 144, 145, 154, Schedule B—Coconut Products Ordinance (Cap. 160), as amended by Act No. 20 of 1962, ss. 18, 20, 20A, 20B, 30, 31 and Regulations 7, 11, 14, 17 of Amending Regulations of 1963.*

In March 1968 a Company, of which the petitioner was a Director, made applications to the Principal Collector of Customs under section 58 of the Customs Ordinance for permission to ship certain quantities of desiccated coconut to Halifax in Canada. Although the applications and the ship's manifesto specified Halifax as the port of destination, the three shipments of desiccated coconut were in fact landed at the port of New York in the United States of America. The Collector took the view that the exportation of these consignments to New York, instead of to Halifax, was contrary to a restriction imposed by the Regulations made under the Coconut Products Ordinance. He therefore called upon the Directors and the Office Manager of the Company to show cause why an order of forfeiture under section 130 of the Customs Ordinance, read with the Coconut Products Ordinance, should not be made. After an inquiry was held the Collector elected, in terms of section 130 of the Customs Ordinance, to impose a forfeiture of three times the value of the goods in question, amounting to a total of Rs. 5,010,504. The position of the Collector was that the exportation of the consignments of desiccated coconut was in contravention of section 12 of the Customs Ordinance, read with the last paragraph of Schedule B to that Ordinance, and punishable under section 130.

The petitioner sought, in the present application, to have the order of the Collector quashed by way of *Certiorari*. Separate applications for similar writs were made by the two other Directors and the Office Manager of the Company.

Held, (i) that section 130 of the Customs Ordinance, so far as was relevant to the present application, should be stated as follows :—" Every person who shall be concerned in exporting any goods the exportation of which is restricted contrary to such restriction shall forfeit either treble the value of the goods, or be liable to a penalty of Rs. 1,000, at the election of the Collector of Customs." The forfeiture under this Section is incurred at the moment a prohibited or restricted exportation takes place. The function, and even the duty, of the Collector is only to make an election as between the two specified amounts of the incurred forfeiture.

(ii) that a Writ of *Certiorari* does not lie to quash an election made by the Collector under section 130 of the Customs Ordinance. *Certiorari* does not lie against a person unless he has legal authority to determine a question affecting the rights of subjects and, at the same time, has the duty to act judicially when he determines such question. The existence of a duty to act judicially is not made manifest in section 130 and in connected provisions of the Customs Ordinance. At the highest the Collector's election may, in a provisional manner and to a limited extent, affect the "right" of a subject; but the circumstances in which the election is made are not such as to require the Collector to hear the other side; and no sanction in the proper sense can either be imposed by the Collector upon a person liable to a forfeiture or can else attach under the Customs Ordinance to render the election effective. Unless a competent Court determines, in a subsequent action instituted by the Attorney-General under section 145 of the Customs Ordinance, that a forfeiture was indeed incurred under section 130, the Collector's election is ineffective. The principle *audi alteram partem*, as discussed in *Durayappah v. Fernando* (69 N. L. R. 265), does not apply in the case of the election authorised or required by section 130 of the Customs Ordinance.

Tennekoon v. Principal Collector of Customs (61 N. L. R. 232), overruled.

Omer v. Caspersz (65 N. L. R. 494), partly overruled.

Quaere, whether, if the petitioner had been "concerned in the exportation" of shipments of desiccated coconut to New York, instead of to Halifax, in contravention of the terms of the export licence issued to the Company by the Manager of the Ceylon Coconut Board, such exportation was an exportation of restricted goods contemplated in section 130 and Schedule B of the Customs Ordinance, read with the Coconut Boards Ordinance as amended by Act No. 20 of 1962 and the Amending Regulations of 1963 made under section 20B of the amended Coconut Products Ordinance.

APPLICATION for a writ of *certiorari*.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena, Q.C.*, *N. E. Weerasooria* (Junior) and *R. D. C. de Silva*, for the petitioner.

H. L. de Silva, with *Ananda de Silva*, *Shiva Pasupathy* and *G. P. S. Silva*, Crown Counsel, for the respondents.

Cur. adv. vult.

March 30, 1969. THE JUDGMENT OF THE COURT—

The petitioner in this case is a Director of a Company carrying on business *inter alia* as exporters of desiccated coconut from Ceylon. Early in March 1968 the Company made applications to the Principal Collector of Customs stating its intention to ship certain quantities of desiccated coconut to Halifax (Canada). These applications were made under s. 58 of the Customs Ordinance for permission to export the goods prior to the presentation of the Bill of Entry for the goods. Customs duty and dues having been duly recovered or secured, the desiccated coconut

was exported in April and March, 1968. Although, however, the applications and the ship's manifests specified Halifax as the port of destination, the three shipments of desiccated coconut were in fact landed at the port of New York.

On 17th September 1968, the 1st respondent to the present application, an Assistant Collector of Customs, issued a notice to the present petitioner in the following terms :—

" *Shipments of D. C. Nuts*

An Inquiry will be conducted by me in my office commencing at 9.30 a.m. on 23rd and 24th September, 1968 in regard to the following shipments of Desiccated Coconuts effected by your establishment in contravention of Sections 58, 57 and 130 of the Customs Ordinance (Chap. 235), read with the Coconut Products Ordinance (Chap. 160)—

(i) ' Jeppessen Maersk ' sailed on 22.4.68. 742,900 lbs. D. C. Nuts valued at Rs. 713,553.

(ii) ' Johannes Maersk ' sailed 5.4.68. 504,400 lbs. D. C. Nuts valued at Rs. 483,780·48.

(iii) ' Leda Maersk ' sailed 14.3.68. 499,900 lbs. D. C. Nuts valued at Rs. 472,835·75

as persons being concerned in the exportation of the above shipments of Desiccated Coconuts contrary to restriction, in that the above Desiccated Coconuts were shipped to the Port of New York, instead of the Port of Halifax as stated in your application in respect of each consignment. You are requested to be present at this inquiry and show cause, as to why I should not proceed to make order of forfeiture of three times the value of the said Desiccated Coconuts in each case, on each of you, in terms of Section 130 of the Customs Ordinance, Chap. 235. "

Similar notices were also issued to two other Directors of the same Company and to the Office Manager of the Company.

On 25th September 1968, the 1st respondent informed the petitioner that the " application " referred to in the above notice was " the intend-to-ship application " made by the Company under s. 58 of the Customs Ordinance in respect of the shipments specified in the notice.

The inquiry referred to in the notice was ultimately held on 25th and 26th September, at which sworn evidence was recorded of the petitioner and other Directors or employees of the Company, and at which also some documents were produced by the Customs. The 1st respondent

kept a written record of the evidence. The inquiry was followed by a letter of 30th September 1968 addressed to the petitioner in the following terms :—

" *Shipments of D.C. Nuts*

I have carefully considered the evidence that was led before me at this inquiry, and I hold that Mr. D. L. Jayawardene is guilty of the charges made against him and conveyed to him by my notice No. EXP. 470 of 17.9.68.

I elect in terms of Section 130 of the Customs Ordinance (Cap. 235) to impose a forfeiture of three times the value of the goods in question—

viz : (*a*) ' Jeppessan Maersk ' Rs. 2,140,659·00

(*b*) ' Johannes Maersk ' Rs. 1,451,340·00

(*c*) ' Leda Maersk ' Rs. 1,418,505·00

amounting to a total of Rs. 5,010,504·00 (Rupees Five Million ten thousand five hundred and four). "

Letters were addressed in identical terms to the two other Directors and the Office Manager, subject only to the difference that in the case of Office Manager the amount of the forfeiture was mitigated to Rs. 1,670,168.

We reserve for explanation at a later stage, the references in the notice of 17th September to ss. 57 and 58 of the Customs Ordinance, because they do not appear to be of relevance to the questions we have firstly to decide.

Some explanation is here necessary of the reference in the Collector's notice of 17th September 1968 to the Coconut Products Ordinance, Cap. 160. It is sufficient to state for the present that the position of the Collector has been that the export of desiccated coconut from Ceylon is subject to a licensing scheme established by Regulations made under that Ordinance, that the scheme requires an export licence to authorise the export of desiccated coconut, that the licence actually issued to the Company is one which authorised export only to Halifax (Canada), that the exportation of these consignments to New York was therefore contrary to a restriction imposed by those Regulations, and that the petitioner was a person concerned in such exportation.

If the position of the Controller as just explained be correct, then the exportation of these consignments of desiccated coconut was in contravention of s. 12 of the Customs Ordinance, read with the last paragraph of Schedule B to that Ordinance. The penalty for such a contravention is set out in s. 130 of that Ordinance, which we now proceed to examine.

The relevant provision of section 130 which has to be considered for present purposes may be stated as follows :—

> " Every person who shall be concerned in exporting any goods the exportation of which is restricted contrary to such restriction shall forfeit either treble the value of the goods, or be liable to a penalty of Rs. 1,000, at the election of the Collector of Customs. "

It is necessary at this stage to point out that sections 33, 129, 132 and 133 of the Customs Ordinance also provide for a similar election by the Collector as between the same two alternative penalties. But in these Sections, the language employed is slightly different from that used in s. 130, and the forfeiture is expressed as :—" shall forfeit treble the value thereof, or the penalty of Rs. 1,000, at the election of the Collector of Customs. " It is clear that this is the language appropriate to express the apparent intention, that is to say, that the offender will forfeit a sum equal to treble the value of the goods *or* the sum of Rs. 1,000, the choice between the two sums being made at the election of the Collector.

It will be seen that this intention was not accurately stated in the language of the section 130. That language is in fact ungrammatical. The use of the words " shall forfeit either " obviously indicates an intention to impose one of two alternative forfeitures ; but that intention is not properly carried out in the phrases which follow. Reference to the English Customs Statutes establishes that the imposition of a forfeiture of one of two alternative sums was adopted into our Law from the English Law, and that in corresponding sections of the English Statutes the language was the same as that employed in our sections 33, 129, 132 and 133. It is therefore clearly necessary to correct the grammar of s. 130 and to assume its intention to be that a person concerned in any of the acts referred to in the section " shall forfeit treble the value of the goods, or the penalty of Rs. 1,000, at the election of the Collector of Customs ". The propriety of this assumption was not questioned by Counsel at the hearing.

In the case of *Palasamy Nadar v. Lanktree* [1] this Court considered the effect of a provision in s. 46 (now s. 44) of the Customs Ordinance that any goods exported or taken out of the Island contrary to certain specified prohibitions and restrictions *shall be forfeited*, and construed this provision to mean that on the happening of some event " the owner of the goods is automatically and by operation of law divested of his property in the goods as soon as the event occurs ". The Court further held that " no adjudication declaring the forfeiture to have taken place is required to implement the automatic incident of forfeiture ". The decision in this case followed the construction placed in *De Keyzer v. British Railway Traffic Co.* [2], on the language of s. 202 of the English Customs Consolidation Act of 1876, which states that all conveyances used for the conveyance

[1] *(1949) 51 N. L. R. 520 at p. 523.* [2] *(1936) 1 K. B. 224.*

of any goods liable to forfeiture under the Customs Acts *shall be forfeited.* The judgments in the English case state that "where certain events have happened the property in question is labelled 'forfeited' under s. 202", and that "as soon as it is ascertained that a conveyance has been used for the conveyance of goods liable to forfeiture, *ipso facto* that conveyance is forfeited".

We can see no sensible distinction between the language in s. 130, and the language of the two sections which were construed in the two decisions to which we have just referred, and much of the argument before us proceeded on the basis that the forfeiture under s. 130 is incurred at the moment a prohibited or restricted exportation takes place. It thus appears that the function, and even the duty, of the Collector under s. 130, is only to make an election as between the two specified amounts of the incurred forfeiture.

Consideration of the matters to which we have thus far referred shows, despite some indications to the contrary in the Collector's notice of 17th September and his letter of 30th September, that the action which the Collector intended to take was to elect "treble the value of the goods exported", and not a sum of one thousand rupees, as being the sum forfeited under s. 130 in the instant case. It is this action, purporting to have been taken under s. 130, which the petitioner seeks to have quashed by means of a Mandate in the nature of a Writ of Certiorari issuing from this Court. Applications for similar Mandates were made to this Court by the two other Directors and the Office Manager of the Company, and the arguments we have heard covered all the four applications.

The first question which arises for our decision is whether a Writ of Certiorari will lie to quash action taken by the Collector of Customs under s. 130 of the Ordinance.

Undoubtedly the Collector cannot claim that the occasion for the exercise of his function or duty of election under s. 130 has arisen, unless, at the least, he has reason for forming an opinion that goods have been exported contrary to one of the statutory prohibitions or restrictions contemplated in the section; but the argument for the petitioner has been that the election cannot lawfully be made unless the Collector has first determined that the facts by reason of which the statutory forfeiture is incurred do actually exist. On this ground it was argued that such a determination is one which affects the rights of the person concerned in the exportation, in that the consequence of the election can be that the person will have to pay the larger of two alternative sums. Having regard to the magnitude of the difference between the two alternative sums which may have to be paid in the instant case, it was further argued that a determination which precedes an election, which can have so serious a consequence, must be reached in a quasi-judicial manner.

It was also submitted by one Counsel in the course of his argument that the application of s. 130 may well involve two stages of quasi-judicial decision, namely, the stage at which the Collector satisfied himself in regard to the existence of what were described as the jurisdictional facts, and secondly, the stage at which he brings his mind to bear on the question of electing between the alternative statutory forfeitures.

Another similar argument was that, because there are two stages in this process of election and because the election made at the second stage can seriously affect the rights of subjects, the quasi-judicial character attaches to both stages of the consideration which the Collector must give to the matter.

We have had the benefit of full and helpful arguments from both sides upon the question whether a Writ will lie in this case, and Counsel have very properly referred us to numerous decisions, of British, Ceylon and other Courts. But we find after considerations that it will suffice to refer only to some of those decisions which in our opinion help to resolve the problem which we have to decide.

We ask no excuse for citing the celebrated dictum of Atkin L.J. in the case of *R. v. Electricity Commissioner* [1] :—

> " Wherever 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 their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these Writs."

This dictum was amplified in the judgment of Lord Hewart, C.J. in *Rex v. Legislative Committee of the Church Assembly* [2] as follows :—

> " The question therefore which we have to ask ourselves in this case is whether it is true to say in this matter, either of the Church Assembly as a whole, or of the Legislative Committee of the Church Assembly, that it is a body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially. It is to be observed that in the last sentence of Atkin L.J. the word is not " or ", but " and ". 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 the further characteristic that the body has the duty to act judicially. The duty to act judicially is an ingredient which, if the test is to be satisfied, must be present. As these writs in the earlier days were issued only to bodies which without any harshness of construction could be called, and naturally would be called Courts, so also today these Writs do not issue except to bodies which act or are under the duty to act in a judicial capacity ."

[1] *(1924) 1 K. B. 171 at 205.* [2] *(1928) 1 K. B. 411 at 415.*

Acting upon the dicta which we have just cited, what we have to consider is whether, in making an election under s. 130 of the Customs Ordinance, the Collector firstly has to determine a question affecting the rights of subjects, and secondly has to act judicially in making the election.

In the case of the *Electricity Commissioners*, what was claimed to be *ultra vires* was a Scheme purporting to be adopted under Statute by the Commissioners. The Attorney-General relied on provisions in the Statute which required the Scheme to be submitted to a Minister for confirmation and to both Houses of Parliament for approval, and under which the Scheme might be altered or even rejected. In view of these provisions, it was argued that the Scheme as adopted *by the Commissioners* did not affect the rights of subjects, and that the Writ therefore would not lie. Once this objection to the issue of a Writ of Prohibition was overruled, the fact that the provisions of the Scheme did affect the rights of subjects could no longer be disputed. There then remained the question whether the Commissioners had a duty to act judicially. In regard to this question, the judgment of Bankes, L.J. [1] points out that the Act imposed upon the Commissioners very wide and responsible duties and powers in reference to the approval or formulation of schemes and that " at every stage they are required to hold local inquiries for the purpose of giving interested parties the opportunity of being heard ". There is a further statement in the judgment that the Court should hold " that powers so far-reaching, affecting as they do individuals as well as property, are powers to be exercised judicially and not ministerially ". It appears therefore that in the circumstances of the case it was manifest to the Court that the Commissioners did indeed have a duty to act judicially. For the present we must say that the existence of such a duty is not made manifest in s. 130 and in connected provisions of our Customs Ordinance.

Mr. Gratiaen relied on a dictum of their Lordships of the Privy Council in a recent appeal from Ceylon, *Durayappah v. Fernando* [2], where the matter for consideration was whether a Minister, in making an order for the dissolution of a Municipal Council, had a duty to observe the principle *audi alteram partem*. The dictum in this judgment, which we find of great assistance, reads thus :—

> " In Their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are :—
>
> First what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice.

[1] *(1924) 1 K. B. 198.* [2] *(1966) 69 N. L. R. 265.*

Secondly in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene.

Thirdly when a right to intervene is proved what sanctions in fact is the latter entitled to impose upon the other.

It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined."

It is convenient at this stage to consider the third of the matters which Their Lordships in *Durayappah's case* regarded as of importance in deciding whether the principle *audi alteram partem* does or does not apply, namely what sanctions the authority is entitled under the Statute to impose upon the complainant of injustice. We pass therefore to discuss the consequences which will or can flow from the Collector's election under s. 130. No doubt (as is apparent from the letter of 30th September 1968 addressed to the petitioner) the Collector will, when he makes an election under s. 130, proceed to make a demand of payment of the forfeiture; but no liability to pay the amount demanded arises merely by reason of the demand. The Collector has no right under the Ordinance, by any executive act to seize or take any sum of money from a person to whom such a demand is addressed. Unless of course a person voluntarily complies with such a demand, there is only one means by which he can be compelled to pay the amount of the demand, and this is by a decree of a competent Court entered in an action instituted by the Attorney-General and referred to in s. 145 of the Ordinance, which provides as follows :—

"All penalties and forfeiture which shall be incurred under this Ordinance shall and may be sued for and recovered in the name of the Attorney-General in the respective courts of Ceylon, in like manner as other revenue cases."

It was common ground at the argument that in such an action the Attorney-General cannot succeed in obtaining a decree unless he is able to establish the relevant cause of action, namely, that a person has been concerned in an exportation falling within the scope of s. 130. Once the existence of the cause of action is established in the action, the further element that he forfeits a sum of money is automatically established by the operation of s. 130 itself. It is thus clear that the fact that the Collector makes an election of one of the two alternative sums which section 130 declares to be forfeit, does not and must not in any way affect the duty of a competent Court to decide whether or not the statutory forfeiture was actually incurred in a particular case. Indeed the judgment in the case of *Palasamy Nadar v. Lanktree* [1] makes it clear that the Collector *makes no adjudication* when he elects to seize goods which s. 46 declares to be forfeited. We are satisfied that similarly there is no adjudication on the facts by the Collector when he makes his election

[1] *(1949) 51 N. L. R. 520.*

under s. 130, and that the only determination having the legal effect of an adjudication is that which a Court will make in an action brought by the Attorney-General. There is thus no sanction attached to the Collector's election in the nature of any compulsion to make payment. What is effective in the Collector's election is that, if a Court does hold that the liability to make payment has arisen in law, the amount of the payment (as between the two alternative sums specified in s. 130) has been pre-determined by the Collector's election. We cannot think that this fixation of one of two alternative sums is a *sanction* imposed upon the petitioner in the sense in which that term is used in the judgment in *Durayappah's case*. With respect to this point, Their Lordships observed as follows :—

> "The third matter can be dealt with quite shortly. The sanction which the Minister can impose and indeed, if he is satisfied of the necessary premise, must impose upon the erring Council is as complete as could be imagined ; it involves the dissolution of the Council and therefore the confiscation of all its properties."

In regard to the first matter enumerated by Their Lordships in *Durayappah's case*, the precise question for us is "what is the nature of the property held by the petitioner ?" He certainly has a right to keep his money, which right can clearly be affected, but only because the Statute, and not the Collector, imposes a forfeiture of money against a person who has in fact contravened s. 130. By reason of that forfeiture, he incurs under the Statute a liability to pay money, which of course places in jeopardy his right to keep his money. In making this observation we are appreciative of the principle that the rights affected need not necessarily be "rights" from a jurisprudential point of view. The election of the Collector under s. 130, however, *does not create a new jeopardy* to the petitioner's right ; the election serves only to fix the extent of the statutory jeopardy to one of two alternative amounts arbitrarily imposed by s. 130. The election will have validity only if a Court holds, in an action instituted under s. 145, that there has been a contravention of s. 130 ; and if a Court does so hold, we much doubt whether a person so found to have contravened the section can properly be regarded as having any "right" to suffer the lesser of the two alternative forfeitures.

It is significant that in s. 130, as well as in a few other sections of the Ordinance, the Legislature compels the Collector to make a choice between what manifestly appear to be two arbitrary alternatives. The sections give no guidance to the Collector as to the considerations which might affect his choice between these two alternatives, and they do not leave it open for him at the stage of election to demand no forfeiture at all or to demand a sum lower than either of the two arbitrary sums specified in these sections. In the absence of any standard prescribed in the Statute by reference to which the Collector might decide to recover a sum which he might consider appropriate in a particular case, it is

unreasonable to infer that the Legislature had any intention that the Collector should in making this election act otherwise than in his absolute discretion. In *Pritchard's case* [1] Parker J., as he then was, observed that it cannot be too clearly understood that the remedy by way of Certiorari only lies to bring up to this Court and quash *something which is a determination or a decision.* (The italics are ours.) This description of the character of the matter which may be quashed can scarcely be said to apply to an *election* between two arbitrary alternatives, one or other of which must necessarily be chosen under s. 130.

It was submitted for the petitioner that the duty of election imposed on the Collector must necessarily carry with it the duty to have due regard to the extent of the participation of the offender in any of the acts referred to in s. 130, to the question whether his participation was with guilty knowledge of the breach of any relevant law, and also to the question whether his blameworthiness was such as to render more appropriate the one penalty or the other. One practical example of a case which in this submission might deserve special consideration of a quasi-judicial nature would be that of a clerk employed in the petitioner's Company who had merely been concerned upon instructions from his employers in filling up application forms in a misleading manner. It was submitted, of course on the assumption that a clerk who had acted in that manner comes within the scope of s. 130, that the penalty of Rs. 1,000 would be more appropriate and that the Collector, despite the lack of any indication to this effect in the Section, would nevertheless be under a duty to take all the circumstances into consideration and impose the lesser penalty. In our opinion the answer to this submission is twofold ; firstly, that the Legislature has nowhere indicated the principle on which the Collector is to be guided in making his election ; secondly, that the Legislature has not expressly contemplated the process of a quasi-judicial determination of this matter by the Collector. Moreover the possibility that the lesser penalty may appear to a Court to be the more appropriate in a particular case is not in our opinion a consideration upon which to base an inference that the Legislature intended the Collector to act quasi-judicially. While it is true that one can contemplate cases in which the milder choice may appear more appropriate, one can also contemplate cases in which either choice which the Collector may make would be harsh in the particular circumstances. If for instance a messenger of the petitioner's Company who delivered to the Customs authorities documents effective to promote the exportation of these shipments of desiccated coconut is assumed to fall within the scope of s. 130, even the lesser penalty of Rs. 1,000 appears to us to be somewhat fantastic. In any event if the election actually made by a Collector under s. 130, whether of the graver or less grave forfeiture specified in s. 130, is excessive, the matter does not end there. The Ordinance provides in s. 163 for mitigation by the Collector of any forfeiture incurred under the Ordinance and for appeals to the Minister. We have no doubt that it was the intention of the Legislature that the provisions of s. 163 will be

[1] *(1953) 1 W. L. R. 1158.*

utilized with due regard to particular circumstances and to any mitigating factors, and to soften the strictness of the arbitrary forfeitures imposed by various Sections of the Ordinance. Sections 131 and 142, for instance, impose automatic forfeitures which might be harsh and unreasonable in the circumstances of a particular case. In enacting s. 163, the Legislature took account of the fact that the penalties which it itself arbitrarily imposed, or which it compelled a Collector to select, may be arbitrary and should as a matter of policy be mitigated in appropriate circumstances.

Some stress was laid during the argument on cases in which it has been held that the need for confirmation or the possibility of alteration or abandonment of some determination does not have the effect that there is no duty to act judicially in reaching the stage of determination. Two such cases were those of *Carmichael* [1] and *Boycott* [2] in which the ground for the issue of a Writ was that the certifying officer in those cases made adjudications which virtually decided facts upon which another authority could make an order affecting the rights of a subject. This view of those cases was expressed in the case of *R. v. Manchester Legal Aid Committee* [3].

> "The certifying surgeon in the former case and the Board of Education certifying medical officer in the latter case were concerned solely with the facts of the particular case, facts presented to them *ex parte*, and it was not for them to take into consideration any questions of policy or expediency."

It suffices to point out that there is no indication in s. 130 of the Customs Ordinance that the Collector need consider any matters *other than matters of policy or expediency.*

With reference to the second matter specified in the dictum in *Durayappah's case*, Their Lordships directed attention to the statutory grounds upon which the Minister was empowered to dissolve a Municipal Council. With reference to two of these specified grounds, it appeared manifest to them that a Council must be entitled as a matter of the most elementary justice to be heard before the Minister decided to dissolve a Council on such grounds. That being so, and looking at the Section as a whole, it was not possible to single out for different treatment the third ground of dissolution, which was incompetence on the part of a Council. Their Lordships thought that if the sole ground for dissolution had been only the vague ground of incompetence, there might be some force in the argument that the principle *audi alteram partem* is not applicable. In the instant case, the Legislature has not specified even a vague ground upon which the election of the Collector is to be based. Thus the circumstances or occasions on which the Collector intervenes do not appear to be such as require that a party be heard before an election unfavourable to him is made.

[1] *(1928) 1 K. B. 29.* [2] *(1939) 2 A. E. R. 626.*
[3] *(1952) 1 A. E. R. 480 at 490.*

Our consideration, in the context of s. 130, of the matters mentioned in the dictum in *Durayappah's case* thus leads us to these conclusions : at the highest the Collector's election may, in a provisional manner and to a limited extent, affect a "right" of the petitioner ; but the circumstances in which the election is made are not such as to require the Collector to hear the other side ; and no sanction in the proper sense can either be imposed by the Collector upon a person liable to a forfeiture or can else attach under the Ordinance to render the election effective. We hold therefore that the principle *audi alteram partem* does not apply in the case of the making of the election authorised or required by s. 130.

Mr. Gratiaen cited a decision of the Supreme Court of India in *East India Commercial Co. Ltd. v. Collector of Customs* [1], in which it was held that certain proceedings taken under the Indian Sea Customs Act are quasi-judicial, and that a Writ of Prohibition will lie in respect of them. It is not necessary to discuss the circumstances of this particular case because there is a decisive distinction between the structure of the Indian Act and that of our own. Section 167 of the Indian Act, which was construed in the case mentioned, uses the language that goods "*shall be liable* to confiscation", and that a person "*shall be liable* to a penalty". Section 188 provides that "where goods are under any other provision so liable to confiscation, or a person so liable to a penalty, an appropriate Customs officer may *adjudge* the confiscation or penalty", and Section 188 provides for an appeal from such an adjudication. Further there is provision for remission of such penalties or confiscations and for the review by the Central Government of any decision or order passed under the Act. What is most important is s. 193 which provides that an adjudged penalty may be levied by the sale of goods of the offender, and that where it cannot be realised by such a levy, a Magistrate will, upon notification to him of the penalty, proceed to enforce payment thereof in like manner as if it were a fine imposed by the Magistrate.

It will be seen therefore that when a penalty is adjudged by a Customs Officer under s. 182 of the Indian Act, and it is not set aside or varied in a subsequent proceeding, a Customs Officer has power to recover the penalty and a Magistrate acting as a Court of execution has a duty to levy that penalty. This is a procedure significantly different from that contemplated in our Ordinance : unless a competent Court determines that a forfeiture was indeed incurred under our s. 130, the Collector's election is ineffective. The adjudication of an Indian Customs Officer has effect in its own virtue and constitutes a determination as against an alleged offender that he is in fact an offender ; whereas in our Ordinance such an adjudication is committed solely to a Court, which will manifestly act judicially and independently of any opinion of the Collector upon which his election of a penalty may have been based.

[1] *(1962) A. I. R. S. C. 1893.*

Relying upon the provisions in ss. 7, 8 and 9 of the Customs Ordinance as to the power of Customs Officers to administer oaths, to hold inquiries, to examine witnesses on oath, and to call for and inspect documents, and as to the punishment of persons giving false evidence at such inquiries, it was argued for the petitioner that an inference properly arises from these provisions that an election under s. 130 must be made in a quasi-judicial manner. Having regard however to the wide scope of various provisions of the Customs Ordinance, there appear to be many purposes in connection with which inquiries by Customs Officers may be necessary, such for instance as the purpose of determining the appropriate scale of duties applicable to goods, imported or exported ; and it was not argued that in regard to inquiries held for such purposes a duty arises for Customs Officers to act judicially. There are many Statutes which require that returns, statements and declarations furnished to a statutory authority must be made or verified under oath, but this circumstance by itself does not justify an inference that in the consideration of such returns, statements or declarations for the purpose of reaching some decision thereon, the statutory authority has a duty to act judicially.

In connection with the argument just considered, Counsel referred to the fact that in the instant case the Collector, by giving the notice of 17th September 1968, appears himself to have conceded that it was his duty to act judicially. The procedure which the Collector purported to follow was apparently the consequence of two decisions of this Court to which we will now refer.

In *Tennekoon v. Principal Collector of Customs* [1], the version of the facts presented by the Customs was that the petitioner in the case had been concerned in unshipping of two bars of gold unlawfully imported, or had knowingly concealed them. On this ground the petitioner was called upon to pay a penalty of Rs. 10,000 under s. 127 of the Customs Ordinance, which is now s. 129. This section provides just as does s. 130 for the automatic forfeiture of either treble the value of the goods, or the penalty of Rs. 1,000, at the election of the Collector. Weerasooriya J. referred to the Collector's order as being one " calling upon the petitioner to pay a penalty of Rs. 10,000 ". Relying principally upon dicta in the case of *R. v. Manchester Legal Aid Committee*, the learned Judge held that the Collector was under a duty to act judicially. Having regard to a concession by the Crown that no opportunity was given to the petitioner to meet the case against him, a Writ of Certiorari was issued to 'quash' the Collector's order. This judgment was followed in the case of *Omer v. Casperse* [2], without any fresh consideration of the question whether Certiorari would lie. There was in this latter judgment criticism of the Customs Officers who had dealt with the matter under review to the effect that, because of the earlier decision in *Tennekoon's case*, they should have known that it was their duty to conduct a proper inquiry before imposing a forfeiture. It appears that this criticism has led to the form of procedure (notice and inquiry) which the Collector adopted

[1] *(1959) 61 N. L. R. 232.* [2] *(1963) 65 N. L. R. 494.*

in the instant case. Despite our opinion that the Collector has no duty to act judicially in electing between the two alternative forfeitures, we would encourage rather than discountenance the procedure of a notice and inquiry.

In considering the character of the forfeiture which is incurred under s. 130 and the nature of the function performed by the Collector under this section, it is useful to compare the character of other forfeitures for which the Ordinance provides. Section 44 which was considered in the case of *Palasamy Nadar v. Lanktree* [1] provides that goods exported contrary to the restrictions in Schedule B " shall be forfeited and shall be destroyed or disposed of as the Principal Collector of Customs may direct." Section 43 has identical provision for the case of goods imported contrary to certain prohibitions or restrictions. Sections 47, 50, 65 and 75, for example, also provide for the forfeiture of goods in certain events. As was held in the case just mentioned, the forfeiture is " automatic " in all these cases, and the character of the forfeiture was thus explained in that case (*idem* at p. 523) :—

> " A forfeiture of goods by operation of law would, of course, be of purely academic interest until the owner is in fact deprived of his property by some official intervention. Section 123 (now s. 125) of the Ordinance provides the machinery for this purpose. It empowers any officer of the Customs to seize any goods which are " declared to be forfeited " by the Ordinance. When that is done, the goods " shall be deemed and taken to be condemned " and may be dealt with in the manner directed by law unless the person from whom they have been seized or their owner " shall, within one month from the date of seizure..... give notice in writing to the Collector..... that he intends to enter a claim to the..... goods..... and shall further give security to prosecute such claim before the Court having jurisdiction to entertain the same." (Section 146, now s. 154.) If notice is given and security tendered within the prescribed time, the Collector is required to deliver up the goods to the claimant who is given a further thirty days within which to prosecute his claim in the appropriate Court. Unless notice and security are so given, and the action filed within the prescribed period, the owner no longer retains a right to claim property in the goods and is also precluded from challenging the validity of the seizure and alleged forfeiture in judicial proceedings. In that event he may only hope for but he may not demand as of right from the appropriate authority a merciful mitigation of the full rigours of the forfeiture. (Sections 155, 156 and 157—now Sections 163, 164 and 165.) "

We agree entirely with this explanation. It follows that when goods are declared by the Ordinance to be forfeited, and are seized as provided in s. 125, the property in the goods will be lost to their owner unless the validity of the seizure is challenged by an action instituted in a competent Court within a strictly limited period.

[1] *(1949) 51 N. L. R. 520.*

Counsel did not attempt to argue before us that seizures under s. 125 need be preceded by any quasi-judicial proceedings ; and the explanation which we have just cited confirms our own opinion that no such proceeding need be held, for instance, when Customs Officers seize goods because of an opinion that they are forfeit under s. 43 or s. 44 or any other of the Sections we have mentioned. In other words, such a seizure is purely an executive act, which will render effective in practice the statutory forfeiture of goods, unless of course an action is brought by their owner as provided in s. 154.

It readily appears that the restrictions contemplated in ss. 44 and 130 are identical or substantially similar. The breach of such an export restriction entails (if the goods are within reach) a physicial forfeiture of the goods under s. 44, and entails also a monetary forfeiture under s. 130 against persons concerned in the exportation. There is a corresponding relationship between ss. 43 and 129 in the case of imports. The physical seizure of goods under s. 125, which conclusively deprives their owner of his property unless he is vigilant to prosecute his claim to them by action in the Court, creates a real and present peril. Far slighter is the peril, if any, created by the mere election and demand of the monetary forfeiture incurred under s. 130, which may or may not be sued for by the Attorney-General and will be recoverable only if a Court determines that it was indeed incurred. If then a quasi-judicial proceeding need not precede so grave an action as a seizure of goods, far less is there the need of such a proceeding before an election is made under s. 130.

In the case of *Omer v. Caspersz*, customs officers had taken three different actions, because of an opinion that certain goods had been imported contrary to restrictions :—

(1) The goods were seized in March 1962 and the importer was later informed that the goods were forfeited. This action was referable to s. 43 read with Section 125.

(2) In October 1962 the Principal Collector informed the importer that an additional forfeiture of Rs. 149,850 (treble the value of the goods) had been "imposed" on him under s. 129, and he was called upon to pay this sum.

(3) In November 1962 the Principal Collector informed the importer that under s. 144 steps were to be taken to stop all his imports or exports until the additional forfeiture was paid.

The application made by the importer to this Court was for a Writ of Mandamus to compel the Collector to pass entries for subsequent imports by the importer, and this Writ was issued by the Court.

The Crown at the present hearing has not questioned the correctness of the issue of the Writ of Mandamus in that case, although Crown Counsel has argued that the Writ should have been issued on a ground

different from that set out in the judgment. He conceded that s. 144 applies only if and after a forfeiture is adjudged due by a Court in an action under S. 145.

In addition however, the learned Judge in that case either did, or thought that he could, issue a Writ of Certiorari to quash the order of November 1962 in so far as it related to the additional forfeiture referred to at (2) above ; and the ground for the issue of the Writ or the opinion that it could issue, was that the Collector had a duty to act quasi-judicially before " imposing a forfeiture ".

The circumstances of that case reveal the inconsistency which can arise from the opinion which the learned Judge in that case obviously held.

The seizure and forfeiture of the goods alleged to have been unlawfully imported in March 1962 was referable to s. 43, under which unlawfully imported goods are automatically forfeited. In fact the importer had actually resorted to the remedy against a seizure afforded by s. 154, for he had instituted an action in the District Court to challenge the validity of the seizure. The Crown had in the same action made a claim in reconvention for the forfeiture of Rs. 149,850.

As we have already pointed out above, the physical forfeiture and the monetary forfeiture both automatically applied on the assumption that the importation in March 1962 had been unlawful. In the action filed by the importer, the District Judge would have had to decide whether in fact the importation was unlawful ; and if he so decided, then the consequences would be that both the physical forfeiture and the monetary forfeiture were legally effective ; but the quashing by this Court of the monetary forfeiture had the effect of nullifying the physical forfeiture, and of thus preventing the District Court from upholding the counter claim by the Crown which in law should have been perfectly valid.

It seems to us that the circumstances of the case of *Omer v. Caspersz* illustrate the error of admitting a distinction between s. 43 and s. 129, based on an opinion that a quasi-judicial proceeding is required in the latter case although such a proceeding is not required in the former.

The present Bench is not bound by the two decisions, each of a single Judge, to which we have just referred. The decision in *Tennekoon's case* appears to have been reached without consideration of the Legislative Scheme in the Customs Ordinance providing for the incidence and recovery of forfeitures, and without the advantage of applying, to the circumstances and effect of the Collector's election, tests of the nature which were subsequently laid down by the Privy Council in *Durayappah's case*. In view of the conclusion which we now reach, the decision in *Tennekoon's case* must be overruled ; so also the decision in *Omer v. Caspersz*, in so far as it is inconsistent with the present judgment.

For the reasons now stated we uphold the objection to the issue of the Writ which was taken by the youthful Counsel who led for the Crown, and we express our appreciation of the assistance which we have derived from his able and lucid arguments. We hold that the Writ of Certiorari does not lie to quash an election made by the Collector under s. 130 of the Ordinance, and we must accordingly dismiss this application.

At the conclusion of the arguments pertaining to the question which we have just decided, Mr. Gratiaen, referring to certain observations made by the Privy Council in the case of *Kariapper v. Wijesinghe* [1], invited us to express our views on the merits of the petitioner's application, even if we were to decide that the Writ would not lie in this case. Counsel appearing for the petitioners in the other applications endorsed this invitation. Learned Crown Counsel did the same; but we must note that at a later stage of the hearing he did express the fear that the position of the Crown might be prejudiced if, while dismissing this application on the ground upon which we have now decided to do so, we were to express *obiter* any opinion on the merits of the petitioner's case. His fear was that if the proceedings in the present applications are not at this stage taken before the Privy Council by way of an appeal against our judgment, a District Judge may in any further action taken by the Attorney-General under s. 145 of the Ordinance, quite naturally be influenced by any opinion we express adverse to the Crown's case. Even a Bench of this Court hearing an appeal in such an action may, Crown Counsel thought, at the least be embarrassed by opinions expressed by the present Bench. We shall bear in mind the considerations which Crown Counsel has urged, especially as opinions which we may now express may also place at a disadvantage the petitioners in these four applications. At the same time we must record Mr. Gratiaen's statement from the Bar that the legal advisers of the petitioners in these applications would be anxious to recommend that an appeal be taken from a decision of this Bench holding that Certiorari does not lie in this case. We invited Counsel who led for the petitioner in Application No. 535 of 1968 to make such statements from the Bar as he might wish in relation to this matter, and we understood that his silence meant acquiescence in the statement made by Mr. Gratiaen.

On the assumption that the Writ will lie in an appropriate case to quash the election of the Collector of Customs under s. 130 of the Ordinance, Mr. Gratiaen argued that even if the petitioner had been "concerned in the exportation" of shipments of desiccated coconut to New York, instead of to Halifax, such exportation was not within the restrictions contemplated in s. 130 read with Schedule B to the Customs Ordinance, and that accordingly there did not exist the jurisdictional facts upon which the Collector could lawfully elect the forfeiture of treble the value of the consignments. This argument calls for consideration of the history of the control of the export of desiccated coconut, which would in Mr. Gratiaen's submission establish that there have been only ineffective attempts to regulate and control such exports.

[1] *(1967) 70 N. L. R. 49.*

It is perfectly correct that until 4th June, 1962 Parliament had not directly imposed any control of such exportation. In April 1961 a set of regulations, which we will refer to as the " 1961 Regulations ", were published in the *Gazette* after approval by the Senate and the House of Representatives. These regulations purported to be made under the powers conferred by s. 30 of the Coconut Products Ordinance (Cap. 160). The scheme of control embodied in these regulations can be briefly summarised thus :

(*a*) persons engaged in the manufacture or export of desiccated coconut were required to register themselves with the Manager of the Ceylon Coconut Board as " manufacturers " or " shippers ", as the case may be ;

(*b*) the right to registration was made dependent upon the availability to an applicant of a factory at which the process of manufacture is in accordance with certain specified requirements, where registration as a manufacturer is sought, or the availability of a place of business suitable for the storage and shipment of desiccated coconut, in the case of a person seeking registration as a shipper ;

(*c*) a registered shipper would be entitled free of charge to an export permit, but such a shipper was prohibited from exporting any desiccated coconut not manufactured by a registered manufacturer ;

(*d*) certain standards of quality as to the manufacture of desiccated coconut were prescribed and comprehensive requirements were enforced as to the factories and processing by which desiccated coconut may be manufactured.

Counsel for the Crown did not argue that the 1961 Regulations were *intra vires* the powers conferred by s. 30 of the Coconut Products Ordinance. Although desiccated coconut is a " coconut product " as defined in s. 31, it is fairly clear that s. 30 did not enable the Minister to make Regulations for the control of the *export* of desiccated coconut. In the case of copra and coconut oil, which also are " coconut products ", ss. 18 and 20 respectively did enable the Executive to introduce a scheme of control for exportation whether by licence or by permit ; but there was no corresponding provision for the case of desiccated coconut. This apparent deficiency in the Ordinance was provided for in the Amending Act, No. 20 of 1962, which inserted in the principal Ordinance the following new section :—

" 20 A. On and after such date as may be fixed in that behalf by the Minister by notification published in the *Gazette*, no person shall export any desiccated coconut from Ceylon except under the authority of a desiccated coconut general export licence or desiccated coconut special export licence issued by the Board. "

At the same time a new section 20B was also so inserted which authorised Regulations to be made for—

" (*a*) the regulation, inspection, supervision, and control of the manufacture, packing, transport, storing *and export* of desiccated coconut ;

(*b*) prescribing standards of quality to which all desiccated coconut manufactured shall confirm ;

(*c*) ensuring that desiccated coconut exported from Ceylon is free from impurities or foreign matter, and is of good quality ;

(*e*) the issue, renewal, suspension and cancellation of desiccated coconut general export licences and desiccated coconut special export licences, and the terms and conditions subject to which such general or special licences shall be issued, and the manner of disposal of desiccated coconut in respect of which such licences are refused. "

In addition, power was taken for regulations to be made in regard to numerous matters affecting the manufacture of desiccated coconut, and the registration of manufactures and shippers. Sub-section (2) of the new section 20B further provided as follows :—

" (2) Section 20B, inserted in the principal enactment by sub-section (1) of this section, shall be deemed to have come into force on the date of commencement of the principal enactment and accordingly, the Desiccated Coconut (Manufacture and Export) Regulations, 1961, published in Gazette No. 12,400 of May 5, 1961, shall be deemed to have been duly made under the said section 20B, and to have been valid and effectual for all the purposes for which they were made. "

As matters have turned out, it appears that Parliament's intention to control the export of desiccated coconut by means of a licensing system, has to this day not been directly implemented. The simple mode of implementation contemplated in the new section 20A was that the Minister should fix a date as envisaged in that section, having previously obtained the approval of Parliament for regulations made under the new s. 20B, embodying details of the procedure for the issue, renewal, suspension and cancellation of licences to exporters of desiccated coconut. Instead of taking the obvious course of rendering the new section 20A effective by fixing a date, the Minister in April 1963 was content only to obtain the approval of Parliament for a set of Regulations which amended the 1961 Regulations. The principal amendment for present purposes was the introduction of a new Regulation 7, which includes the following provisions :—

" 7. (1) No desiccated coconut shall be exported from the Island except on a general export licence issued in that behalf by the Manager on a payment of a fee at the rate of 15 cents per hundredweight or part thereof.

(2) Every application for a Desiccated Coconut General Export Licence shall be substantially in such Form as may be approved for the purpose by the Board, and shall be accompanied by a declaration that the statements contained therein are true and accurate.

(3) If the Manager is satisfied that the particulars given in the application are correct and if the bacteriological reports relating to the production of the mill on or about the date or dates of manufacture have consistently been satisfactory up to the date of application in that they do not indicate contamination with pathogenic organisms or other organisms to a harmful extent, the Manager shall issue a Desiccated Coconut General Export Licence to the applicant."

It is unhelpful to speculate about the reason why the Minister did not in 1963 think fit to fix a date as envisaged in new section 20A ; but his failure so to do has given rise to doubts and difficulties which might well have been avoided. The petitioner relies on that failure for the submission that there is not in force any lawful provision which restricts the exportation of desiccated coconut. The submission in brief has been that the only lawful provision which can require an export licence as a condition precedent to the export of desiccated coconut is section 20A but that this requirement in s. 20A is not effective in the absence of the notification referred to therein. The new regulation 7 purports to impose such a requirement, but it is submitted that the regulation is *ultra vires*.

The answer of Crown Counsel has been that the power given by paragraph (*a*) of s. 20B, to make regulations for the regulation, supervision and control ..... of *the export* of desiccated coconut, when read with s.17(1) (*d*) of the Interpretation Ordinance, includes the power to provide for an export licensing system. What is involved in the answer of Crown Counsel is that paragraph (*a*) of s. 20B conferred on the Minister, independently of s. 20A and as an alternative to enforcing its provisions, power to make regulations for an export licensing system.

We agree of course that had paragraph (*a*) of s. 20B been the only provision of the Ordinance relevant to this question, the general provision in s. 17 of the Interpretation Ordinance would have the effect of conferring the independent and general power contended for by Crown Counsel. But s. 17 of the Interpretation Ordinance applies in the case of an enactment *unless the contrary intention appears ;* and we must therefore consider whether a contrary intention does appear. The Legislature undoubtedly intended that from a date to be fixed by the Minister, the requirement of export licences which Parliament had in prospect would become operative. The powers to make regulations which will make that requirement workable and effective and which will be ancillary to that requirement were expressly conferred by Parliament in paragraph (*b*), (*c*) and (*e*) of s. 20B ; and the descriptions " general export licence " and " special export licence " which are used in s. 20A recur in paragraph (*e*) of s. 20B.

Moreover, the Legislature specified the Board as the authority competent to grant the licences, and we are unable to agree that the apparent general power which paragraph (*a*) of s. 20B confers would enable the Minister to commit the function of granting licences to some other authority chosen by the Minister. We note also that, if Crown Counsel's argument be correct, s. 20A and paragraph (*e*) of s. 20B become mere surplusage if the Minister elects to exercise his alleged alternative powers. Our conclusion is therefore that Parliament did not intend to confer such alternative powers. (An explanation for the subject of "export" being mentioned in paragraph (*a*) of s. 20B can be found in sub-section (2) of s. 20B. That sub-section validated the 1961 Regulations, which *inter alia* did control export; and since "cover" was being given to those Regulations under the powers in s. 20B (2), it was perhaps thought expedient that those powers should (in paragraph (*a*)) include the regulation .... of export.)

The conclusion we have stated above is not however decisive in favour of the petitioner. We have to take note of the fact that the Regulations which the Minister did make in 1963, and which introduced the new Regulation 7, had the approval of both Houses of Parliament. In so far therefore as the Amending Regulations purport to require a General Export Licence as a condition for the exportation of desiccated coconut, we cannot shut our eyes to the fact of Parliament's approval of this Regulations and we are compelled to the conclusion that Parliament did thus approve what was in substance a proposal of the Minister to bring into effect the intention of Parliament evidenced in s. 20A that desiccated coconut may only be exported under the authority of a licence. We hold in other words that Parliament's approval of the Regulations relieved the Minister of the duty to fix a date under s. 20A, and that the coming into force of the Regulations as so approved was tantamount to the requisite fixation of the date by the Minister.

The doubt to which we have so far dealt is not however the only doubt which has arisen because of the Minister's failure to act in the manner precisely contemplated by Parliament. We have thus far held that the approval and publication of the Amending Regulations of 1963 was tantamount to the fixation of the date from which s. 20A was effective. But s. 20A contemplated Export Licences to be issued by the Ceylon Coconut Board, whereas Regulation 7 of the Amending Regulations provides for licences to be issued by the Manager of the Board. Here again, we are quite unable to understand why the Minister and the Draftsman of the Regulations apparently failed to read s. 20A and to frame the Regulations so as to accord with that section. Nevertheless we think that the defect in Regulation 7, that it committed to the Manager, and not to the Board, the function of issuing export licences is not so fundamental as to render the Regulation *ultra vires*. The Manager is a subordinate officer appointed by the Coconut Board, and no doubt acts under the Board's supervision. Moreover, under paragraph (8)

of Regulation 7 the refusal by the Manager to grant an export licence is subject to an appeal to the Board, which may then allow the licence. The Regulation thus complies in substance with the intention of s. 20A that licences be issued by the Board.

We pass now to material relevant for the consideration of Mr. Gratiaen's second submission upon the question whether the exportation in this case was contrary to a valid legal restriction contemplated in schedule B to the Customs Ordinance. Regulation 7 (2) of the 1961 Regulations as amended in 1963 provides that an application for an export licence shall be in a form approved by the Board, and it has been assumed on all sides that the form upon which the petitioner made this application for a licence was one so approved by the Board. This form required the petitioner's Company to specify the port of discharge and the final destination of the consignments in respect of which the Company sought export licences and the company specified respectively "Halifax" and "Canada". Similarly, the form of the licences issued to the Company specified "Halifax" as the port of discharge.

From certain averments in an affidavit of the 1st respondent and from the contents of copies of certain notices which have been produced, it would appear that the Coconut Board had decided and notified to shippers that shipments of desiccated coconut *to the United States* would be authorised by licence only if officers of the Board had first exercised certain special precautions in the matter of the supervision of the manufacture and the inspection and testing of desiccated coconut intended for export to the United States. In order that these special precautions may be taken, it was important that the Manager should have notice in advance of a shipper's intention to export desiccated coconut to the United States. Two Circulars to Shippers, dated 29th November, 1963, and 21st July, 1966, accordingly requested shippers to notify the Board immediately upon their entering into contracts with American buyers, and to furnish particulars of the mill from which desiccated coconut would be purchased for shipment under such contracts. In the instant case, the Company did not furnish any such notification or particulars to the Board although the petitioner does not deny that his Company had received the two notices to which we have referred. The position for the Crown, has been that the petitioner was aware that the exportation of these three consignments to New York would not have been authorised by export licence if the Company's applications of March 1968 had specified the United States, and not Canada, as the final destination of the shipments.

One point in Mr. Gratiaen's second submission is that the licences issued to the Company, while specifying Halifax as the port of destination, did not in terms state, either that they authorised exportation only to that port or that the shipments must not be exported to any port in the United States. We should add that there is nothing in the Regulations which might indicate to a shipper that the specification of a destination,

whether in a shipper's application or in the Manager's licence, is restrictive in the sense that exportation to any other destination would constitute a breach of a fundamental condition of the licence. We were referred in this connection to paragraph (*o*) of s. 30 (2) of the Ordinance which gave power to maintain statistics relating to the coconut industry; the specification of the destination of shipments, it was contended, may have been required merely for statistical purposes, and not for the purpose of controlling the destination of exports. It was further urged that the specification of a destination in an export licence is no more restrictive than is the specification of the name of the vessel in which a shipment is to be made; learned Crown Counsel did not argue that the specification of the vessel was intended to be restrictive.

We understand that the Board's decision to exercise special precautions and control in relation to the export of desiccated coconut to the United States was one of much importance for the maintenance of the reputation in that country of Ceylon's product and for the promotion of our exports to that country. It is surprising therefore that neither the Regulations nor the Forms employed were altered in order to give clear effect to that decision, and to avoid the possibility of objections that export to the United States was not in contravention of the Board's licences. Nevertheless, but with some hesitation, we think that in all the circumstances these objections must be overruled. The Company was aware of the contents of the Board's circulars and of the intention to prevent exports to the United States of desiccated coconut, in respect of which the special precautions therein mentioned had not been taken. The Company was thus aware that, had the United States been specified in its applications as the final destination, the licences either would not have been granted or else would have been granted only after a special investigation as to the source and quality of the proposed shipments. In these circumstances, when the Company specified Canada as the final destination, it represented to the Board that the shipments were not destined for the United States; and the Company was further aware that the Board's licence was not intended to authorise exportation to a destination in the United States. The Company cannot rely on the lack of clarity in the four licences in order to disclaim knowledge of the fact that the licences did not authorise exportation to the United States. We hold therefore that the exportation to that country was in contravention of the terms of the licence. We should add that we were not invited to consider whether or not the petitioner himself had knowledge of the matters of which we hold the Company to have been aware.

For the reasons we have stated, we must now assume that the licences issued in this case did purport to restrict or prohibit exportation of the three consignments to the United States. This means in effect that we have to read the entry in the licences of the destination as being " Halifax, and not any destination in the United States ". The further question which now arises is whether the Manager had power in law to make such an entry, or in any other manner to prevent the exportation of these

shipments to the United States. The question, framed somewhat differently, is: if the Company had in its three applications specified the United States as the final destination, did the Manager have power to refuse the licences solely on the ground that there had not been compliance with the requirements set out in the Board's circulars ?

Upon this question, it was submitted for the Crown that Parliament's intention in enacting provisions for a scheme of licensing must be construed in the light of present-day economic conditions and of the need to regulate trading with any country in particular products by reference to the special requirements of the country of importation. For example, it was suggested, the authorisation of exports from Ceylon to particular countries only may be desirable in order to redress an adverse balance of our trade with those countries, or because the exports might fetch higher prices in those countries than in others ; again, as is the case with rubber produced in Ceylon much of which is the subject of a " barter " agreement, it may be desirable to " channel " Ceylon exports to those countries which supply some of our essential requirements. As to the particular restriction in the present case, we have no doubt that the Coconut Board decided to take special precautions before authorising exports of desiccated coconut to the United States, for the very good reason that the Health authorities of that country insist on high standards of quality and purity.

Crown Counsel argued that the provisions of S. 20A and of S. 20B (in particular paragraphs (*a*) and (*e*)) are wide enough to authorise the Board or its Manager to impose what was described as a system of " destination control ". He submitted that the word " export " carries with it the connotation of " sending out to another country " ; this submission is undoubtedly correct, being borne out by the fact that some sections of the Customs Ordinance distinguish between " exporting " and " taking out " of goods. Relying on the considerations mentioned in the preceding paragraph of this judgment, Crown Counsel further submitted that s. 20A of the Ordinance, and/or paragraph (*a*) of s. 20B, contemplate that it is not only exportation from Ceylon generally, but also exportation to any particular country, which may be regulated by a licensing scheme.

It was urged that the purpose of the Board, in deciding that special precautions must be taken in the case of desiccated coconut intended for shipment to the United States, was not to impose a higher standard of quality or purity in such a case, but only to make investigations and inspections which should eliminate as completely as possible the risk that such shipments do not attain the prescribed standards. In this view if the special precautions thus taken reveal deficiencies in standard or quality, then the Board would refuse a licence for exportation, not only

to the United States, but to any country whatsoever. But this view of the matter is not readily reconcilable with a relevant paragraph in the Board's Circular of 21st July 1966 :—

> "The Board's inspectors will then pay special attention to the manufacture of the material destined for America, and will carry out bag by bag sampling. If the material is likely to satisfy American requirements, licences for shipment to America will be issued. Licences will not be granted in respect of material that does not reach the required standard."

The only explicit provisions in the regulations which refer to the issue of export licences are found in regulation 7. Paragraph (3) of that regulation refers to certain "bacteriological reports relating to the production of the mill". Having regard to the form provided by the Board for the making of applications for export licences, this reference is to the mill at which is manufactured the desiccated coconut which an applicant intends to export. If the reports relating to the production at that mill have consistently been satisfactory, paragraph (3) requires that the Manager "shall issue" the export licence. This paragraph by implication empowers the Manager to refuse a licence if the relevant bacteriological reports are not satisfactory. Thereafter paragraph (9) also empowers the Manager to refuse a licence if the packages intended for export do not bear labels issued by him. It is not the position of the Crown that the company's applications could have been refused on either of these grounds, or that the Manager was deceived into issuing the licences to the Company despite the existence of one or other of those grounds for refusal.

Regulation 11 prescribes standards of quality for the manufacture of desiccated coconut, and regulations 14, 17 and 19 contain elaborate provisions regarding the packing of desiccated coconut for export, the conditions with which a shipper's store and packing room must conform, and the inspection of such store and packing rooms by the Board's officers. Despite the absence of any link between Regulation 7 and these other regulations, it may have been open to the Crown to argue that these other regulations qualify the apparently peremptory provision in regulation 7 (3), which entitles an applicant to an export licence if the condition specified in that regulation is satisfied. But such an argument was not presented by the Crown in this case, because there is no averment that there was any breach of any of these regulations.

Our consideration of the relevant regulations shows that there is no provision in the regulations, which requires a shipper to give notice to the Board at the stage when he enters into a contract with any foreign buyer or with a buyer in any particular foreign country, or which empowers the Manager to refuse a licence for export to any particular country on the ground that special precautions could not be taken to supervise the manufacture of the product intended to be exported.

It thus appears that the Manager's alleged power to control the destination of a shipment of desiccated coconut exists, if at all, only by implication; namely that any statutory requirement of a licence to export goods implies that the authority issuing the licence has power to impose a restriction as to the countries to which they may be exported. In considering whether such a power may be implied, we have to bear in mind the following observations of Lord Halsbury L.C. in *Rossi v. Edinburgh Corporation* [1]:—

> "What is sought to be done, whether by by-laws, or indirectly by the language of the licence that is issued, is something that can only be done by the Legislature. It is a restraint of a common right which all His Majesty's subjects have—the right to open their shops and to sell what they please subject to legislative restriction—and, if there is no legislative restriction which is appropriate to the particular thing in dispute, it seems to me it would be a very serious inroad upon the liberty of the subject if it could be supposed that a mere single restriction which the Legislature has imposed could be enlarged and applied to things and circumstances other than that which the Legislature has contemplated."

We have unfortunately not been able to reach unanimity upon the question whether or not the Manager does have the implied or inherent power which learned Crown Counsel claimed that he has. That being so, we do not consider it appropriate, in the circumstances of this case, to express by way of an *obiter* the opinion of the majority of us on this question. We shall only set out therefore the substance of the opposing arguments.

The position of the Crown was that it is implicit in any system of licensing of exports that goods are not to be sent out of the country to any other country except upon the authority of a licence authorising the sending of the goods to that other country. The fact that export licences are and may be issued which are silent as to destination, in this view really creates no difficulty. A licence may expressly or impliedly grant wide authority to export to any part of the world, and where a licence is silent as to destination, it implied y gives authority to do so. In the ordinary case, a licence would give authority for the export to a particular country or place. In such a case, the authority to export to that particular country or place is the pith and substance of the licence and is not a condition or restriction attached to it.

If the Coconut Board had reason to think that it was in the interests of the industry that more stringent steps than were ordinarily taken should be taken to ensure that desiccated coconut to be exported to American ports was free of contamination and conformed to the standards laid down by the regulations, there was no reason why it should not issue export licences after such export only after such steps were taken. The

[1] *1905 A. C. 21 at page 26.*

regulations provide for sampling, for inspection of the factory and the shipper's place of work where the packing is done. It was submitted that one of the purposes which was served by the special precautions taken by the Board was to ensure that shipments to American ports do not fail to attain to the prescribed standards of quality and purity, and that this was a legitimate purpose.

Crown Counsel further urged that, even if the Board had no power to require for exports to American ports standards higher than those generally prescribed, the petitioner's Company nevertheless took an improper course in failing to disclose its intention to export these shipments to the United States. If the company had been refused a licence on the ground that the shipments did not conform to such a higher standard, it could have insisted on its rights and, if necessary, sought its legal remedy against a wrongful refusal to issue the licence. It was, however, not open to the company to resort to the device of applying for an export licence to send desiccated coconut to Halifax and thereafter to send that desiccated coconut to New York, for an export licence to send goods to Halifax gives no authority to send them to any other place.

The arguments for the petitioner on this question directed attention to the context of the Ordinance, particularly paragraphs (*b*) and (*c*) of s. 20B, and of the regulations themselves.

In the case of the export of desiccated coconut, both the Ordinance and the Regulations enter into comprehensive details indicative of the nature and extent of the contemplated scheme of export licensing : standards and methods of manufacture, quality and purity, sampling, storage, packing and labelling of the product to be exported—all these matters are the subject of express regulation. It was contended that if a particular intended shipment of the product satisfies all these detailed express requirements, it would be unreasonable to suppose that the Legislature or the Minister had in contemplation a further unspecified restriction on export, namely that the Manager may refuse to authorise export to a particular country if he is of opinion that the shipment " does not satisfy the requirements " of that country. Had such an additional restraint been in contemplation, one would expect even a passing or indirect reference to it in the regulations. Instead, and on the contrary, regulation 7 (3) provides that the Manager *shall issue* the licence if the condition stated in that regulation is satisfied.

Mr. Gratiaen further submitted that if the regulations could properly have introduced " destination control ", the power to do so is referable to paragraph (*e*) of s. 20B, which enables regulations to be made for " the issue " of export licences and for " the terms and conditions subject to which " licences shall be issued. A specification " Halifax, and not the United States ", or a restriction " any destination other than the United States ", would be, in his submission, a condition of a licence, and

the insertion of such a condition would be lawful only if it is clearly authorised by the regulations. In the absence of such an empowering regulation, the proper conclusion, he argued, is that the Manager had no authority to impose such a condition.

Learned Crown Counsel also relied on something in the nature of an "estoppel". He contended that since the Company accepted and had the benefit of an export licence, the validity of a restriction or condition contained or implied therein cannot now be challenged. We adopt with respect the answer given by Sankey J. (as he then was) to a similar contention which was made in the case of *Ellis v. Dubowski* [1].

We need refer only to one further point raised on behalf of the petitioner. It was contended that the only "offence" referred to in the notice of 17th September 1968 was that of making a false statement in the "intend to ship" applications, and that the notice did not inform the petitioner of the much more serious charge that there had been exportation contrary to a restriction referred to in s. 130 of the Customs Ordinance. We are satisfied, however, that there is no substance in this contention. The notice refers to *a contravention of s. 130 of the Customs Ordinance*, read with the Coconut Products Ordinance; it uses the language of s. 130 "persons concerned in the exportation"; it states that the Desiccated Coconut were shipped to the port of New York, instead of the port of Halifax; and it refers to a forfeiture of three times the value *in terms of s. 130*. Moreover the arguments of Counsel who appeared for the petitioner at the inquiry held by the Collector show clearly Counsel's knowledge that the charge was one of exportation to an unauthorised destination. No grounds were made out, in our opinion, for an objection that the petitioner did not have notice of the "charge" against him, or that in any other respect the Collector failed to observe the principles of natural justice.

These applications to this Court were probably made in reliance upon the two earlier cases which we have held to have been wrongly decided. While the application is dismissed, we make no order as to costs.

(Sgd.) H. N. G. FERNANDO,
Chief Justice.

(Sgd.) SAMERAWICKRAME,
Puisne Justice.

(Sgd.) WEERAMANTRY,
Puisne Justice.

Application dismissed.

[1] *(1921) 3 K. B. 621 at p. 627.*