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HOUSE OF LORDS

PADFIELD AND OTHERS

v.

MINISTER OF AGRICULTURE, FISHERIES AND FOOD

AND OTHERS

Lord reid.
Lord Morris of Borth-y-Gest
Lord Hodson
Lord Pearce
Lord Upjohn

Lord Reid

MY LORDS,

Since 1933 there has been in operation a Milk Marketing Scheme for England and Wales made under Statutory provisions now contained in the consolidating Agricultural Marketing Act 1958. Under that scheme pro-

ducers are bound to sell their milk to the Milk Marketing Board and that Board periodically fixes the prices to be paid to the producers. England and Wales is divided into eleven regions. In each region producers receive the same price but there is a different price for each region. One reason for (his is that the cost to the Board of transporting milk from the producers' farms to centres of consumption is considerably greater for some regions than for others. The lowest price is paid to producers in the Far Western Region and the highest is paid to producers in the South Eastern Region : prices paid in the other nine regions vary but fall between these two extremes. The present differentials between the regions were fixed many years ago when costs of transport were much lower. For the last ten years or so South Eastern producers have been urging the Board to increase these differentials but without success. It appears that the present differential between the South East and the Far West is 1-19 pence per gallon : South Eastern producers contend that the figure should be in the region of 31/2 pence per gallon. As the total sum available to the Board to pay for the milk they buy in all the regions is fixed each year, giving effect 10 the contention of the South Eastern producers would mean that they and perhaps the producers in some other regions would get higher prices, but producers in the Far West and several other regions would get less.

This matter has been considered by two independent committees and their recommendations would, at least to some extent, favour the contention of the South Eastern producers. I only mention this fact because it shews that their contention cannot be dismissed as wholly unreasonable or inconsistent with the general Scheme.

The Milk Marketing Board is comprised of twelve members from the legions, three elected by all producers in the country and three appointed by the Minister. The Board of course acts by a majority of its members. It is said that members each have in mind, quite properly, the interests of their constituents, that the adoption of the proposals of the South Eastern producers would be against the financial interests of the constituents of most of the members, and that the experience of the last ten years shews that the South Eastern producers cannot hope to get a majority on the Board for their proposals.

The 1958 Act provides two methods by which persons aggrieved by the Board's actions can seek a remedy. The first is arbitration. The South Eastern producers attempted to invoke that remedy but it is now common ground that arbitration would be inappropriate. To give effect to their contention would require a readjustment of the price structure all over the country and this could not be achieved by arbitration.

The other possible remedy is that provided by section 19 of the 1958 Act which is in these terms :

> "(1) The Minister shall appoint two committees (hereafter in this Act referred to as a ' consumers' committee' and a ' committee of " investigation') for Great Britain, for England and Wales and for " Scotland respectively.

" (2) A consumers' committee shall—

" *(a)* consist of a chairman and of not less than six other

" members, who shall be such persons as appear to the Minister,
" after consultation as to one member with the Co-operative
" Union, to represent the interests of the consumers of all the
" products the marketing of which is for the time being regulated
" by schemes approved by the Minister ; and

" *(b)* be charged with the duty of considering and reporting
" to the Minister on—

" (i) the effect of any scheme approved by the Minister,
" which is for the time being in force, on consumers of
" the regulated product; and

" (ii) any complaints made to the committee as to the
" effect of any such scheme on consumers of the regulated
" product.

" (3) A committee of investigation shall—

" *(a)* consist of a chairman and either four or five other
" members ; and

" *(b)* be charged with the duty, if the Minister in any case so
" directs, of considering, and reporting to the Minister on, any
" report made by a consumers' committee and any complaint
" made to the Minister as to the operation of any scheme which,
" in the opinion of the Minister, could not be considered by a
" consumers' committee under the last foregoing subsection.

" (4) On receiving the report of a committee of investigation under
" this section the Minister shall forthwith publish the conclusions of the
" committee in such manner as he thinks fit.

" (5) For the purpose of enabling any committee appointed under
" this section to consider any matter which it is their duty under
" this section to consider, the board administering the scheme to which
" the matter relates shall furnish the committee with such accounts and
" other information relating to the affairs of the board as the com-
" mittee may reasonably require, and shall be entitled to make repre-
" sentations to the committee with respect to the matter in such manner
" as may be prescribed by regulations made by the Minister under this
" Part of this Act with respect to the procedure of the committee.

" (6) If a committee of investigation report to the Minister that any
" provision of a scheme or any act or omission of a board administering
" a scheme is contrary to the interests of consumers of the regulated
" product, or is contrary to the interests of any persons affected by the
" scheme and is not in the public interest, the Minister, if he thinks fit
" so to do after considering the report—

" *(a)* may by order make such amendments in the scheme as he
" considers necessary or expedient for the purpose of rectifying
" the matter;

" *(b)* may by order revoke the scheme;

" *(c)* in the event of the matter being one which it is within the
" power of the board to rectify, may by order direct the board
" to take such steps to rectify the matter as may be specified
" in the order, and thereupon it shall be the duty of the board

" forthwith to comply with the order.

" Before taking any action under this subsection the Minister shall give
" the board notice of the action which he proposes to take and shall
" consider any representations made by the board within fourteen days
" after the date of the notice.

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" (8) Any order made under paragraph *(a)* of subsection (6) of this
" section, under paragraph *(c)* of that subsection or under the last
" foregoing subsection shall be subject to annulment in pursuance of a
" resolution of either House of Parliament, and any order made .under
" paragraph *(b)* of the said subsection (6) shall not take effect unless it
" has been approved by a resolution of each House of Parliament."

With a view to getting the Minister to take action under this section the present Appellants, who are office bearers of the South Eastern regional committee of the Board, approached the Minister and met officials of the Ministry on 30th April 1964. The outcome of that meeting was unsatisfactory to them and on 4th January 1965 their solicitors wrote to the Minister making a formal complaint and asking that the complaint be referred to the Committee of Investigation. The nature of the complaint was stated thus:

"4. These acts and/or omissions of the Board *(a)* are contrary to
" the proper and reasonable interests of producers in the South-Eastern
" region and of other producers near large liquid markets, all of whom
" are persons affected by the scheme, and *(b)* are not in the public
" interest.
" . . . . . .

"6. *As to (a) in para.* 4 *above*

" It is contrary to the reasonable and proper interests of the producers
" referred to in para. 4 above that (in addition to the other contribu-
" tions they properly made under the scheme) they should make a con-
" tribution to the marketing costs of reaching the liquid markets from
" the more distant parts of the country which are properly attributable
" to producers in those more distant parts and which should be borne
" by such producers.

" 7. *As to (b) in para.* 4 *above*

" (i) the cross-subsidy set out above has caused or contributed to
" and will cause or contribute to an unreasonable alteration in the
" balance of production, reducing growth in the nearer areas and in-
" creasing it in the more distant. This has tended and will tend to
" increase the total marketing costs to the public detriment.

" (ii) it is not in the public interest to continue a system of pricing
" which unduly favours one set of producers as against others."

To this letter the Minister's private secretary replied on the 23rd March 1965:

" The Minister has asked me to reply to your letter of 4th January
" in which you made a complaint on behalf of Messrs. G. Padfield,
" G. L. Brock and H. Steven, against the Milk Marketing Board, and

" requested that the complaint should be referred to the Committee of
" Investigation.

" The Minister's main duty in considering this complaint has been
" to decide its suitability for investigation by means of a particular
" procedure. He has come to the conclusion that it would not be
" suitable. The complaint is of course one that raises wide issues
" going beyond the immediate concern of your clients, which is pre-
" sumably the prices they themselves receive. It would also affect the
" interests of other regions and involve the regional price structure as
" a whole.

" In any event the Minister considers that the issue is of a kind
" which properly falls to be resolved through the arrangements avail-
" able to producers and the Board within the framework of the Scheme
" itself. Accordingly he has instructed me to inform you that he is
" unable to accede to your clients' request that this complaint be
" referred to the Committee of Investigation under section 19 of the
" Act."

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And in reply to a further letter an official of the Minister replied on 3rd May 1965:

" I am directed to reply to your letter of 9th April addressed to the
" Minister's Private Secretary.

" You will appreciate that under the Agricultural Marketing Act
" 1958 the Minister has unfettered discretion to decide whether or not
" to refer a particular complaint to the Committee of Investigation.
" In reaching his decision he has had in mind the normal democratic
" machinery of the Milk Marketing Scheme, in which all registered
" producers participate and which governs the operations of the
" Board."

Thereafter the Appellants applied to the Court for an Order of *Mandamus* commanding the Minister to refer this complaint to the Committee of Investigation.

On 3rd February 1966 a Divisional Court (Lord Parker L.CJ. and Sachs and Nield JJ.) made an order against the Minister but on 27th July 1966 this order was set aside by the Court of Appeal by a majority (Diplock and Russell LJJ., Lord Denning M.R. dissenting).

The question at issue in this appeal is the nature and extent of the Minister's duty under section 19(3)*(b)* of the 1958 Act in deciding whether to refer to the Committee of Investigation a complaint as to the operation of any scheme made by persons adversely affected by the scheme. The Respondent contends that his only duty is to consider a complaint fairly and that he is given an unfettered discretion with regard to every complaint either to refer it or not to refer it to the committee as he may think fit. The Appellants contend that it is his duty to refer every genuine and substantial complaint, or alternatively that his discretion is not unfettered and that in this case he failed to exercise his discretion according to law because his refusal was caused or influenced by his having misdirected himself in law or by his having taken into account extraneous or irrelevant con-

siderations.

In my view the Appellants' first contention goes too far. There are a number of reasons which would justify the Minister in refusing to refer a complaint. For example he might consider it more suitable for arbitration, or he might consider that in an earlier case the committee of investigation had already rejected a substantially similar complaint, or he might think the complaint to be frivolous or vexatious. So he must have at least some measure of discretion. But is it unfettered?

It is implicit in the argument for the Minister that there are only two possible interpretations of this provision—either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court. So it is necessary first to construe the Act.

When these provisions were first enacted in 1931 it was unusual for Parliament to compel people to sell their commodities in a way to which they objected and it was easily foreseeable that any such scheme would cause loss to some producers. Moreover, if the operation of the scheme was put in the hands of the majority of the producers, it was obvious that they might use their power to the detriment of consumers, distributors or a minority of the producers. So it is not surprising that Parliament enacted safeguards.

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The approval of Parliament shews that this scheme was thought to be in the public interest, and in so far as it necessarily involved detriment to some persons, it must have been thought to be in the public interest that they should suffer it. But in sections 19 and 20 Parliament drew a line. They provide machinery for investigating and determining whether the scheme is operating or the Board is acting in a manner contrary to the public interest.

The effect of these sections is that if, but only if, the Minister and the Committee of Investigation concur in the view that something is being done contrary to the public interest the Minister can step in. Section 20 enables the Minister to take the initiative. Section 19 deals with complaints by individuals who are aggrieved. I need not deal with the provisions which apply to consumers. We are concerned with other persons who may be distributors or producers. If the Minister directs that a complaint by any of them shall be referred to the Committee of Investigation, that committee will make a report which must be published. If they report that any provision of this scheme or any act or omission of the Board is contrary to the interests of the complainers *and* is not in the public interest then the Minister is empowered to take action, but not otherwise. He may disagree with the view of the Committee as to public interest, and, if he thinks

that there are other public interests which outweigh the public interest that justice should be done to the complainers, he would be not only entitled but bound to refuse to take action. Whether he takes action or not, he may be criticised and held accountable in Parliament but the Court cannot interfere.

1 must now examine the Minister's reasons for refusing to refer the Appellants' complaint to the Committee. I have already set out the letters of 23rd March and 3rd May 1965. I think it is right also to refer to a letter sent from the Ministry on 1st May 1964 because in his affidavit the Minister says he has read this letter and there is no indication that he disagrees with any part of it. It is as follows:

" My colleague Mr. Jones-Parry and I had the opportunity of
" discussing with you a day or two ago a matter which you first raised
" with the Ministry at the end of January, namely, what means the
" Ministry could suggest for investigating and remedying the grievance
" felt by your Committee concerning the regional price of milk in the
" south-east.

" 2. We explained that, as it seemed to us, the only procedure avail-
" able would be for a group of producers in the south-east to formulate
" a complaint within the terms of section 19 of the Agricultural Market-
" ing Act 1958 and request the Minister to refer this to the Committee
" of Investigation. We made it clear, however, that the Minister is
" not bound so to refer any complaint and has discretion to decide
" whether to do so.

" 3. In considering how to exercise his discretion the Minister would,
" amongst other things, address his mind to the possibility that if a
" complaint were so referred and the Committee were to uphold it,
" he in turn would be expected to make a statutory order to give effect
" to the Committee's recommendations. It is this consideration, rather
" than the formal eligibility of the complaint as a subject for investiga-
" tion, that the Minister would have in mind in determining whether
" your particular complaint is a suitable one for reference to the
" Committee. We were unable to hold out any prospect that the
" Minister would be prepared to regard it as suitable.

"4. The reasons which led us to this conclusion were explained to
" you as follows:

" *(a)* The guarantee given to milk producers under the Agriculture
"Acts is a guarantee given to the Board on behalf of all pro-
" ducers. The Minister owes no duty to producers in any

" particular region, and this is a principle that would be
" seriously called into question by the making of an Order
" concerned with a regional price ;

" *(b)* Such action would also bring into question the status of the
" Milk Marketing Scheme as an instrument for the self-
" government of the industry and such doubt would also, by
" extension, affect the other Marketing Schemes as well; and

" *(c)* It is by no means clear that the Minister could make an Order
" pertaining to the price of milk in the south-east without deter-
" mining at least one of the major factors governing prices in
" the other regions, and he would therefore be assuming an
" inappropriate degree of responsibility for determining the
" structure of regional prices throughout England and Wales.

" 5. I wish to point out that the statement of these reasons is not
" intended to imply an assessment of the merits of your complaint
" considered as an issue of equity among regions."

The first reason which the Minister gave in his letter of 23rd March 1965 was that this complaint was unsuitable for investigation because it raised wide issues. Here it appears to me that the Minister has clearly misdirected himself. Section 19(6) contemplates the raising of issues so wide that it may be necessary for the Minister to amend a scheme or even to revoke it. Narrower issues may be suitable for arbitration but section 19 affords the only method of investigating wide issues. In my view it is plainly the intention of the Act that even the widest issues should be investigated if the complaint is genuine and substantial, as this complaint certainly is.

Then it is said that this issue should be " resolved through the arrange-
" ments available to producers and the Board within the framework of the
" scheme itself". This re-states in a condensed form the reasons given in paragraph 4 of the letter of the 1st May 1964 where it is said " the Minister
" owes no duty to producers in any particular region ", and reference is made to the " status of the Milk Marketing Scheme as an instrument for
" the self-government of the industry ", and to the Minister " assuming an inappropriate degree of responsibility ". But, as I have already pointed out, the Act imposes on the Minister a responsibility whenever there is a relevant and substantial complaint that the Board are acting in a manner inconsistent with the public interest, and that has been relevantly alleged in this case. I can find nothing in the Act to limit this responsibility or to justify the statement that the Minister owes no duty to producers in a particular region. The Minister is, I think, correct in saying that the Board is an instrument for the self-government of the industry. So long as it does not act contrary to the public interest the Minister cannot interfere. But if it does act contrary to what both the Committee of Investigation and the Minister hold to be the public interest the Minister has a duty to act. And if a complaint relevantly alleges that the Board has so acted, as this complaint does, then it appears to me that the Act does impose a duty on the Minister to have it investigated. If he does not do that he is rendering nugatory a safeguard provided by the Act and depriving complainers of a remedy which I am satisfied that Parliament intended them to have.

Paragraph 3 of the letter of 1st May 1964 refers to the possibility that if the complaint were referred and the Committee were to uphold it, the Minister " would be expected to make a statutory order to give effect to
" the Committee's recommendations ". If this means that he is entitled to refuse to refer a complaint because if he did so he might later find himself in an embarrassing situation, that would plainly be a bad reason. I can see an argument to the effect that if, on receipt of a complaint, the Minister can satisfy himself from information in his possession as to the merits of the complaint, and he then chooses to say that, whatever the Committee

might recommend, he would hold it to be contrary to the public interest to

take any action, it would be a waste of time and money to refer the complaint to the Committee. I do not intend to express any opinion about that because that is not this case. In the first place it appears that the Minister has come to no decision as to the merits of the Appellants' case, and secondly the Minister has carefully avoided saying what he would do if the Committee were to uphold the complaint.

It was argued that the Minister is not bound to give any reasons for refusing to refer a complaint to the Committee, that if he gives no reasons his decision cannot be questioned, and that it would be very unfortunate if giving reasons were to put him in a worse position. But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the Court must be entitled to act.

A number of authorities were cited in the course of the argument but none appears to me to be at all close to the present case. I must however notice *Julius* v. *Lord Bishop of Oxford 5* App. Cas 214 because it was largely relied on. There the statute enacted that with regard to certain charges against any Clerk in Holy Orders it " shall be lawful " for the Bishop of the diocese " on the application of any party complaining thereof" to issue a commission for enquiry.

It was held that the words " it shall be lawful" merely conferred a power. " But there may be something in the nature of the thing empowered to be " done, something in the object for which it is to be done, something " in the conditions under which it is to be done, something in the title of " the person or persons for whose benefit the power is to be exercised, which " may couple the power with a duty, and make it the duty of the person " on whom the power is reposed, to exercise that power when called upon " to do so " (per Lord Cairns at page 223). Lord Penzance said that the true question was whether regard being had to the person enabled, to the subject matter, to the general objects of the statute and to the person or class of persons for whose benefit the power was intended to be conferred, the words do or do not create a duty (page 229), and Lord Selborne said that the question was whether it could be shown from any particular words in the Act or from the general scope and objects of the statute that there was a duty (page 235). So there is ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended.

In *Julius'* case no question was raised whether there could be a discretion but a discretion so limited that it must not be used to frustrate the object of the Act which conferred it; and I have found no authority to support the unreasonable proposition that it must be all or nothing—either no discretion at all or an unfettered discretion. Here the words " if the Minister " in any case so directs " are sufficient to show that he has some discretion but they give no guide as to its nature or extent. That must be inferred

from a construction of the Act read as a whole, and for the reasons I have given I would infer that the discretion is not unlimited, and that it has been used by the Minister in a manner which is not in accord with the intention of the Statute which conferred it.

As the Minister's discretion has never been properly exercised according to law, I would allow this appeal. It appears to me that the case should now be remitted to the Queen's Bench Division with a direction to require the Minister to consider the complaint of the Appellants according to law. The rder for costs in the Divisional Court should stand. The Appellants should lave their costs in the Court of Appeal but as extra expense was caused this House by an adjournment of the hearing at their motion they should only have two-thirds of their costs in this House.

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Lord Morris of Borth-y-Gest

MY LORDS,

Pursuant to decisions of policy which have been the basis of Agricultural Marketing Acts since 1931 there have been various marketing schemes. The producers of an agricultural product are themselves entitled to submit a Scheme to the Minister of Agriculture for the regulation and marketing of a product. There may be a Board to administer the Scheme. Subject to compliance with certain conditions the Minister may approve such a Scheme. A Scheme is to be one for regulating the marketing of a product " by the producers thereof". The present case concerns one such Scheme, namely the Milk Marketing Scheme. There has been a Scheme in operation since 1933. It was then approved by the Minister and has since from time to time been amended. It is manifest that a Scheme will be more acceptable to some producers of milk than to others. The advantage of having a buyer for all the milk which a producer produces will appeal to those who otherwise would have produced more than they could sell. There will be no such advantage for those so placed that they could have a sure and ready market for all that they could produce. If prices are fixed regionally, and are fixed having regard to the average of transport and marketing costs within the region, there will be some within the region who could assert that their costs if they had been left to themselves would have been less than those of others. If in fixing prices regionally it is not deemed advisable fully to reflect the variations as between regions of transport and marketing costs then it follows that encouragement to production is being given to certain regions at the expense of others. Within the regions, therefore, as well as within the industry, the interests of some producers are being advantaged at the expense of other producers. The less fortunate are being helped by the more fortunate.

The latter may not welcome the policy which brings about such a result. They may see no reason why they should not have more and others less.

They may object to a system under which they are in substance contributing to a subsidy to others. Yet all this may be one of the results of having a Scheme.

The Milk Marketing Scheme is administered by a Board. It has twelve regional representatives (one for each of ten regions and two for the eleventh region). Those regional members of the Board are elected by the registered producers (paragraph 16 of the Scheme). In addition there are three special members elected by all registered producers and not less than two and not more than three persons appointed by the Minister. The Scheme provides (by paragraph 24) that questions arising at any meeting of the Board are to be decided by a majority of the votes of members present. There are Regional Committees whose duty it is to report to or to make representations to the Board on the operation of the Scheme in relation to the producers in the region. (Paragraph 31.) On the coming into force of the Scheme a poll of registered producers had to be taken on the question whether the Scheme was to remain in force. (Paragraph 44.) Under the statutory provisions (Section 1 subsection (8) of the Act of 1931 now Section 2 subsection (7) of the Act of 1958) the Scheme had to be laid before Parliament. The Board has wide powers to regulate marketing (paragraph 60). If the Board requires registered producers to sell any milk only to the Board then " the Board shall from time to time prescribe the " terms on which and the price at which such milk shall be sold to the " Board and may also prescribe the form in which contracts for the sale of " such milk to the Board shall be made " (paragraph 64). The Board may prescribe different terms, prices and forms of contract for different classes of producers or classes of sale or descriptions of milk.

Two things are apparent. One is that the Scheme provides for government of the industry by the industry. The second is that no machinery is provided whereby the work of the Board could be over-ruled by some reviewing body in regard to such matters as terms of sale and price fixation.

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The Appellants are three producers in one region (the South Eastern Region). They have the support of most, or nearly all, of the other producers in that region. In substance they say that the price being paid to them should be higher. They complain of the operation of the Scheme. They asked (by a letter of the 4th January 1965) that their complaint should be referred to the Committee of Investigation which has been appointed under the Act. It is important to note their complaint. It was " of certain acts and/or omissions in prescribing (under paragraph 64 of the " Scheme) the terms on which and the price at which milk shall be sold " to the Board, in that the Board should, but do not, take fully into account " variations as between producers in the costs of bringing their milk to a " liquid market whether such costs are incurred or not". They set out figures showing that the range of variation (between regions) of producers' net prices is 1.19 pence per gallon, whereas the range of variation (between regions) of true marketing costs is considerably higher (3.37 pence per gallon in 1961-62 and probably 3.66 pence per gallon in 1963-64). The costs in the South Eastern region are the lowest.

The cost of transporting milk is naturally at its lowest in regions where the producers are near to centres of population and the Milk Marketing

Board pay a higher price at the farm gate to producers in those regions than to producers in other regions. This is known as a differential. Producers in the South Eastern region receive a higher regional differential than do producers in any of the other regions.

The complaint as formulated would imply that there should be varying differentials as between all producers, but the case proceeded on the basis that there should be no variation in the differential as between the producers in a particular region.

It would seem probable that the essential facts and figures relating to the complaint are either well known or are readily ascertainable. It is quite clear that in the fixing of prices it must have been decided by the Board that they would not take regional variations of transport costs " fully" into account. That decision, if taken in good faith, must have been a policy decision. It must also be the case that the members of the Board who fixed the prices must have been fully aware of the contentions of the Appellants. Every member of the Board must have heard the competing contentions for and against the Board's policy advanced and recited over and over again. They have been canvassed over the years. It has been for the Board to decide as a matter of policy whether regional prices should or should not " take fully into account variations as between producers in " the costs of bringing their milk to a liquid market ". Wider issues of policy are, in turn, involved. The Appellants in their letter to the Minister have suggested that the price fixations of the Board will have the result of " reducing growth in the nearer areas and increasing it in the more distant" and they suggest that this will tend to increase the total marketing costs to the public detriment. It may or it may not be a good thing to increase production in the more distant areas. It may or it may not be in the public interest to encourage such production. It is no part of our province to attempt to assess the weight of the competing public interests which are involved or to consider whether the policy decisions of the Board will or will not in the long run enure to the public advantage. The Board may or may not have reached the widest decision. It is, however, manifest that the Board's decisions have been deliberate. There is no suggestion that the Board have not acted in entire good faith. Nor is it said that they have exceeded their powers under the Scheme as approved. When in 1964 the Appellants made a suggestion to the Board that there should be an arbitration the Board, through their Solicitors in a letter (dated the 18th June 1964) to the Appellants' Solicitors, stated—" While your clients contend " that they ought to have a bigger proportion of the available money, there " are other producers elsewhere who contend that your clients ought to " have a smaller proportion. The proportions actually determined by the " Board are the result of collective decisions of the Board and do not neces- " sarily represent the view of any one producer or of the producers in any

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" one county or region ". In recording the view that the case was not one for arbitration it was said—" The Board have the duty of determining prices " and they have done so to the best of their ability. They consider that as " they have acted within their powers and in good faith, an arbitrator

" appointed under paragraph 93 of the Scheme has no power to substitute " his view (if it differs from the Board's) of what those prices should be." On behalf of the Board it was further said—" Your clients cannot receive " more unless some others receive less, and what is really involved is the " whole determination of prices throughout the country. Paragraph 93 of " the Scheme is not intended to transfer the Board's duty of determining " prices to an arbitrator at the instance of a particular group of producers." The Appellants do not now suggest that arbitration would be appropriate but in asking that their complaint should be referred to the Committee of Investigation appointed under the Act they are in effect asking for an Arbitration in another form. They are asking that the determination of prices should be made by the Committee. The Committee could only recommend that the Appellants should receive a higher price on the basis that other producers should receive a lower price. The position of all those others would be affected. The Committee would be acting as an appellate body from the decision of the Board. It may have to be decided as a matter of policy and judgment whether the Committee of Investigation (which could be concerned with any one of the Marketing Schemes coming into existence under the Act and was not appointed to be concerned with any particular Scheme such as the Milk Marketing Scheme) would be the appropriate body to perform the function. The Committee of Investigation is, however, in existence and it certainly would be open to the Minister if he deemed it desirable to refer a complaint of the present kind to the Committee.

Before your Lordships it was in the first place submitted that the Appellants had a right to have their complaint referred to the Committee and that accordingly an Order of Mandamus should be directed to the Respondent positively commanding him to refer the complaint. This contention was rejected by the Divisional Court and was not even advanced in the Court of Appeal. I, also, would reject it. In my view the Respondent is endowed with a discretion. It is for him to decide whether to ask the Committee to report on any complaint made as to the operation of any Scheme made under the Act. A duty will only devolve upon the Committee " if the " Minister in any case so directs ".

These words are in sharp contrast to those which are employed in the Act when a positive duty is imposed upon the Minister. Thus in section 2 subsection (3) are the words " shall direct a public enquiry to be held". In section 19 subsection (4) are the words "the Minister shall forthwith " publish". In Section 20 subsection (3) are the words " the Minister " shall refer ". If Parliament had intended to impose a duty on the Minister to refer any and every complaint, or even any and every complaint of a particular nature, it would have been so easy to impose such a duty in plain terms. I cannot read the words in Section 19 subsection (3) as imposing a positive duty on the Minister to refer every complaint as to the operation of every Scheme. Such was the Appellants' contention though they modified it by suggesting that the duty would not exist in the case of trivial or frivolous or repetitive complaints. In support of their revived contention the Appellants submitted that in some circumstances a duty exists to exercise a power. So in the present case it was argued that a power was deposited in the Minister, that the power was given for the benefit of particular persons, that in the Act they were specifically designated (e.g. persons complaining as to the operation of a Scheme) and that in the Act

the circumstances in which there is entitlement to the exercise of the power are defined (i.e. that there should be a complaint to the Minister as to the operation of the Scheme being a complaint which could not be considered by a Consumers' Committee). Reliance was placed upon a passage in the speech of Lord Cairns L.C. in *Julius* v. *Lord Bishop of Oxford 5* App. Cas. 214. At page 225 Lord Cairns said that the cases decided

> " that where a power is deposited with a public officer for the purpose
> " of being used for the benefit of persons who are specifically pointed
> " out, and with regard to whom a definition is supplied by the Legislature
> " of the conditions upon which they are entitled to call for its exercise,
> " that power ought to be exercised, and the Court will require it to be
> " exercised."

In my view this passage does not avail the Appellants. I can see no provision in the Act showing that the Appellants or others who might make a complaint similar to theirs were " entitled " to call upon the Minister to exercise the power given to him. At most their entitlement was that the Minister should consider and should decide whether or not in the exercise of his discretion he would refer a complaint. It would have to be shown that the Act gave the Appellants a " right" to have their complaint sent to the Committee before the power in the Minister could be held to be one that he was bound to exercise. Thus in his speech in *Julius* v. *Bishop of Oxford* Lord Blackburn at page 241 said that

> " if the object for which the power is conferred is for the purpose of
> " enforcing a right, there may be a duty cast on the donee of the power
> " to exercise it for the benefit of those who have that right, when
> " required on their behalf."

So also (at page 244) Lord Blackburn said—

> " The enabling words are construed as compulsory whenever the object
> " of the power is to effectuate a legal right."

Where some legal right or entitlement is conferred or enjoyed, and for the purpose of effectuating such right or entitlement a power is conferred upon someone, then words which are permissive in character will sometimes be construed as involving a duty to exercise the power. The purpose and the language of any particular enactment must be considered. Thus in *The King* v. *Mitchell* [1913] 1 K.B. 561 consideration was given to the words of Section 9 of the Conspiracy and Protection of Property Act 1875 viz—

> " Where a person is accused before a Court of summary jurisdiction
> " of any offence made punishable by this Act, and for which a penalty
> " amounting to twenty pounds, or imprisonment, is imposed, the
> " accused may, on appearing before the Court of summary jurisdiction,
> " declare that he objects to being tried for such offence by a Court of
> " summary jurisdiction, and thereupon the Court of summary jurisdiction
> " may deal with the case in all respects as if the accused were charged

" with an indictable offence and not an offence punishable on summary
" conviction, and the offence may be prosecuted on indictment
" accordingly."

A declaration of objection to being tried by a Court of summary jurisdiction was duly made by a person accused of an offence made punishable by the Act who was entitled to object. It was held that accordingly he had a right to trial by jury and that the justices were bound to give effect to his claim and had no jurisdiction to try the case.

On the principles laid down in *Julius'* case it becomes necessary to consider the language used in the Agricultural Marketing Act and the purposes of the Act. A Consumers' Committee under Section 19(2) is charged with the duty of considering and reporting to the Minister on the effect of a Scheme on consumers and also on " any complaints made to the committee " as to the effect of any such scheme on consumers of the regulated product ". The words in Section 19 subsection (3) are in marked contrast. A Committee of Investigation is only charged with the duty of considering and reporting " if the Minister in any case so directs ". The Minister may

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refer to them a report of a Consumers' Committee. He may refer to them a complaint which has been made to him and which in his view could not have gone to a Consumers' Committee. The language here is in my view purely permissive. The Minister is endowed with discretionary powers. If he did decide to refer a complaint he is endowed with further discretionary powers after receiving a report (see Section 19 subsection (6)).

I cannot, therefore, accept the contention of the Appellants that they had a right to have their complaint referred to the Committee and that the Minister had a positive duty to refer it. The Minister, in my view, had a discretion. It was urged on behalf of the Respondent that his discretion was in one sense an unfettered one, though it was not said that he could disregard the complaint. The case proceeded on an acceptance by the Respondent that he was bound to consider the complaint and then, in the exercise of his judgment, to decide whether or not to refer it to the Committee.

If the Respondent proceeded properly to exercise his judgment then, in my view, it is no part of the duty of any Court to act as a Court of Appeal from his decision or to express any opinion as to whether it was wise or unwise. The Minister was given an executive discretion. In speaking of a power given by Statute to a local authority to grant certain licences Lord Greene M.R. said in his judgment in *Associated Provincial Picture Houses Limited* v. *Wednesbury Corporation* [1948] 1 K.B. 223 at page 228—

" When discretion of this kind is granted the law recognises certain
" principles upon which that discretion must be exercised, but within
" the four corners of those principles the discretion, in my opinion,
" is an absolute one and cannot be questioned in any court of law."

1 think it follows that an Order of Mandamus could only be made against

the Minister if it is shown that in some way he acted unlawfully. A court could make an Order if it were shown *(a)* that the Minister failed or refused to apply his mind to or to consider the question whether to refer a complaint or *(b)* that he misinterpreted the law or proceeded on an erroneous view of the law or *(c)* that he based his decision on some wholly extraneous consideration or *(d)* that he failed to have regard to matters which he should have taken into account. I propose to consider whether any one of these is established. The Order that was made by the Divisional Court commanded the Respondent " to consider the said complaint of the Appli- " cants according to law and upon relevant consideration to the exclusion " of irrelevant considerations ".

As to *(a)* it cannot be asserted that the Respondent failed to consider the Appellants' complaint. In his affirmation the Respondent states that he considered the complaint and all the matters put before him by the Appellants. He states that he came to his decision for the reasons indicated in the letters of the 23rd March and 3rd May 1965, namely that he " considered that the issue raised by the applicants' complaint was one " which in all the circumstances should be dealt with by the Board rather " than the Committee of Investigation ".

As to *(b)* I do not consider that the Respondent is shown to have misinterpreted the law unless it could be said that any of the considerations recorded in the letters from the Ministry were so inadmissible as to involve that the Respondent took a wrong view of the law or misdirected himself in law. I turn therefore to consider the letters. They formed the foundation for the submission that on the basis of *(c)* and *(d)* above the Order of the Divisional Court was appropriately made.

As the Respondent states in his Affirmation that he came to his decision for the reasons indicated in the two letters it is primarily those letters that are to be studied. As, however, he states that in deciding as to the application he had read a letter dated the 1st May 1964 written by a Ministry representative and as he has not stated that he excluded from his mind

the considerations therein recorded I think that it is a reasonable inference that they had, or may have had, some influence. It is fair, I think, to regard all three letters as revealing what was in the mind of the Respondent. His decision was that the complaint was not one that in his view was suitable for investigation by means of the particular procedure of a reference to the Committee of Investigation. That decision was essentially a policy decision. It concerned a situation that was known and understood in the industry. The main facts in regard to it were known. The differential, or the range between producers' net prices, stands at 1.19 pence per gallon. It has stood at that figure for some years. It was a figure that was first fixed during the War. That fact was known to all concerned. So also must it have been known to all concerned that if true marketing costs were taken "fully" into account the range would be much higher. The question must therefore have been a perennial one as to whether the differential should be varied. If it were, then producers in some regions would get more and producers in other regions

would get less. A constant major policy problem must have been whether it is desirable to encourage production in those regions where, if there were no Scheme, producers would not fare very well. So also it must have been widely known that two Committees had made suggestions relating to this long-standing problem. One of them (the Cutforth Committee) had reported as far back as 1936. Another (the Davis Committee) had in 1963 suggested that the country should be divided into five price zones each with a different differential and that the total range of the prices at the farm gate should be the figure of 2.4 pence per gallon instead of the figure of 1.19 pence per gallon. But all these facts and considerations must have been well known.

I know of no reason to assume or to suggest that the members of the Board in the discharge of their duties have acted irresponsibly. Because a policy decision under a national Scheme results in a measure of advantage to some and a measure of disadvantage to others it does not follow that the members of the Board have been guided, not by considerations of the national interest or of the general interest of their industry but solely by considerations as to how the pockets of their colleagues would be affected.

At any time during the sequence of the past years it would have been open to a Minister, had he considered it desirable and politic, to take the initiative under Section 20 subsection (2) of the Act and to give directions to the Board concerning prices. It was at all time a question of policy for successive Ministers, whether or not they should take such action. For any decision or for any inaction a Minister would be answerable in Parliament.

It was against all this background that the Respondent had to consider the Appellants' request in the early part of 1965. In agreement with Diplock and Russell L.JJ. I do not consider that it has been shown that he failed to exercise his discretion: nor has it been shown that he was guided by irrelevant considerations or that he failed to consider relevant matters. A study of the letters leads me to the view that the Respondent considered it desirable that the milk industry should, in accordance with its own Scheme, be self-governing and that it would not be good policy for him to over-rule decisions of the Milk Marketing Board which fixed the price to be paid in a particular region or to particular persons. I do not find in the letters any statement that the Respondent considered that he had no power to refer the Appellants' complaint to the Committee: nor any statement that the Respondent considered that he was compelled to leave price fixing to the Milk Marketing Board. Rightly or wrongly he considered it best to do so.

As a result of the meticulous scrutiny to which the three letters have been subjected the Appellants contend that irrelevant or inadmissible considerations were taken into account by the Respondent.

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1. Criticism is made of the passage in the letter of the 23rd March to the effect that the complaint of the Appellants was " one that raises wide issues " going beyond the immediate concern of your clients which is presumably " the prices they themselves receive ". In the following sentence it is pointed

out that the complaint would also affect the interests of other regions and involve the regional price structure as a whole. I do not read that passage as involving that the complaint ought not to go to the Committee merely because it raised wide issues. What I think was being pointed out was that the Appellants' complaint would necessarily involve a complete review of the prices in all the regions as fixed by the Board. I see no reason to think that the Respondent was unaware of his powers as, for example, under Section 20 subsection (2). What I think is revealed is that the Respondent as a matter of policy considered it undesirable or inappropriate for him to over-rule the Board in regard to price fixation. This is shown by the letter of the 1st May 1964 where it is said—

> " It is by no means clear that the Minister could make an Order
> " pertaining to the price of milk in the south-east without determining
> " at least one of the major factors governing prices in the other regions,
> " and he would therefore be assuming an inappropriate degree of
> " responsibility for determining the structure of regional prices through-
> " out England and Wales ".

2. Criticism is made of the passage in which it is said that the Minister considered that the issue was of a kind which properly fell to be resolved within the framework of the Scheme. It is said that he was mistaking his powers and was being unmindful of the courses of action open to him either under Section 20 subsection (2) or after a report from a Committee under Section 19 subsection (6)*(c)*. I see no reason to deduce that the Respondent was oblivious of his powers : nor that he was not appreciating that under the machinery of the Scheme a majority vote could result in disadvantages for some districts. If the Respondent nevertheless decided that the self-governing machinery should operate, his decision could be attacked as being impolitic, but I do not think it could be attacked as being made on inadmissible considerations.

3. Criticism is further made of the sentence in the letter of the 1st May 1964 which reads—

> " In considering how to exercise his discretion the Minister would,
> " amongst other things, address his mind to the possibility that if a
> " complaint were so referred and the Committee were to uphold it, he
> " in turn would be expected to make a statutory order to give effect
> " to the Committee's recommendations."

This sentence may be obscure and imprecise but I doubt whether we ought to put the most unfavourable construction upon it. If there was a reference to the Committee and if the Committee reported that some act of the Board was contrary to the interests of consumers or " of any persons affected by " the Scheme " and was not in the public interest, then the Minister would himself have a discretion as to whether or not to take any course of action designated in subsection (6) of Section 19.

There may be cases where from a knowledge of the problem and all its aspects and because of his own firm view as to what course the public interest demands, a Minister could see that a reference could lead to no useful result. A Minister might conclude that whatever report a Committee might make a reference to them would only produce needless confusion and disappointment and would not prompt him to follow a course of action that he considered undesirable. Though the 1964 letter is not very explicit

it is for the Appellants to show that the Respondent was guided by irrelevant considerations. In agreement with Diplock and Russell L.JJ. I consider that the Appellants have failed to show this.

For the reasons which I have set out I would dismiss the Appeal.

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Lord Hodson

MY LORDS,

The Appellants say in the first place that this is a case which satisfies the test, propounded in *Julius* v. *The Lord Bishop of Oxford* 5 App. Cas. 214, drawing the distinction between a power coupled with a duty and a complete discretion. In the former case enabling words are said to be compulsory when they are words to effectuate a legal right.

It is argued that the Minister is subject to *mandamus* here for he is given a power to be exercised in favour of persons who are defined and accordingly are given a right to have their claim submitted to a Committee of Investigation under the provisions of Section 19 of the Agricultural Marketing Act 1958. This argument was abandoned before the Divisional Court, not put forward in the Court of Appeal but was resurrected before your Lordships by way of Supplemental Case. Section 19(3), so far as material, reads:
" A committee of investigation shall—

" . . . .

" *(b)* be charged with the duty, if the Minister in any case so directs,
" of considering and reporting to the Minister on, any report made
" by a consumers' committee and any complaint made to the Minister
" as to the operation of any scheme which, in the opinion of the Minister,
" could not be considered by a consumers' committee under the last
" foregoing section."

Schemes for regulating the marketing of agricultural products were introduced by the Agricultural Marketing Act 1931 and are compulsory in their operation upon consumers, who are protected as to price and supply, upon distributors and upon producers who get the advantage of having no milk left on their hands unsold.

The discretion must be exercised by the Minister in accordance with the intention of the Act but there is nothing in the language used in the subsection introduced by the words " If the Minister in any case so directs " nor in the context of the Act and earlier legislation to support the view that an absolute right to an enquiry is given to an aggrieved person. The argument of the Appellants is undermined, in my opinion, by their consession that trivial, frivolous or vexatious complaints can be shut out as, for example, where a complaint has been recently dealt with in a parallel case. True that the scheme is of a compulsory nature and section 19 is designed for te redress of grievances but this is not to exclude the Minister's discretion to reject a complaint if he exercises his discretion according to law. The succeeding section, section 20 of the Act, indicates the position of the Minister as responsible for giving directions to a Board as to its acts or omissions as he considers necessary or expedient in the public interest and his directions have to be complied with so far as the Board is not

required to do anything which it has no power to do.

If the Minister has a complete discretion under the Act, as in my opinion be has, the only question remaining is whether he has exercised it lawfully.

It is upon this issue that much difference of judicial opinion has emerged although there is no divergence of opinion as to the relevant law. As the Master of the Rolls. Lord Denning, said, citing Lord Greene M.R. in the case of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223:

> "A person entrusted with a discretion must, so to speak, direct
> " himself properly in law. He must call his own attention to the
> " matters which he is bound to consider. He must exclude from his
> " consideration matters which are irrelevant to what he has to consider."

In another part of this judgment at page 228 Lord Greene drew attention to that which I have mentioned above, namely, the necessity to have regard to matters which the statute conferring the discretion shows that the

authority exercising the discretion ought to have regard. The authority must not, as it has been said, allow itself to be influenced by something extraneous and extra-judicial which ought not to have affected its decision.

I come now to the facts of the present case. In 1933 the Milk Marketing Scheme (amended in 1955) came into operation. The members of the Board consist of 12 regional members elected for the several regions by the registered producers and three special members elected by all registered producers and not less than two and not more than three persons appointed by the Minister (see Part II of the Scheme, paragraph 9) Questions arising at a meeting of Board are decided by a majority of the votes of the members present (see Part II paragraph 24). The price of milk is fixed by the Board for milk delivered at the farm gate.

The South Eastern farmers being much nearer to the great population of London are paid what is called a differential to compensate them for the loss of the advantage they would otherwise have over most other districts in consequence of their proximity to a large market. The differential was fixed many years ago at 1.19d. per gallon and the South Eastern farmers have long complained that it is too low and sought without success to obtain redress of their grievance from the Board. They have been outvoted since, in the interests of their own pockets, so it is said, a majority of the other regions opposed them. This decision has been reached notwithstanding the recommendations of two committees set up at different times who have recognised the justice of their claim. On the Davis committee, set up in 1963, making its report without any benefit to the South Eastern farmers ensuing, and the Board having rejected their claim, the first named Appellant approached the Minister at the end of January 1964 asking what means the Ministry could suggest for investigating and remedying the grievance felt by his committee concerning the regional price of milk in the South East.

Correspondence ensued to which it will be necessary to refer and the decision of the Minister refusing to refer the complaint to the Investigating Committee was contained in a letter of 23rd March 1965. The letter reads, so far as material:

" The Minister's main duty in considering the complaint has been
" to decide its suitability for investigation by means of a particular
" procedure. He has come to the conclusion that it would not be suit-
" able. The complaint is of course one that raises wide issues going
" beyond the immediate concern of your clients, which is presumably
" the prices they themselves receive. It would also affect the interests
" of other regions and involve the regional price structure as a whole.
" In any event the Minister considers that the issue is of a kind
" which properly falls to be resolved through the arrangements available
" to producers and the Board within the framework of the Scheme
" itself. Accordingly he has instructed me to inform you that he is
" unable to accede to your clients' request that this complaint be
" referred to the Committee of Investigation under section 19 of the
" Act."

In response to a further letter from the Appellants' solicitors a letter dated 3rd May 1965 was received referring to the Minister's unfettered discretion and adding that in reaching his decision he had had in mind the normal democratic machinery of the Milk Marketing Scheme in which all registered producers participated and which governs the operations of the Board.

Upon the Appellants' solicitors enquiring whether it would be asserted that the letters of 1965 were the only matters present to the Minister's mind at the time of his decision, to the exclusion of the considerations set out in the letters which had passed in the year 1964, the Minister affirmed on 4th November 1965, he having been appointed on the 19th October 1964 (after the 1964 letters had passed):

" In considering the applicants' application I read among other
" papers the letter signed by Mr. J. H. Kirk and dated the 1st May
" 1964."

He continued :

" Before reaching my decision not to refer the applicants' complaint
" to the Committee of Investigation I considered all the matters put
" before me on behalf of the applicants in support of their application.
" I came to my decision for the reasons indicated in the letters dated
" 23rd March 1965 and 3rd May 1965 .... namely that I considered
" that the issue raised by the applicants' complaint was one which in
" all the circumstances should be dealt with by the Board rather than
" the Committee of Investigation."

If the letter of the 1st May 1964 be looked at, and it was not disowned by the Minister in his affirmation or at all, it throws further light on the refusal of the Minister to exercise his discretion by referring the complaint to the Investigating Committee. This letter contains the following:

" In considering how to exercise his discretion the Minister would,
" amongst other things, address his mind to the possibility that if a
" complaint were so referred and the Committee were to uphold it, he
" in turn would be expected to make a Statutory Order to give effect
" to the Committee's recommendations.

" It is this consideration, rather than the formal eligibility of the
" complaint as a subject for investigation, that the Minister would have
" in mind in determining whether your particular complaint is a suitable

" one for reference to the Committee. We were unable to hold out any
" prospect that the Minister would be prepared to regard it as suitable.

" The reasons which led us to this conclusion were explained to you as
" follows:

" *(a)* The guarantee given to milk producers under the Agriculture
" Acts is a guarantee given to the Board on behalf of all producers.
" The Minister owes no duty to producers in any particular region,
" and this is a principle that would be seriously called into question
" by the making of an Order concerned with a regional price ;

" *(b)* Such action would also bring into question the status of the
" Milk Marketing Scheme as an instrument for the self-government of
" the industry and such doubt would also, by extension, affect the
" other Marketing Schemes as well; and

" *(c)* It is by no means clear that the Minister could make an Order
" pertaining to the price of milk in the south-east without determining
" at least one of the major factors governing prices in the other
" regions, and he would therefore be assuming an inappropriate degree
" of responsibility for determining the structure of regional prices
" throughout England and Wales.

" I wish to point out that the statement of these reasons is not intended
" to imply an assessment of the merits of your complaint considered as
" an issue of equity among regions."

The reasons disclosed are not, in my opinion, good reasons for refusing to refer the complaint seeing that they leave out of account altogether the merits of the complaint itself. The complaint is, as the Lord Chief Justice pointed out, made by persons affected by the Scheme and is not one for the consumer committee as opposed to the Committee of Investigation and it was eligible for reference to the latter. It has never been suggested that the complaint was not a genuine one. It is no objection to the exercise of the discretion to refer that wide issues will be raised and the interests of other regions and the regional price structure as a whole would be affected. It is likely that the removal of a grievance will in any even have a wide effect and the Minister cannot lawfully say in advance that he will not refer the matter to the Committee to ascertain the facts because, as he says in effect, although not in so many words, " I would not regard it as right to "give effect to the report if it were favourable to the Appellants."

It has been suggested that the reasons given by the Minister need not and should not be examined closely for he need give no reason at all in the exercise of his discretion. True it is that the Minister is not bound to give

his reasons for refusing to exercise his discretion in a particular manner, but when, as here, the circumstances indicate genuine complaint for which the appropriate remedy is provided, if the Minister in the case in question so directs, he would not escape from the possibility of control by *mandamus* through adopting a negative attitude without explanation. As the guardian of the public interest he has a duty to protect the interests of those who claim to have been treated contrary to the public interest.

I would allow the appeal accordingly and remit the matter to the Queen's

Bench Division so as to require the Minister to consider the complaint of the Appellants according to law. I agree with the order for costs proposed by my noble and learned friend Lord Reid.

Lord Pearce

MY LORDS,

Prima facie the Appellants have a complaint of substance. They are " persons affected by the scheme ". The " act or omission of the Board " in not paying them a higher price differential is " contrary to their interests ". And apparently reasonable *prima facie* arguments have been advanced to show that this " is not in the public interest". The Appellants' complaint is therefore *prima facie* suitable to be considered by the Committee of Investigation.

The outline of their complaint is simple. They farm in the more populous South East Region. In a more populous region milk is more valuable. The consumer is near at hand. The cost of transport is less. And milk which is drunk fetches higher prices than that which is used for manufacture. As against this the overheads of production are, generally speaking, somewhat higher than in some more rural regions. For instance, the land in the more populous region is almost inevitably more expensive. It seems to follow that if the producer of milk in a populous region is paid precisely the same price as the producer in a sparsely populated rural region, the former is not being fairly treated. Some acknowledgment of this fact is made in a differential of 1.19 pence per gallon which was, we are told, fixed by the Minister during the war. Of this figure .71 of a penny related to the cost of transport. With rising prices the present differential cost in respect of transport has risen to over 3d. No acknowledgment of this increase in cost has ever been made in the price paid to the farmers in the South East Region. Yet, unless the figure fixed by the Minister in the war was too large, which has not been suggested, it would seem that in view of increased costs it must now be too small. *Prima facie* this would seem unfair. Two committees, one in 1956 and one in 1963 have, on investigation, lent weight to the Appellants' contention. But the gain of the South East would mean some loss in some regions elsewhere. The South East Region is in a minority on the Board. They have been unable, in spite of fifteen attempts, to persuade the majority to do anything about it. The Appellants contend that the present situation is not only unfair to them but also it is not in the public interest. They argue, for instance, that the present situation discourages the production of milk in the region where it is most valuable. Against this, of course, may be set the benefit of encouraging milk production in more sparsely populated regions. Any final conclusion on this matter obviously needs close consideration of all its relevant detail. One may sum it up superficially by saying that there is *prima facie* a complaint of some substance, that it has had support from two committees, and that there seems little likelihood of the majority of the Board doing anything to remedy it.

This is not a criticism of the majority. Most of them are elected to represent their own regions. One can hardly expect them to vote in favour of something that will injure their own regions. Nor would it be very

conducive to the success of the scheme if a region felt that its representative was pursuing altruistic policies in favour of other regions at the expense

of those whom he is elected to represent. If justice to a minority is to be imposed at the expense of a majority, it is probably more convenient that it should be imposed *aliunde*.

This fact was in my opinion recognised by Parliament. It was obvious that the scheme and the Act created a monopoly and imposed severe restrictions on individuals' liberty of action. With the aim of general betterment Parliament was interfering with the individual farmer's method of earning a livelihood and subjecting him to the mercies of the majority rule of the Board. But (no doubt with these considerations in mind) Parliament deliberately imposed certain safeguards. Two independent committees must be appointed (section 19). First there is the "Consumers' committee" to deal with consumers' complaints. The findings of this committee do not however produce any effective result, unless and until they have been considered by the more important Committee of Investigation. That committee is " charged with the duty, if the Minister in any case so " directs, of considering and reporting to the Minister on, any report made " by a consumers' committee and any complaint made to the Minister as " to the operation of any scheme which, in the opinion of the Minister, " could not be considered by a consumers' committee ". The Minister is bound to publish that report. " If a committee of investigation report to " the Minister that any provision of a scheme or any act or omission of a " Board is contrary to the interests of consumers of the regulated product, " or is contrary to the interests of any persons affected by the scheme and " is not in the public interest, the Minister, if he thinks fit so to do after " considering the report may " either amend the scheme so as to rectify the matter, or revoke the whole scheme, or direct the Board to take steps to rectify the matter (after hearing any representations from the Board). By section 20 the Minister has a right of his own motion, independently of the investigation committee, to impose his will on the Board. But in that case the Board can ask to have the matter heard by the committee of investigation, and if the committee's report is in the Board's favour the Minister cannot impose his will on them.

Thus the independent committee of investigation was a corner stone in the structure of the Act. It was a deliberate safeguard against injustices that might arise from the operation of the scheme. There is provision for arbitration between individual producers and the Board. But this is clearly not intended to deal with a case such as the present; and the Board has rightly refused arbitration on this matter.

The Appellants have therefore no avenue for their complaint except through section 19. And that section makes access to the committee of investigation dependent on a direction of the Minister to the committee of investigation. There is no provision as to what are the duties of a Minister in this respect. Has he a duty to further complaints of substance which have no other outlet? Or can he refuse them any outlet at all if he so chooses? Need he have any valid reason for doing so? Or if he refuses without any apparent justification, is he exempt from any interference by

the Courts provided that he either gives no reasons which are demonstrably bad or gives no reasons at all? No express answer to these questions is given in the Act. The intention of Parliament, therefore, must be implied from its provisions and its structure.

Both sides placed some reliance on the case of *Julius v. Lord Bishop of Oxford* 5 App. Cas. 214. This dealt with a somewhat analogous problem under an Act which said "it shall be lawful" for the bishop to issue a commission. It was held that the words gave the bishop a complete discretion to issue or decline to issue a commission. That decision rested on the construction of the particular Act and it made clear that in the context of an Act is to be found the answer to the question how a power given by it is to be exercised. Lord Cairns L.C. said at page 225:

> " The cases to which I have referred appear to decide nothing more
> " than this: that where a power is deposited with a public officer for

> " the purpose of being used for the benefit of persons who are sped-
> " fically pointed out, and with regard to whom a definition is supplied
> " by the Legislature of the conditions upon which they are entitled
> " to call for its exercise, that power ought to be exercised, and the
> " Court will require it to be exercised."

At page 229 Lord Penzance said:

> " The words ' it shall be lawful' are distinctly words of permission
> " only. They are enabling and empowering words. They confer a
> " legislative right and power on the individual named to do a particular
> " thing, and the true question is not whether they mean something
> " different but whether, regard being had to the person so enabled—
> " to the subject matter, to the general objects of the statute, and to
> " the person or class of persons for whose benefit the power may be
> " intended to have been conferred—they do, or do not, create a duty
> " in the person on whom it is conferred, to exercise it."

And (at page 235) Lord Selborne said:

> " The question whether a judge, or a public officer, to whom power
> " is given by such words, is bound to use it upon any particular
> " occasion, or in any particular manner, must be solved *aliunde,* and,
> " in general, it is to be solved from the context, from the particular
> " provisions, or from the general scope and objects, of the enactment
> " conferring the power."

It is quite clear from the Act in question that the Minister is intended to have *some* duty in the matter. It is conceded that he must properly consider the complaint. He cannot throw it unread into the waste paper basket. He cannot simply say (albeit honestly) " I think that in general " the investigation of complaints has a disruptive effect on the scheme and " leads to more trouble than (on balance) it is worth; I shall therefore " never refer anything to the committee of investigation ". To allow him to do so would be to give him power to set aside for his period as Minister the obvious intention of Parliament, namely that an independent committee

set up for the purpose should investigate grievances and that their report should be available to Parliament. This was clearly never intended by the Act. Nor was it intended that he could silently thwart its intention by failing to carry out its purposes. I do not regard a Minister's failure or refusal to give any reasons as a sufficient exclusion of the Court's surveillance. If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions. In the present case however the Minister has given reasons which show that he was not exercising his discretion in accordance with the intentions of the Act.

In the present case it is clear that Parliament attached considerable importance to the independent committee of investigation as a means to ensure that injustices were not caused by the operation of a compulsory scheme. It provided no other means by which an injustice could be ventilated. It was not content to leave the matter wholly in the power of a majority of the Board. Nor was it content that the removal of injustice should be left to the power of the Minister. It wished to have the published views of an independent committee of investigation (with wide power to explore the matter fully). It also wished that committee to consider and weigh the public interest—a fact that makes it clear that the question of public interest was not at that stage being left to the Minister. When the report is published then the Minister may and must make up his own mind on the subject. He has power to do what he thinks best and decide whether or not to implement the report. He is then answerable

only to Parliament, which will have the advantage of being able to understand the pros and cons of the matter from the published report of an independent committee. Until that is published nobody can effectively criticise his action, since nobody will have a balanced view of the strength of the grievance and its impact on the public interest.

It is clear, however, as a matter of common sense, that Parliament did not intend that frivolous or repetitive or insubstantial complaints or those which were more apt for arbitration should be examined by the committee of investigation. And no doubt the Minister was intended to use his discretion not to direct the committee to investigate those. It is argued that if he has a discretion to *that* extent, he must also have an unfettered discretion to suppress a complaint of substance involving the public interest which has no other outlet. I cannot see why this should be so. Parliament intended that certain substantial complaints (involving the public interest) under the compulsory scheme should be considered by the investigation committee. It was for the Minister to use his discretion to promote Parliament's intention. If the Court had doubt as to whether the Appellants' complaint was frivolous or repetitive, or not genuine, or not substantial, or unsuitable for investigation or more apt for arbitration, it would not interfere. But nothing which has been said in this case leads one to doubt that it is a complaint of some substance which should properly

be investigated by the independent committee with a view to pronouncing on the weight of the complaint and the public interest involved.

The fact that the complaint raises wide issues and affects other regions was not a good ground for denying it an investigation by the committee. It is a matter which makes it very suitable for the committee of investigation, with its duty to report on the public interest, and its capacity to hear representatives of all the regions.

Moreover the Minister was mistaken in thinking that " normal demo- " cratic machinery of the Milk Marketing Scheme" was a ground for refusal to have the complaint investigated. It is alleged that the normal democratic machinery of the Board is acting contrary to the public interest. The investigation under section 19 and the Minister's powers under section 20 were intended to correct, where necessary, the normal democratic machinery of the scheme. Parliament had put into the hands of the Minister and those of the committee of investigation the power and duty where necessary to intervene. A general abdication of that power and duty would not be in accord with Parliament's intentions.

1 would allow the appeal.

Lord Upjohn

MY LORDS,

This appeal is of great importance to the milk producing industry and therefore to the country in general, for it is concerned with the refusal of the Respondent Minister to order an inquiry into the complaint of the Appellants representing the milk producing fanners of the South East Region.

In 1931 Parliament, in order to produce better conditions within the agricultural industry and more efficient and economical methods of production and distribution, enacted the Agricultural Marketing Act 1931 which provided for schemes to be prepared for the control of various sections of the industry. In 1933 pursuant to the provisions of the Act the Milk Marketing Scheme 1933 for England and Wales was prepared and approved by Parliament and is, subject to many subsequent amendments, still in force; I shall refer to it as the Scheme. Many other schemes relating to the control of other sections of the industry have been prepared and

approved and the Act now controlling these schemes is the Agricultural Marketing Act 1958, an Act consolidating the Act of 1931 and later amending Acts. For all relevant purposes schemes have statutory force.

As was intended by Parliament the Scheme was prepared by the industry itself, a circumstance much relied upon in argument on behalf of the Minister ; but of course that does not mean that it received the unanimous approval of all milk producers ; that would be impossible to expect of any scheme. The Scheme provided for a Board to administer it consisting of

members elected by the eleven Regions into which the country was for the purposes of the Scheme divided, one of them being the South East Region. It provided for the registration of producers of milk and in those days when compulsory powers were less familiar than to-day, went so far as to provide that no unregistered producer should sell any milk. Furthermore the Scheme empowered the Board (a power quickly exercised and still in force) to resolve that registered producers should sell only to the Board and then only at the price and upon the terms prescribed by the Board. No one doubts that these provisions were greatly to the advantage of the industry as a whole but a scheme which put the milk industry into such a straight jacket may produce anomalies and individual discontent. In my opinion it was with this *(inter alia)* in view and in the realisation that such matters should receive review at ministerial level that Parliament enacted the provision now to be found in section 19 of the 1958 Act.

That section provided that the Minister should appoint two committees, a consumers' committee and a committee of investigation. The former committee is bound to consider and report to the Minister upon any approved scheme and any complaints made to them as to the effect of the scheme on consumers, a matter with which this appeal is not concerned.

The committee of investigation is by section 19 (3)*(b)*:

> " charged with the duty, if the Minister in any case so directs, of con-
> " sidering, and reporting to the Minister on .... any complaint made
> " to the Minister as to the operation of any scheme which .....
> " could not be considered by a consumers' committee."

These committees are by the Act permanent committees and have been set up by the Minister to receive and deal with, from time to time, matters referred to them ; another indication that Parliament realised that schemes might require inquiry and review in operation as time went on and circumstances changed.

The South East region contend that for many years they have received too low a price for their products for the reasons I shall not discuss, for they are set out fully in the speech of my noble and learned friend Lord Reid. Further, it is perfectly clear upon the facts that this question, having been considered by two independent committees (with results on the whole favourable to the South East Region) and having been raised on no less than fifteen occasions at Board Meetings by the South East Regional representative since 1958, cannot be dismissed as frivolous, vexatious or trivial. In fairness to the Minister and his advisers let it be said that this has never been suggested.

At first sight therefore I should suppose that this was precisely the type of matter which Parliament had envisaged would be fit for investigation by the Committee of Investigation and report to the Minister, but the Minister has declined either to investigate the complaint himself, as of course he was perfectly entitled to do, or to refer it to the Committee of Investigation.

Section 19(3) as a matter of language confers a discretion upon the Minister as to whether any complaint made to him should be referred to the Committee of Investigation, the relevant words being "if the Minister " in any case so directs " plainly words of discretion and not of duty. But it was argued before your Lordships, perhaps more strenuously at the first

hearing than at the second after Supplemental Cases had been delivered, that the case was governed by the principle established by the well known case of *Julius v. Bishop of Oxford* 5 App. Cas. 214 where it was held that words of permission such as " it shall be lawful" might in some cases in fact call for its exercise and create a duty upon the donee of the power or permission to exercise it. It was held not to do so in that case where Parliament had conferred upon the Bishop a power to issue a commission, but like so many cases in our law where it was held that the principle did not apply it is the leading authority for the proposition that there may be, as it is so often said, " a power coupled with a duty ". In other words, as was so succintly stated by the Court in *R.* v. *Steward of Havering Atte Bower* 5 B. & Ald. 691 "The words of permission are obligatory"; briefly they create a duty not a power.

But in my opinion that principle can have no application to the present where it is clear that Parliament would have used different words if it had intended that the Minister was under a duty to refer every complaint to the Committee of Investigation ; in fact Parliament would have adopted precisely the same language as in section 19(2) where consumers are empowered to make their complaints direct to the Consumers' Committee without any intermediate reference to the Minister.

So it is clear that the Minister has a discretion and the real question for this House to consider is how far that discretion is subject to judicial control.

My Lords, upon the basic principles of law to be applied there was no real difference of opinion, the great question being how they should be applied to this case.

The Minister in exercising his powers and duties conferred upon him by statute can only be controlled by a prerogative writ which will only issue if he acts unlawfully. Unlawful behaviour by the Minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the classification of Parker L.CJ. in the Divisional Court):

1. by an outright refusal to consider the relevant matter, or
2. by misdirecting himself in point of law, or

(c) by taking into account some wholly irrelevant or extraneous consideration, or

(d) by wholly omitting to take into account a relevant consideration.

There is ample authority for these propositions which were not challenged in argument. In practice they merge into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings I have mentioned.

In the circumstances of this case which I have sufficiently detailed for this purpose it seems to me quite clear that *prima facie* there seems a case

for investigation by the Committee of Investigation. As I have said already it seems just the type of situation for which the machinery of section 19 was set up, but that is a matter for the Minister.

He may have good reasons for refusing an investigation, he may have indeed good policy reasons for refusing it though that policy must not be based on political considerations which as Farwell L.J. said in *R.* v. *Board of Education* [1910] 2 K.B. 165 at 181 are pre-eminently extraneous. So I must examine the reasons given by the Minister, including any policy upon which they may be based, to see whether he has acted unlawfully and thereby overstepped the true limits of his discretion, or as it is frequently said in the prerogative writ cases, exceeded his jurisdiction. Unless he has done so the Court has no jurisdiction to interfere. It is not a Court of Appeal and has no jurisdiction to correct the decision of the Minister acting

lawfully within his discretion, however much the Court may disagree with its exercise.

In his affidavit filed in opposition to the Appellants' application for the order of *Mandamus* the Minister, after referring to the fact that he had read the letter dated 1st May 1964 of Mr. Kirk, an Under Secretary of the Ministry, stated that he reached his decision for refusing a reference to the Investigating Committee for the reasons given in his private secretary's letters of 23rd March and 3rd May 1965 all addressed to the Respondents or their solicitors. So to these letters I must turn to see whether his reasons are open to challenge on the ground of being unlawful.

The first letter, that of 23rd March 1965, in which the Minister gave his reasons was, so far as relevant, in these terms :

" The Minister's main duty in considering this complaint has been to
" decide its suitability for investigation by means of a particular pro-
" cedure. He has come to the conclusion that it would not be suitable.
" The complaint is of course one that raises wide issues going beyond
" the immediate concern of your clients, which is presumably the prices
" they themselves receive. It would also affect the interests of other
" regions and involve the regional price structure as a whole.

" In any event the Minister considers that the issue is of a kind which
" properly falls to be resolved through the arrangements available to
" producers and the Board within the framework of the Scheme itself.
" Accordingly he has instructed me to inform you that he is unable
" to accede to your clients' request that this complaint be referred to
" the Committee of Investigation under section 19 of the Act."

This letter seems to me to shew an entirely wrong approach to the complaint. The Minister's main duty is not to consider its suitability for investigation; he is putting the cart before the horse. He might reach that conclusion after weighing all the facts but not until he has done so ; but perhaps this is the least of the criticisms (arising out of his letter) to be directed at the Minister. But I have dealt with it as in argument it was seriously pressed upon your Lordships as a conclusive consideration in answer to any challenge to his powers.

His next statement—that it raises wide issues etc.—shews a complete misapprehension of his duties, for it indicates quite clearly that he has completely misunderstood the scope and object of Section 19. It is when wide issues are raised and when the complaint of one region raises matters which may affect other regions and the regional price structure as a whole, that the Minister should consider it as a most powerful (though not conclusive) element in favour of referring the complaint instead of the reverse. Then, again, in his final paragraph of this letter the Minister reveals the same misconception. It was just because it was realised that the Board structure might produce within its framework matters for complaint by those vitally affected that the machinery of Section 19 was set up. This letter shews that the Minister was entirely misdirecting himself in law based upon a misunderstanding of the basic reasons for the conferment upon him of the powers of Section 19.

I turn to his second letter, that of 3rd May 1965 which so far as relevant was in these terms:

> " You will appreciate that under the Agricultural Marketing Act
> " 1958 the Minister has unfettered discretion to decide whether or not
> " to refer a particular complaint to the Committee of Investigation. In
> " reaching his decision he has had in mind the normal democratic
> " machinery of the Milk Marketing Scheme, in which all registered
> " producers participate and which governs the operations of the Board."

This introduces the idea, much pressed upon your Lordships in argument, that he had an "unfettered" discretion in this matter; this, it was argued, means that provided the Minister considered the complainant *bona fide* that was an end of the matter. Here let it be said at once, he and his

advisers have obviously given a *bona fide* and painstaking consideration to the complaints addressed to him ; the question is whether the consideration given was sufficient in law.

My Lords, I believe that the introduction of the adjective " unfettered " and its reliance thereon as an answer to the Appellants' claim is one of the fundamental matters confounding the Minister's attitude, *bona fide* though it be. First the adjective nowhere appears in Section 19, it is an unauthorised gloss by the Minister. Secondly even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the Courts ; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely

that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives.

The second sentence of this letter again only shews what I have earlier pointed out, that the Minister has failed to understand that it may be his duty to intervene where there is a serious complaint that the " democratic " machinery " of the Board is producing unfairness among its members.

Those are the reasons relied upon by the Minister for refusing a reference. Summing up the matter shortly, in my opinion every reason given shews that the Minister has failed to understand the object and scope of Section 19 and of his functions and duties thereunder which he has misinterpreted and so misdirected himself in law.

The matter, however, does not end there for in his affidavit the Minister referred, as I have already mentioned, to Mr. Kirk's letter of 1st May 1964 without disapproval. That letter contained this paragraph :

> " 3. In considering how to exercise his discretion the Minister would, " amongst other things, address his mind to the possibility that if a " complaint were so referred and the Committee were to uphold it, " he in turn would be expected to make a statutory order to give effect " to the Committee's recommendations. It is this consideration, rather " than the formal eligibility of the complaint as a subject for investi- " gation, that the Minister would have in mind in determining whether " your particular complaint is a suitable one for reference to the Com- " mittee. We were unable to hold out any prospect that the Minister " would be prepared to regard it as suitable."

This fear of parliamentary trouble (for in my opinion this must be the scarcely veiled meaning of this letter) if an inquiry were ordered and its possible results is alone sufficient to vitiate the Minister's decision which, as I have stated earlier, can never validly turn on purely political considerations ; he must be prepared to face the music in Parliament if statute has cast upon him an obligation in the proper exercise of a discretion conferred upon him to order a reference to the Committee of Investigation.

My Lords, I would add only this: that without throwing any doubt upon what are well known as the club expulsion cases, where the absence of reasons has not proved fatal to the decision of expulsion by a club committee, a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a Court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly.

The Minister in my opinion has not given a single valid reason for refusing to order an inquiry into the legitimate complaint (be it well founded or not)

of the South East Region; all his disclosed reasons for refusing to do so are bad in law. I would allow this appeal in the terms proposed by my

noble and learned friend Lord Reid.

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