THE SECURITY EXPORT COMPANY...APPELLANT; 1923

AND

THE HONOURABLE J. E. HETHERINGTON, PROVINCIAL SECRETARY-TREASURER OF THE PROVINCE OF NEW BRUNSWICK..... RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Certiorari—Collection of tax—Distress—Secretary-Treasurer of Province—Judicial or ministerial Act—Tax on liquor for export—Direct or indirect taxation—B.N.A. Act s. 92 (2)—12 Geo. V, c. 3 (N.B.), Liquor Exporters' Taxation Act.

By section 3 of the Liquor Exporters' Taxation Act of New Brunswick (12 Geo. V, c. 3), every person who has liquor for export from the province shall pay to the Crown a tax thereon at a specified rate and, by section 4, within a specified time; by section 6 in default of payment the amount of the tax may be levied by distress under a warrant signed by the Provincial Secretary-Treasurer, or (section 7) the Secretary-Treasurer may bring an action to recover it; and section 9 authorizes the Lieutenant-Governor in Council to make regulations for, *inter alia*, "the fixing and determining of the amount of the said tax." In a case of distress under these provisions it was not shown how the amount had been determined.

Held, Anglin and Mignault JJ. dissenting, that the act of the Secretary-Treasurer in signing the warrant is judicial and not ministerial merely and that certiorari will lie to bring the proceedings before the Supreme Court of the province for review.

Held also, Anglin and Mignault JJ. expressing no opinion, that the imposition of a tax on liquor kept for export is indirect taxation and *ultra vires* of the provincial legislature.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick quashing a writ of certiorari obtained by the appellant to have the proceedings on distress of its goods reviewed.

Two questions were raised on the appeal, namely, whether or not certiorari lies under the circumstances set out in the head-note and secondly, whether or not the Liquor Exporters' Taxation Act of New Brunswick was *intra vires* of the legislature of the province. The Appeal Division held that certiorari does not lie in such a case which made unnecessary any decision as to the validity of the Act.

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Geoffrion K.C. and *Fred. R. Taylor K.C.* for the appellant. The Secretary-Treasurer in signing the distress warrant performs a judicial act.

For the contrary proposition the respondent and Mr. Justice White in the Appeal Division rely on *Ex parte Taunton* (1). That case merely decides that the issuing of a distress warrant under 43 Eliz., c. 2, is a ministerial act but is no authority on its issue under other conditions. A much earlier case *Harper* v. *Carr* (2), not referred to in *Ex parte Taunton* (1), was such a case. There the issue of the warrant was held to be judicial.

In *Painter* v. *Liverpool Gas Light Co.* (3) the issue of a warrant without first hearing the parties was held to be illegal. This is one test of the ministerial or judicial character of the act. Another test is given in *Staverton* v. *Ashburton* (4) where Wightman J. said: "Were not the justices under the statute 43 Eliz., c. 2, entitled to withhold their assent if they thought fit? That is the test as to whether the act is ministerial or judicial." This test was adopted by Allen C.J. in *The Queen* v. *Simpson* (5) at page 474.

The modern judicial tendency is towards giving to the term "judicial act" a very broad scope "including many acts that would not ordinarily be termed judicial." Per Fletcher-Moulton L.J. in *Rex* v. *Woodhouse* (6).

The tax on liquor held for export is indirect taxation and the act imposing it is *ultra vires*. See *Bank of Toronto* v. *Lambe* (7); *Attorney General for Quebec* v. *Queen Ins. Co.* (8).

Byrne K.C., Attorney-General of New Brunswick for the respondent. The court below in quashing the writ exercised a discretion which should not be interfered with on appeal. Moreover the judgment appealed from is not final and this court has no jurisdiction. *Faucher* v. *Compagnie du St. Louis* (9).

(1) 1 Dowl. 54.
(2) 7 T.R. 270.
(3) 3 Ad. & El. 433.
(4) 4 E. & B. 526.
(5) 20 N.B. Rep. 472.
(6) [1906] 2 K.B. 501
(7) 12 App. Cas. 575.
(8) 3 App. Cas. 1090.
(9) 63 Can. S.C.R. 580.

As to the character of the Provincial Secretary's act we rely on the opinion of Mr. Justice White. And see also *The Queen* v. *Shurman* (1).

The validity of the Liquor Exporters' Taxation Act in question in proceedings is pending in the Supreme Court of New Brunswick.

IDINGTON J.—The Chief Justice of the province of New Brunswick granted, on the application of the appellant, on the 31st of August last, an order absolute for the issue of a writ of certiorari directed to the respondent, and a rule nisi to quash a distress warrant which he had, in his quality of Provincial Secretary-Treasurer pretending to act under the Liquor Exporters' Taxation Act, being 12 Geo. V, c. 3 of the said province, issued against the goods of appellant directing the sheriff of the city and county of St. John, in said province, to levy thereon the sum of $62,042.

The return of the said respondent to the said writ was as follows:—

I, J. E. Hetherington, Provincial Secretary-Treasurer of the province of New Brunswick, do hereby certify that before the coming of the writ of our said Lord the King to me directed and to this schedule annexed, I did, as Provincial Secretary-Treasurer of the province of New Brunswick, on the 10th day of August, A.D. 1922, sign and issue a distress warrant, and on the 12th day of August, A.D. 1922, deliver the said distress warrant to Amon A. Wilson, Esq., which distress warrant is in the words and figures following:

" Amon A. Wilson, Esq.,
High Sheriff of the city and county of St. John.

Sir: Under and by virtue of section 6 of the Act of Assembly 12 George V, chapter 3, cited as "The Liquor Exporters Taxation Act," default having been made by the Security Export Company, Limited, of the tax imposed upon it by the said act within the time limited for payment. Therefore, I do hereby authorize and require you the said Sheriff to distrain the goods and chattels of the Security Export Company, Limited, wherever found within the province of New Brunswick and levy by distress upon the goods and chattels of the said Security Export Company, Limited, the sum of sixty-two thousand and forty-two dollars, being the amount of the tax due to the Crown for use of His Majesty in right of the province of New Brunswick by the said Security Export Company, Limited, upon forty-nine thousand six hundred and forty-two gallons of liquor, which the said Security Export Company, Limited, owns, now has, keeps or has property rights in, within the province of New Brunswick for export to a place outside of the province of New Brunswick, and you the said Sheriff shall levy the said sum of sixty-two thou-

(1) [1898] 1 Q.B. 578.

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sand and forty-two dollars aforesaid and all costs of sale of the goods and chattels of the said Security Export Company, Limited, or so much thereof as may be necessary to satisfy the said tax and the costs of the said distress.

Dated this 10th day of August, A.D. 1922.

J. E. HETHERINGTON,
Provincial Secretary-Treasurer,
of the province of New Brunswick."

That the said warrant of distress is now, I verily believe, in the possession of the said Amos A. Wilson, Esq., High Sheriff of the city and county of St. John, aforesaid, and was so in his possession at the time of the receipt of the said writ by me, and I have not now, nor did I have at the time, nor at any time since the receipt of the said writ, the said distress warrant in my custody or keeping.

And this is my return to the said writ.

Dated this 9th day of September, A.D. 1922.

J. E. HETHERINGTON,
Provincial Secretary-Treasurer
of the province of New Brunswick.

The said writ was granted by the said Chief Justice upon the following grounds:—

1. That the Provincial Secretary-Treasurer has no jurisdiction to issue the distress warrant or execution whereon the levy was made on the goods of the Security Export Company, Limited.

2. That the Liquor Exporters' Taxation Act is *ultra vires* of the Legislature of the province of New Brunswick and in violation of the British North America Act.

3. That the document in this case purporting to be a distress warrant is irregular in that it is not a formal warrant directing the Sheriff to levy the said tax with costs, but merely a letter of direction to the Sheriff to levy the said tax.

The appellant being, as seems to be admitted, lawfully engaged in the export of liquor, in course of such business stored in the King's bonded warehouse in St. John about 49,642 gallons of liquor for export to places outside the said province, upon which said Sheriff, on the 14th of August, 1922, levied by virtue of the said distress warrant.

The Appeal Division of the Supreme Court of New Brunswick having heard the questions raised upon the return of said rule nisi according to the practice provided by the Judicature Act, 1909, and order 62 thereunder, discharged said rule nisi, holding that the act of respondent in issuing said warrant was a mere ministerial act and in no sense a judicial act.

The court in so holding seems to rely upon section 9 of the said Act, which provides as follows:—

9. The Lieutenant-Governor in Council may, notwithstanding anything contained in this Act, and in so far as it is within the jurisdiction of the province so to do, make regulations, and the same repeal and amend from time to time, regarding the premises and kind of premises in which liquor shall be kept for export purposes, inspection of the said premises and the liquor kept therein, the kind and quality of liquor so kept, the marking and labelling of packages for exportation, the fixing and determining of the amount of the said tax, the cost to be allowed to the Sheriff executing any warrant of distress, the providing for the registration of all persons, firms, associations, companies and corporations carrying on a liquor export business or having liquor stored for export, and the returns to be made by them or their agents of liquor received, sold, exported and on hand, and generally all such matters and things incidental to or in any way connected with the liquor export business and the method and manner of conducting the same.

(1) Such regulations, or such parts thereof as the Lieutenant-Governor in Council shall determine, shall be published in the *Royal Gazette*, and, when so published, shall have the same force and effect as if incorporated as provisions of this Act, and the violation of or failure to comply with any such regulations shall constitute an offence and subject the offender thereof to the penalty hereinafter mentioned.

Counsel for appellant herein in the course of his argument produced a copy of the publication of such regulations; stated that same were published in the local *Royal Gazette* of the 7th of June, 1922, and that no others ever had been published; and submitted, as I think correctly, that the court could take judicial notice thereof.

The Attorney-General for New Brunswick, who appeared as counsel for respondent herein, neither pretended to deny said statements nor to challenge said submission.

He suggested mildly that the Lieutenant-Governor in Council could legally alter same from time to time as to each parcel of goods happening to come into store for exportation, and vary the tax as advised, without publication in the *Royal Gazette*.

I cannot assent thereto as a correct interpretation and construction of the Act, or of said section.

On the contrary I hold that until publication in the *Royal Gazette* such changes of regulations could have no legal effect.

I have taken the liberty of reading the said publication therein and cannot find, either that it changes the rate of taxation, or pretends to assign to any one the determination of the amount due by any exporter in respect thereof. It provides for the appointments of an inspector and assist-

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ant to give certain receipts and in many ways check exporters thereby from infringing the law. In course thereof he is to keep books and do many things, but, not in a single sentence nor altogether, is he assigned the duty of declaring anything due upon or in request of which a warrant of distress may be issued.

The fair inference to be drawn from sections 4, 6 and 7, which read as follows,—

4. The tax imposed by this Act in respect of all liquor had or kept as aforesaid at the time of the passing of this Act shall be paid to the Provincial Secretary-Treasurer within one month from the date at which said Act shall come into force, and on all liquor subsequently acquired, kept, sold or shipped as aforesaid, said tax shall be paid to the Provincial Secretary-Treasurer within fifteen days from the date when such liquor is acquired, kept, sold or shipped.

6. In default of payment within the time limited of any tax by this Act imposed, the same may be levied, with costs, by distress upon the goods and chattels, wherever found, of the person, firm, association, company or corporation liable therefor, under a warrant signed by the Provincial Secretary-Treasurer, directed to the Sheriff of any county, and the sheriff to whom the same is directed shall levy the tax and all costs, by sale of the goods and chattels of the person, firm, association, company or corporation in default, or so much thereof as may be necessary to satisfy the tax and the costs of said distress.

7. Any tax imposed by this Act may, at the option of the Provincial Secretary-Treasurer, be recovered by and in the name of the Provincial Secretary-Treasurer, by action in any court of competent jurisdiction,

coupled with the preamble reciting that the purpose of the Act was to assign to a department of the Government the control of liquor export business, is that the respondent, or he filling that office which he then filled, should decide and determine what the amount demanded should be, and, incidentally thereto, should decide when to issue a warrant of distress. In course of doing so he certainly would require to have the evidence before him to enable him to so determine and ought to act judicially in regard thereto, and he has not pretended, in his reply, above quoted, aught else, or that any one else had so decided or had the duty to decide. I infer that he might use the inspector's books and other material, as well as the bank account of his own department and record of his receipts thereby, as proper means of determining what was due from any exporter. Evidently the respondent's was the department to which the control as recited was intended to be assigned.

I am for these reasons, as well as from the bare act of deciding the truth of what is recited by him in the warrant, of the opinion that he was not in what he did or should have done, limited to discharging mere ministerial functions.

I therefore cannot agree with the court below in holding otherwise.

After reading many of the cases cited in argument and many more, I am inclined to agree with Mr. Justice White that it is almost impossible to reconcile all the cases in question, but much of the apparent conflict is due to many changes in the law governing certiorari.

And much, of all that, is cleared up by the reasoning in the modern cases to which I will presently refer, or cite.

Meantime I may point out that the learned justice speaking for the court seems to rest the decision of the court now appealed from, almost entirely upon the authority of the case of *Ex parte Taunton* (1), arising out of and resting upon what 43 Elizabeth, c. 2, section 4, provided for in regard to two Justices of the Peace issuing a distress warrant to levy the amount assessed and declared due, by the mode described in a full and amply detailed manner in previous sections of the Act.

Judgment had thereby been definitely declared and the amount due clearly ascertained. How that furnishes any analogy for what we have herein to deal with, I respectfully submit, passes my understanding. At best it was the decision of a judge in the Practice Court. Here we have no such declaration of any finding of the amount due except in this warrant of distress issued by the respondent and presumably determined by him on such material as he was *ex parte* furnished with. It seemingly combines judgment and warrant of distress in one document.

It seems rather an irregular method but that is what is complained of.

The case of *The Overseers of Staverton* v. *The Overseers of Ashburton* (2), is also referred to by Mr. Justice White, as if it turned upon the same section of said Act of Elizabeth, which it does not, as *Ex parte Taunton* (1). Instead

(1) [1836] 1 Dowl. 54.

(2) [1855] 4 E. & B. 526.

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it turned upon section 5, which deals with an entirely different subject matter, relative to the question of apprenticeship. The judgment therein is, however, very valuable for our purpose, inasmuch as it has to deal with the distinctions between what is the discharge of a judicial duty and a ministerial duty.

It was attempted therein in appeal to uphold the judgment of a court appealed from that the mere assent of two justices was a ministerial act and could not be held or called the discharge of a judicial duty.

The contention there seemed quite as plausible as that which respondent herein so successfully set up below. It was overruled therein and the court appealed from reversed and seems to point our duty to do likewise herein.

It also upheld the decision in the case of *The King* v. *Hamstall Ridware* (1), which had turned upon a like narrow distinction between what was a judicial, though contended to have been only a ministerial duty.

The counsel for appellant calls attention to the following note on page 21 of Paley on Summary Convictions, 8th ed.,

> In general the issuing of a warrant of distress or commitment is a judicial act as the party against whom it is sought should have an opportunity of showing that he has obeyed the order or conviction which the warrant is intended to enforce.

Of those cited by Paley counsel for appellant selects *Rex* v. *Benn* (2); *Harper* v. *Carr* (3); *Painter* v. *Liverpool Gas Co.* (4), and *Hammond* v. *Bendyshe* (5).

Numerous others are cited by Paley in said note but none, though distinguishing many from those just cited, which seem to help respondent herein.

The cases cited by either side herein have all been fully considered save a number of American decisions and others that would not bind us. I find that the American cases cited for the most part rest on local statutes.

The sole question that has given me most trouble was that which the court below proceeded upon. And upon that the only case respondent's counsel cites which, if still

(1) [1789] 3 T.R. 380.
(2) 6 T.R. 198.
(3) 7 T.R. 270.
(4) [1831] 3 Ad. & E. 433.
(5) [1849] 13 Q.B. 869.

law, could bind us, is the case of *Reg.* v. *Sharman; Ex parte Denton* (1), which as counsel for appellant points out, was expressly overruled by *The King* v. *Woodhouse* (2). And I find that this latter was in turn reversed by the House of Lords in *Leeds Corporation* v. *Ryder* (3). What is the result in neat law? I find much to interest as well as help in the reasoning of many judges, but nothing decisive of the case in hand.

I am quite satisfied on the foregoing cases and many others I have looked at that the act of the respondent was judicial and not ministerial and that certiorari would lie herein.

As an illustration of how wide the range of the authority of the court given the jurisdiction to issue a writ of certiorari extends, I may refer to the case of *Reg.* v. *Coles* (4).

Counsel for respondent argued that this writ of certiorari in question herein was against the Crown.

I fail to see how on the facts I have dealt with.

It certainly is against a servant of the Crown and so is every other directed to a justice of the peace, or to the Quarter Sessions, or any other inferior jurisdiction.

The Attorney-General on behalf of the respondent seemed to hint or suggest that the Lieutenant-Governor in Council in fact had directed all that was done herein.

I hope not. But if so, such fact was not proven or relied on in any way in the return made by the respondent, who responded as if he and his department were in control as much as any justice of the peace or other officer subject to the supervision of the court having the powers implied in its power to issue a writ of certiorari.

I come now to the question of the validity of the legislation.

The Provincial Legislature, according to my reading of the British North America Act, never had the power to impose either import or export duties except under and by virtue of a special reservation relative to timber and lumber, provided for by section 124 of the Act in favour of New Brunswick. That demonstrates how completely

(1) [1898] 1 Q.B. 578.
(2) [1908] 2 K.B. 501.
(3) [1907] A.C. 420.
(4) 8 Q.B. 75, in 1844.

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all concerned in framing the Act looked upon other export duties as without foundation, within the B.N.A. Act.

The exceptional privilege was cancelled by an agreement between New Brunswick and the Dominion at a price of $150,000 a year, as evidenced by the Dominion Statute 36 Vict., c. 41.

In the Attorney General's factum herein for respondent he makes no allusion to the contention set up, as the second of the grounds upon which the Chief Justice had ordered the issue of the writ and rule nisi, namely the invalidity of the said legislation in question herein by reason of its being *ultra vires*.

Yet he sets up as a reason in said factum that there is some other litigation pending which would decide the question of *ultra vires*.

Numerous cases can be found where parties have exhibited the like perversity of pursuing two different paths to find the law, when the shortest would have sufficed.

Sometimes the pursuer of both remedies found one had been taken away by legislation, but in other cases he found both had been left open, and that is so in this case, because the legislature failed to take away the writ of certiorari, though evidently quite willing to go very far.

The appellant's counsel relies upon our decision in *Martinello* v. *McCormick* (1), which, if we had in this record evidence of what is meant by the King's shop, where the liquor was stored, might in itself be conclusive against respondent.

Many other reasons might be assigned to shew how completely *ultra vires* this legislation is which seems to be quite regardless of the limits of power existent in the legislature.

I am of the opinion that this appeal should succeed and the appeal be allowed with costs here and in the Appeal Division below; the warrant quashed, and the course made clear, according to local practice, for pursuing any other remedies those concerned have resorted to or may desire to pursue.

(1) 59 Can. S.C.R. 394.

There is some question raised in my mind as to the effect of recent legislation taking away the right of appeal in cases of certiorari and making the amount involved the only test unless where leave of appeal given.

Having considered the question and seeing no point made of it by respondent, I conclude that, the amount involved far exceeding the $2,000 limit, the appeal lies.

No leave to appeal here appears in the record and I assume therefore no leave asked for.

DUFF J.—The statute under which the Secretary-Treasurer proceeded is entitled "The Liquor Exporters' Taxation Act," and the relevant enactments provide that (section 3) any person

who now has or keeps or has property rights in * * * liquors for export to any place outside the said province or who in the said province sells or ships liquors to be delivered at any place outside the said province

shall pay to the Crown a specified tax, calculated according to the quantity of liquor

now or hereafter had or kept within the province * * * or sold or shipped * * * for delivery outside

of the province; (section 4),

the tax * * * in respect of all liquor had or kept * * * at the time of the passing of this Act shall be paid * * * within one month

from the coming in force of the Act,

and on all liquor subsequently acquired, kept, sold or shipped as aforesaid

within fifteen days

from the date when such liquor is acquired, kept, sold or shipped;

the tax is to be a first lien and charge upon all the property in the province of any person liable to pay it; and by section 6, in default of payment within the time limited, the tax may be levied by distress upon the goods of the person liable

under a warrant signed by the Provincial Secretary-Treasurer, directed to the Sheriff of any county, and the Sheriff * * * shall levy the tax and all costs by sale of the goods * * * of the person in default.

I think it is quite clear that there is no duty and no authority to adjudicate in the sense of giving a binding decision as to the conditions under which the statute authorizes the issue of a warrant.

The general rule touching the office of the writ of certiorari is usually expressed by saying that it lies to remove

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acts of inferior courts and judicial acts of bodies possessing statutory jurisdiction, but it does not lie to remove acts which are merely ministerial. Obviously the application of the rule turns upon the scope of the words "judicial" and "ministerial." In applying the rule in particular cases, some judges have found the criteria of removability by developing the scope of "judicial" used in this sense, and others by considering the scope of "ministerial." What is "judicial" is not, for the purposes of the rule, "ministerial"; what is "ministerial" is not, for the purposes of the rule, "judicial."

As White J., who delivered the judgment of the New Brunswick Court of Appeal, observes, it is, perhaps, impossible to reconcile all the cases, but fortunately the subject has been discussed in modern times in judgments which have illuminated it, from which, I think, a criterion may be adduced which is sufficient to determine the question arising on this appeal.

In a case of prohibition *Reg.* v. *Local Government Board* (1), Brett L.J. (Lord Esher) said:

> Whenever the legislature entrusts to any body of persons, other than the Superior Courts, the power of imposing an obligation on individuals, the courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.

And May C.J., said, in *The Queen* v. *Corporation of Dublin* (2):

> For the purpose of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances, and imposing liability or affecting the rights of others.

The judgment containing the most valuable exposition of the subject is that of Fletcher Moulton L.J., (as he then was) in *Rex* v. *Woodhouse* (3). The Lord Justice there points out that while certiorari is often said to be applicable only to "judicial acts," the cases by which this limitation is supposed to be established shew that the words "judicial act" must be taken in a very wide sense, including many acts that would not ordinarily be termed "judicial," and his conclusion is this:

(1) [1882] 10 Q.B.D. 309 at p. 321.

(2) [1878] 2 L.R. Ir. 371, at p. 377.

(3) [1906] 2 K.B. 535

The true view of the limitation would seem to be that the term "judicial act" is used in contrast with purely ministerial acts * * * in short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law.

There is no conflict, I think, between this modern statement of the rule and that cited by Mr. Taylor from *Rex* v. *Glamorganshire* (1):

This court will examine the proceedings of all jurisdictions erected by Act of Parliament and if they under pretence of such Act proceed to encroach jurisdiction to themselves greater than the Act warrants, this court will send a certiorari to them to have their proceedings returned here to the end that this court may see that they keep themselves within their jurisdiction and if they exceed it to restrain them, and the examination of such matters is more proper for this court.

My conclusion is that the issuing of a warrant of distress by the Secretary-Treasurer in exercise of the authority given by the Act or in assumed exercise of such authority is not an act which can be described as merely ministerial. Assuming the conditions of authority to be fulfilled, he has the right and duty to decide, and the statute leaves it to his discretion, whether taxes shall be collected by means of distress or not, and the effect of his decision, the formal expression of which is the issue of the warrant, is that, always assuming the conditions of authority to exist, the person liable to pay the tax becomes subject to the additional liability to have his goods distrained and sold for the payment of what is due without previous judicial ascertainment of it. He is no mere passive instrument of the law. The liability to distress is a liability resulting from the determination of the Secretary-Treasurer that a distress warrant shall issue.

A question which will require discussion, namely, whether there is anything in the statute itself, in the terms in which the authority is given, in the special nature of the subject matter with which the statute deals, showing that the authority given the Secretary-Treasurer ought not to be regarded as judicial for our present purpose, may conveniently be postponed for a brief examination of the grounds on which the court below proceeded in holding that the warrant of the Secretary-Treasurer is not removable by certiorari. The Appeal Division followed the

(1) 1 L. Raym. p. 580.

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previous decision of the Supreme Court of New Brunswick in *The Queen* v. *Simpson* (1), in which a County Treasurer's warrant for the collection of taxes was under consideration, which proceeded largely on the authority of the decision in *Ex parte Taunton* (2), in which it was held that a warrant issued by justices for the collection of a poor-rate under the statute of Elizabeth was not removable. *Ex parte Taunton* (2) has never been expressly overruled, and no case has been referred to in which such a warrant has been held to be removable, and, moreover, no decision was cited that is necessarily inconsistent with it; and I have been unable to find any such decision prior, at least, to the year 1910. There are, moreover, decisions and weighty dicta which lend it support. In *The Queen* v. *Webber* (3), Ridley J., and Darling J., both express the opinion that the distress warrant in question in that case was a merely ministerial act. The passage cited above from the judgment of May C.J., is preceded by this sentence:

> It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant.

This judgment of May C.J., had the approval of Lord Fitzgerald at the time, and the sentence I have just quoted, together with the passage quoted before, are reproduced with approval in the judgment of Palles C.B. in *Reg.* v. *Local Government Board* the Wexford Case (4), which had the concurrence of Walker L.J., and Holmes L.J.; and Fletcher Moulton L.J., at p. 535 of the judgment already referred to, observes that

> the process of certiorari does not apply * * * to the issue of a warrant to enforce a poor-rate.

An early case, *Rex* v. *Lediard* (5), in which a warrant issued under the authority of statute was held not to be removable, on the ground that the issuing of it was a ministerial act merely, was followed in a subsequent case, *Rex* v. *Lloyd* (6).

(1) 20 N.B. Rep. 472.
(2) 1 Dowl. 54.
(3) [1899] 16 Times L.R. p. 1.
(4) [1902] 2 Ir. 349.
(5) Sayer 6.
(6) Cald. 309.

Mr. Taylor vigorously assailed the judgment in *Ex parte Taunton* (1), but I do not think it is necessary to decide, for the purposes of this appeal, whether or not the question, if it had arisen in more recent times as touching a warrant for collection of a poor-rate, would have been the same. What we are really concerned about is whether or not the decision in *Ex parte Taunton* (1) and other cognate decisions and the dicta to which I have referred furnish any rule or principle for our guidance in relation to the question now before us.

There is a most important distinction between the act of magistrates in issuing a warrant for the collection of a poor-rate and the act of the Secretary-Treasurer in issuing a warrant for the collection of the liquor tax. The jurisdiction of justices in proceedings for the recovery of a poor-rate under the Act of Elizabeth was a very peculiar one. It is quite true that it was the duty of the justices not to issue a warrant without calling upon the party whose goods it was proposed to distrain to shew cause against it; that is decided in a number of cases cited by Mr. Taylor, most of which will be found at pp. 21-22 of Paley's Summary Convictions. It is sufficient to refer to two of them: *Rex* v. *Benn* (2); *Harper* v. *Carr* (3). But while it was the duty of the justices to hear what the party affected had to say for the purpose of shewing that the rate was not a valid rate, as, for example, that though rated as an occupier, he was not an occupier, or that the land was outside the territorial jurisdiction of the rating authority, or that he was not liable to pay because he had already paid, the decision of the justices upon these points, as Parke B., points out in *Newbould* v. *Coltman* (4), was not a judicial decision, the inquiry into these matters not being a judicial inquiry, in the sense that their decision upon it was binding upon anybody and a party whose goods were distrained being consequently entitled afterwards to raise in an action the very matters which he had brought before the justices in answer to the summons, if it appeared either that the rate was an invalid rate or that the plaintiff was not liable

(1) 1 Dowl. 54.
(2) 6 T.R. 198.
(3) 7 T.R. 271.
(4) [1851] 6 Ex. 189, at page 199.

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to pay. Another striking feature of this proceeding was that if it appeared that the magistrates had jurisdiction, mandamus would lie to compel them to issue the warrant. *The Queen* v. *Bradshaw* (1); *Church Wardens of Birmingham* v. *Shaw* (2); *Reg.* v. *Marsham* (3). In *Bradshaw's Case* (1) and *Marsham's Case* (3) it was laid down in terms that the duty of the magistrates, their jurisdiction being unquestioned, was purely ministerial and having regard to the practice and the course of decision it is indisputable that, assuming the conditions of authority to exist, the magistrates in issuing such a warrant had no discretion, had no authority or duty to decide, and were mere passive instruments of the law; while any inquiry they might make as to the conditions of authority was not a judicial inquiry, and any conclusion they might reach had not the conclusive quality which is the attribute of a judicial decision. There is, indeed, a decision of a Divisional Court in the year 1910 (Lord Alverstone L.C.J., Channel and Coleridge JJ.) which suggests that the modern tendency is to regard as judicial for the relevant purpose the issue of such a warrant on the ground, perhaps, that the duty of the magistrates to inquire into the question of non-payment of the rate, for example, is a circumstance which marks the proceeding a judicial one. In the case referred to, *The King* v. *Doherty* (4), the application was to remove a warrant of commitment under a conviction which had adjudged that the defendant should be committed in default of payment of a fine, and in default of sufficient distress the fine, unknown to the defendant, had in fact been paid, and that circumstance not having been brought to the attention of the magistrate, a warrant of commitment had issued. The warrant was removed and quashed, Lord Alverstone observing,

> it is now too late for this court to hold that a warrant of commitment is not a judicial act.

It would not be easy to distinguish between a warrant of commitment under this conviction and a warrant of distress under the same conviction; nor, perhaps, is it easy to find a distinction between such a warrant of distress and a warrant of distress to enforce a poor-rate. The judg-

(1) [1860] 29 L.J. M.C. ,176.
(2) [1849] 10 Q.B. at page 881.
(3) [1922] 50 L.T., 142.
(4) [1910] 74 J.P. 304.

ment illustrates, I think, a modern tendency to enlarge the scope of certiorari. See the observations of Vaughan Williams L.J., in *Reg.* v. *Nicholson* (1).

It is useful, I think, to contrast the act of magistrates issuing a warrant for the collection of a poor-rate and the act of magistrates in assenting to the indenture of pauper apprentices under the Statute of Elizabeth. In *Staver* v. *Ashburton* (2) this latter act was held to be a judicial act. Wightman J., in the course of the argument, suggested that the true test for distinguishing between judicial acts and merely ministerial acts was to be found in the answer to the inquiry whether or not mandamus would lie. If the magistrates, assuming, of course, the conditions of their authority to exist, were entitled to withhold their hand or to act in their discretion, then mandamus would not lie, and the act would not be said to be ministerial merely.

These considerations convince me that *Ex parte Taunton* (3) and decisions like it do not afford a satisfactory guide for passing upon the point now before us. But another important question remains, and that is whether the act of the Secretary-Treasurer is an act which for the want of a better term I shall describe as "administrative" and outside the scope of certiorari. The authority given by the Act is not an authority conferred upon the Crown; it is given to the Secretary-Treasurer by his title of office, and, moreover, when the tax is sued for the action is to be brought in the name of the Secretary-Treasurer. I think it is clear that the Secretary-Treasurer acts in exercise of an authority given to him as Secretary-Treasurer by the statute. There are two decisions to which I think reference should be made in this connection. The first is the case of *Degge* v. *Hitchcock* (4), a decision of the Supreme Court of the United States. The question was whether certiorari would lie to bring up a "fraud order" made by the Postmaster General in effect prohibiting the persons against whom it was directed from using the mails. It was held that this order was not removable on two grounds: first, that as regards the conditions of the Postmaster General's author-

(1) [1899] 2 Q.B. 455.
(2) 4 E. & B. 526.
(3) 1 Dowl. 54.
(4) 229 U.S.R. 162.

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ity or any suggestion of arbitrary and therefore unauthorized exercise of statutory power, no decision of the Postmaster General on such points could be conclusive, and that the parties affected might resort to equitable process for the purpose of correcting any excess of jurisdiction or abuse of authority, and assuming jurisdiction to exist, the authority of the Postmaster General was held primarily intended to be exercised for the protection of the public, and therefore falling within a class of acts in exercise of governmental functions which under the description "administrative" had been held to be outside the scope of the remedy invoked. The other case is a decision of the High Court of Australia in *The King* v. *Arndel* (1). The question arose there in relation to an order made by the Postmaster General similar to that which came before the Supreme Court of the United States eight years later in the case just referred to. The opinion which prevailed as expressed in the judgment of Griffith C.J., at page 572, was that the order was not judicial in its character because, having regard to the nature of the subject with which the legislature was dealing and to the terms in which the authority was conferred, he drew the inference that the legislature contemplated the exercise of a duty in circumstances of emergency, and consequently without notice to the parties who might be affected. He drew the conclusion from this that the authority given by the statute could not consistently with the terms and the object of the statute be treated as "judicial" for the purpose of certiorari proceedings.

It is not without interest to observe, as appears from the report of *Degge* v. *Hitchcock* (2), that in exercising a jurisdiction of the same type the Postmaster General of the United States would be amenable to restraint by equitable process for arbitrary exercise of his jurisdiction and that, in fact, the practice in respect of such orders in the United States appears to be that they are only made there after an investigation in which the parties affected are heard.

I have considered it right to refer to these decisions, but the analogy between the questions presented for decision

(1) 3 C.L.R. 557. (2) 229 U.S.R. 162.

in these cases and the questions now before us is not sufficiently close to enable us to derive much instruction from them. There is a wide difference between the authority of the Postmaster General to regulate the business of his department by orders made for the protection of the public against fraud and immorality and the jurisdiction of the head of a department to collect a debt due to the Crown by summary process in the absence of any judicial determination of liability. Administrative the act is, perhaps, in some sense, but its predominant characteristic is that it is an extraordinary remedy for the collection of a civil debt. Urgent, no doubt, this summary process might be in an easily conceivable emergency, but I am by no means prepared to hold that under the authority of this statute the Secretary-Treasurer is entitled to disregard the principle which was held to govern magistrates in issuing a warrant under the statute of Elizabeth and to require them first to give the person affected an opportunity to question his liability.

The statute cannot contemplate the issue of the warrant without inquiry by the Secretary-Treasurer into the facts; an inquiry which, though not judicial in the sense that his decision is binding, is judicial in the sense that it aims at ascertaining the facts with a view to a possible proceeding in the nature of an execution, the issue of which execution rests in his discretion. Even assuming the facts ascertained by the Secretary-Treasurer in such a manner as to establish to his own satisfaction the existence of authority he might well in any given case conceive it to be his duty, in view of possible dispute, not to proceed *breve manu.*

On the merits, the question to be dealt with is whether the legislation in question, the Liquor Exporters' Taxation Act, is an enactment which the province had authority to pass in execution of its power to legislate in relation to the subject of "direct taxation within the province" under item (2) of section 92. The statute professes to impose a tax on everybody who has in the province liquor for export and upon everybody in the province who sells or ships liquor to be delivered at any place outside the province.

It is perhaps worth while to emphasize the point that

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the sole question we have to consider is whether the legislation can be supported as legislation under item (2), and if it properly falls within item (2) then it is clearly within the power of the province to enact. There is here no ground for suggesting, as was held in Wharton's case, that under the guise of imposing a tax for the purpose of raising a revenue the province is really attempting to enact legislation upon a subject outside of its legislative jurisdiction—the regulation of trade and commerce, for example. There is not the slightest ground for suggesting that the statute is anything other than it professes to be, namely, a taxing statute, a statute passed with the object of raising a revenue for the public purposes of the province by imposing duties upon the export of liquor and upon the sale of liquor for export.

It seems very clear, however, that the tax imposed is one which cannot be brought within the category of "direct taxation." Postponing for a moment any reference to the decisions upon the construction of this phrase as used in the British North America Act, it may be well to note that so far as one is aware there is no principle of classification of taxes as "direct" and "indirect" that has found acceptance among economists or practical financiers according to which such a tax as that in question would not fall within the class of indirect taxes. A tax on commodities, such as a customs duty, an excise duty, is mentioned by Mill as a typical indirect tax. In the Oxford Dictionary one finds the statement that a direct tax is

> one levied immediately upon the persons who are to bear the burden, as opposed to indirect taxes levied upon commodities, of which the price is thereby increased so that the persons on whom the incidence ultimately falls pay indirectly a proportion of taxation included in the price of the article.

The principle of distinction adopted, according to Professor Bastable, by "practical financiers," which regards those taxes as direct that are levied on "permanent and recurrent occasions" and those as indirect which are levied upon "occasional and particular events" would equally exclude this tax from the class of direct taxes. If, therefore, the question now arose for the first time one must, I think, have been driven to the conclusion that whether

the phrase "direct taxation" was to be read according to the sense which would be ascribed to the words by economists or by practical financiers or in popular use, the tax under discussion does not fall within it.

The phrase "direct taxation" has, however, received a construction in a series of cases beginning with *The Attorney General* v. *The Queen Ins. Co.* (1), and coming down to *Alleyn* v. *Barthe* (2), and in effect it has been authoritatively held that the definition of "direct tax" given by John Stuart Mill as one which "is demanded from the very person who it is intended or desired should pay it," is to be taken as giving the sense in which the words are used in the B.N.A. Act because, to quote the judgment of Lord Hodhouse in *Bank of Toronto* v. *Lambe* (3), this definition has appeared to the judges who have been called upon to construe the words

> to embody with sufficient accuracy * * * an understanding of the most obvious indicia of direct and indirect taxation which is a common understanding, and is likely to have been present in the minds of those who passed the Federation Act.

It was urged before us with a good deal of vigour by the Attorney General of New Brunswick that the legislature of New Brunswick was concerned only with the persons on whom the tax was levied; and indeed that the problem of determining the incidence of such a tax is one involved in so much obscurity that it cannot be assumed that the legislature acted upon any view of it, or with any view other than that of collecting the tax from the persons who by the statute are made liable to pay it.

I think it may well be doubted whether the legislature of New Brunswick was in the least concerned with the point of the ultimate incidence of the tax, but this is by no means conclusive and is of little if any relevancy to the question now raised before this court, whether or not the legislature had legislative authority to create the tax. For the purpose of applying the definition of Mill in order to decide questions arising under item (2) of section 92, one must assume that the legislature imposing the tax contemplates the normal effect of such a tax imposed in the exist-

(1) 3 App. Cas. 1090. (2) [1922] 1 A.C. 215.
(3) 12 App. Cas. 575.

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ing circumstances, and the question one must ask oneself is whether, in view of the normal effect and tendency of a given tax, it may be affirmed that the tax is demanded from the very persons who are ultimately to bear the burden of it. Normally, every addition to the cost of supply inevitably tends to increase the supply price—the price that is to say, which is sufficient to call forth the exertions necessary for producing the given quantity—and thus has a tendency to raise the market price. If the market price falls below this point permanently, then the given source of supply will inevitably be cut off. For the purpose of determining the cost of supply from a given source, there is no difference between the case of manufacture, the cost of transport, or a toll as a customs duty which must be paid in order to get the goods to market, and the seller who has to pay these things will require, if he can, the reimbursement of them in addition to his profit. No distinction of substance in this respect can be drawn between what is commonly known as a sales tax, a custom duty, an excise duty and the duties imposed by the statute now under consideration. The market price is a product of variable factors, and in particular circumstances may be such that goods are sold at a loss, but whether they are sold at a loss or at a profit, as a rule taxes on manufactured commodities which can be indefinitely reproduced enter into the factors determining the price at which the commodities are sold just as the cost of manufacture and the cost of transport do, and in the same degree.

It is therefore impossible to affirm that such a tax as this, which the taxpayer will certainly add to the price of his commodity if he can, is intended to be borne by the very persons from whom it is demanded.

ANGLIN J. (dissenting).—The purpose of these proceedings was to bring before the Supreme Court of New Brunswick a distress warrant issued by the Provincial Secretary-Treasurer under section 6 of "The Liquor Exporters' Taxation Act" of that province (1922, c. 3). This warrant was directed to the sheriff of the City and County of St. John to levy the amount of a tax imposed by section 3 of that statute on the appellant. The right to issue the warrant is chal-

lenged not because the terms of the statute did not authorize the imposition of the tax, nor because there is any question as to its amount, or as to the existence of the conditions on which liability to pay it arises under the statute (all these matters are covered by the provisions of subsections 3, 4, 8 and 9), nor because there had not been default in payment, but solely on the ground that the statute itself was *ultra vires* of the Provincial Legislature in that the tax thereby imposed is not "direct taxation." While the Provincial Secretary must satisfy himself that the tax, in respect of which he proposes to issue his warrant, is due and that the person whose goods are to be distrained is in default, he is not empowered to adjudicate upon those matters. He is merely authorized to provide for the collection of a tax actually in arrear by means of a distress warrant—and this is not without significance. *Newbould* v. *Coltman* (1).

Inasmuch as other means of effectually raising the question of the validity of the statute are available—we were told that it is presently in issue in an action in the Chancery Division of the Supreme Court of New Brunswick brought by the present appellant for equitable relief, and the right so to raise it was not questioned—and the act which it is sought to review is that of an executive officer of a provincial government (*Rex* v. *Arndel* (2)), I gravely doubt the propriety of resort being had to the extraordinary remedy of certiorari and am disposed to think the court below would have exercised a sound discretion had it set aside the writ accordingly. *Degge* v. *Hitchcock* (3).

But I am also of the opinion that the writ was properly set aside by the Appeal Division of the Supreme Court of New Brunswick on the ground that the act of the Provincial Secretary-Treasurer in issuing a distress warrant under section 6 of the "Liquor Exporters' Taxation Act" was a purely ministerial and not a judicial act. No doubt the phrase "judicial act" must be taken in a very wide sense and includes many acts not ordinarily termed judicial and of bodies not ordinarily considered to be courts. But

(1) 6 Ex. 189, 199-201. (2) 3 C.L.R. 557, 571-2.
(3) 229 U.S.R. 162, 171-2.

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I do not regard the making out and delivery of a distress warrant which a statute provides may be issued upon default in making payment of a tax by it ordained as such an act. The case of the issuing of a warrant to enforce a poor rate is clearly analogous, and to that Fletcher-Moulton L.J., said in *Rex* v. *Woodhouse* (1):

> the process of certiorari does not apply * * * even though the rate is one which could itself be questioned by certiorari.

The issuing of such a warrant in the opinion of the Lord Justice is an instance of a "purely ministerial act." Indeed it is given as a typical example of such acts in most of the authorities; Short and Mellor's Crown Practice (2 ed.), p. 42; 10 Hals. L. of E., p. 172. The issue of a warrant to the sheriff by the secretary of a county under section 86 of "The Act Respecting Rates and Taxes" (C.S.N.B., c. 170) to levy the amount of rates is a similar act. Another analogous act or series of acts is what occurs upon the signing of judgment and the issue of execution thereon by the clerk of a court under statutory provisions or rules of court authorizing him to do so upon default of appearance by the defendant to a writ of summons. In both these cases the default, including all the circumstances requisite to put the person against whom the process is to issue *in mora,* must be made to appear to the official by the prescribed proof. But his act is none the less simply ministerial. He is only required to satisfy himself that the conditions under which he is empowered to act have been shewn to exist. His conclusion that they do in fact exist binds nobody

For other instances in which the issue of process under circumstances not dissimilar has, on the ground that the act is simply ministerial, been held not to be a proper subject for certiorari reference may be made to *Rex* v. *Lediard* (2), cited with approval in *Rex* v. *Pryse-Lloyd* (3); *Ex parte Taunton* (4); *The Queen* v. *Overseers of Salford* (5); *Rex* v. *Marsham* (6); *The Queen* v. *Webber* (7). The issue of a warrant of commitment for non-payment of a fine and costs has been regarded as an act of a different

(1) [1906] 2 K.B. 501, at p. 535.
(2) Sayer 6.
(3) Cald. 309.
(4) 1 Dowl. 54.
(5) [1852] 18 Q.B. 687.
(6) 50 L.T. 142.
(7) 16 Times L.R. 1

character involving the exercise of judicial functions; *Rex* v. *Doherty* (1).

It is urged that the Provincial Secretary-Treasurer acted judicially in issuing the distress warrant in question because the statute gives him an option to withhold it and to resort to an action to enforce payment of the overdue tax (section 7). But such an exercise of judgment and discretion did not give to his decision to issue the warrant a judicial character. *The People ex rel. Corwin* v. *Walter* (2). It is the duty of the Provincial Secretary when satisfied that the tax is in arrear to take one or other of the means directed by the statute to recover it. The liability of the appellant was in no sense imposed by the Provincial Secretary's determination to issue the warrant; it arose under the statute. The existence of the right to issue the warrant no doubt depended upon a contingency and, as an executive officer, the Provincial Secretary had to determine whether or not the contingency had happened. But, notwithstanding the necessity for such determination, the exercise of the power remained a ministerial act. *The Queen* v. *Dublin* (3); *Reg. (Wexford C.C.)* v. *Local Government Board* (4); *Rex* v. *Kerry County Council* (5). The Provincial Secretary's determination does not bind. The happening of the contingency may be questioned in an action brought to try the validity of the act done under the alleged exercise of the power. ([1902] 2 Ir. R. 374.)

Nor were the rights of the appellant affected by the action of the respondent *per se*. The only right involved in what he did was his own right as an executive officer of the Crown to choose as between the two remedies available under the statute; one or the other it was his duty to take. In making the choice he may have been influenced by considerations of policy and expediency to which effect quite properly would be given in discharging such an administrative duty, but which may not be fit grounds for judicial action. Having said that

certiorari is the process by which the High Court controls the exercise of jurisdiction by inferior courts. For our purpose "judicial" must include juridical,

(1) 74 J.P. 304.
(2) 68 N.Y. 403, 410.
(3) 2 L.R. Ir. 371, 376.
(4) [1902] 2 Ir. 349, 373-4, 383-4.
(5) [1905] 2 Ir. 299, 303.

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Fitzgibbon L.J. (1), after quoting the words of Brett L.J. in *The Queen* v. *Local Government Board* (2)—an application for prohibition,—

> wherever the legislature entrusts to any body of persons other than the Superior Courts the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given them by Act of Parliament,

and the definition of a "judicial act" given by May C.J. in the Dublin case (supra),—

> an act done by a competent authority upon the consideration of facts and circumstances, and imposing liability or affecting the rights of others,

proceeds:

> These statements have been criticized but, as applied to the cases under consideration, I respectfully venture to say that they appear to me to be right. They were made in cases where the acts considered were done in the exercise, or assumed exercise, of judicial, as distinguished from any other authority. Ministerial and administrative acts may be done by courts as well as by others; they may involve consideration of facts and circumstances; they may impose liabilities and may effect rights; and yet such acts may not be controlled by certiorari. Therefore, the statements which I have quoted must be confined to acts involving the exercise, or assumed exercise, of some jurisdiction.

There was in this case no exercise, or assumed exercise, of jurisdiction in the sense in which the Lord Justice uses that term.

I am, for these reasons, of the opinion that it was properly held by the Supreme Court of New Brunswick that the remedy of certiorari is not available and that this appeal should, accordingly, be dismissed.

BRODEUR J.—A preliminary question has been raised as to whether the act of the Secretary-Treasurer of the province of New Brunswick, the Honourable Mr. Hetherington, in issuing the warrant of distress is purely ministerial and not judicial.

The court below held that he acted ministerially and that consequently the writ of certiorari does not lie.

To decide this question we have to consider the legislation passed by the legislature of New Brunswick in 1922 and called "The Liquor Exporters' Taxation Act."

By this Act, section 3, a tax of $1.25 a gallon is imposed on a person or company having in the province liquors for export to any place outside the province. The tax has to

(1) [1902] 2 Ir., at p. 383. (2) [1882] 10 Q.B.D. 309, at p. 321.

be paid within a certain delay (section 4); and if there is default of payment within this delay, the tax may be levied by distress upon the goods of the person liable under a warrant signed by the Provincial Secretary-Treasurer directed to the sheriff (section 6), or the Secretary-Treasurer may at his option take an action in his name before a court of competent jurisdiction to recover the amount of the tax (section 7). By section 9 the Lieutenant-Governor in Council is authorized to make regulations as to the premises in which liquor shall be kept for export, as to its inspection, its kind and quality and marking, as to the registration of all firms and persons carrying out the business and as to "the fixing and determining of the amount of the said tax."

We have nothing before us shewing how the amount of the tax mentioned in the distress warrant has been determined. The Secretary-Treasurer has not thought advisable to submit the question to the courts as he had the option to do under section 7 of the Act; he has preferred to proceed against the appellant company by distress warrant.

Before issuing this distress warrant the Secretary-Treasurer had to satisfy himself that the appellant company had in its possession a certain quantity of liquor, that it had property rights in the liquor kept, that it was liable for the tax claimed, that there had been a demand for payment and default on the part of the debtor and that the law which he had as a Minister of the Crown to carry out was within the competency of the legislature.

All these questions could have been submitted at his discretion to the courts of the land to be determined but he has preferred to proceed by distress warrant, and it cannot be seriously contended for one moment that he did not then himself determine those questions of fact and of law before taking such a serious step as to levy the tax by distress upon the goods of the person liable. All those circumstances shew that he could not issue the warrant without determining those different questions. He has, upon consideration of facts and circumstances, imposed a liability and has affected the rights of the appellant company

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and consequently has made a judicial determination. *The Queen* v. *Corporation of Dublin* (1).

Anybody who possesses authority from the legislature to perform judicial acts constitutes a court so as to be amenable to the writ of certiorari (*Rex* v. *Woodhouse* (2)). It has been in England a question whether certiorari lies as to the licensing justices. *Reg.* v. *Sharman* (3), and *Reg.* v. *Bowman* (4), are authority for the proposition that the licensing justices under the law as it existed before the licensing Act of 1904 were acting in an administrative capacity and that certiorari would not lie. But in the case of *Rex* v. *Woodhouse* (2), these decisions of *In re Sharman* (3) and *In re Bowman* (4) were not followed; and it was decided that the acts of the licensing justices were judicial acts and that certiorari lies in respect of them.

I was inclined to think at first that the acts of members of an executive council in a province were not amenable before the courts by way of certiorari; but in the very recent cases of *The Board of Education* v. *Rice* (5), and of *Local Government Board* v. *Arlidge* (6) it was decided that in a question which was the subject of an appeal to those departments, though it should not be considered as being tried, an opportunity should be given to the parties in the controversy to be heard; and if the boards failed in that duty their orders might be subject of certiorari. See also *The Queen* v. *Local Government Board* (7).

It seems to me that the decision of the Provincial Secretary-Treasurer of New Brunswick in issuing the warrant in question may be considered as a judicial act subject to review by certiorari.

As to the issuing of warrants, it has been decided that they are not judicial acts in the following old cases: a warrant to apprehend an offender *Rex* v. *Lloyd* (8); *Rex* v. *Lediard* (9); a warrant to levy a poor-rate *Ex parte Taunton* (10); a warrant for the maintenance of order *Rex* v. *Webber* (11). But we find also that the following warrants

(1) 2 L.R. Ir. 371.
(2) [1906] 2 K.B. 501.
(3) [1898] 1 Q.B. 578.
(4) [1898] 1 Q.B. 663.
(5) [1911] A.C. 179.
(6) [1915] A.C. 120.
(7) [1902] 2 Ir. 349.
(8) Cald. 309.
(9) Sayer 6.
(10) 1 Dowl. 54.
(11) 16 Times L.R. 1.

have been held judicial acts; a search warrant under 48-49 V, ch. 69, which relates to the protection of women and girls *Hope* v. *Evered* (1); a warrant of arrest under the same act *Lea* v. *Charrington* (2).

It has been decided in England, in a case almost similar to this one, that the certificate given by commissioners of income tax authorizing repayment of sums paid in respect of income tax may be removed by certiorari in order to be quashed. *Rex* v. *City of London Commissioners of Income Tax* (3).

For these reasons, I consider that the writ of certiorari would lie.

We have then to decide the main issue which has been raised by the appellant company as to whether this legislation imposing a duty on liquor to be exported is *ultra vires*. On this point I need not repeat what has been so well said by my brother Duff, in whose view I concur, that this tax is *ultra vires*.

For these reasons the appeal should be allowed with costs of this court and of the court below.

MIGNAULT J. (dissenting).—While at common law certiorari lies only to review proceedings of a judicial or quasi-judicial nature, it is very difficult, if not impossible, to define with absolute precision what are judicial or quasi-judicial acts (Corpus Juris. *Certiorari*, no. 68, vol. 11, p. 121). There is no doubt the term "judicial" or "quasi-judicial" is here used in a very wide sense, but on the other hand if the act be a purely ministerial one, certiorari certainly does not lie. As said by Fletcher-Moulton L.J., in *Rex* v. *Woodhouse* (4):

> The true view of the limitation would seem to be that the term "judicial act" is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law.

The instance suggested by Fletcher-Moulton L.J., the issue of a warrant to enforce a rate where certiorari does

(1) 17 Q.B.D. 338.
(2) 23 Q.B.D. 45.
(3) 91 L.T. 94.
(4) [1906] 2 K.B. 501, at p. 535.

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not lie, although the rate itself could be questioned by that process, is most pertinent in the present case, for here the act attacked is a distress warrant to enforce a tax, and it is hard to distinguish this case from the instance suggested by the learned judge.

There are no doubt cases under statutes requiring the assent of two justices for the issue of a warrant, where the giving of this assent, when there was no inquiry and judicial act preliminary to the assent of the justices, was held to be a judicial act. *The King* v. *Inhabitants of Hamstall Hidware* (1); *Overseers of Staverton* v. *Overseers of Ashburton* (2); *Harper* v. *Carr* (3). But such cases are clearly distinguishable from the one under consideration, the statute here giving the respondent no discretion to refuse to collect the tax when the contingency provided for has happened.

This appears to me the deciding factor in this case as to the possibility of attacking by certiorari the distress warrant issued by the respondent. Section 6 of 12 Geo. V, ch. 3 (New Brunswick) states that in default of payment within the time limited (by the statute) of any tax by the Act imposed, the same may be levied under a warrant signed by the Provincial-Treasurer directed to the sheriff. Section 7, it is true, gives the Secretary-Treasurer the option of taking an action to recover the tax in any court of competent jurisdiction. But he must do one thing or the other, issue the warrant or take action before the courts, and in so doing his act is of a purely ministerial and administrative character and in no wise a judicial one. He does not determine the liability of the taxpayer, he decides nothing, he merely issues a warrant or takes an action to recover a tax imposed by the statute. Should he institute an action to collect the tax it would not be contended that his act was a judicial one. And if that be so, the mere signing of a warrant under which the sheriff proceeds to levy the tax, which decides no question of liability but only puts the machinery of the law into motion, is surely not a judicial act.

(1) 3 T.R. 380. (2) 4 E. & B. 526.

(3) 7 T.R. 270.

On this ground, I think the appeal fails. The substantial question of the validity of this statute, which cannot be determined upon these proceedings, is, I understand, in issue before the New Brunswick courts in another action. This lessens the regret that I would otherwise feel to have to dispose of this case on the rather technical ground that the appellant misconceived its remedy when it attacked the distress warrant by certiorari. There does not appear, however, any possibility of avoiding the conclusion that this is not a case for certiorari.

The appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Fred. R. Taylor.*
Solicitor for the respondent: *H. C. Ramsey.*