THE LAW OF HIGHWAYS.

PART I.

THE LAW OF HIGHWAYS INDEPENDENT OF STATUTE.

CHAPTER I.

HIGHWAYS IN GENERAL.

Highway Defined.—The term "highway," in its widest sense, comprises all portions of land over which every subject of the Crown may lawfully pass (*a*).

Highway is Open of Right to the Public.—It is essential to the notion of a highway that it should be open to all members of the public. The definition at once excludes land over which a man may pass by virtue only of a licence personal to himself, or in the exercise of his right as the owner or occupier of that land, or as the owner or occupier of other land to which an easement over that land is appurtenant. It excludes roads, commonly called occupation roads, laid out for the accommodation of the occupiers of adjoining properties, and legally open to them only. It excludes also lands, such as village greens, parks, or fields, over which the inhabitants of a particular district have by custom (*b*) or otherwise

(*a*) The following are some of the definitions of the term "highway" given by text-writers: A way "which is common to all the King's people, whether it lead directly to a market town or only from town to town, may be properly called a highway" (1 Hawk. P. C. 32, s. 1). "Any thoroughfare which is open to all the King's subjects" is a highway (Wellbeloved on Highways, Chap. I.). "A highway is a passage which is open to all the King's subjects" (2 Sm. L. C. (11th ed.), 164). And see *Austin's (Katherine) Case* (1672), 1 Vent. 189, per Lord Hale, cited Com. Dig. "Chimin" (A. 1.); and *Bailey* v. *Jamieson* (1876), 1 C. P. D. 329, 332.

(*b*) *Fitch* v. *Rawling* (1795), 2 H. Bl. 393; *Hall* v. *Nottingham* (1875), 1 Ex. D. 1; *Ex parte Lewis* (1888), 21 Q. B. D. 191; *Edwards* v. *Jenkins*, [1896] 1 Ch. 308. A racecourse is not a highway (*Earl of Coventry* v. *Willes*

a right of recreation: in this case, as in the case of common lands, although other members of the public may habitually make use of the land without hindrance, they do so under cover of a right which, in strict law, is confined to a limited class.

An Easement of Passage only.—The right of the public in a highway is an easement of passage only—a right of passing and repassing (c). In the language of pleading, a party can only justify *passing along*, and not *being in*, a highway. Where a plaintiff brought an action for wrongfully taking and impounding his cattle which, being in the highway, had strayed therefrom in consequence of the defendant's neglect to put up fences, the declaration was held bad on demurrer, because it did not show unequivocally that the plaintiff was making a lawful use of the highway (d). "The property," said HEATH, J., "is in the owner of the soil, subject to an easement for the benefit of the public." This dictum was severely criticised by Lord CAIRNS, L.J. (e), who went so far as to

(1863), 9 L. T. (N.S.) 384). The use of an esplanade for purposes of amusement is in no way inconsistent with its being part of a highway (Lord WATSON, in *Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L. T. 425). See also *Ramuz* v. *Southend Local Board* (1892), 67 L. T. 169; *Att.-Gen.* v. *Blackpool Corporation* (1907), 71 J. P. 478. The public have no right at common law to enter upon the foreshore when dry, except for the purposes of navigation or fishing (*Blundell* v. *Catterall* (1821), 5 B. & Ald. 268; 24 R. R. 353; *Llandudno Urban District Council* v. *Woods*, [1899] 2 Ch. 705; *Brinckman* v. *Matley*, [1904] 2 Ch. 313).

(c) "The King has nothing but the passage for himself and his people" (1 Roll. Abr. 392). It does not include the right to race upon the highway (*Sowerby* v. *Wadsworth* (1863), 3 F. & F. 734; *Att.-Gen.* v. *Blackpool Corporation* (1907), 71 J. P. 478). There is no right on the part of the general public to hold meetings on a highway, common or foreshore known to the law (*De Morgan* v. *Metropolitan Board of Works* (1880), 5 Q. B. D. 155; *Ex parte Lewis* (1888), 21 Q. B. D. 191; *Llandudno Urban District Council* v. *Woods*, [1899] 2 Ch. 705; *Brighton Corporation* v. *Packham* (1908), 72 J. P. 318). There can be no dedication by long user of land for such a purpose. The only dedication in the legal sense is that of a public right of passage (WILLS, J., in *Ex parte Lewis*, *supra*). There is no right known to the law as a right to indefinitely stray over land (WILLS, J., in *Eyre* v. *New Forest Highway Board* (1892), 56 J. P., at p. 518; *Abercromby* v. *Fermoy Town Commissioners*, [1900] 1 I. R. 302). In *Hadwell* v. *Righton*, [1907] 2 K. B. 345, PHILLIMORE, J., suggested that passing and repassing did not exhaust the rights of the public: "Members of the public, in addition to using the highway *eundo et redeundo*, are also entitled to use it *morando* for a short time." So also A. L. SMITH, L.J., in *Hickman* v. *Maisey*, [1900] 1 Q. B., at p. 756: "For instance, if a man, while using a highway for passage, sat down for a time to rest himself by the side of the road, to call that a trespass would be unreasonable. Similarly, if a man took a sketch from the highway, I should say that no reasonable person would treat that as an act of trespass." The mere fact that a meeting is held on a highway does not make it unlawful, and it may therefore be a "public lawful meeting" within the Public Meeting Act, 1908 (*Burden* v. *Rigler*, [1911] 1 K. B. 337; 75 J. P. 36; 27 T. L. R. 140; [1910] W. N. 279). And see note (b) on p. 141, *post*. See further article in (1911) J. P. Jo. p. 14.

(d) *Dovaston* v. *Payne* (1795), 2 H. Bl. 527.

(e) *Rangeley* v. *Midland Rail. Co.* (1867), L. R. 3 Ch. 310.

assert that an owner who dedicates land to the public as a highway deprives himself of "the occupation of the land on which the road is formed." "It appears to me," said Lord CAIRNS, "to be an incorrect expression to speak of this as an easement. There can be no easement properly so called unless there be both a servient and a dominant tenement. There is in this case no dominant tenement whatever. . . . There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement; it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement where the occupation remains in the owner of the servient tenement subject to the easement" (*ee*).

It may be observed that if a highway, regarded as an easement, is in this respect *sui generis*, a permanent occupation of land limited to the purpose of passing and repassing is not less exceptional with reference to the doctrine of occupation or possession (*f*). The distinction between a highway and an ordinary easement is, however, unimportant as regards the rights of individual members of the public; and the principle of the common law is both sufficiently clear and supported by ample authority. Subject to the right of the public to pass and repass on the highway, the owner of the soil in general remains the occupier of it, and as such may maintain trespass against any member of the public who acts in excess of his right. Thus, where A. was convicted (under 1 & 2 Will. 4, c. 32, s. 30) of trespassing in search of game upon "land in the possession and occupation" of B., who was lord of the manor and owner of the land on both sides of the highway, the conviction was upheld, although the evidence showed that A. was upon the highway at the time of the alleged traspass (*g*). Lord CAMPBELL, C.J., said: "Must not the highway in this case

(*ee*) See *Hawkins* v. *Rutter*, [1892] 1 Q. B. 668, where "easement" in s. 60 of the County Courts Act, 1888, was held to imply a dominant and a servient tenement, and not to include a public right of way.

(*f*) The suggestion of Lord GIFFORD (*Sutherland* v. *Thomson* (1876), 3 Ct. Sess. Cas., quoted in *Orr-Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839, at p. 872), that in a case of a public right of way the dominant tenement is the whole kingdom, results in an anomaly equally unsatisfactory in theory. Even if this large use of the word tenement could be defended, there is no other instance of a servient tenement being part of, and included in, the dominant tenement.

(*g*) *R.* v. *Pratt* (1855), 4 El. & Bl. 860, followed in *Mayhew* v. *Wardley* (1863), 8 L. T. 504.

be considered as land in the possession and occupation of B.? I think it must, and consequently that a trespass had been committed in the manner charged." CROMPTON, J., said: "If a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser." The civil cases in trespass are to the like effect, showing that the owner of soil can sue a traspasser as for an injury to his possessory right. In *Harrison* v. *Duke of Rutland* (h) it appeared that the defendant was the owner of a grouse moor crossed by a highway, the soil of which was vested in him. On the occasion of a grouse drive upon his moor, the plaintiff went upon the highway, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the shooters. The Court of Appeal held that, inasmuch as the plaintiff was upon the highway for purposes other than its use as a highway, he was a trespasser (i). LOPES, L.J., said: "If a person uses the soil of the highway for any purposes other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public." The case of *Harrison* v. *Duke of Rutland* was followed in *Hickman* v. *Maisey* (k). In this case the plaintiff was possessed of land which was crossed by a highway. A trainer of racehorses had agreed with the plaintiff for the use of some of his land for the training and trial of racehorses. A view of the land so used could be obtained from the highway on the plaintiff's land. The defendant was the proprietor of a publication which gave accounts of the doings of racehorses in training, etc. He walked backwards and forwards on a portion of the highway on the plaintiff's land, about fifteen yards in length, for a period of about an hour and a half one day watching and taking notes of the trials of racehorses on the plaintiff's land. The plaintiff brought an action of trespass against him in respect of his user of the highway, and the jury having found in his favour, it was held by the Court of Appeal that the defendant had exceeded the ordinary and reasonable

(h) [1893] 1 Q. B. 142.

(i) LOPES and KAY, L.JJ., held (Lord ESHER, M.R., *diss.*) that the court ought to make a declaration to that effect.

(k) [1900] 1 Q. B. 752. See also *Tyne Improvement Commissioners* v. *Imrie; Att.-Gen.* v. *Tyne Improvement Commissioners* (1899), 81 L. T. 174.

user of a highway as such to which the public are entitled, and was, therefore, guilty of trespass on the plaintiff's land. "Although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its existence in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage" (*l*). "If a person is found using a highway in a manner which is altogether outside the purpose for which it was dedicated, that raises the question with what intention he went on the highway; for the law judges by his subsequent action what his original intent was" (*m*).

It is the owner of the soil, however, who alone can sue for the trespass. Where some fowls from the adjoining land were in a highway, and as the plaintiff, a cyclist, got abreast of them, they were frightened by a dog, and one of them flew into the spokes of the bicycle causing it to upset, whereby the plaintiff was injured, it was held he had no cause of action against the owner of the fowls (*n*). "It is said that the fowls were trespassing. But the cases which were relied upon as showing that that would give a cause of action were cases in which the plaintiff was the owner of the soil on which the trespass was committed and are, consequently, not in point, for here the cyclist had no interest in the soil of the highway" (*o*).

Highways by Water.—It is immaterial whether the land over which the right of passage exists is or is not covered with water. The right of navigation is simply a right of way; and a navigable river (*p*),

(*l*) *Per* COLLINS, L.J., in *Hickman* v. *Maisey*, [1900] 1 Q. B., at pp. 757, 758.

(*m*) *Ibid.*, p. 758. See also BLACKBURN, J., in *Coventry* (*Earl*) v. *Willes* (1863), 9 L. T. (N.S.) 384. In *Fielden* v. *Cox* (1906), 22 T. L. R. 411, an injunction to restrain the defendants from trespassing on a highway by using it for the purpose of catching moths by means of lamps and other appliances was refused, the trespasses being merely technical, and the defendants never threatening or intending to infringe any rights of property and desisting from doing so when requested.

(*n*) *Hadwell* v. *Righton*, [1907] 2 K. B. 345.

(*o*) *Ibid.*, p. 349, BRAY, J. See also *Higgins* v. *Leach* (1909), 73 J. P. 185; *Cox* v. *Burbidge* (1863), 32 L. J. C. P. 89.

(*p*) *Orr-Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839; *Original Hartlepool Collieries Co.* v. *Gibb* (1877), 5 Ch. D. 713; PARKER, C.J., in *Rex* v. *Hammond* (1717), 10 Mod. 382; Fitz. Abr. Challenge, 279; 3 Com. Dig. Chimin A. 1; 1 Hawk. P. C. 32, s. 1; *Mayor, etc. of Carlisle* v. *Graham* (1869), L. R. 4 Ex. 361; *Bourke* v. *Davis* (1889), 44 Ch. D. 110. If the water change its course and make for itself a new channel, the right of way will continue over the

a river made navigable by charter (q), a ferry (r), an inland lake (s), or a canal maintained under statutory authority for the purposes of navigation, which is free and open to the public, is governed by the general principles applicable to all highways. There are some important differences between highways by land and highways by water (t). The former alone are directly included

new course (3 Com. Dig. Chimin A. 1, citing THORPE, J., 22 Ass. 93). HALE explains what are navigable rivers. "There be rivers," he says, "as well fresh as salt, that are of common or publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are primâ facie *publici juris* common highways for man or goods, or both, from one inland town to another. Thus, the rivers of Wey, of Severn, and of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they are become to be of private property as in what parts they are of the King's property, are public rivers *juris publici*. And, therefore, all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments or removed" (De Jure Maris, cap. iii). It has been held in the United States that the public have a right of way in every stream which is capable in its natural state and its ordinary volume of water of transporting, in condition fit for market, the products of the forests or mines, or of the tillage of the soil upon its banks (*Morgan* v. *King*, 35 N. Y. R. 454; *Shaw* v. *Crawford*, 10 Johns. 236). The public have likewise a right to travel on a public river on the ice, and, therefore, if anyone cut holes through the ice, he is liable in damages for all injuries caused thereby to those travelling upon such way, without carelessness or fault on their part (*French* v. *Camp*, 6 Shepley (Me.) 438; Cook, Highway Laws (1870), 21).

(q) *Cf. Simpson* v. *Att.-Gen.*, [1904] A. C. 476. In this case, under letters patent in the 17th century, the owner of land adjoining the river Ouse, which was then a public river navigable in sections, made in his own land cuts from the river and locks in the cuts and took tolls from the vessels passing through the locks. The House of Lords held that there was no evidence that the locks had ever been dedicated to the public as a highway.

(r) The interests of the public in a ferry are similar to their interests in highways in general. The public have a right to embark and disembark at the landing places, provided such landing places are highways (Wellbeloved on Highways, 32 *et seq.*; *Peter* v. *Kendal* (1827), 6 B. & C. 703; *Huzzey* v. *Field* (1835), 2 C. M. & R. 432, at p. 442; *Newton* v. *Cubitt* (1862), 12 C. B. (N.S.) 32, at p. 58. See also *Payne* v. *Partridge* (3 Will. 3), 1 Salk. 12; Saville, 11, pl. 29; *Cowes Urban District Council and Others* v. *Southampton, etc. Steam Packet Co.*, [1905] 2 K. B. 287; *General Estates Co.* v. *Beaver*, [1914] 3 K. B. 918; 79 J. P. 41; 30 T. L. R. 634; and *Hammerton* v. *Dysart* (*Earl*), [1916] 1 A. C. 57; 31 T. L. R. 592). For any obstruction to the use of a ferry by the public, the remedy proper to be pursued is an indictment (Wellbeloved, 33). The owner of a franchise of a ferry cannot maintain an action for loss of traffic caused by the erection and user of a bridge close to his line of ferry, because his exclusive right extends only to carriage by boat (*Dibden* v. *Skirrow*, [1908] 1 Ch. 41). Servants of the Crown, *e.g.*, post office officials, are entitled to free passage over ferries properly so called; but this privilege does not extend to a ferry which a corporation is by statute merely empowered (not obliged) to establish and maintain (*Att.-Gen. for Ireland* v. *Londonderry Bridge Commissioners*, [1903] 1 I. R. 389).

(s) *Marshall* v. *Ulleswater Steam Navigation Co.* (1871), L. R. 7 Q. B. 166.

(t) *Williams* v. *Willcox* (1838), 8 A. & E. 333; *Denaby and Cadeby Main Collieries, Ltd.* v. *Anson*, [1911] 1 K. B. 171.

in the proper subject of this Work; but the cases relating to highways by water frequently throw great light on questions of principle, and may be occasionally referred to for purposes of illustration.

A highway which crosses a river by means of a ford, or a public footpath which crosses a stream by means of stepping-stones, does not thereby cease to be a highway; and the right of passage remains though floods may sometimes render the way dangerous or impassable.

Railways not Highways.—Railways have sometimes been regarded as highways, and some countenance is given to this view by the terms of s. 92 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), which enacts that "upon payment of the tolls . . . demandable all . . . persons shall be entitled to use the railway, with engines and carriages properly constructed, . . . subject . . . to the regulations to be from time to time made by the company by virtue of the powers . . . hereby and by the special Act conferred upon them" (*u*). The opposite view is, however, more accurate, and also more convenient. A railway company is a private corporation, upon which the legislature has conferred the privilege (in the nature of a franchise) of earning profit by performing certain services for the benefit of the public. Coupled with this privilege is an obligation, similar to the obligation of a "common calling"; for the company may not refuse to perform such services for any member of the public who offers to contract with it on such terms as it is legally entitled to exact. There is, in general, a contractual relation between a railway company and those who use the railway (*x*), which is entirely at variance with the conception of a highway.

Cul-de-sac.—It was at one time doubted whether there could be a highway where there was no thoroughfare, that is, whether a *cul-de-sac* or way closed at one end could be a highway. In the case of *Rugby Charity Trustees* v. *Merryweather* (*y*), Lord KENYON, C.J., expressed a confident opinion that it made no difference that the way in question (Lamb's Conduit Street) was not a thoroughfare: "If it were otherwise in such a great town as this, it would be a trap to make people trespassers." A similar

(*u*) See *Great Northern Rail. Co.* v. *Eastern Counties Rail. Co.* (1852), 21 L. J. Ch. 837. "In 1848 . . . the theory was still alive in all our railway legislation that a railway was a highway, like a turnpike road, to be used by the public on certain terms as to tolls and otherwise" (WILLS, J., in *London and North Western Rail. Co.* v. *Llandudno Improvement Commissioners*, [1897] 1 Q. B., p. 298).

(*x*) *Butler* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207.

(*y*) (1790), 11 East, 375 n.

view was also taken by Lord ELLENBOROUGH, C.J. (z). The authority of these opinions was much shaken by the adverse opinions of Sir JAMES MANSFIELD, C.J., in *Woodyer* v. *Hadden* (a), and of ABBOTT, C.J., and HOLROYD and BEST, JJ., in *Wood* v. *Veal* (b). But in the case of *Bateman* v. *Bluck* (c), the question was directly in issue. The *locus in quo* was a court in the metropolis which had been paved and lighted by commissioners under a local Act. Lord CAMPBELL, C.J., expressed his opinion as follows: "We are bound to assume the finding to be good unless, as is contended, there cannot, in law, be a highway through a place which is no thoroughfare. It seems to me that such a doctrine is incorrect. There may or may not be a highway under those circumstances. Take the case of a large square with only one entrance, the owner of which has, for many years, permitted all persons to go into and around it; it would be strange if he could afterwards treat all persons entering it, except inhabitants, as trespassers. In *Rugby Charity Trustees* v. *Merryweather* (d), Lord KENYON laid down that there might be a highway through a place which was not a thoroughfare, and seems to have left it to the jury whether there was such a highway or not. In *Woodyer* v. *Hadden* (e), the court did not decide that there could not be a highway under such circumstances, but only in that particular case there was none, and I do not find anything decided which is necessarily inconsistent with what was laid down by Lord KENYON" (f). In *Att.-Gen.* v. *Chandos Land and Building Society* (ff), where five courts (each of which was a *cul-de-sac*), having tenements varying from two to over twenty, in the metropolis, had been lighted, cleansed and repaired from time to time by the local authority, in some cases for over a hundred years, and in others for about eighty or ninety years, and the property had been in lease from 1782 to 1879, and from that year to 1887 in trust without power to dedicate, WARRINGTON, J., held on the facts, that each court had been dedicated since 1887. In *Att.-Gen.* v. *Mayor, etc. of Richmond* (g), there was a narrow square with three cottages on one side and three tenements and a plumber's shop on the other. The square opened into a narrow alley nine feet wide, subsequently widened to twelve feet, and had a building over the entrance at each end. There was no evidence that the square had ever been used by

(z) *Rex* v. *Lloyd* (1808), 1 Camp. 260.
(a) (1813), 5 Taunt. 125.
(b) (1822), 5 B. & Ald. 454.
(c) (1852), 18 Q. B. 870.
(d) (1790), 11 East, 375 n.
(e) (1813), 5 Taunt. 125.
(f) A public way must have a public terminus at each end (*Young* v. *Cuthbertson* (1854), 1 Macq. H. L. Cas. 455). "It is not necessary that the terminus should be an exit in the ordinary sense; it may be a *cul-de-sac*" (*ibid.*).
(ff) (1910), 74 J. P. 401.
(g) (1903), 89 L. T. 700.

a single person other than as an approach to houses in the square or to premises which had their back entrances opening on the square, or that it had been cleansed, paved or lighted by the local authority. Upon the facts, SWINFEN EADY, J., held that the square was not a public highway, but had always been a private square. In *Att.-Gen.* v. *Antrobus* (*h*), FARWELL, J., held that the roads leading to Stonehenge on which there had been no expenditure on repair or other matters by the highway authority were not highways.

The decision in *Bateman* v. *Bluck*, *supra*, has been repeatedly followed, and has not since been doubted (*i*). KAY, J., appears to have suggested that these cases may apply only in urban districts (*k*); but there does not seem to be any reason for so limiting the application of the principle. The legal consequence ordinarily arising from dedication and acceptance cannot be prevented in rural any more than in urban districts by the mere fact that the way is a *cul-de-sac*, though that is an important circumstance to be considered in weighing presumptive evidence of dedication. "It is always a strong observation to a jury that the way leads nowhere" (*l*), and the difficulty is no doubt more formidable in rural districts. It is no doubt difficult to make out dedication of a *cul-de-sac* by mere user only (*m*), but expenditure of public money in, for example, repairing, cleansing or lighting the *cul-de-sac*, coupled with user, is strong evidence from which dedication may be inferred (*n*).

(*h*) [1905] 2 Ch. 188.

(*i*) See, *e.g.*, *Souch* v. *East London Rail. Co.* (1873), L. R. 16 Eq. 108; *Vernon* v. *Vestry of St. James, Westminster* (1880), 16 Ch. D. 449; *Att.-Gen. and London Property Investment Trust, Ltd.* v. *Richmond Corporation* (1903), 68 J. P. 73; *Josselsohn* v. *Weiler* (1911), 75 J. P. 513; *Vine* v. *Wenham* (1915), 84 L. J. (Ch.) 913; *Kingston-upon-Hull Corporation* v. *North Eastern Railway Co.* [1916] 1 Ch. 31; *Att.-Gen.* v. *Sewell* (1918), 88 L. J. (K. B.) 425; 83 J. P. 92; 35 T. L. R. 193.

(*k*) *Bourke* v. *Davis* (1889), 44 Ch. D. 110, at p. 123. "It is argued that a *cul-de-sac* may be a highway. That is so in a street in a town into which houses open, and which is repaired, sewered and lighted by the public authority at the expense of the public. . . . But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended": KAY, J., *ibid.* "What would be the meaning in a country place of a highway which ends in a *cul-de-sac*, and ends at the gate on to a common? Such things exist in large towns . . . but whoever found such a thing in a country district like this, where one of the public, if there were any of the public who wanted to use it at all, would drive up to that gate for the purpose of driving back again? I have known it successfully established in a beautiful walk leading to a cliff or a place on the seashore" (WILLS, J., in *Eyre* v. *New Forest Highway Board* (1892), 56 J. P., p. 518). There may be a dedication to a point such as a church or to the sea or to a river (*per* PHILLIMORE, J., in *Tyne Improvement Commissioners* v. *Imrie* (1899), 81 L. T., p. 179).

(*l*) CROMPTON, J., in *Bateman* v. *Bluck*, *ante.*

(*m*) ROMER, L.J., in *Whitehouse* v. *Hugh*, [1906] 2 Ch. 283.

(*n*) *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 188 (roads leading to Stonehenge).

If part of a public road is legally closed, as by commissioners under an Inclosure Act, so that the remaining part becomes a *cul-de-sac*, the public right therein is not destroyed (*o*). Thus, where a public footpath led through the parish of T. and was continued into the parish of S., and certain Inclosure Commissioners were authorised by statute to stop up any footpath in the parish of T., it was held that they were entitled to stop up so much of the footpath as lay in that parish without affecting the public right to pass over the footpath within the parish of S. ALDERSON, B., said: "It is clear to me that part of a footway may be stopped up, and that the rest of it is not destroyed as a footway but may be left as such, although in reality a mere *cul-de-sac*. I see no absurdity in this" (*p*). If a highway becomes a *cul-de-sac* in consequence of the erection of buildings authorised by Act of Parliament, it still remains a highway, and an indictment will lie for obstructing it; and if the jury find that it has ceased to be of any public utility by reason of the erection, this is not material, except with regard to the *quantum* of punishment to be inflicted (*q*). But if the access to a highway at both ends has become impossible by reason of the ways leading to it having been legally stopped up, its character as a public highway is gone (*r*).

A highway leading to and terminating at the side of a navigable river open to the public is not a *cul-de-sac*, because, the river being a highway, the right of passage is continuous (*s*). A proposed street 60 feet wide, from the end of which egress was provided by a lane 20 feet wide, was held not to terminate in a *cul-de-sac*, however inconvenient it might be; for a *cul-de-sac* is a "blind alley" or way which has only one issue (*ss*).

Highway, how Pleaded.—In pleading a highway it is, in most cases, sufficient to allege generally that it is a highway, that being the "genus of all public ways" (*t*). It is not necessary to state

(*o*) PATTESON, J., in *Rex* v. *Downshire* (1836), 4 A. & E. 698.

(*p*) *Gwyn* v. *Hardwicke* (1856), 25 J. L. M. C. 97. See also *Esher and Dittons Urban District Council* v. *Marks* (1902), 71 L. J. K. B. 309.

(*q*) *R.* v. *Burney* (1875), 31 L. T. 828.

(*r*) *Bailey* v. *Jamieson* (1876), 1 C. P. D. 329.

(*s*) *Cf. Campbell* v. *Lang* (1853), 1 Macq. H. L. Cas. 451. Any change in the line of the shore, whether effected by natural or artificial means, does not affect the continuity of the right; so that, if the owner in fee of a street ending at a navigable river erects wharves or docks on the bank in front of the street terminus, the highway will extend over such erections to the water's edge (*People* v. *Lambier*, 5 Denio, 9); *secus* where wharves and docks are erected under Act of Parliament (*Yarmouth (Mayor)* v. *Simmons* (1878), 10 Ch. D. 518).

(*ss*) *Stevenson* v. *Lee*, [1910] S. C. 14.

(*t*) HOLT, C.J., in *R.* v. *Saintiff* (3 Anne), 6 Mod. 255.

any *termini* (*u*): "When a way is a public highway it is not necessary to state either the *terminus a quo* or the *terminus ad quem*; where it is a private way it is necessary to state them, because private ways are given for particular purposes, and the justification must show that they were used for those purposes. But it is different with regard to a public highway because all his Majesty's subjects have a right to use that way for all purposes and at all times" (*x*). But it is sometimes more convenient to state the *termini*, especially where a party relies alternatively on the allegation of a public highway and on the claim of a private right of way. And if the opposite party is likely to be embarrassed at the trial by the uncertainty of the allegation, the party pleading may be ordered to give particulars of the *termini* and the course of the alleged highway (*y*).

It is not generally necessary to allege that a highway has been such from time immemorial or to state how and when it became a highway: "Great inconveniences would follow if it were otherwise; for strangers passing along the streets of London, for example, could not ascertain when they first became highways" (*z*). But where, in an action to restrain trespass on a road, the defendants by their amended defence alleged that the road had for many years been used by the public as of right and was a highway, having been dedicated to the public by the plaintiff and her predecessors in title or some of them, an order for particulars was made that if the defendants relied on any specific acts of dedication, or specific declaration of intention to dedicate, whether alone or jointly with evidence of user, they should set forth the nature and dates of such acts or declarations and the names of the persons by whom the same were done or made (*a*).

Coke's Classification of Ways.—Sir E. Coke, following previous writers (*b*), made a threefold classification of ways according to the extent of the right of passage over them: "There be three kinds of wayes whereof you shall reade in our ancient bookes. First, a footway, which is called *iter quod est jus eundi vel ambulandi hominis*; and this was the first way. The second is a footway and horseway,

(*u*) *Rouse* v. *Bardin* (1790), 1 H. Bl. 351.

(*x*) *Ibid.*, p. 355: *per* WILSON, J. And see *R.* v. *Hammond* (1717), 10 Mod. 382.

(*y*) KAY, J., in chambers, ordered the party to amend his pleading (*Spedding* v. *Fitzpatrick*, *infra*, following *Harris* v. *Jenkins* (1882), 22 Ch. D. 481, a case of private right of way. See also *Farrell* v. *Coogan* (1883), 12 L. R. Ir. 14, a case of easement of support and rainwater flow).

(*z*) *Per cur.*, *Aspindall* v. *Brown* (1789), 3 T. R. 265; *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517.

(*a*) *Spedding* v. *Fitzpatrick* (1888), 38 Ch. D. 410.

(*b*) Fleta, lib. 4, ch. 27; Bracton, lib. 4, fol. 232.

which is called *actus ab agendo;* and this vulgarly is called *packe* and *prime way*, because it is both a footway, which was the first or *prime way*, and a *packe* or *drift way* also. The third is *via aditus*, which contains the other two, and also a cartway, etc., for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi;* and this is twofold, viz., *regia via*, the king's highway for all men, *et communis strata*, belonging to a city or towne, or between neighbours and neighbours" (*c*).

This classical passage serves as a useful statement of certain presumptions which are applicable alike to public and private rights of way. In general, proof of a right of cartway or carriageway will establish a right for the passage of all carts or carriages. This right will include a right of footway (*d*), and also of driftway and bridleway; and a right of driftway or bridleway (but not of carriageway) will include a right of footway.

But exceptional cases exist, where the wider right does not include the narrower, and these presumptions may be controlled and rebutted either by the provisions of an Act of Parliament or by the act of the person who dedicates the highway or grants the easement. Thus, an Act of Parliament may authorise the construction of a tram-road passable for carriages constructed in a particular manner, imposing a penalty on any person using the road on horseback, and this will be a public highway to be used only by such carriages (*e*). A towing-path alongside a canal or navigable river may be a highway to be used only for the purpose of towing barges or vessels (*f*), and will not be open to ordinary foot-passengers unless a distinct right has been acquired.

The presumption that a way for carts and carriages includes a way for cattle may be rebutted—at all events, in the case of a private right of way—by the evidence of circumstances alone, *e.g.*, by the character of the way. A plaintiff claimed a private right of way for cattle from a public street along a narrow passage or yard to premises used by him as a slaughter-house. It was admitted by the defendant that all manner of carriages might pass and repass. The evidence showed that the preceding occupier had been

(*c*) Co. Lit. 56 a. As to *regia via* and *communis strata* see *R.* v. *Hammond* (1717), 10 Mod. 382—"The words are synonymous expressions and signify the same thing."

(*d*) *Davies* v. *Stephens* (1836), 7 C. & P. 570; *R.* v. *Hatfield* (*Inhabitants*) (1736), Lee temp. Hard. 315, per Lord HARDWICKE, C.J.; *Cowling* v. *Higginson* (1838), 4 M. & W. 245; *Higham* v. *Rabett* (1839), 5 Bing (N.C.) 622; *Wells* v. *London, Tilbury and Southend Railway Co.* (1877), 5 Ch. D. 126, 132; *Newcomen* v. *Coulson* (1877), 5 Ch. D. 133. And see note (*y*), page 24 *post*.

(*e*) *Rex* v. *Severn and Wye Railway Co.* (1819), 2 B. & Ald. 646.

(*f*) *Ibid.*, *per* BAYLEY, J. See also *Winch* v. *Conservators of the Thames* (1872), L. R. 7 C. P. 458, at p. 471.

accustomed to drive hogs along the way, and the plaintiff had lately been in the habit of driving oxen there, but no other user for cattle was proved. The jury, pressed with the argument of danger from horned cattle, found against the right claimed; and the court refused to disturb the verdict, thinking that the extent of the right to be inferred from the usage was a proper question for the jury, and that "there might often be good reasons why a man should grant a right of carriageway, and yet no way for cattle." CHAMBRE, J., dissented, on the ground that all the evidence was on one side, and the verdict was against it (*i*).

The restrictions above referred to mean restrictions on the *right* of passage, for a way is none the less a way for carts and carriages generally, and correctly pleaded as such, although it is in fact too narrow, or is crossed by bridges or archways too low, to admit the passage of large vehicles (*k*).

In the various statutes relating to the maintenance and control of public ways, the term highway is used in a more limited sense, and must be distinguished from several cognate terms, such as bridges, turnpike roads, main roads, and streets.

Highways.—In the Highway Act, 1835 (*l*), it is provided that the word "highways" "shall be understood to mean all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements"; but some of the provisions of the Act did not apply to turnpike roads, unless they were expressly mentioned (*m*).

Bridges.—A bridge which has been dedicated to and used by the public does not differ from an ordinary road in so far as regards the public right of passage (*n*). But from very early times the duty of repairing bridges of public utility has been primarily imposed, not upon the parish, but upon the county; hence the common and convenient expression "county bridge." The obligation to repair extends primâ facie to the approaches and the roadways for a space of 300 feet on each side of the bridge.

Turnpike Roads.—Turnpike roads are a species of highway

(*i*) *Ballard* v. *Dyson* (1808), 1 Taunt. 279.

(*k*) *Rex* v. *Lyon* (1825), 5 D. & R. 497.

(*l*) 5 & 6 Will. 4, c. 50, s. 5.

(*m*) *Ibid.*, s. 113, and note, *post.*

(*n*) Coke, 2 Inst. 700, 701; *Rex* v. *West Riding of Yorkshire* (1802), 2 East, 342; *Rex* v. *Inhabitants of Bucks* (1810), 12 East, 192; *Rex* v. *Inhabitants of Salop* (1810), 13 East, 95; *Rex* v. *Inhabitants of Kent* (1814), 2 M. & S. 513; *R.* v. *Inhabitants of County of Southampton* (1887), 19 Q. B. D. 590; *Mayor, etc., of Bury* v. *Lancashire and Yorkshire Rail Co.* (1888), 20 Q. B. D. 485; (1889), 14 App. Cas 417.

now extinct. They were marked by one invariable characteristic: "The ordinary meaning of the words 'turnpike road' is a road on which a turnpike is lawfully erected, and the public are bound to pay tolls" (*o*). "A turnpike road means a road having toll-gates or bars on it, which were originally called 'turns,' and were first constructed about the middle of the last (*i.e.*, eighteenth) century. Certain individuals, with a view to the repair of particular roads, subscribed amongst themselves for that purpose, and erected gates upon the roads, taking tolls from those who passed through them. These were violently opposed at first, and petitions were presented to Parliament against them; and Acts were in consequence passed for their regulation. This was the origin of turnpike roads. The distinctive mark of a turnpike road is the right of turning back any one who refuses to pay toll" (*p*). This construction of the term has been approved and followed (*q*), in opposition to the contention that a turnpike road is restricted to mean a road to which the Turnpike Acts apply.

Turnpikes cannot be lawfully erected on highways except under statutory authority. It is very doubtful whether a highway can, except under statute or Royal grant, be dedicated to the public subject to a condition that the public shall pay tolls to the owner for using it (*r*); but it is clear that if this can be done, a highway so dedicated would not be a turnpike road. "It appears to me that it would be incorrect to describe a road as a turnpike road merely because the proprietors take tolls for the use of it as owners, without being subject to any statutory liabilities in respect thereof, such as are imposed on the trustees of turnpike roads" (*s*).

In general, turnpike roads were made such only for a term of years, the statutory authority being periodically renewed. If a road had been a highway before the legislature made it a turnpike road, it remained as an ordinary highway if the powers of the Turnpike Act were suffered to expire; but if the road had been first made under the Turnpike Act, upon the expiry of the Act, the public right of passage was at an end unless some other means were taken to renew or continue the right (*t*). Under the High-

(*o*) PARKE, B., in *Northam Bridge Co.* v. *London and Southampton Rail. Co.* (1840), 6 M. & W. 428; *cf. R.* v. *East and West India Docks, etc. Rail Co.* (1853), 2 E. & B. 466.

(*p*) *Northam case, supra, per* Lord ABINGER, C.B.

(*q*) *R.* v. *French* (1878), 3 Q. B. D. 187; 4 Q. B. D. 507.

(*r*) *Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 750.

(*s*) *Per* MATHEW, J.: *Midland Rail Co.* v. *Watton* (1886), 17 Q. B. D. 30.

(*t*) *Rex* v. *Winter* (1828), 8 B. & C. 785; *R.* v. *Thomas* (1857), 7 El. & Bl. 399; *Rex* v. *Mellor* (1830), 1 B. & Ad. 32.

way Act, 1878 (*u*), many disturnpiked roads are converted into main roads.

Main Roads.—By the Highway Act, 1878 (*u*), a new class of highways was formed, called main roads, the burden of repair being thrown partly on the county and partly on the ordinary highway authority. The Local Government Act, 1888, has now transferred the whole burden to the county councils (*x*). These main roads include, in the first place, roads which were disturnpiked after 1870; and secondly, any highway which serves more than merely local convenience, and is placed by the county authority in the class of main roads " by reason of it being a medium of communication between great towns, or a thoroughfare to a railway station, or otherwise."

Ministry of Transport Roads.—Under the Development and Road Improvement Funds Act, 1909, as amended by the Roads Act, 1920 (*y*), the Minister of Transport has power with the approval of the Treasury to make advances to county councils in respect of the construction of new roads or the improvement of existing roads, and to construct and maintain any new roads which appear to him to be required for facilitating road traffic. A road so constructed by him is to be a public highway; and the enactments relating to highways and bridges shall apply to such road accordingly, except that it shall be repaired by and at the expense of the Minister. For the purpose of the maintenance, repair, improvement and enlargement of or dealing with any such road, the Minister shall have the same powers (except the power of levying a rate) and be subject to the same duties as a county council have and are subject to as respects main roads; and may exercise any powers vested in a county council for the purposes of the maintenance and repair of bridges. He has the same powers as a county council for the preventing and removing of obstructions.

Streets.—In the ordinary popular sense, " street " means a way or road in an urban district with houses on both sides, or at least on one side (*z*). The Public Health Act, 1875, gives a much more comprehensive definition: " 'Street' includes any highway . . .

(*u*) 41 & 42 Vict. c. 77, s. 13, *et seq.*, *post.*

(*x*) 51 & 52 Vict. c. 41, s. 11, *post.*

(*y*) 9 Edw. 7, c. 47, s. 8, and 10 & 11 Geo. 5, c. 72, *post.* And see the Ministry of Transport Act, 1919 (9 & 10 Geo. 5, c. 50), s. 17 (1) (5), *post.*

(*z*) JESSEL, M.R.: *Taylor* v. *Corporation of Oldham* (1876), 4 Ch. D. 395; Lord SELBORNE, L.C.: *Robinson* v. *Local Board of Barton-Eccles* (1883), 8 App. Cas. 798. See also *R.* v. *Fullford* (1864), 33 L. J. M. C. 122; *Portsmouth Corporation* v. *Smith* (1883), 13 Q. B. D. 184, 195; *Midland Rail Co.* v. *Watton* (1886), 17 Q. B. D. 30.

and any public bridge (not being a county bridge), and any road lane footway square court alley or passage whether a thoroughfare or not" (*a*). Even in the popular sense, and still more within this wide statutory meaning, some "streets" are, and some are not, highways, with reference to the right of passage. Consequences of greater practical importance flow from the further distinction between streets which are, and streets which are not, highways repairable by the inhabitants at large (*b*).

(*a*) 38 & 39 Vict. c. 55, s. 4. See *R.* v. *Local Board of Goole*, [1891] 2 Q. B. 212; *Fenwick* v. *Rural Sanitary Authority of Croydon Union*, *ibid.*, 216.

(*b*) See the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 149, 150, 152, *post*