DAMAGE IN THE EXERCISE OF STATUTORY POWERS.[1]

Kent v. E. Suffolk Catchment Board[2]

In a recent number of *Res Judicatae* three cases, *Smith v. Cawdle Fen Commissioners*[3]; *Gillett v. Kent Rivers Catchment Board*[4], *Kent and Porter v. East Suffolk Rivers Catchment Board*[5], were noted involving principles governing the liability of public authorities in exercise of statutory powers. The *East Suffolk* case was a decision of Hilbery J. whose judgment was affirmed by the majority in the Court of Appeal, but was reversed in the House of Lords. It is debatable whether the decision was reversed on a point of law or on a question of fact. Did the problem of causation involved lead to a more exact statement of the duty owed, or did their Lordships differ on the facts from Hilbery J. and ask a question which he did not consider ? It is submitted that this latter view may be more correct. A further note on this case seems therefore appropriate.

By virtue of the Land Drainage Act 1930 a Catchment Board is empowered to repair a breach in drainage work. The plaintiffs were owners of land protected by a wall from a tidal river which, owing to an unusually high tide, overflowed, causing part of the wall to collapse and flooding the plaintiffs' lands. The Catchment Board attempted to repair the breach but it was proved in evidence that the Board had adopted a negligent method of repair and the land was kept in a submerged state much longer than would have been necessary had the Board used a sufficient number of skilled workmen. The plaintiffs claimed damages for breach of statutory duty and negligence in the performance of that duty. It was admitted firstly that the Board was not under a duty to repair the breach at all—the statute was purely permissive, therefore if the Board took no action there was no liability. The Board had a discretion to apply its funds as it thought fit in each case—it had to strike " a just balance between the rival claims of efficiency and thrift." Secondly it was admitted that the Board by exercising its power to repair did come under a duty to the plaintiffs, a duty not imposed by statute but at Common Law. The question was as to the extent of the duty. " Once they had taken action it was, I think, clear that they were under some obligation to the owner of the land upon which their operations were being carried out. The question is, not as to its existence, but as to its extent." It was on this point that the judicial differences of opinion turned.

Hilbery J.'s statement of the law[6] is generally unexceptionable. " Once work is undertaken by an authority under a permissive statutory authority, and once that work is done in a way which results in injury, the person who is injured can recover if he can show that, when the authority was actually doing the work, it did it without reasonable care, and thereby caused the injury of which the complaint is made." All their lordships agreed with that statement, but they thought that the question to be decided was whether the Board in this case did, by its failure to use

1. The writer acknowledges the assistance she has derived in preparing this note from discussion with the Honours Class in Constitutional Law I.
2. [1941] A.C. 74; [1940] 4 All E.R. 527.
3. [1938] 4 All E.R. 64.
4. [1938] 4 All E.R. 810.
5. [1939] 2 All E.R. 207.
6. Res Judicatae II., p. 84.

reasonable care (including despatch), cause any injury to the plaintiffs. Hilbery J. thought that it had caused such injury; Lord Atkin thought that it might have done so. The other members of the House thought that the Board had not caused any injury. They decided the question as a problem in causation—the loss suffered by the plaintiffs was due to the original breach and the Board's failure to counteract successfully the operations of nature merely allowed the damage to continue while they were engaged in repairing it.

This decision of their Lordships, while agreeing with the statement of Hilbery J., has amplified it considerably and has led to a more exact statement than has previously been given of the rules applicable where an authority has failed to exercise powers. The majority of the House thought that the Board's duty was not like that of an independent contractor, to carry out work with reasonable care, skill and despatch, but merely a duty not to add by want of care skill and despatch to the damage. The plaintiffs would have suffered had the Board not acted at all. The Board, with its responsibilities over the whole area to consider, and its limited finances, could have abandoned the project altogether, leaving the plaintiffs with no legal remedy against them for withdrawing, although the lands may have remained flooded indefinitely. But if a contractor were engaged to execute the task, he would be liable in damages if he did not exercise reasonable skill and promptness and damage resulted.

This decision leaves unimpaired the decisions and principles on which the other cases in the previous note rest, and is entirely consistent with Lord Blackburn's statement in *Geddis v. Bann R. Reservoir*[7]:—"It is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized if it be done negligently. And it would seem that if by a reasonable exercise of the powers, either given by Statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, and consistent with the decision in *Sheppard v. Glossop Corporation*,[8] 'negligence' not to make such reasonable exercise of their powers." The principles involved in the present case were inherent in *Sheppard's* case, but obscure, and the *East Suffolk* case has laid down a more precise formulation of the law as it is to be applied to authorities acting under an empowering statute.

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7. [1878] 3 A.C. 430.
8. [1921] 3 K.B. 132.