whether the levy there was one "upon" commodities at all. In view of this fact it seems likely that, should this question again come before the present High Court, the decision in *Matthews'* case will not stand and that the opinion of the minority in that case will prevail by statutory majority.

—H. O. CLARK.

WORKERS' COMPENSATION AND ACCIDENTS OUTSIDE THE STATE.

Mynott v. Barnard[1]

The Appellants were dependants of a workman killed whilst working on a mill in Tocumwall (N.S.W.). The deceased had been engaged in Cobram, Victoria, where he lived and was domiciled. The respondent employer carried on business throughout Victoria and on this occasion in New South Wales. The trial judge found as a fact that the parties intended their contract to be governed by Victorian law. The dependants claimed compensation under the Victorian Workers' Compensation Act 1928. The County Court judge, sitting as arbitrator dismissed the claim and this decision was upheld by the Full Court of the Supreme Court. From this decision the applicants appealed to the High Court. The appeal was dismissed.

The problem which arose was this: Does the Victorian Workers' Compensation Act cover accidents occurring and injury sustained outside Victoria? In *Tomalin v. Pearson*[2] the Court of Appeal held that the corresponding English Act did not apply when the accident took place in Malta, though the contract of employment was made in England between parties domiciled in England. This case was followed in *Schwartz v. India Rubber Coy.*[3] In the Privy Council in *Krzus v. Crow's Nest,*[4] Lord Atkinson approved *Tomalin's* case, saying that the Act did not apply "to an accident happening in Malta arising out of an employment carried on in Malta." The Irish Supreme Court however in *Keegan v. Dawson*[5] refused to follow *Tomalin's* case, maintaining that the approval of Lord Atkinson did not extend to the general proposition there laid down. In America this problem has also frequently arisen.[6] In *re Cameron,*[7] it was said, "Nothing in the statute suggests that the state of New York has attempted to stretch forth its arm to draw within the scope of its own regulations the relations of employer and employee in work conducted beyond its borders. Hazardous employment here is regulated by the Workmen's Compensation law; hazardous employment elsewhere though connected with a business conducted here does not come within its scope." In Australia we find that the matter has not been

1. (1939) A.L.R. 193.
2. (1909) 2 K.B. 61.
3. (1912) 2 K.B. 299.
4. (1912) A.C. 590.
5. (1934) I.R. 232.
6. See 31 H.L.R. 619, Beale on *Conflict of Laws,* Vol. II., 1317-20,*Cameron v. Ellis Construction Co.* 252 N.Y. 394, *Wright's* case 291 Mass. 344. *Tallman v. Colonial Transport Co.,* 259 N.Y. 512.
7. See note 6.

the subject of definite decision, although in *Beazley v. Ryan*[8] the Victorian Supreme Court decided that an accident which happened in Victoria incidental to a New South Wales contract of employment did come within the scope of the Act.

Thus the Court was really at large so far as binding authority was concerned. What the Court had the opportunity of doing and ultimately did, was to determine the scope of this branch of the law on a basis of justice and convenience. The terms of the Act being very general, the Court had a wide field of discretion and was confronted with a whole series of competing limitations from which it was free to select the one which appeared to be most expedient.

One limitation is that urged by Mr. Gilbert in a recent article[9] and is based on a contractual approach. The contention is that a Victorian workman engaged with a Victorian employer, *under a "Victorian" contract* of employment, is entitled to recover compensation under the Victorian Workers' Compensation Act in whatever State the accident causing his injury may occur because the Act in effect imports such a term into the contract. It is certainly a settled rule of private international law that the introduction of terms into a contract by implication of law is a matter for the proper law of the contract. And if we are to regard the Workers' Compensation Act as implying terms into a contract of employment then the only material consideration is the proper law, the locality of the accident being altogether irrelevant. But this view was unanimously rejected by the High Court. It is true that the Courts have regarded the Act as imposing statutory conditions of employment, but as Latham C.J. points out, it has been so described merely for the purpose of emphasising the fact that liability under the Act only arises in cases where there is a contract of employment. The obligations created by the statute cannot truly be said to be of a contractual nature for the very cogent reason that they attach independently of the will of the parties. Implied terms also operate independently of the intention of the parties, but they will never be introduced when they conflict with the express terms. The Workers' Compensation provisions cannot be excluded at all even if the parties expressly stipulate that they shall have no application. That is the essential respect in which the compensation provisions differ from implied terms of a contract. Moreover dependants who also have rights under the statute have no contractual relations with the employer at all. It would appear therefore that on consideration of the nature of the Workers' Compensation legislation we must inevitably reject, as the High Court did reject, any suggestion that the criterion of the applicability of the Act is whether the proper law of the contract of employment is Victorian.

There are two other possible limitations which could be applied. One is the *situs* of the accident, and the other is the location of the employment. Latham C.J. adopted the view that the Act applies only in the case of accidents happening in Victoria. That is, of course, the position laid down in *Tomalin's* case. Latham C.J. maintains that the

8. (1935) V.L.R. 135.
9. 11 A.L.J. 242.

Victorian Parliament had really "enacted" this decision in 1914. He says "that case was decided in 1909. The importance of the decision was obvious. The Victorian Parliament enacted the Workers' Compensation Act in 1914. The Act has been re-enacted in 1915 and 1928. In my opinion it should be assumed that the legislature was content to adopt the limitation of the legislation set forth in *Tomalin's* case."

Dixon J., arriving at the same decision, was not content however to base his decision on the *situs* of the accident. From a consideration of the decisions of the courts of the State of New York, he concluded that the real test of the applicability of the Act was the *location of the employment* and not the *situs* of the accident. His Honour quotes the following statement from *re Cameron*: "The Workmen's Compensation law applies to injuries within the State, and an award of compensation may be made for injuries sustained outside the State only where those injuries arise out of and in the course of employment which is located here." In this case it is maintained that where an employee does work within a State, and his duties require him occasionally to leave the borders of the State, then during the execution of those occasional duties outside the State he is still in employment within the State. Thus, according to this view it would be possible to recover under the Victorian Act even if the injury is sustained outside Victoria so long as it is in the course of doing work merely incidental to work carried on in Victoria. In *Mynott v. Barnard* the employment was carried on entirely and exclusively in New South Wales and could not be said to be located in Victoria.

The test of the location of the employment certainly extends the operation of the Act, and it has the advantage that it enables recovery to be made under the Victorian Act in circumstances in which, on the Chief Justice's view, it would be necessary for the applicant to go to the expense of resorting to the courts of another State. But at the same time there is much to be said for the Chief Justice's insistence upon the certainty and ease of application of the test of the *situs* of the accident—the more so in Australia where every State has similar legislation. In the transport industries especially, the determination of the location of an employment may be a very abstract and difficult matter.

—BORIS SHER.

THE LEGAL LIABILITY OF DRAINAGE AUTHORITIES.[1]

Smith v. Cawdle Fen Commissioners.[2] *Gillett v. Kent Rivers Catchment Board.*[3] *Kent & Porter v. East Suffolk Rivers Catchment Board.*[4]

The three cases here noted concern the legal liability of public authorities to be sued in damages by an individual who has suffered injury resulting from the exercise of statutory powers, or from the failure to exercise them. In the *Cawdle Fen* case the plaintiff's land was

1. The author acknowledges gratefully the assistance he has derived in writing this note from discussion with the Honours class in Constitutional Law I.
2. (1938) 4 All E.R. 64.
3. (1938) 4 All E.R. 810.
4. (1939) 2 All E.R. 207.