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.

flooded owing to the inadequate height of a protecting bank vested by statute in the defendant authority, but the action brought for damages for negligence failed. In *Gillett's* case a drainage channel controlled by the defendant drainage authority became blocked with weeds, and as a result in a specially wet season the plaintiff's land was flooded and his potato crop ruined. His action for damages also failed. In the *East Suffolk* case a tidal river broke through a wall which the defendants were empowered to maintain, and the land of the plaintiffs was flooded. The defendants although held not liable for the original flooding were found to have adopted a negligent method of repairing the breach so that the land was damaged by prolonged submergence, and on this finding they were held liable in damages.

A drainage authority may be taken as a typical public authority, distinguishable however from a highway authority, to which special rules apply. The first general question is to ask whether the terms of the statute impose a duty which has been broken. In the second place, even though such a duty may be established, and a breach of it proved, nevertheless an action for damages may possibly fail, because the statute has provided another remedy.

In the three cases above, both of these points were resolved against the plaintiffs. First, they failed to establish that the Land Drainage Act of 1930 imposed a *duty* on the drainage authorities to construct and maintain such works as to avert the injury suffered by the plaintiffs. The Land Drainage Act was interpreted only as conferring *powers* to construct and repair drainage works. Secondly, even had a duty been established, the plaintiffs would apparently still have failed in the *Cawdle Fen* case and in *Gillett's* case, since the Act itself provided other modes of remedying the defaults of the drainage authorities, i.e., complaint to the Catchment Board of defaults by the Commissioners, and complaint to the Minister of defaults by the Catchment Board.[5]

The plaintiffs had therefore to fall back on the rules governing liability in the exercise of statutory powers. The first is that for damage caused by mere failure to exercise a statutory power, a public authority is not liable in damages. For, as Scrutton L.J. said in *Sheppard v. Glossop Corporation,*[6] "it is not negligent to abstain from doing a thing unless there is a duty to do it." In the *Cawdle Fen* case there was no doubt that the defendants could have prevented the damage if they had exercised their powers under the Act and built the wall higher. Instead, they merely kept the existing wall in good order. Du Parcq J. found in their favour, for they had exercised all reasonable care in what they had undertaken, viz. maintaining the wall; while they were not obliged to undertake any action at all such as building a new or a higher wall, and could not be liable for failing to act where they had assumed no duty. The plaintiff was "really seeking to put upon the defendants a duty which the legislature does not put upon them at all."[7]

5. Land Drainage Act, 1930, ss. 10,12; see (1938) 4 All E.R. pp. 65 (du Parcq J.) 813-4 (Stable J.).
6. (1921) 3 K.B. 132, 145.
7. (1938) 4 All E.R. p. 69.

Similarly in *Gillett's* case the plaintiff could not succeed merely by showing that the authority had failed to exercise its powers. Even if there had been a duty here, there was no negligence in its discharge, for the defendants were found to have exercised due care and skill in their maintenance of the drain. The decision however did not need to go beyond the omitted power:—

"If all that is complained of is that the drainage board have not maintained in a due state of efficiency one of the water courses or drainage works in that area, that omission to exercise their power does not render them liable to be sued for damages in an action."[8]

The second rule governing liability in the exercise of statutory powers is best known in the often-quoted words of Lord Blackburn in *Geddis v. Proprietors of Bann R. Reservoir*:[9]

"It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, 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 authorised if it be done negligently. And I think 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, "negligence" not to make such reasonable exercise of their powers."

The *East Suffolk* case illustrates the nature of the rule very clearly, establishing the liability of an authority for negligence in the execution of an authorised act. The claim for damages was based on two grounds; firstly on breach of statutory duty, alleging that the wall broke because the defendants failed to perform their duty to maintain it: this was unsuccessful because there was no negligence and no duty; and secondly, on the negligence of the defendants in the performance of their duty to repair the wall. On this second ground the claim was successful. The defendants were under no actionable duty to undertake the repair of the wall, although they probably could have been directed to do so under sec. 12 of the Land Drainage Act. But they began the task of blocking the breach, and the court found that they adopted a negligent method: they tried to fill the gap along the line of the destroyed bank, and only succeeded in supplying the inrushing water with more debris to deposit upon the plaintiffs' lands. Nor for several months were enough men employed for efficiency, and it was only after a considerable period, during which the plaintiffs' property suffered severely from the prolonged submergence, that a wall was built around the scoured-out gap.

"Once work is undertaken (said Hilbery J.) 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 complaint is made."[10]

8. Ibid., p. 814 (Stable J.).
9. (1878) 3 A.C. pp. 455-6.
10. (1939) 2 All E.R. 207, 219.

Torn from its context the latter part of Lord Blackburn's dictum, that the authority may be liable for omission to make reasonable use of its powers, has proved puzzling, not to say misleading. Our drainage cases place it in its proper setting. Liability arises only where the authority, by undertaking work in the exercise of its powers, comes under a duty to take reasonable care lest its work should cause damage to others. Thus, having undertaken to repair the broken wall, the East Suffolk Rivers Catchment Board was liable for the damage caused by its negligent method, though the negligence consisted partly in omitting to employ a reasonable number of men to accomplish the work by the method chosen. The obverse of this appears in the *Cawdle Fen* case, where the defendants omitted to build the wall high enough for complete safety. This omission was not negligent, because there was no duty undertaken to build a wall. Lord Blackburn did not make an omission the basis for an action for negligence unless there is some duty in existence, and such a duty will arise under an empowering statute only when the authority takes some positive step to create it.

C. W. HARRIS.

LEGAL LIABILITY OF HIGHWAY AUTHORITIES.[1]

Buckle v. Bayswater Road Board.[2]

This case is an interesting application of the rule that the statutory obligation of a public corporation to repair roads does not of itself render the authority liable to an action for damages for injury arising from the mere failure to keep the highway in repair. But this freedom from liability for what is known as non-feasance is strictly confined to highway authorities and the courts have been careful to prevent its extension. On the one hand, where (as often to-day) a highway authority has other functions and capacities, whether under the same statute or some other, the authority will not be able to claim the benefit of the non-feasance rule if the fabric it has failed to repair was constructed in the exercise of some other statutory function. On the other hand, there have been suggestions that the true test of liability for non-repair is to be found rather in the nature of the work itself than in the capacity in which the authority has acted. On this view the non-feasance rule applies to the actual highway itself, but not to artificial structures placed in or under it. In the majority of cases either test would, of course, produce the same result: for a highway authority acting as such will generally confine itself to the making of highways and will not build artificial structures thereon. In the case under discussion, however, the "artificial structure" test led McTiernan J. to one conclusion and the "juridical capacity" test led Dixon J. to the opposite. Additional interest is lent to the case by the fact that Latham C.J. agreeing with Dixon J.'s view of the law, disagreed with him in its application to the particular facts.

1. The author gratefully acknowledges the assistances he has received in writing this note from discussion with the Honours class in Constitutional Law I.
2. (1936) 57 C.L.R. 259.