[HIGH COURT OF AUSTRALIA.]

WATER CONSERVATION AND IRRIGATION COMMISSION (NEW SOUTH WALES) . . RESPONDENT, } APPELLANT;

AND

BROWNING . . . . . APPLICANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1947.

MELBOURNE, *May* 29; *June* 12.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Statute—Discretionary power—Mandamus—Statutory Commission—"Entirely in the discretion of the Commission"—Purposes of statute—Policy of Commission—Lease of irrigation farm—Transfer of lease—Application for consent of Commission—Refusal—Proposed transferee naturalized in Australia but of enemy origin—Irrigation Act 1912-1944 (*N.S.W.*) (*No.* 73 *of* 1912—*No.* 26 *of* 1944), *s.* 8—*Crown Lands Consolidation Act* 1913-1944 (*N.S.W.*) (*No.* 7 *of* 1913—*No.* 26 *of* 1944), *ss.* 145A, 241.

The *Irrigation Act* 1912-1944 (N.S.W.) constituted the Water Conservation and Irrigation Commission, gave it control of irrigation areas and empowered it to dispose of lands in irrigation areas under the law relating to Crown lands. The *Crown Lands Consolidation Act* 1913-1944 (N.S.W.) provided, by s. 145A, that an irrigation-farm lease should not be transferred without the consent of the Commission and that the granting or refusing of consent "shall be entirely in the discretion of the Commission"; and, by s. 241, that aliens might acquire leases in irrigation areas, provided they became naturalized within a certain period.

Held that it was not beyond the Commission's discretion to refuse its consent to a transfer of an irrigation-farm lease on the ground that the proposed transferee, though naturalized, was of enemy origin.

Decision of the Supreme Court of New South Wales (Full Court): *Browning* v. *Water Conservation and Irrigation Commission* (*N.S.W.*), (1947) 47 S.R. (N.S.W.) 395; 64 W.N. 120, reversed.

APPEAL from the Supreme Court of New South Wales.

An application to the Water Conservation and Irrigation Commission of New South Wales for its consent to the transfer of an irrigation-farm lease from Eric Browning to Antonio Carbone having been refused, Browning obtained from the Supreme Court of New South Wales a rule nisi, returnable before the Full Court, for a writ of mandamus calling upon the Commission to deal with and determine according to law the application for transfer on the ground that the discretion of the Commission in rejecting the application was not duly exercised in accordance with law. The Full Court made the rule absolute.

By special leave (which was granted subject to the condition that the appellant pay the respondent's costs of the appeal in any event) the Commission appealed from this decision to the High Court. The facts appear in the judgments hereunder.

Dwyer K.C. (with him *C. M. Collins*), for the appellant. The relevant power of the Commission is now to be found in s. 145A of the *Crown Lands Consolidation Act* 1913-1944 (N.S.W.). See also ss. 137, 139, 141, of that Act and s. 8 of the *Irrigation Act* 1912-1944 (N.S.W.). The *Crown Lands Consolidation Act*, s. 241, in providing that aliens may, subject to a condition, acquire lands in irrigation areas, merely removes a disability. It does not confer any right which limits the Commission's discretion as was thought in the Supreme Court. The Commission's general policy in relation to aliens is not inconsistent with anything in the relevant Acts. It appears that the present case was given special consideration in relation to that policy. Accordingly, it cannot be said that the Commission did not exercise a real discretion or that it went beyond the purposes of the legislation. [He referred to *Randall* v. *Northcote Corporation* (1); *R.* v. *Arndel* (2); *R.* v. *Port of London Authority*; *Ex parte Kynoch Ltd.* (3); *Carltona Ltd.* v. *Commissioners of Works* (4); *Point of Ayr Collieries Ltd.* v. *Lloyd-George* (5).]

R. L. Taylor, for the respondent. The discretion conferred on the Commission is not unlimited; it must be regarded as limited to the purposes of the Act, which does not authorize an arbitrary decision (*Shrimpton* v. *The Commonwealth* (6)). Section 241 is sufficient to show that the Commission exceeded the purposes of the Act in the present case. Moreover, the Commission merely applied a general

(1) (1910) 11 C.L.R. 100.
(2) (1906) 3 C.L.R. 557.
(3) (1919) 1 K.B. 176.
(4) (1943) 2 All E.R. 560.
(5) (1943) 2 All E.R. 546.
(6) (1945) 69 C.L.R. 613.

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policy which had been formulated before the making of the application in this case. There is nothing in the Act to warrant such a policy. The result of it was that this case was not considered on its merits, and the Supreme Court was right in concluding that there had been a failure by the Commission to make a valid exercise of its discretion.

Dwyer K.C., in reply, referred to *East Suffolk Rivers Catchment Board* v. *Kent* (1).

Cur. adv. vult.

June 12.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by special leave from an order of the Full Court of the Supreme Court of New South Wales making absolute an order nisi for a writ of mandamus directed to the Water Conservation and Irrigation Commission, requiring the Commission to deal with and determine according to law an application of Eric Browning for the consent of the Commission to the transfer of an irrigation farm lease by Browning to one Antonio Carbone.

The Water Conservation and Irrigation Commission is constituted under the *Irrigation Act* 1912-1944. By s. 8 of that Act it is provided that the Commission shall, subject to the Act and regulations thereunder, " (*a*) have control of any irrigation area and any works thereon or used in connection therewith ; and (*b*) may in the manner prescribed dispose of lands in irrigation areas under the *Crown Lands (Amendment) Act* 1912." The relevant power under the *Crown Lands Act* is now represented by s. 145A of that Act as amended by Act No. 2 of 1943, s. 15. Section 145A, so far as relevant, provides as follows :—" Except with the consent of the Commission—(*a*) an irrigation-farm lease . . . shall not be transferred . . . either in whole or in part or otherwise dealt with . . . Application for the consent of the Commission shall be made in the prescribed form. The granting or refusing of any such application shall be entirely in the discretion of the Commission."

Carbone was born in Italy and was naturalized in Australia in 1934. Aliens may hold irrigation leases if they become naturalized within five years of acquisition (*Crown Lands Act*, s. 241). There is no statutory limitation upon the acquisition of such leases by naturalized aliens.

The Commission refused to consent to the application for transfer by Browning to Carbone. The grounds of refusal were stated in a letter in the following words :—" the Commission exercised its

(1) (1941) A.C. 74.

discretion in accordance with the provisions of section 145A of the *Crown Lands Consolidation Act*, 1913, having regard to the established policy of the Commission in respect to the acquisition of land by naturalized persons of enemy origin." Upon the return of the order nisi for a mandamus in the Supreme Court Mr. William Rawlings, one of the Commissioners, explained the policy of the Commission to which reference had been made in the letter in the following manner :—

" 3. The Commission several years ago took into consideration the powers it had of granting or refusing its consent to the transfer of lands within an irrigation area and decided that it was not in the interests of the irrigation areas and the development of land therein that a consent to the transfer of land within the irrigation area to a naturalized person of enemy origin be granted unless upon examination of any individual case there were disclosed special circumstances.

4. The aforesaid decision was reached because a very large amount of public money had been sunk in the irrigation area ; and the Commission considered that such irrigation farm lands as were available should be kept available for Australians, particularly returned soldiers, and also because it was found from experience that as a general rule Italians are not good farmers under irrigation methods and also because it is most undesirable that any further aggregation of Italians be built up on the irrigation area.

5. There has been an aggregation of Italians on the Murrumbidgee irrigation area.

6. I dealt with the application for permission for the transfer of irrigation-farm lease No. 1254 to Antonio Carbone of Leeton and fully considered all the facts and circumstances of his case, keeping in mind the aforesaid matters but as such consideration did not disclose any special circumstances, in the exercise of my discretion, I refused to consent to such transfer."

It was held by the Full Court that the discretion entrusted to the Commission by s. 145A of the *Crown Lands Consolidation Act* was not an arbitrary and unlimited discretion but was a discretion which was to be exercised in order to promote the object of the Act as shown by its terms. This object was described as being " to see that as far as possible the irrigation farms were occupied by capable and desirable farmers." It was held that the considerations referred to in the affidavit of Mr. Rawlings were irrelevant to the exercise of the discretion of the Commission and that as such extraneous matters had been taken into account the Commission had not really exercised the discretion committed to it, and that therefore a writ of mandamus should be granted.

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Latham C.J.

On several occasions this Court has had to consider provisions vesting a wide discretion in an administrative body and to consider whether the discretion was intended by the legislature to be absolutely unlimited. If this were the case the authority could exercise its powers for any reason whatever or for no reason at all. The intention of the legislature is to be ascertained from the words of the statute as applied to the subject matter with which the statute deals. If it then appears that the discretion entrusted to the authority was intended to be exercised upon grounds of a certain character and not upon other grounds, the authority will be limited to the consideration of grounds held to be proper. It has frequently been held that where it is shown that a discretion has been exercised upon grounds which were irrelevant to the objects of the statute conferring the discretion, there has been no real exercise of the discretion intended by the legislature to be vested in the authority. In such a case a court can, by a writ of mandamus, direct the authority to exercise its discretion in accordance with law. Several cases in which this principle has been worked out and applied are referred to in *Shrimpton* v. *The Commonwealth* (1).

In the opinion of the Supreme Court the reasons given by Mr. Rawlings for the decision of the Commission " were none of the business " of the Commission, i.e., they were " extraneous and irrelevant " to the exercise of its discretion.

The Commission is charged under s. 8 of the *Irrigation Act* with the control of irrigation areas. Section 8 (3) contains an express provision that certain specified " matters of policy shall be submitted by the Commission to the Minister and shall be subject to his approval." This provision leaves other matters of policy in the hands of the Commission—but any policy applied by the Commission must be relevant to the objects of the Act if they can be ascertained by a scrutiny of its provisions.

Section 145A of the *Crown Lands Consolidation Act* provides that the granting or refusing of any application for transfer of an irrigation-farm lease shall be " entirely in the discretion of the Commission." It was evidently intended by Parliament to confer a very wide authority upon the Commission.

The transfer of an irrigation-farm lease makes the transferee a tenant of the Commission. The transferee becomes subject to conditions as to residence and improvement of the lease. See *Crown Lands Consolidation Act*, s. 142D. But the transfer of an irrigation-farm lease is more than a transfer of property which, once made, is over and done with. The transferee becomes a member of

(1) (1945) 69 C.L.R. 613, at p. 620.

an irrigation community which, by reason of the common dependence of its members upon water supply regulated in accordance with defined water rights, is more closely integrated than most other settlements. A man may be a good farmer and yet there may be reasons why it would be a mistake to allow him to come into a particular settlement. The suitability of applicants for admission to such a community is a matter which the Commission, in administering an irrigation area, may, in my opinion, quite properly take into account. The introduction of foreigners or an increase in the number of foreigners, and particularly of foreigners who belong or have belonged to an enemy country, may reasonably be thought to be unwise in the interests of the smooth and efficient development of the area. It is not for this Court to determine whether or not such an opinion is in fact well founded. But such matters should not, in my opinion, be held to be irrelevant to the discharge by the Commission of its functions in controlling and developing an irrigation settlement.

In my opinion the Commission did not exceed its powers in determining the application by considering " all the facts and circumstances of the case " in the light of the policy described in the affidavit of Mr. Rawlings, and accordingly I think that the appeal should be allowed, the appellant paying the costs of the appeal in accordance with the terms of the order granting special leave to appeal.

RICH J. This case is rather embarrassed by the nature of the answers given by or on behalf of the Commission. Some of the answers appear to be erroneous or irrelevant, as the Supreme Court has suggested ; for instance, the statement that Italians as a general rule are not good farmers under irrigation. One remembers that during the centuries B.C. the Romans were farmers and that in the Augustan period Virgil in the Georgics wrote a treatise or sort of handbook on agriculture and husbandry. We also know that during this war the Italians transformed very unpromising land in this country into flourishing gardens. And the reference to the policy laid down by the Commission would appear to be of rather a cast-iron variety and not subject to the merits of the particular case and the provisions of s. 241 (2) and (3) of the *Crown Lands Consolidation Act*. The fact that the transferor is not an alien and that the transferee at the date of his naturalization in 1934, although an alien, was not an enemy alien was not taken into account. For aught I know he may have fought on our side against the Germans. However, in the last resort an affidavit by one of the Commissioners was filed stating that the circumstances of " the individual " case were

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considered. And as in another branch of the law—that of contracts of service—a wrong reason for refusal to perform a contractual obligation does not deprive the party from justifying his action under a right to which he was entitled at the time: Cf. *Shepherd* v. *Felt and Textiles of Australia Ltd.* (1). So too in the case of a mandamus incorrect or irrelevant reasons for performing a duty are beside the question unless the reasons prove that the particular body or its members " have not applied themselves to the question which the law prescribes, or that in purporting to decide it they have in truth been actuated by extraneous considerations, or that in some other respect they have so proceeded that the determination is nugatory and void " (*R.* v. *War Pensions Entitlement Tribunal*; *Ex parte Bott* (2)). The legislature has vested in the Commission very extensive powers of disposing of land in irrigation areas, of developing, controlling and supervising these areas. The legislature has not thought fit to define or limit the Commission's discretion in initiating and carrying out a policy which may appear to it to be the best and most effective method of development—and so long as that policy is not proved to be mala fide or arbitrary or capricious the Court is not empowered to substitute judicial methods for the Commission's policy of management and control.

For these reasons I would allow the appeal and discharge the order nisi. In accordance with the order granting special leave the appellant Commission should pay the costs.

STARKE J. Appeal by special leave from a judgment of the Supreme Court of New South Wales, in Full Court, making absolute a rule nisi for a writ of mandamus directed to the Water Conservation and Irrigation Commission calling upon it to deal with and determine an application on the part of Eric Browning for its consent to the transfer of irrigation-farm lease No. 1254 to Antonio Carbone.

Crown lands in New South Wales may not be sold, leased, dedicated, reserved or dealt with except under and subject to the provisions of the provisions of the *Crown Lands Consolidation Act* 1913, s. 6. The respónsible Minister has power to declare lands available for disposal by way of (*inter alia*) lease as irrigation-farm leases (Act, s. 139). Any person, with certain exceptions, may apply for holdings within an irrigation area but the granting of any such application is entirely at the discretion of the Water Conservation and Irrigation Commission constituted under the *Irrigation Act* 1912-1944 (See *Crown Lands Consolidation Act* 1913, ss. 5 (" The Commission "), 137, 139,

(1) (1931) 45 C.L.R. 359, at pp. 370, 371.

(2) (1933) 50 C.L.R. 228, at pp. 242, 243.

140, 141). Except with the consent of the Commission an irrigation-farm lease may not be transferred or sub-leased either in whole or in part or otherwise dealt with. Application for the consent of the Commission must be made in the prescribed form. The granting or refusing of any such application is entirely in the discretion of the Commission (*Irrigation and Water (Amendment) Act*, 1943, No. 2, s. 15 (*g*)).

Eric Browning was the holder of an irrigation-farm lease and in 1946 he applied to the Commission for its consent to the transfer of that lease to one Carbone, an Italian, who had become a naturalized British subject.

The Commission refused its consent, whereupon Browning obtained the rule nisi for a writ of mandamus directed to the Commission which was made absolute, as already mentioned.

Mandamus is the means of enforcing the performance of a public duty (*Randall* v. *Northcote Corporation* (1)). And the person applying for the writ must show a legal right to insist upon that performance (*R.* v. *Lewisham Union* (2)). The Acts, already mentioned, imposed, it was said, a duty of a public nature upon the Commission to consider and determine according to law Browning's application for a consent to the transfer of his irrigation-farm lease to Carbone and it was also said that his right to insist upon the performance of that duty was established (*Randall* v. *Northcote Corporation* (1)).

But there is something to be said for the view that the discretions reposed in the Water Conservation and Irrigation Commission were not intended to be examinable in any court of law. The Acts are dealing with the alienation and administration of crown lands and so far as lands in irrigation areas are concerned, the granting and transfer of holdings are placed entirely in the discretion of the Commission as an instrument of the Executive Government: Cf. *R.* v. *Arndel* (3). But I accept, for the purposes of this case, the propositions above set forth.

In the first place it must be observed that the Commission did consider Browning's application for its consent to the transfer and refused it. So the applicant's case is that the Commission's decision is vitiated because it took into consideration matters " absolutely outside the ambit of " its authority " and absolutely apart from the matters which by law ought to be taken into consideration."

(1) (1910) 11 C.L.R. 100.
(2) (1897) 1 Q.B. 498.
(3) (1906) 3 C.L.R. 557.

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And, if so, the Commission has not considered and determined the application for consent to the transfer according to law (*R.* v. *Port of London Authority*; *Ex parte Kynoch Ltd.* (1)).

It is not, and could not be, suggested that there was any want of bona fides on the part of the Commission which has candidly stated its reasons for refusing its consent to the transfer in an affidavit by one of the Commissioners. Several years ago the Commission decided that it was not in the interests of the irrigation areas and the development of the land therein that consent should be given to transfers to naturalized persons of enemy origin unless upon examination of any individual case special circumstances were disclosed. This decision was made because of the large amount of public money sunk in the areas. It was also considered desirable that irrigation-farm lands should be made available for Australians, particularly returned soldiers.

The Commission also found from experience that Italians, as a general rule, were not good farmers under irrigation methods, and that there was a considerable aggregation of Italians in the irrigation area in question, which was undesirable.

Keeping in mind all these matters and considering all the facts and circumstances of the case of Antonio Carbone, who was a naturalized Italian of enemy origin, the Commission was of opinion that there were no special circumstances affecting his case and in its discretion refused its consent to the transfer. Surely, whether a proposed transferee would be a good irrigation farmer is a relevant consideration. The question is not whether the Commission came to a right conclusion on the facts but whether it considered and determined the application for a consent upon relevant considerations.

Again, the Commission regards the aggregation of a number of Italians in the irrigation area, to which the application for the consent related, as undesirable. No reason is stated for that conclusion but given honestly why is not that circumstance one for the consideration and discretion of the Commission? To increase the number of somewhat inefficient irrigationists might, I suppose, be undesirable and perhaps there are other good reasons. But that again is for the consideration and discretion of the Commission. Further, the Commission considers that irrigation-farm lands should only be made available for naturalized persons of enemy origin in special circumstances and that Australians, particularly returned soldiers, should have lands available for them. That is a matter of policy.

After all the Act does not limit in any way the discretion of the Commission. It gives it control of all irrigation areas, the disposal

(1) (1919) 1 K.B. 176, at p. 187.

of lands within those areas and also matters of policy, except those mentioned in s. 8 (3) of the *Irrigation Act* 1912-1944, which are subject to the approval of the responsible Minister. "If a matter is left to the discretion of any individual or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not. If such a power is given to any one, it is sufficient in common sense for him to say that he has exercised that power according to the best of his judgment" (*R.* v. *Mayor and Aldermen of London* (1)).

Reference was made during the argument to s. 241 of the *Crown Lands Consolidation Act* 1913 providing that aliens may acquire leases within irrigation areas though they must become naturalized within a prescribed time. That section is inapplicable to this case for Carbone was a naturalized subject. It makes clear, however, that an alien is not debarred from holding irrigation-farm leases though it in no wise affects the discretion of the Commission in granting or consenting to the transfer of such leases.

The appeal should be allowed: the order of the Supreme Court set aside and the rule nisi for a mandamus discharged.

DIXON J. This is an appeal by special leave from a rule of the Supreme Court of New South Wales making absolute a rule nisi for a prerogative writ of mandamus directed to the appellant, the Water Conservation and Irrigation Commission, calling upon the Commission, that is, I presume, commanding it, to deal with and determine according to law an application by the respondent, Browning, to transfer an irrigation-farm lease to one Antonio Carbone.

The ground of the rule nisi was that the discretion of the Commission in rejecting Browning's application had not been duly exercised in accordance with law.

The *Irrigation Act* 1912-1944 constitutes the Commission as a body corporate the members of which are the Minister administering that Act and two Commissioners. The statute gives the Commission control of irrigation areas and of works upon or used in connection with irrigation areas. For that purpose the Commission takes the place under the material provisions of the *Water Act* 1912-1936 of the Minister and it is the constructing authority. It disposes of lands in irrigation areas under the *Crown Lands Consolidation Act.* Any specified area of land of the Crown may be constituted an irrigation area.

(1) (1832) 3 B. & Ad. 255, at p. 271 [110 E.R. 96, at p. 102].

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Land within an irrigation area is divided into areas by the Commission, which determines the purchase money or rent. The Minister prescribes the special conditions for the holdings, which may be irrigation-farm purchases, non-irrigable purchases or town-land purchases, or irrigation-farm leases, non-irrigable leases or town-land leases.

In the notification by the Minister the water rights attached to irrigation-farm purchases or leases must be stated. The Commission deals with applications for holdings and the grant of an application is placed entirely at its discretion. It is expressly authorized to give preference to an applicant or group of applicants.

The powers of the Commission in relation to irrigation areas are wide and varied. From the supply of water for irrigation and the construction and maintenance of works for that purpose, the levying and collection of water charges and other moneys owing by an occupier and the supervision of the holdings, the Commission's powers extend to providing public utilities, services, facilities and amenities for irrigation areas such as railways, tramways, roads, drainage, sewerage, sanitary services, water supply and power and to carrying on industry, trade and business. There are special provisions relating to the local government of an area, but it is unnecessary to go into them. However, the Commission has a power of making regulations covering matters many of which are elsewhere the common subject of municipal by-laws.

The legislation the effects of which have been shortly described is contained partly in the *Irrigation Act* 1912-1944 and partly in Part VI. of the *Crown Lands Consolidation Act* 1913 as amended to 1944, more particularly by Act No. 2 of 1943.

The duty for the enforcement of which the mandamus has been granted has been held by the Supreme Court to arise from one of the provisions of Part VI., namely, s. 145A. The material portion of the section provides that, except with the consent of the Commission, an irrigation-farm lease, among other interests, shall not be transferred or sub-leased in whole or in part or otherwise dealt with. It goes on to provide that the application for the consent of the Commission shall be made in a prescribed form and that the granting or refusing of the application shall be entirely within the discretion of the Commission. The consent is essential to validity and the provisions requiring it are made conditions attaching to the holding, and breach of them works a forfeiture.

The respondent, Browning, holds an irrigation-farm lease in the Yanco No. 1 irrigation area which is included in the Murrumbidgee irrigation scheme.

In September, 1946, he entered into a contract with Antonio Carbone of Leeton, a naturalized British subject of Italian birth, by which he agreed to sell to him the lease. On 14th October 1946, the respondent forwarded to the Commission an application for the Commission's consent to the transfer pursuant to the sale. On 26th October the Commission replied that it was not prepared to consent to the transfer to Carbone, nor approve of the contract of sale to him. In answer to a request for the ground of the refusal, the Commission wrote saying that it exercised its discretion in accordance with s. 145A having regard to the established policy of the Commission in respect to the acquisition of land by naturalized persons of enemy origin. This statement is explained in an affidavit by one of the Commissioners. He says, in effect, that several years ago the Commission decided that it was not in the best interests of the irrigation areas and the development of land therein to consent to a transfer of land in an area to a naturalized person of enemy origin, unless an examination of the individual case disclosed special circumstances. He adds that the decision was reached because a large amount of public money was sunk in the irrigation area and the Commission considered that such irrigation farm lands as were available should be kept for Australians, particularly returned soldiers, and also because it was found from experience that, as a general rule, Italians are not good farmers under irrigation methods and also because it is most undesirable that any further aggregation (*sic*) of Italians be built up on an irrigation area. Finally, the Commissioner says that in the case of the transfer to Carbone all the facts and circumstances were considered, but they did not disclose any special circumstances and consent was refused in the exercise of the discretion.

The Supreme Court adopted the view that the grounds assigned were extraneous to the Commission's functions and, moreover, that the refusal of consent was based on a fixed rule and not a proper consideration of the application. *Jordan* C.J., in delivering the judgment of the Court, expressed the view that what the Commission's communication had described as its established policy in respect of the acquisition of land by naturalized persons of enemy origin was clearly no business of the Commission. His Honour also said that it was inconsistent with s. 241 (2) and (3) of the *Crown Lands Consolidation Act*, which provide that an alien may apply for and acquire, among other interests, a lease within an irrigation area, but that he shall become naturalized within five years upon pain of forfeiting his interest. As to the Commission's view that irrigation farms should be kept for Australians, particularly returned soldiers,

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Jordan C.J. considered that also to be none of the Commission's business. Its opinion that, as a general rule, Italians are not good farmers under irrigation methods, his Honour regarded as a conclusion of a general nature which the Commission applied as a fixed rule without there being any suggestion or ground for believing that Carbone was a bad farmer. The further opinion of the Commission that Italians should not congregate in an irrigation area was considered by the learned judge to be irrelevant. His Honour concluded by saying that, in his opinion, it sufficiently appeared that, instead of considering and determining Carbone's case upon its merits, as it was the Commission's duty to do in order to make a valid exercise of its discretion, it based its refusal upon irrelevant considerations and has, therefore, failed to make any valid exercise of its discretion at all.

In considering the correctness of the decision that a mandamus should issue, it is important, I think, that we should firmly exclude from the matters we take into account the wisdom or unwisdom of the Commission's opinions, or the justness or unjustness of their views about Italians as irrigation farmers or about the undesirability of increasing their number in particular areas. These are matters which have nothing to do with a court of law called upon to decide whether a case for mandamus has been made out. The Commission is an administrative body entrusted with a full discretion. A mandamus does not lie to it except to compel it to discharge a duty, in this case to consider the application and exercise its discretion to grant or refuse consent. Prima facie some refusal to execute its duty must be shown. Where an administrative body has given a decision in ostensible performance of its duty, it must be shown that nevertheless in truth the duty remains unperformed, so that the purported decision implied a refusal of the true duty. In a case like this that can only be done if it is made to appear that the body acted upon grounds outside the purposes for which it was entrusted with a discretionary power or duty: See *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1); *R.* v. *Trebilco*; *Ex parte F. S. Falkiner & Sons Ltd.* (2), and *Andrews* v. *Diprose* (3).

The statutory provision which gives to the Commission the discretionary power of consenting to the transfer contains no statement of the matters which the Commission is to take into consideration in exercising the power. It contains a prohibition against transferring an irrigation-farm lease except with the consent of the

(1) (1933) 50 C.L.R. 228, at pp. 242, 243, 245.
(2) (1936) 56 C.L.R. 20, at pp. 27, 29, 32.
(3) (1937) 58 C.L.R. 299, at pp. 302, 308, 309.

Commission and proceeds to say that the grant or refusal of the application for consent shall be entirely in the discretion of the Commission. But there is no positive indication of the considerations upon which it is intended that the grant or refusal of consent shall depend. The discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view. No doubt the Commission is placed under a duty to consider an application for consent to a transfer and to grant or to refuse or withhold consent. And I agree with the view expressed by *Jordan* C.J. that the use of the word " entirely," while it indicates that the discretion is meant to rest in the Commission alone, does not necessarily indicate that it is intended to be arbitrary and unlimited, although I hardly think *Shrimpton* v. *The Commonwealth* (1) which his Honour cites, is much to the point, having regard to the constitutional limitations upon the operation of the word " absolutely " there considered : See *Dawson* v. *The Commonwealth* (2) and *Miller* v. *The Commonwealth* (3). But, though the discretion is neither arbitrary nor completely unlimited, it is certainly undefined. I have before remarked on the impossibility, when an administrative discretion is undefined, of a court's doing more than saying that this or that consideration is extraneous to the power (*Swan Hill Corporation* v. *Bradbury* (4)). But there must be some warrant in the provisions, the nature or the subject matter of the statute before so much can be said of a particular consideration that has been acted upon. What warrant have we in point of law for saying that the considerations governing the Commission's refusal of consent to the transfer to Carbone can be material to no purpose falling within the scope and object of the Commission's discretion ?

The Commission is responsible for the successful development of irrigation areas as well as for superintending and controlling them. The width and variety of its powers are enough to show that matters of policy are by no means withheld from the Commission. The growth and character and components of the community by which an irrigation area is worked is not a matter altogether foreign to the Commission's responsibilities. One of the very reasons why transfer of irrigation holdings is not permitted, except by the consent of the Commission, is to enable it to decide the suitability and desirability of the individual proposed and whether it is or is not advantageous

(1) (1945) 69 C.L.R. 613.
(2) (1946) 73 C.L.R. 157.
(3) (1946) 73 C.L.R. 187.
(4) (1937) 56 C.L.R. 746, at pp. 757, 758.

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to have him. The grounds of suitability, desirability and advantage are matters for the Commission's judgment. If the Commission considers divisions arising from race or from hostile affiliation undesirable, what is there in the statute to show that it is a consideration wholly outside the Commission's province ? If it sees advantage in having returned soldiers, it is not easy to see any legal ground why the Commission should not take that into account. There may be much reason to doubt the validity of the reasoning by which the opinions of the Commission have been reached. But that is not for us. The honesty of the Commission's conclusions is not in question and it does not appear that, in giving effect to them, the Commission has been actuated by anything but what appears to it to be the welfare of the irrigation area and of the Commission's administration of the area.

There is, in my opinion, no sufficient warrant in the statutes for holding that the reasons given by the Commission are beyond its competence. I cannot see that they involve an inconsistency with s. 241 (2) and (3) which do no more than relieve aliens from an incapacity conditionally upon their acquiring nationality within a specified period.

The question whether the Commission gave effect to a fixed rule without considering the individual case of Carbone involves a familiar difficulty. The application of a rule antecedently adopted does not vitiate an exercise of a discretion of the kind belonging to the Commission, unless there was a failure to consider the application as an individual case. The affidavit of the Commissioner says that the circumstances of the case were considered and, although there is ground for conjecturing that no very adequate opportunity was given to transferor or transferee for showing special facts or considerations, we have little before us on the subject, and in any case, there is, in my opinion, no sufficient evidence to justify the conclusion that, in substance, there was a refusal or failure to consider the application.

For these reasons I think that the appeal should be allowed with costs and that the rule nisi granted to the respondent, Browning, and made returnable instanter should be discharged with costs.

McTIERNAN J. I agree that this appeal should be allowed, but not without some doubt.

The matters affecting the social composition of the area which influence the rejection of the respondent's application approach, if they do not transcend, the line between the control vested by the Act in the appellant and the political responsibilities of the State.

But I am unable to reach a clear conclusion that those matters were irrelevant in the consideration of the respondent's application, having regard to the extent and nature of the control and the powers and discretion vested in the appellant by the Act. The opinion expressed by the Commission that the person to whom the respondent applied to transfer his lease would be an unsuitable farmer in this irrigation area because he is an Italian, is likely to be received with incredulity by the uninitiated: but the suitability of a person to become a lessee is entirely within the province of the appellant, and if it makes an erroneous decision of fact on this question a court cannot intervene to control it unless, perhaps, its decision is not made in good faith. There is no charge of bad faith made in this case: the appellant has given its reasons for refusing to grant the respondent's application. It does not appear that it failed to consider the respondent's application according to law.

Appeal allowed. Order of Full Court set aside. In lieu thereof order that rule nisi be discharged with costs. Appellant to pay costs of appeal to this Court.

Solicitor for the appellant, *F. P. McRae*, Crown Solicitor for New South Wales, by *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Cater & Dalton*, Leeton, by *Malleson, Stewart & Co.*

E. F. H.