CONSTITUTIONAL LAW:

ADMINISTRATIVE DISCRETION AND COMMON LAW LIABILITY: MORE CATCHMENT BOARD CASES.

The decision of the House of Lords in *Kent v. East Suffolk Catchment Board*,[1] is now a classic of administrative law. It raised in an acute form the problem of the borderlines between administrative discretion and common law liability of a public authority. This is one of the root problems of administrative law, and has been elaborated in hundreds of decisions by Continental administrative tribunals. In English law, however, this, like many public law problems, has only recently become articulate, and they have to be decided within the common law framework. The *ratio decidendi* of *Kent's Case* is not quite easy to ascertain. Some of the judgments emphasized the fact that the Board's failure to repair the breach in the dyke as quickly as it ought to have done, given reasonable care and skill, did not cause any additional damage, as the Board need not have done anything at all. Other judgments emphasized the public law aspect; operating within a limited budget and obliged to act in the public interest, a public authority should not be hampered in the exercise of its discretion, nor should it be judged by the same standards of negligence as a private contractor. Lord Atkin dissented strongly from all these considerations, and regarded the Catchment Board as liable according to the same principles as a private contractor.

The decision left several questions unanswered: what would have been the position if the plaintiff had offered to have the work done privately, but the Board had insisted on doing it itself? What if the Board had charged a service fee, or at least recovered the expenses of the work? Some of these questions have now been answered, though perhaps not satisfactorily. In *Smith v. River Douglas Catchment Board*,[2] the Board had covenanted with a number of landowners, including the plaintiff's predecessor, that it would "widen and deepen and make good the banks of the Eller Brook . . . take over the control of the Brook . . . and maintain for all time the work when completed." In return, the landowners agreed to contribute towards the cost of the work. In 1946 the banks burst, owing to faulty work by the Board, and flooded the plaintiff's land, causing damage to it. One fact, which was held to be important by Denning L.J., was that, as a consequence of the Board's undertaking and work, the plaintiff had ploughed up land and cultivated fields, thus suffering damage which would not have occurred had the Board done nothing.

The Court of Appeal held in the first place that this was a covenant which ran with the land, and therefore inured to the benefit of the successor in title. This is a question which the author of this note does not feel competent to deal with. On the public law problem the Court held that:

(*a*) the action of the Board had caused definite damage;

1. [1941] A.C. 74.
2. [1949] 2 All E.R. 178.

(*b*) the Board had not exercised its statutory power, but entered into a contract, for which a lump payment by the owners was the consideration ;

(*c*) there was a breach of contract.

The fact that additional damage was caused distinguishes this case from *Kent's Case*. But on the other two points, the judgments of the Court are most unsatisfactory. There was no examination of the question whether the payments—which under the agreements were to be a contribution towards the cost of the work—included a remuneration for the work done, or merely a contribution to the cost of material. This is, however, a very relevant question. It would be very doubtful whether the latter kind of contribution would justify the implication of a contract. If the exercise of a public duty is to be construed as a private contract, this should be done only where the terms are comparable to those of private contracting—that is, where the consideration consists in the reimbursement of cost, services, and a reasonable profit margin. The Court was also very vague on the question of negligence. The Judge of first instance had denied negligence ; the Court of Appeal was content with stating that there was a breach of contract. Whether it regarded the Board's conduct as negligent, or considered that breach of contract did not presuppose negligence, is not clear.

A later decision, by a partly differently composed Court of Appeal, in *Marriage v. East Norfolk Rivers Catchment Board*,[3] illuminated the different aspects of the legal position of public authorities in regard to private interests. Here the Catchment Board had deposited river dredgings on a bank, thereby raising its level. Consequently, flood waters were prevented from escaping over the bank, as they formerly had done, and their diversion swept away a bridge owned by the plaintiff, who claimed damages for nuisance. Here the Court held that the Board had exercised wide statutory powers which necessarily involved the possibility of interference with private rights. The relevant Statute, the *Land Drainage Act* 1930, expressly provided a remedy by way of compensation to persons injured by the carrying out of statutory operations. This was held to exclude by implication any additional or alternative common law remedies. To hold otherwise would mean, as Tucker L. J. put it[4] " to substitute a decision of the Court for that of the Board, in a matter which the Legislature has placed in the discretion of the Board, and for which it has expressly provided compensation."

The law thus appears to be somewhat as follows :

(1) A public authority equipped with statutory powers which imply wide discretion as to the exercise of its public duties cannot be hampered by—

(*a*) construing a contract from the carrying out of an operation in the exercise of a statutory power ;

(*b*) holding the authority liable in tort where it has acted negligently, but not caused additional damage, by comparison with the situation existing before it acted ;

3. [1949] 2 All E.R. 1021.
4. *ibid.*, at p. 1025.

(c) granting a remedy in common law where statutory compensation is provided.

(2) Where, on the other hand, a public authority enters into a specific agreement with interested parties under which it receives compensation for the work done, a contract must be implied and the authority is liable for damages, apparently whether it has acted negligently or not.

(3) The decision in *Smith's Case* suggests that any monetary consideration suffices to imply a contract, but it is doubtful whether this view would be sustained by the House of Lords.

W. F.

CONSTITUTIONAL LAW: THE WRIT OF PROHIBITION AND THE JUDICIAL FUNCTION.

The King v. City of Melbourne; *Ex parte Whyte*.[1]

In the above-named case, the Applicant was summoned before the Licensed Vehicles Committee of the Melbourne City Council to shew cause why the hackney carriage driver's licence and three private hire car licences issued to him should not be revoked, cancelled or suspended. The Committee refused to allow him to appear before it by a solicitor, so the Applicant sought a writ of prohibition directed to the Lord Mayor, Councillors, and Citizens of the City of Melbourne, prohibiting the Council from proceeding to consider the revocation etc. without affording him the opportunity of being represented by a solicitor.

Section 4 of the *Carriages Act* 1928, *inter alia* empowers the Council of the City of Melbourne to make by-laws for licensing and regulating hackney carriages plying for hire within that city. The by-law, made pursuant to this section, authorises the Council to grant licences and to revoke them after having determined that the licensee has been guilty of a breach of any of the provisions of the by-law, or has otherwise been guilty of conduct which in the opinion of the Council renders him unfit to continue to hold the licence. Under Act 6 *Vict. No.* 7 (1842) the Council had committed the functions of granting and revoking licences to the Licensed Vehicles Committee, although the acts of the Committee were not to become effective until approved by the Council.

The City of Melbourne argued as a preliminary objection that it was not a proper party to the proceedings, that as the *Carriages Act* 1928 conferred the power to make these by-laws directly on the "Council of the City of Melbourne," rather than on the "City of Melbourne," the Council had acted under this by-law as an independent unincorporated body, and not on behalf of the city corporation. O'Bryan J., who decided the case, took the objection seriously; but he pointed out that in *Taylor v. Shire of Eltham*,[2] the context of the *Land Act* 1915 and of the relevant section (184) providing that "any number of persons not less than three, or any municipal council" might be appointed to be a committee of

1. [1949] V.L.R. 257.
2. [1922] V.L.R. 1.