CHAPTER IV.

REPAIR AND NON-REPAIR.

Common Law Liability of Parish.—"By common law or of common right, the inhabitants of the parish at large are bound to repair the highways" (*a*). The primâ facie liability of the parish is the general rule of the common law, which admits only of certain well-defined exceptions; and in every case where such an exception is not established, the parish must repair *ex necessitate*. "The parish is at common law bound to repair all public highways; this being by the common law the mode by which each parish contributes its share towards the public burthen of repairing all highways, instead of all the public roads being repaired by one general tax. The parish must bear in that shape its share of the general burthen, and its inhabitants receive an equivalent, not in the use of that road in particular, but in the use of all the public roads in the realm" (*b*). The Highway Acts and kindred statutes have provided an elaborate machinery by which the performance of the public obligation is enforced and regulated; but the liability of the parish still remains the underlying principle of the law (*c*).

A sub-division of the parish, of defined local area, such as a township or hamlet, may by immemorial custom be chargeable, like a parish, with the repair of highways within it; but there is no case

(*a*) *Rex* v. *Great Broughton* (1771), 5 Burr. 2700; *Rex* v. *Sheffield* (1787), 2 T. R. 111; GROVE, J.: *Cubitt* v. *Lady Caroline Maxse* (1873), L. R. 8 C. P., p. 717. Once a highway it is always repairable by the parish (Com. Dig. Chimin. A. 4). Where the boundary between two conterminous parishes is a highway, the presumption is that the half highway on either side of the *medium filum* belongs to the parish on that side (*R.* v. *Strand Board of Works* (1863), 33 L. J. M. C. 33). In the same way, where two parishes are separated by a river, the *medium filum* is the presumptive boundary between them (*R.* v. *Landulph* (1834), 1 M. & Rob. 393).

(*b*) PARKE, B.: *Rex* v. *Leake* (1833), 5 B. & Ad. 469.

(*c*) In an urban district the primary obligation to repair rests on the urban authority (The Public Health Act, 1875, s. 149), and in a rural district on the rural district council (The Local Government Act, 1894, s. 25). In the case of main roads it rests on the county council, and in certain cases on the urban authority (The Local Government Act, 1888, s. 11); and where a road is constructed by the Minister of Transport, he is under an obligation to repair (The Development and Road Improvement Funds Act, 1909, s. 9, as amended by the Roads Act, 1920). Liability may also attach to particular individuals or bodies through prescription, *ratione tenuræ*, *ratione clausuræ*, etc.

wherein the primâ facie liability by law belonging to a parish has been held to extend to any other district or division whatever than a parish or sub-division thereof (*d*).

So strictly has the principle of the liability of the parish been followed, that at common law no liability to repair highways could attach to any place outside the limits of a parish. Where an extra-parochial place has been formed into a township by Act of Parliament, no obligation to repair the highways is created unless an obligation is specifically imposed (*e*). It has been said that an extra-parochial place which has been accustomed to repair old highways, may be made liable by reason of custom or usage (*f*). But if the origin both of the road and of the township (formerly an extra-parochial place) is clearly ascertained, the inference of liability by usage cannot be drawn, even if for twenty years surveyors of highways had been appointed, and highway rates raised, and repairs done, in the township (*e*). Statutory provision has since been made, whereby extra-parochial places might become highway parishes, liable to be put into a highway district, but they did not thereby become subject to the common law liability to indictment for non-repair (*g*).

Customary Liability of Segment of Parish.—A sub-division of a parish, such as a township, hamlet, or vill, may, by immemorial usage, be liable to repair its own highways, and entitled to exemption from contribution to the repair of highways in the rest of the parish. Such a custom has been explained as the result of a presumed bargain, before the time of legal memory, between the township or hamlet and the rest of the parish that each should take on itself the repairs of its own roads (*h*).

The liability of a township or hamlet is an exception to the primâ facie liability of the parish; and accordingly, where a township in a parish has immemorially repaired its highways, and a new

(*d*) Lord DENMAN, C.J.: *R.* v. *Midville* (1843), 4 Q. B. 240. The case of *Rex* v. *Yarnton* (1663), Sid. 140; 1 Keble, 498, 514, has sometimes been referred to as a precedent of an indictment for non-repair of a highway being laid against a hundred. The case is very obscurely reported, and has been interpreted in different ways. See the comments of BEST, J., in *Rex* v. *Kingsmoor* (1823), 2 B. & C. 190, and the reporter's note to that case at p. 196. The question was how judgment was to be entered upon a verdict for the defendant on the issue that "the defendants ought not to repair." The issue seems to have been tried by consent, the record being admittedly faulty. The case is not, on any view, an authority for holding that a hundred can in any circumstances be subject to the liability of a parish.

(*e*) *R.* v. *Midville* (1843), 4 Q. B. 240.

(*f*) *Rex* v. *Kingsmoor* (1823), 2 B. & C. 190.

(*g*) See the Highway Act, 1862, s. 7; the Highway Act, 1864, s. 7; *R.* v. *Wingland* (1877), 2 Q. B. D. 349.

(*h*) PARKE, B.: *R.* v. *Barnoldswick* (1843), 4 Q. B. 499.

road is constructed in the township under an Act of Parliament which expressly exempts the township from the obligation of repairing it, the obligation necessarily falls on the rest of the parish (*i*).

The custom cannot be supported except in a portion of a parish which is of defined area, and bears a character known to the law, such as a hamlet, vill, tithing, etc.; if lands have been exempted from the payment of highway rates for the parish, but are not shown to form such a legal area, the presumption rather is that they have been improperly omitted from the rates (*j*).

The liability of the parish, being of common right, is judicially noticed; the liability by custom of any segment of a parish, and the corresponding exemption, must be pleaded and proved by the party relying on it (*k*). A plea by a parish, throwing the liability of repair on a particular sub-division by reason of immemorial custom, need not allege any consideration for the custom (*l*).

The existence of such a custom is a question of fact for the jury. When a tithing claims exemption from the highway rates of the parish in which it is situate, and the evidence shows that the parish has never contributed to the repair of the highways in the tithing, and that the tithing has always repaired the highways within it, and has never contributed to the repairs of the highways in the rest of the parish, the jury are warranted in finding the customary exemption proved (*m*). And when these three elements concur, this is the proper inference to be drawn.

Immemorial exemption of a township or hamlet, without proof that it has separately repaired highways within it, is not sufficient to establish the existence of an immemorial usage and custom existing in the township or hamlet, to charge it with the repair of its own highways, and thus to exempt it from contribution to the repairs of the highways in the rest of the parish. Thus, where a hamlet claimed exemption from the highway rates of the parish, and showed that the owners and occupiers in it had never in the memory of man paid highway rates, nor done team work, nor paid any composition in lieu thereof, but there was no sufficient evidence that the roads in the hamlet (on which slight repairs had been

(*i*) *Rex* v. *Sheffield* (1787), 2 T. R. 166.

(*j*) *R.* v. *Freeman* (1859), 33 L. T. (o.s.) 220; 7 W. R. 556; *Great Western Rail Co.* v. *Denchworth* (*Surveyor*) (1861), 25 J. P. 312. In some cases, however, lands may be legally exempt. See the Highways Act, 1835, s. 33; *R.* v. *Heath* (1866), L. R. 1 Q. B. 218.

(*k*) *Rex* v. *Sheffield*, *supra*; *Rex* v. *Penderryn* (1788), 2 T. R. 513; *Rex* v. *Hatfield* (1820), 4 B. & A. 75.

(*l*) *Rex* v. *Ecclesfield* (1818), 1 B. & A. 348; *cf. Rex* v. *West Riding of Yorkshire* (1821), 4 B. & A. 623.

(*m*) *Freeman* v. *Read* (1863), 4 B. & S. 174.

done by the hamlet) were highways, the justices disallowed the claim for exemption on the ground that no consideration for the exemption was proved; and the majority of the Court of Queen's Bench approved their decision (*n*).

But if in addition to evidence of immemorial exemption of a township from the highway rates of the parish there is evidence that the township has actually repaired highways within it, it is no answer to show that the highways which have been so repaired are modern highways, nor is it necessary to prove that there have been ancient highways in the township (*o*). It seems, however, that evidence that ancient highways had never existed in the township, would show the alleged custom to be bad, actual repair of existing roads being a good consideration to support the customary exemption, but a mere presumed promise to repair any roads which might from time to time become public within it being insufficient (*p*).

Where a parish consists of several townships, each of which has immemorially appointed its own surveyors, and levied its own highway rates, and the parish itself had never appointed surveyors or levied highway rates, the proper inference is that each township is liable to repair all the highways within it; and if it appears that one particular road in township A. had always been repaired by township W., the court will accordingly presume that this had been done by arrangement between the two townships, and not between township W. and the parish (*q*). If a hamlet in one parish had immemorially repaired its own highways, it might enter into an arrangement with another parish to be united with it for the purpose of highway rates and repairs; but the fact that a hamlet in one parish had immemorially been united with another parish

(*n*) *R.* v. *Rollett* (1875), L. R. 10 Q. B. 469 (LUSH, J., dissenting); *Great Western Rail Co.* v. *Denchworth* (*Surveyor*) (1861), 25 J. P. 342, *post*, p. 91, note (*n*).

(*o*) *R.* v. *Barnoldswick* (1843), 4 Q. B. 499.

(*p*) PARKE, B., expressed a clear opinion that such a contingent obligation to repair would be good consideration for the exemption (*R.* v. *Barnoldswick* (1843), 4 Q. B. 499). This would be a sound deduction from the supposition of a bargain before the time of memory, if it were justifiable to explain the immemorial custom on contractual principles. On this view the jury might have found the exemption good, even if it had been proved that there never had been any highways in the township. And LUSH, J., dissented from the judgment in *R.* v. *Rollett* (1875), L. R. 10 Q. B. 469, on the same ground. It is to be noticed that the majority of the court did not expressly disapprove the view of PARKE, B., and LUSH, J., but merely held that the justices were right in finding that no consideration had been proved for the exemption. LUSH, J., thought that every presumption ought to have been made in favour of a legal origin for the customary exemption which had been proved.

(*q*) *R.* v. *Ardsley* (1878), 3 Q. B. D. 255.

for highway purposes, and had in recent times repaired its own roads by arrangement with that parish, will not avail to exempt it from contributing to the repair of highways in the parish where it lies, as being, or having been, a hamlet separately repairing its own highways (*r*).

A previous conviction of the inhabitants of a particular subdivision of a parish for non-repair of a highway is admissible in evidence to show that the district is liable by immemorial custom to repair the highways within it (*s*).

Extent of Liability of "Parish."—Where a township or other known portion of a parish is by immemorial custom chargeable with the repair of its own highways, it is placed, for highway purposes, in the same position as a parish; and the term parish in the Highway Act, 1835, bears this extended signification (*t*). The liability of the township must indeed be proved, for it is not judicially noticed; but when it has been proved, the township, like a parish, can only discharge itself by showing with certainty that some one else is liable to repair the particular highway in question in accordance with certain exceptions defined by the common law, or, at least, that it is not liable by reason of some statutory provision. These various grounds of non-liability are enumerated hereafter (*u*).

The liability, whether of a parish or of a segment of a parish, is imposed upon the whole of that local area. If a parish lies partly in one county and partly in another, and a highway in one county is out of repair, an indictment will not lie against the inhabitants of that part of the parish only which lies in that county; the whole parish must contribute to the repairs (*x*). The liability to repair a particular road is sometimes proved by the fact that the parish have previously repaired; but if it can be shown that the repairs have been begun and continued under a mistaken notion of liability, a liability from this circumstance cannot be imposed (*y*).

(*r*) *Dawson* v. *Willoughby* (1864), 5 B. & S. 920.

(*s*) *R.* v. *Lordsmere* (1886), 54 L. T. 766. A conviction on indictment for obstructing a highway is not an estoppel to civil proceedings in trespass (*Petric* v. *Nuttal* (1856), 25 L. J. Ex. 200). The finding of justices that a street is a highway repairable by the inhabitants at large in proceedings under the Private Street Works Act, 1892, is conclusive as to the status of the street (*Wakefield Corporation* v. *Cooke*, [1904] A. C. 31).

(*t*) See note (*e*) to 5 & 6 Will. 4, c. 50, s. 5, *post*.

(*u*) *Post*, pp. 86 *et seq.*

(*x*) *Rex* v. *Clifton* (1794), 5 T. R. 498, overruling *Rex* v. *Weston* (1770), 4 Burr. 2507.

(*y*) *Rex* v. *Edmonton* (1831), 1 M. & Rob. 24.

The liability extends primâ facie to all roads, whether old or new, within the parish or segment thereof. "By the general rule of law, the inhabitants of any district who were liable to the repair of all the roads there, previously to the introduction of a new highway, are also liable to the repair of that highway" (*z*). A conviction on indictment of a parish for non-repair of a highway is conclusive evidence against the parish that the highway is in the parish (*a*). It is not necessary to prove that the particular road in question has ever before been repaired by the parish (*b*). Even where the particular road has been repaired from time immemorial by an adjacent township or parish, the township or parish in which it lies is still primâ facie liable, unless it can show some known ground of exemption (*c*).

The liability does not extend to any roads lying outside the limits of the parish, township or hamlet. Such an obligation cannot exist at common law, every parish being bound to maintain its own highways; nor can it be imposed by custom upon a parish, or upon a township or hamlet, immemorially liable to repair its own highways. "All customs are purely local, and confined to particular places. There cannot be a custom in one place to do something in another. The land in a particular place, and the inhabitants in respect thereof, may be charged by custom, for matters within the place; but custom will not apply to matters out of it" (*d*).

Under the Highway Acts there are two cases in which a parish or township may become liable to repair a highway lying in another parish or township. Where a highway lies in two parishes, one side of it in one parish and the other in another, the justices may divide the highway into sections by a transverse line, and direct each parish to repair the whole breadth of the highway in one of such sections (*e*). Where a highway is diverted under the powers of the Highway Act, 1835, the parish or township which was liable to repair the old highway is liable to repair the new highway, even if it lies in another parish or township (*f*).

The liability to repair continues so long as the highway exists, unless the liability has been put an end to by statute, or an

(*z*) ABBOTT, C.J.: *Rex* v. *Netherthong* (1818), 2 B. & A. 179.

(*a*) *R.* v. *Haughton* (1853), 1 E. & B. 501; *R.* v. *Nether Hallam* (1854), 6 Cox C. C. 435. A recital in a local Act that a highway is in a certain parish, is at most only evidence of that fact (*R.* v. *Haughton*, *supra*).

(*b*) *R.* v. *Newbold* (1869), 33 J. P. 115.

(*c*) *R.* v. *Ashby Folville* (1866), L. R. 1 Q. B. 213; *R.* v. *Ardsley* (1878), 3 Q. B. D. 255.

(*d*) *Rex* v. *Ecclesfield* (1818), 1 B. & A. 348.

(*e*) 5 & 6 Will. 4, c. 50, s. 58.

(*f*) *Ibid.*, s. 92.

order for the discontinuance of repair as unnecessary has been obtained (*g*). Where an ancient public bridleway existed for the greater part undefined over common uninclosed lands, the remaining part being through old inclosures, and by an award under a local Act the road, altered in some parts and defined throughout within narrower limits, was set out as a public bridle-road and carriage road for the use of the private individuals named, to be kept in repair by them, and no order of the justices for stopping or diverting the old road, or certificate of the sufficiency of the new road, had been obtained, it was held that the award did not operate under 41 Geo. 3, c. 109, as a diversion or stopping up of the old public bridle-road and setting out of a new one, but that the public had the same right of passage as before, and therefore that the parish in which the road lay remained liable to do such repairs requisite to maintain it as a public bridle-road (*h*).

Where it appeared that commissioners, by their award made in 1840, set out a public highway which ran in the same track as and included, but straightened and widened, an ancient highway, and the road passed through allotted land on both sides of it, except that on one side, in one part, there was an ancient inclosure, and the parish had repaired the road both before and after the award, but no steps had been taken by the commissioners for putting the road into complete repair, pursuant to 41 Geo. 3, c. 109, s. 9, and there never had been any declaration by justices that the road had been fully and sufficiently formed, completed and repaired, it was held that the parish was not liable in respect of the non-repair of the road (*i*).

Where commissioners were appointed under an Inclosure Act, which enacted that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, and that the private roads should be repaired by such person or persons as they should award, the commissioners had no power to impose on the parish at large the burden of repairing any of the private roads set out in pursuance of the Act (*k*). "The clause of the Act embraces two distinct objects—the public roads and the private roads. With respect to the former, it directs that they shall be repaired in such manner as other public roads are, that is, by the parish; then having disposed of the public roads, speaking of the private roads, it says that they shall be repaired by such person and persons as the commissioners shall direct; but

(*g*) See the Highway Act, 1864, s. 21; the Highways and Locomotives (Amendment) Act, 1878, s. 24, *post*.

(*h*) *R.* v. *Cricklade* (*Inhabitants*) (1850), 14 Q. B. 735.

(*i*) *R.* v. *East Hagbourne* (1859), 28 L. J. M. C. 71.

(*k*) *Rex* v. *Cottingham* (*Inhabitants*) (1794), 6 T. R. 20.

this cannot be understood to mean any person in any distant part of the kingdom, but such persons interested in the inclosure as the commissioners thought ought to bear the burden. . . . Where the commissioners directed the parish at large to repair these private roads they exceeded the authority vested in them by the Act" (*l*). Where an Inclosure Act passed in 7 Geo. 3 enacted that all the highways, roads, and ways to be laid out "should be made, and at all times thereafter repaired and kept in repair in such manner as other public highways were by law directed to be repaired by such of the townships respectively as the commissioners . . . should direct or appoint," and the commissioners awarded the inhabitants of the township of W. to repair and keep in repair a highway lying in another township affected by the inclosure, and there was no satisfactory evidence that the inhabitants of W. as a body ever repaired it, FARWELL, J., held that he was justified in reading into the Act after the words "in such manner as other public highways are by law directed to be repaired by such of the said townships respectively" the words "within whose district such public highways are situated," that the award was *ultra vires*, and that the inhabitants of W. were not liable to repair (*m*).

Upon the trial of an indictment against the parish of A. for the non-repair of a highway, it appeared that A. had always repaired the road in question which passed over waste ground in the parish of B., and connected together two separate portions of A. In 1785 the inhabitants of A. submitted to an indictment for non-repair of the same highway and paid a fine. In 1788, commissioners, acting under an Inclosure Act, relating to the parish of B., made an award whereby they set out the road in question as situate in B. and to be repaired by B. No dispute as to the boundary of the two parishes was brought before the commissioners, nor did they assume to settle any question of boundary; but they acted under the powers conferred upon them of setting out public and private roads over the moors and in B. After the award, as before, the inhabitants of A. continued to repair. It was held that the former conviction was conclusive evidence against A. that the road was situate in that parish; and that the commissioners having no jurisdiction to set out an award not situate in B., their award did not shift the liability from A. to B. (*n*).

Liability of "Parish" not Destroyed by Agreement with Others.—"Every parish of common right ought to repair the highways,

(*l*) *Rex* v. *Cottingham* (*Inhabitants*) (1794), 6 T. R. 20, GROSE, J. See also *Rex* v. *Wright* (1832), 3 B. & Ad., p. 682 (PARK, J., summing up).

(*m*) *Att.-Gen.* v. *Lunesdale Rural District Council* (1902), 86 L. T. 822.

(*n*) *R.* v. *Nether Hallam* (1854), 6 Cox C. C. 435.

and no agreement with any person whatever can take off this charge which the law lays upon them" (*o*). Thus, where the owner of township S. had agreed to allow to the inhabitants of township N. a road through S. in consideration of N. repairing part of such road, and the owners of lands in N. had repaired for more than 200 years in conformity with such agreement, the fact of the agreement was no answer to an indictment for non-repair against the township of S. (*p*).

Nor is any liability to indictment imposed by such agreement on the party who agrees to repair. Thus a count against a corporation, charging them with liability to repair a highway by virtue of an agreement with the owners of houses alongside of it, cannot be supported (*q*).

On an indictment charging the defendant with liability to repair a highway *ratione tenuræ*, the defendant gave in evidence an ancient deed between certain inhabitants of the parish and the former owner of his land, whereby the former gave to the latter that land in consideration of his repairing an existing highway. The grantee covenanted to repair it, and it was stipulated that if through his neglect to repair the parish was indicted, there should be a right of re-entry and the agreement should be void. The court held that the agreement was only a private arrangement which did not constitute the party liable to indictment for non-repair (*r*).

One parish or township may become liable by agreement to repair a highway in another parish or township, and such agreement, if founded on good and continuing consideration, may be enforced by action (*s*). But if such an arrangement is founded only on considerations of mutual convenience, it may at any time be put an end to by either party (*t*).

Liability of "Parish" not Destroyed by Creation of Auxiliary Fund.—If a statute enacts that a particular street is to be paved by commissioners, and provides a fund to be applied to that purpose, and another statute passed for paving the streets of the parish

(*o*) 1 Vent. 90.

(*p*) *Rex* v. *Scarisbrick* (1837), 6 A. & E. 509.

(*q*) *Rex* v. *Liverpool* (1808), 3 East, 86.

(*r*) *R.* v. *Wm. Beeby* (1839), 8 L. J. M. C. 38.

(*s*) *Cf. Dawson* v. *Willoughby* (1864), 5 B. & S. 920; *R.* v. *Ardsley* (1878), 3 Q. B. D. 255. Under s. 8 (19) of the Local Government Act, 1894, *post*, a parish council has the power to acquire by agreement a right of way in an adjoining parish, the acquisition of which is beneficial to the inhabitants of the parish or any part thereof.

(*t*) *Dawson* v. *Willoughby* (1864), 5 B. & S. 920; *R.* v. *Ashby Folville* (1866), L. R. 1 Q. B. 213.

contains a clause that it shall not extend to the particular street, the inhabitants of the parish are not exempted from their common law liability to keep that street in repair; they still remain liable to indictment for non-repair, and must seek a remedy over against the commissioners (*u*). Very clear words must be used to exempt the inhabitants of a parish or township from their liability to indictment for non-repair (*x*).

The same principle applied to turnpike roads. "It is a mistake to suppose that the object of Turnpike Acts is to relieve parishes and townships from the burden of repairing the highways. Their object is to improve the road for the general benefit of the public by imposing a pecuniary tax in addition to the means already provided by law for that purpose" (*y*). Thus, where a local turnpike Act, after empowering the trustees under it to take tolls, directed that the roads should, from time to time, be repaired by the trustees out of the money arising by virtue of the Act, it was held that the township was indictable for non-repair, and might apply for relief against the auxiliary fund in the hands of the trustees (*z*). It does not make any difference if the trustees are made indictable, because, in the absence of express words relieving the parish or township from their liability to indictment, it will be understood that the statute was intended to create a concurrent liability. Thus where the proprietors of a navigation were required by their Act of Parliament to keep a road in repair, and were declared to be liable to indictment if it should be out of repair, this enactment was held not to relieve the parish or township from their common law liability to indictment (*a*).

Liability of "Parish" after Formation of District.—The Highway Act, 1862, and subsequent statutes provided for the formation of highway districts, and for the appointment of a highway board in each district. Such districts were formed by combining together a number of parishes or other places separately maintaining their own highways, which were represented on the highway board by waywardens. Generally speaking, the object of the legislature in passing these Acts was "not to alter the

(*u*) *Rex* v. *St. George's, Hanover Square* (1812), 3 Camp. 222.

(*x*) *Little Bolton* v. *R.* (1843), 12 L. J. M. C. 104; *R.* v. *Preston* (*Inhabitants*) (1838), 2 Lew. C. C. 193; *R.* v. *Poole Corporation* (1887), 19 Q. B. D. 602. But if before the statute the road was not repairable by the public, and there has been no act of adoption by the parish, the parish is not liable to repair (*Rex* v. *Mellor* (1830), 1 B. & Ad. 32).

(*y*) *Per cur.*, *Bussey* v. *Storey* (1832), 4 B. & Ad. 98.

(*z*) *Rex* v. *Netherthong* (1818), 2 B. & A. 179; *cf.*, as to county bridge, *Rex* v. *Oxfordshire* (1825), 4 B. & C. 194.

(*a*) *R.* v. *Brightside Bierlow* (1849), 13 Q. B. 933.

liability to highway maintenance, but only to extend the area of management, to equalise the costs of repair, and to simplify the machinery for providing the necessary funds" (*b*). The intention of the Acts of 1862 and 1864 was that each constituent "parish" was to bear the cost of maintaining the highways within it, while all expenses incurred for the common use of the whole district should be defrayed from a district fund contributed rateably by the separate "parishes." This was amended by the Highway, etc. Act, 1878, which threw the cost of repairing the highways in the whole district upon the district fund; but it is still provided that when natural differences of soil or locality, or other exceptional circumstances render it advisable, a highway district may be divided into sub-districts, consisting of "parishes" or combinations of "parishes," and the expenses of maintaining the highways within them separately borne by them (*c*).

Power has also been given to combine townships, etc. separately maintaining their own highways, so as to form one highway parish, the effect of which is to merge the township in such highway parish "for all the purposes of the Highway Acts" (*d*). With this exception, the liability of the parish or township remains as it stood at common law. An indictment for non-repair must be brought against the inhabitants of the parish or township (*e*), and not against the highway board or the authority, who act as surveyors for the parish (*f*). And if the waywarden of the parish admits the liability of his parish to repair the highway in question, the highway board are concluded by his admission (*g*).

Under the Local Government Act, 1894 (*h*), the powers, duties, and liabilities of any highway authority within the district of a rural district council are transferred to that council. Power was given to the county council to postpone the transference of such powers, duties, and liabilities for a period of three years from the appointed day under that Act, or such future period as the Local Government Board might on the application of the county

(*b*) *Per cur.*, *R.* v. *Heath* (1866), L. R. 1 Q. B. 218.

(*c*) 41 & 42 Vict. c. 77, s. 7, *post*; the Local Government Act, 1894, s. 29 (c), *post*.

(*d*) The Highway Act, 1862 (25 & 26 Vict. c. 61), s. 7; the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 7.

(*e*) *R.* v. *Mayor of Poole* (1887), 19 Q. B. D. 602.

(*f*) An indictment under the Act of 1878, s. 10, must be brought against the highway board (or highway authority), the words of the section distinctly implying that the highway board are to be a party to the proceedings (*R.* v. *Mayor of Wakefield* (1888), 20 Q. B. D. 810).

(*g*) *Loughborough Highway Board* v. *Curzon* (1886), 16 Q. B. D. 565; 17 Q. B. D. 344.

(*h*) 56 & 57 Vict. c. 73, s. 25.

council allow, and in several instances this was done. Now in all cases the period of postponement has expired; highway boards have ceased to exist, and rural district councils are the successors of the highway board and the highway surveyor (*i*).

Grounds of Non-Liability of "Parish."—A parish, or a sub-division of a parish liable by immemorial custom to maintain its own highways separately, can only discharge itself from the obligation of maintaining any particular highway within it by showing with certainty that some one else is exclusively liable to maintain it, or that by reason of some statutory provision the public duty to maintain it does not exist.

1. *Exceptional Liabilities at Common Law.*—Besides the liability by custom of a sub-division of a parish to repair highways within it, which has already been noticed (*ii*), only three exceptions to the liability of the parish were recognised by the common law. And a parish could discharge itself by showing in answer to an indictment, that the duty of repairing was imposed on some person or corporation. These exceptions were prescription, tenure, and inclosure while it lasts (*k*). It seems, however, that in case of the insolvency of a person subject to such an exceptional liability, the burden of repair may again fall on the "parish" (*l*).

2. *Liability by Statute.*—If a person is made liable by statute to repair a highway, an indictment will lie against him for non-repair (*m*). But all conditions appointed by the statute must be fulfilled before his obligation to repair will arise (*n*). And unless express words are used the liability thus created will be in addition to and not in substitution for the primary liability of the parish or township, and therefore will afford no answer to an indictment against the inhabitants (*o*).

3. *Non-compliance with s.* 23 *of the Highway Act,* 1835.—At common law no adoption by the parish was necessary to make a highway repairable by the parish; but the Highway Act, 1835, s. 23, prescribed certain formalities which must be complied with in the case of roads made since the date of that Act, "by or at the expense of any individual or private person, body politic or corporate." The consequence of non-compliance is that while such

(*i*) 56 & 57 Vict. c. 73, s. 25.

(*ii*) *Ante*, p. 76. (*k*) See *post*, pp. 88 *et seq.*

(*l*) Lord HOLT, C.J.: 1 Ld. Raym. 725; Lord HALSBURY, L.C.: *Sandgate Local Board* v. *Kent County Council* (1898), 79 L. T., at p. 427.

(*m*) *R.* v. *Sheffield Canal Co.* (1849), 13 Q. B. 913.

(*n*) *Rex* v. *Hatfield* (1835), 4 A. & E 156; *R.* v. *Midville* (1843), 4 Q. B. 240.

(*o*) *R.* v. *Brightside Bierlow* (1849), 13 Q. B. 933.

roads may become public highways by dedication and acceptance, there is no obligation on the inhabitants of the parish to repair them. The dedicator himself is not bound to keep them in repair, even if he has in fact voluntarily done repairs (*p*). But the fact of non-compliance with the conditions of the section may be pleaded in answer to an indictment against the parish or township.

4. *Main Roads.*—It seems probable that it would not be a good answer to an indictment against a parish to show that the road in question is a main road, which is vested in and repairable by the county council. Under the Act of 1878, main roads remained under the control of the ordinary highway authorities, and the county was merely bound to contribute half the cost of keeping them in repair; the primary liability of the parish to indictment was not altered by the machinery of the highway board and the contribution by the county. The Local Government Act, 1888, however, enacts that main roads shall be wholly maintained and repaired by the council of the county in which the road is situate, and such council shall have the same powers, and be subject to the same duties as a highway board. The execution of this section is to be a general county purpose, and the cost is to be charged to the general county account; a further provision vests the main roads and the materials thereof in the county council (*q*). The consequences of this enactment are by no means clear. The words which place the county council in the position of a highway board plainly show that an indictment will not lie against the council for non-repair. The transfer of liability to the county primâ facie imports the indictability of the county, so that the remedy for non-repair of a main road, as for non-repair of a county bridge, would be by indictment against the inhabitants of the county. But the absence of any express provision that the county is to be liable to indictment, or that main roads are to be in the same position as county bridges for the purpose of the enforcement of repairs, leaves it doubtful whether the primary liability of the parish has been effectually destroyed (*qq*).

5. *Cesser of Liability to Repair.*—The Highway Acts of 1864 and 1878 contain provisions by which the parish may be relieved of

(*p*) *Roberts* v. *Hunt* (1850), 15 Q. B. 17; *R.* v. *Wilson* (1852), 18 Q. B. 348.

(*q*) 51 & 52 Vict. c. 41, s. 11. See also s. 97, and notes to these sections, *post.* The Minister of Transport is, in respect of a road constructed by him, subject to the same duties as a county council are subject to in respect of a main road (The Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 9, as amended by the Roads Act, 1920 (10 & 11 Geo. 5, c. 72)).

(*qq*) In *Att.-Gen.* v. *Staffordshire County Council*, [1905] 1 Ch. 335, the question as to whether there is a liability to repair enforceable by action was raised but not decided.

the obligation of repairing highways which are "unnecessary for public use," and an order of justices under these Acts declaring that a highway is unnecessary for public use and that it ought not to be repaired at the public expense is a good defence to an indictment for non-repair of the highway (*r*).

Liability by Prescription, etc.—A particular person cannot be bound by prescription that he and all his ancestors have repaired, if it be not in respect of the tenure of his land, the taking of toll or other profit; for the act of the ancestor cannot charge the heir without profit. But a corporation which has a lawful being may be charged, that they and their predecessors time out of mind have repaired, for the predecessors may bind their successors, and as in judgment of law a corporation never dies, if it were ever bound to repair, it must needs continue to be so (*s*).

The question has once or twice arisen whether a parish can be liable by prescription to repair a highway lying in another parish. The parish cannot be so liable by custom (*t*); and, therefore, "if the inhabitants of one district can be charged at all for a matter out of their district, the only mode of charge will be that of prescription; and as no common intendment can be presumed for such a charge, it will be necessary to show some special matter, whereby a lawful beginning may be intended" (*u*). In *Rex* v. *St. Giles, Cambridge* (*x*), where a parish was indicted for non-repair of a highway within it, a plea that the inhabitants of another parish from time immemorial had repaired and been used and accustomed to repair, and of right ought to have repaired the way, was held insufficient on the ground that no consideration was shown for the alleged prescriptive liability. In *R.* v. *Ashby Folville* (*y*), a plea by a parish set up the prescriptive liability of another parish, and stated as a consideration therefor that the latter had levied and received from time to time certain rates and charges on and in respect of certain lands in the former parish, adjacent to the highway in question. The court held (1) that the alleged consideration was illusory and bad, because there cannot be a legal right for one parish to levy rates in another parish; and (2) that at all events the consideration must be coeval with the liability, and a prescriptive liability could not be supported by a right to levy rates, which must have arisen within legal memory.

(*r*) 27 & 28 Vict. c. 101, s. 21; 41 & 42 Vict. c. 77, s. 24, *post.*

(*s*) *Cf.* Co. 13 Rep. 33, "Repair of Bridges"; 1 Hawk. P. C. c. 76.

(*t*) *Ante*, p. 80.

(*u*) *Per* Lord ELLENBOROUGH, C.J.: *Rex* v. *Ecclesfield* (1818), 1 B. & A. 348, p. 361.

(*x*) (1816), 5 M. & S. 260.

(*y*) (1866), L. R. 1 Q. B. 213.

The court were also strongly disposed to think that in the absence of a direct decision on the point, they would not be warranted in holding that a prescriptive liability in one parish to repair a highway situate in another parish can possibly exist in point of law.

"Prescription implies some legal origin" (*z*). A liability to repair may, therefore, arise, undistinguishable in principle from a liability by prescription, under a charter or Royal grant within time of memory. Where the Crown granted a borough in fee farm to a corporation and acquitted them of part of the rent, willing that they should repair the banks, mounds, sea-shores, and pier within the same, it was held that the corporation by accepting the charter became liable to repair in accordance with the condition; and that, this public duty being of general and public concern, the public might enforce the performance of it by indictment (*a*).

Liability Ratione Tenuræ.—The liability to repair may attach to the occupiers of lands adjacent to the highway by reason of the tenure of such lands. If it is sought to attach this liability to a body of persons, it is necessary that such persons should form a corporate body (*b*) capable of holding lands. If they are unincorporated they are incapable of holding lands, and no liability *ratione tenuræ* can attach to them. Accordingly, where it was sought to render the inhabitants of a parish liable to repair a bridge because, as was alleged, from time immemorial by reason of the tenure of certain lands the inhabitants of the parish had repaired the bridge, it was held that inasmuch as the inhabitants as such could not hold land, they could not be liable by reason of tenure (*c*).

Liability to repair *ratione tenuræ* is a charge imposed on the land, and the obligation runs with the land and every part of it. Thus, a concurrent liability may exist on the part of several persons

(*z*) *Mayor, etc. of Lyme Regis* v. *Henley* (1832), 2 B. & Ad. 77, in House of Lords in error from K. B., 1 Bing. N. C. 222. See the original case in C. P., 5 Bing. 91.

(*a*) *Ib.* Where an onerous liability has been asserted and submitted to for a long series of years, although the evidence begins well within modern times, anything not manifestly absurd which will support and give a legal origin to such a custom will be presumed. Therefore, a liability to repair a sea wall submitted to from 1818, when proceedings were taken, to before 1896, ought to be presumed to have a legal origin. When a farm has been subject *ratione tenuræ* to repair a sea wall, such liability attaches to every part of the land comprising the farm, though the farm has been sold and has become vested in several different purchasers (*London and North Western Rail. Co.* v. *Commissioners of Sewers for Fobbing Levels* (1896), 66 L. J. Q. B. 127).

(*b*) *Rex* v. *Inhabitants of Machynlleth and Pennegoes* (1823), 2 B. & C. 166: *Rex* v. *Inhabitants of Ecclesfield* (1818), 1 B. & Ald. 348.

(*c*) *Rex* v. *Inhabitants of Machynlleth and Pennegoes* (1823), 2 B. & C. 166.

if the land liable has been divided (*d*). But if the owner of any part has discharged the liability for the whole, he is entitled to claim contribution from the other owners (*e*). If the owner sells the estate in several parts and agrees with the purchasers to discharge them from the liability to repair, such agreement can only take effect as between the owner and the purchaser; it does not alter the remedy of the public (*f*); for the repair of a highway is a matter of public concern (*g*), and those liable to repair cannot evade liability by private arrangement.

The occupier, and not the owner, is the proper person against whom the indictment should be brought (*h*). The occupier also is liable to pay where the district council do the repairs under s. 25 (2) of the Local Government Act, 1894, after failure by the person liable to repair *ratione tenuræ* to comply with a request from the council (*i*). And it does not seem material what estate the occupier has in the lands (*k*). But though the occupier is the only person chargeable by indictment or by action, he may demand reimbursement from the owner (*l*). In *Rex* v. *Sutton* (*m*), an infant, eleven years old, inherited land charged with the repair of a bridge; his guardian in socage resided on the property; the infant did not reside on the property except on occasional visits. It was held (1) that though the infant was actually seised, yet being so by the possession of his

(*d*) *R.* v. *Inhabitants of Brightside Bierlow* (1849), 19 L. J. M. C. 50, p. 53; *R.* v. *Duchess of Bucklugh* (3 Anne), 1 Salk. 358; *Rex* v. *Buckeridge and Others* (3 Will. & M.), 4 Mod. Rep. 48; *Rex.* v. *Inhabitants of Oxfordshire* (1812), 16 East, 223.

(*e*) *R.* v. *Duchess of Bucklugh* (3 Anne), 1 Salk. 358.

(*f*) *Ib.* See also *London and North Western Rail. Co.* v. *Commissioners of Sewers for Fobbing Levels* (1896), 66 L. J. Q. B. 127.

(*g*) PARK, J., in *Mayor, etc. of Lyme Regis* v. *Henley* (1834), 1 Bing. N. C. 238.

(*h*) 1 Roll. Abr. 390: Un owner de terre qui nest l'occupier do ceo, ne poet estre charge a repairer un common chimin, mes solmen l'occupier (*R.* v. *Barker* (1890), 25 Q. B. D. 213). In *R.* v. *Ramsden* (1858), El. Bl. & El. 949, ERLE and CROMPTON, JJ., thought the passage in Rolle should be understood as referring to liability *ratione clausuræ*.

(*i*) The Local Government Act, 1894, s. 25 (2); *Daventry Rural District Council* v. *Parker*, [1900] 1 Q. B. 1; *Cuckfield Rural District Council* v. *Goring*, [1898] 1 Q. B. 865.

(*k*) 2 Wms. Saund. 158 (*f*) (ed. 1871).

(*l*) *Baker* v. *Greenhill* (1842), 3 Q. B. 148. In this case an Act of Parliament had empowered road trustees to repair and to levy a rate upon the owners liable *ratione tenuræ*. The lessee, having been compelled to pay such a rate, was held entitled to recover the amount from his lessor. The court also decided that the rate was not a parliamentary tax or deduction within the meaning of the lessee's covenant to pay rent "clear of land tax and all othe taxes or deductions whatsoever, either parliamentary or parochial, taxed or imposed, or to be taxed or imposed, upon the premises or upon the lessor in respect thereof, the landlord's property tax only excepted."

(*m*) (1835), 3 A. & E. 597.

guardian, and having no control over the land or the profits, he was not such owner or occupier of the land as to be chargeable by indictment for non-repair; and (2) that the guardian being in possession of the land, and receiving and disposing of the issues subject only to the infant's maintenance and a future account, was liable to indictment for non-repair as occupier of the land. The court further expressed an opinion that if there were no other person against whom performance of the obligation to repair could be enforced, infancy alone would not suffice to exempt a person liable in other respects from indictment for non-repair.

Liability *ratione tenuræ* is generally proved by evidence that the defendant and his predecessors have for a great length of time actually repaired the highway, which, in the absence of explanation, is almost conclusive (*n*). If it is shown that such repairs have been done under a mistaken notion of liability, the presumptive effect is rebutted (*o*), or if the evidence is slight and the repairs are done on the occupier's land (*p*). So, if it is shown that the tenement on which the liability is charged originated within the time of legal memory, for "it is essential to prove the liability from time out of memory" (*q*) where it is sought to found the liability upon prescription (*r*).

Thus, an interest in certain lands was given by Charles I. to V. in consideration of his draining the lands. The lands were drained, and a road was formed through such lands along a bank which was elevated one or two feet above the adjacent country. It was bounded on one side by a large open drain, and on the other by a fence and ditches. The bank was made by the earth of the drain. The participants, as the owners of the land conveyed to V. were called, had repaired the road, as far back as living memory went. The road fell into a state of non-repair, and the inhabitants of the township being indicted, sought to evade liability by throwing it on the participants by reason of their tenure. The court held that since it was not proved that the road existed before

(*n*) HOLROYD, J.: *Rex* v. *Hatfield* (1820), 4 B. & A. 75; *Rex* v. *Skinner* (1805), 5 Esp. 219. In *Great Western Rail. Co.* v. *Denchworth* (*Surveyor*) (1861), 25 J. P. 342, where certain farms in a district of a parish claimed exemption from the highway rate by reason of a custom whereby they were alleged never to have paid the rate before, but the district had no officer of its own who could be made to do the repairs for the district, it was held the omission to rate the district must have arisen from ignorance and no ground for continuing the exemption was shown.

(*o*) *R.* v. *Barker* (1890), 25 Q. B. D. 213.

(*p*) *Rundle* v. *Hearle*, [1898] 2 Q. B. 83.

(*q*) TINDAL, C.J.: *Rex* v. *Hayman* (1829), Mood. & M. 401.

(*r*) *Esher and Dittons Urban District Council* v. *Marks* (1902), 71 L. J. K. B. 309.

the formation of the bank, the participants could not be liable *ratione tenuræ* (*s*). "I am not at all satisfied," said ABBOTT, C.J., "that the road had any immemorial existence; and if so, that reduces the commencement of the repair given in evidence to the reign of Charles I., which negatives any prescriptive liability on the part of those participants" (*t*). "In the strict sense of the

(*s*) *Rex* v. *Hatfield* (1820), 4 B. & A. 75.

(*t*) The proposition that in order to establish liability *ratione tenuræ* the usage must be immemorial was denied in the argument in *Rex* v. *Scarisbrick* (1837), 6 A. & E. 513. In *R.* v. *Beeby* (1839), 8 L. J. M. C. 38, Lord DENMAN, C.J., is reported to have expressed the opinion that possibly in the case of a road newly created a party might, under some circumstances, be held liable for the repairs in respect of tenure of certain lands; and again in *R.* v. *Sheffield Canal Co.* (1849), 13 Q. B. 926, he confessed that he had never understood why as an invariable rule it should be immemorial. *Cf.* also WALTON, J., in *Esher and Dittons Urban Council* v. *Marks*, *post*, p. 93.

There is no case where a person has been held bound by prescription to repair by reason of a tenure created within time of legal memory; but there are indications in the cases of some uncertainty of view as to the real nature of the liability. Three different opinions have been suggested:

1. COKE and others speak of liability *ratione tenuræ* as if it were a mere species of prescriptive liability, the tenure of lands being the most common form of the consideration which is necessary to charge the successors of an individual, as opposed to a corporation, with the continuing liability. Lord ELLENBOROUGH, C.J., thought that *ratione tenuræ* was a compendious term which must have been introduced by way of substitution for a more definite mode of pleading a prescriptive obligation (*Rex* v. *Kerrison* (1813), 1 M. & S. 435).

2. Tenure may be taken in the strict sense; and as no tenure can be created since the statute *Quia Emptores* (1290) except by the Crown, every liability *ratione tenuræ* which was not created by a grant from the Crown must have existed before the statute. In ordinary cases it would be as easy to prove prescriptive usage as to prove the existence of a tenure subject to the burden or service of repairing. On this view, if the lands are shown to have been the property of the Crown, there is no reason why the courts should not presume a liability annexed to a tenure created within time of memory. The case of *Rex* v. *Hatfield*, *supra*, is not an authority to the contrary; for in that case the Crown grant was produced and contained no such obligation.

3. The liability may be regarded as a condition annexed to the grant of lands, whether by a subject or by the Crown. It is true that the benefit of a common law condition cannot be reserved to a stranger; but it does not follow that the public may not take advantage of a valid condition, the performance of which is a matter of public concern. There is no case in which a grant on condition has been held to impose liability *ratione tenuræ*. In *Rex* v. *Scarisbrick* (1837), 6 A. & E. 509, where the township of S. sought to throw the liability upon the owner of the township of N., it was proved that an agreement had been made 250 years before, between the then owner of S. and the then owner of N., whereby the boundary between the properties were marked out, and the owner of S. agreed to allow to the owner of N. and the rest of the inhabitants of N. a road through S., of which N. was to repair the part in question, and that further assurance for the performance of the agreement should be made by a sufficient lawyer. It was also shown that afterwards the owner of S. filed a bill for specific performance against the owner of N., the event of which did not appear, and that the owners of lands in N. had ever since repaired in conformity with the agreement. The

term the liability *ratione tenuræ*, unless arising from a grant by the Crown, must have its origin in a grant prior to the statute *Quia Emptores*" (*u*).

"If it can be proved that the King granted a licence to the owner of certain lands to stop and inclose for the benefit of himself and his heirs a public highway passing through such lands, imposing at the same time a condition that the owner of such lands should make a new road in place of the old one, and that he, his heirs, and assigns should keep such new road in repair; and if it can be further proved that the grantee accepted and acted upon such grant by stopping up the old highway, this would be sufficient to establish an obligation *ratione tenuræ* to repair the new road in place of the old road so stopped up. And it appears to me immaterial whether such grant was made and accepted before or after the reign of King Richard I." (*v*). Accordingly, where the King granted a licence to the owner of certain lands to stop and inclose for the benefit of himself and his heirs a public highway passing through such lands, imposing at the same time a condition that the owner of such lands should make a new road in place of the old one, and that he, his heirs and assigns should keep such new road in repair; and the grantee accepted and acted upon such grant by stopping up the old highway, a liability to repair *ratione tenuræ* the new road was established (*w*).

court held that, assuming that a conveyance and reconveyance could have been made so as to charge the lands in N. with the liability, there was no evidence on which the jury would have been justified in finding that such a legal instrument had ever been made. In *R.* v. *Beeby* (1839), 8 L. J. M. C. 38, the defendant, who was indicted for non-repair, gave in evidence an ancient deed, between certain inhabitants of the parish and the former owner of his land, whereby the former gave the latter that land, in consideration of his repairing an existing highway; the grantee covenanted to repair it, and it was stipulated that if through his neglect to repair the parish were indicted, there should be a right of re-entry and the agreement should be void. It was held that whether or not liability *ratione tenuræ* could be created by a condition in a grant of lands, at all events a covenant to repair and a right of re-entry on breach did not amount to such a condition. The words of COKE (*Porter's Case*, 1 Rep. 26a), that "any man at this day may give lands, tenements, or hereditaments to any person or persons and their heirs for reparation of highways, bridges, causeways, etc.," have no relevance to this subject; the meaning is that the repair of highways and bridges is a good charitable use, and it would be hopeless to contend that the trustees to whom lands were given for that purpose were indictable *ratione tenuræ* for non-repair.

(*u*) WILLS, J.: *Ferrand* v. *Bingley Urban District Council*, [1903] 2 K. B. at p. 451.

(*v*) WALTON, J., in *Esher and Dittons Urban Council* v. *Marks* (1902), 71 L. J. K. B., at p. 313.

(*w*) *Esher and Dittons Urban Council* v. *Marks* (1902), 71 L. J. K. B. 309. The road which was stopped appears also to have been repairable *ratione tenuræ*.

In *Rundle* v. *Hearle* (*x*) the question arose as to the liability to repair a stile on a public footpath. The only evidence against the occupier was that occasionally he and his predecessors in occupation had occasionally done some slight repairs to the footpath and stile, but there was no evidence that he or they had ever been required by the highway authority to do so. The court held that this evidence was insufficient to saddle the occupier with a liability to repair *ratione tenuræ* the stile or footpath, but considered that, as in the case of *Hudson* v. *Tabor* (*y*), such repairs were done for the occupiers' own benefit and not pursuant to any legal liability.

Lands which are charged with liability to repair a particular road *ratione tenuræ* may be legally exempt from contributing to the repair of other roads in the parish or township (*z*).

Liability to Repair Ratione Clausuræ.—Where a highway runs over open, uninclosed country, and the public has acquired an immemorial right to deviate on the adjoining land if the way is founderous or impassable (*a*), the owner who incloses his land and thereby deprives the public of the right to deviate, becomes legally liable to keep the highway in repair while the inclosure lasts.

In *Duncomb's Case* (*aa*), the leading case on the subject, the defendant was indicted "for that, there being an ancient highway in B., he had inclosed his lands on both sides thereof, whereby he had straitened it, and the way was become *lutosa* and *funderosa*, whereas by the law of the land he ought to have made it a sufficient way." It appeared that when the ancient highway in question was out of repair, the public had been immemorially accustomed to deviate on the outlets. The defendant inclosed the

(*x*) [1898] 2 Q. B. 83.

(*y*) (1877), 2 Q. B. D. 290.

(*z*) *R.* v. *Heath* (1806), L. R. 1 Q. B. 218. *Cf.* also *Dalton Overseers* v. *North Eastern Rail. Co.*, [1900] A. C. 345; *Lonsdale* v. *Lowther* (*Overseers*) (1896), 60 J. P. 296, a decision of Mr. MONTAGUE CRACKENTHORPE, Q.C., at quarter sessions.

(*a*) This liability to repair *ratione clausuræ* arises only where the public right to deviate has existed, and the right to deviate over uninclosed land does not appear to exist in all cases or as a matter of law. A definite way may have been dedicated, and that only, and in *Arnold* v. *Holbrook* (1873), L. R. 8 Q. B. 96, at p. 98, COCKBURN, C.J. observed: "The right to deviate may be annexed by prescriptive enjoyment to a highway; but it cannot be presumed to exist as an incident to a limited dedication." And in *R.* v. *Oldreeve* (1868), 32 J. P. 271, WILLES, J., is reported to have said that the right existed where an adjoining owner obstructed the road, but not where the obstruction was caused by the action of the elements.

(*aa*) (10 Car. 1) Cro. Car. 366; 1 Roll. Abr. 390. See *Arnold* v. *Holbrook* *supra*.

outlets, leaving a road four yards wide, and making a causeway reasonably good for horsemen, but so that carts and coaches might not pass nor could meet for the straitness thereof, nor might go besides the way. It was held that the defendant, having thus deprived the public of the ground over which they were used to deviate, was bound to repair the highway and make it a good way.

In *Henn's Case* (*b*) it was agreed by all the judges that if a man do inclose, where he may by law, that he is bound to leave a good way, and also to keep it in continual repair at his own charge, and "the countrey ought not to be contributary thereto." But later cases show that this statement requires qualification, and that the liability only arises where the public are deprived of the right of deviation, the adjoining land having become in a limited sense parcel of the highway (*c*).

"The liability does not arise when the origin of the road is by modern dedication, and where from the circumstances of the origin of the road and the nature of the property, such dedication may reasonably be presumed to have been to the extent of the road only as laid out, excluding any right to go on the land adjoining" (*d*).

Where under an Inclosure Act an ancient highway was directed to be forty feet broad, and was admeasured and set out accordingly, and an allottee of lands under the Act afterwards inclosed his land on each side of the highway with hedges, ditches, and fences, leaving the highway forty feet broad between the ditches, it was held that he incurred no liability to repair, the intention of the Act of Parliament being that the lands adjoining the highway might be inclosed (*e*). So, where a road was originally set out under an Inclosure Act, and the land on both sides was allotted to the defendant's ancestor who was lord of the manor, and there was no evidence that the adjoining land had ever been used for purposes of passage, and the jury found that they did not think, from the nature of the ground on which the road was made, that the public could substantially and beneficially have enjoyed the privilege of driving their carriages on the adjoining land in the event of the road itself being out of repair, the court held the

(*b*) (8 Car. 1), Sir W. Jones, 296.

(*c*) 1 Roll. Abr. 390; *Rex* v. *Stoughton*, 2 Wms. Saund. 462 (ed. 1871). It appears that when an owner of land adjoining a highway fails in his obligation to repair it (*Henn's Case*, *supra*) or obstructs it (*Absor* v. *French* (1678), 2 Show. 28; *Dawes* v. *Hawkins* (1860), 8 C. B. (N. S.) 848) the public may deviate through his hedges or fences, provided they do not penetrate further into the inclosed land than is necessary.

(*d*) CROMPTON, J., in *R.* v. *Ramsden* (1858), El. B. & E. 949.

(*e*) *Rex* v. *Flecknow* (1758), 1 Burr. 461.

defendant was not liable *ratione clausuræ*. ERLE, J., based his opinion on the three grounds: that the highway was not immemorial, that the land inclosed was not shown to have been used for passage, and that the defendant was not the occupier of that land. CROMPTON, J., while resting his decision on the last ground only, also indicated his concurrence in the other reasons of ERLE, J. (*f*). Generally, where the formation of the road is contemporaneous with the inclosure, the liability does not arise (*g*).

"If the same person was the owner of the land on both sides, and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road, and where there was an ancient inclosure on one side, and the owner of lands inclosed on the other, he was bound to repair the whole" (*h*).

The liability to repair a highway *ratione clausuræ* is in the occupier of the lands inclosed, not in the owner as owner (*i*).

The liability to repair exists only so long as the inclosure lasts; so that it "may be put an end to by the person in occupation, who has the possessory right, throwing down the inclosure" (*k*).

The liability *ratione clausuræ* does not now arise where the occupier of lands has obtained the consent in writing of the highway authority to the erection of fences (*l*).

Extinguishment, etc. of Private Liability to Repair.—The liability to repair *ratione tenuræ*, by prescription, etc. ceases if the highway is, under statutory authority, so altered in its nature and course as to be practically destroyed. Thus, where an ancient highway, which was only a horse and pack way about three feet wide, was in 1765 converted into a turnpike road fifteen yards wide, and the Turnpike Act expressly kept alive the liability *ratione tenuræ* of the occupiers of certain farms until its expiry in 1870, it was held that the alteration of the highway had destroyed the original liability by reason of tenure and on the expiry of the Turnpike Act, the township alone was liable (*m*). So, where a highway, paved to the width of nine feet in the centre with stone got from the land charged with the repair, was converted by

(*f*) *R.* v. *Ramsden* (1858), El. B. & E. 949.

(*g*) *Rex* v. *Hatfield* (1820), 4 B. & A. 75.

(*h*) ABBOTT, C.J., in *Steel* v. *Prickett* (1819), 2 Stark. 463.

(*i*) 1 Roll. Abr. 390; *R.* v. *Ramsden* (1858), El. B. & E. 949.

(*k*) CROMPTON, J.: *R.* v. *Ramsden, ubi supra.*

(*l*) The Highway Act, 1862 (25 & 26 Vict. c. 61), s. 46. There is no right to deviate on adjoining land in the case of a private way which has become impassable (*Bullard* v. *Harrison* (1815), 4 M. & S. 387).

(*m*) *R* v. *Township of Pickering* (1877), 41 J. P. 564.

turnpike trustees into a macadamized road by taking up the old pavement and laying down to the width of fifteen feet in the centre, stone brought from places without the county, and its course was in parts stopped and diverted so as to straighten it, it was held that the road, the subject of repair, must be taken to have been destroyed, and that the liability to repair *ratione tenuræ* had therefore ceased (*n*). There may, however, be cases where a highway repairable *ratione tenuræ* is merely widened, or stopped up at one end, and not otherwise changed in course or character; and in such cases the party may remain liable to repair so much of it as he was originally bound to do (*o*). If the liability to repair ceases, the exemption from liability to the highway rate or highway expenses also ceases (*p*).

Highways repairable *ratione tenuræ*, etc. may become repairable by the ordinary highway authority, either at the instance of the party liable to repair them, or on the application of the surveyor, highway board, or district council (*q*).

The Local Government Act, 1888, which throws upon the county council the duty of repairing main roads, contains an express provision keeping alive the liability of any person or body of persons, corporate or unincorporate, not being a highway authority, to maintain and repair any road or part of a road (*r*).

Nature and Extent of Repairs.—The duty to repair and keep in repair means the duty to keep the road as dedicated to the public in such a state as to be safe and fit for ordinary traffic (*s*). In other words, the road must be kept in such repair as to be reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year (*t*), except, possibly, where it has been dedicated for summer use only (*tt*).

In an old case it was held that the parish is not bound to put a

(*n*) *R.* v. *Barker* (1890), 25 Q. B. D. 213; *Heath* v. *Weaverham Overseers*, [1894] 2 Q. B. 108.

(*o*) *Ibid.*: *Esher and Dittons Urban Council* v. *Marks* (1902), 71 L. J. K. B. 309. When highways are widened under the Highway Act, 1835, and made repairable by the parish, parties formerly liable *ratione tenuræ*, etc., are to pay a proportionate annual sum, or a fixed lump sum, in lieu of repairing. See s. 93, *post*.

(*p*) *Heath* v. *Weaverham Overseers*, [1894] 2 Q. B. 108.

(*q*) See the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 62; the Highway Act, 1862 (25 & 26 Vict. c. 61), s. 35; the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 24.

(*r*) 51 & 52 Vict. c. 41, s. 96.

(*s*) LINDLEY, J., in *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264.

(*t*) BLACKBURN, J., in *R.* v. *High Halden* (1859), 1 F. & F. 678.

(*tt*) *R.* v. *Brailsford* (1860), 2 L. T. 508.

common footway in better condition than it has been time out of mind, but as it has been usually at its best (*u*). But in some circumstances an entirely new mode of repair may be necessitated. Thus, where a parish was indicted for not repairing an old soft clay road, which had never been repaired by them with hard substances, and it appeared that in wet weather and in the winter months the road was in a very bad, soft, and quite impassable state, that the ruts were in most places fourteen and sixteen inches deep, and formed, in fact, the watercourses of the road, BLACKBURN, J., directed the jury that the parish was not bound to make the road hard, or bring stone or other hard substances to repair the road; but they were bound in some way, by stone or other hard substances if necessary, to make the road reasonably passable for ordinary traffic at all seasons of the year (*x*). There has in recent years been frequent mention of the nature and extent of the repairs which a highway authority are liable to carry out, and it is now well settled law that it is the duty of a highway authority to maintain any particular highway in a condition to carry the ordinary traffic on that highway in whatever form that ordinary traffic may develop; that is to say, they must keep the road up to date. If the traffic increases in volume or alters in character the highway authority must adapt the road to meet the new requirements (*xx*). The court will not in any case prescribe the mode in which, or the materials with which, the road is to be repaired (*y*). The liability of the highway authority "either at common law or by statute, is general, to repair and maintain the highway, leaving it to them to find out the best, or at any rate adequate, means of discharging that liability" (*z*). Accordingly where a municipal corporation repaired a road with tarmac, having bonâ fide arrived at the conclusion that the work would improve the highway for use by the inhabitants of and visitors to the borough, although the occasion of the work was to enable a club to hold their meeting for motor car speed trials in the borough, the court refused

(*u*) *R.* v. *Cluworth* (3 Anne), 1 Salk. 359.

(*x*) *R.* v. *High Halden* (1859), 1 F. & F. 678.

(*xx*) *Att.-Gen.* v. *Scott* (1904), 68 J. P. 502; (1905), 69 J. P. 109; *Chichester Corporation* v. *Foster* (1905), 70 J. P. 73. The proposition in support of which the above cases are cited was approved by the Court of Appeal in *Att.-Gen.* v. *Sharpness New Docks Co.*, [1914] 3 K. B. 1, and although the judgment of the Court of Appeal was reversed in the House of Lords, this particular principle was accepted, [1915] A. C. 654. See also *Butt & Co.* v. *Weston-super-Mare Urban District Council* (1922), 1 A. C. 340.

(*y*) *R.* v. *Claxby* (1855), 24 L. J. Q. B. 223; *Att.-Gen.* v. *Staffordshire County Council*, [1905] 1 Ch. 336.

(*z*) Lord DAVEY, in *Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L. T. 425.

a *certiorari* to bring up and quash resolutions of the corporation for the payment of the expenses (*a*). And where a local authority restored a highway which had been let down and damaged by mining operations to its former level without regard as to whether it could not be rendered equally commodious at a lower level, the House of Lords held that they were not entitled to recover from the mine owners the full cost of restoring the highway to its former level, but only so much as it would cost to restore it to a level which would make the highway equally commodious (*b*).

Whether a road is or is not out of repair is a question of fact for the jury. But if an indictment charges a parish merely with not paving, it is bad; for they are not bound to pave, but to repair. So, also, if the indictment charges only that the road is very muddy (*valde lutosa*) (*c*).

It is also a question of fact whether repairs are practicable with reference either to the nature and situation of the road or to the character of the accident or operation by which the road has been rendered impassable. Where a highway crosses the bed of a river, which washes over it at every tide, washing away the materials placed there to form the road, and leaving in their place a deposit of mud, the jury may find for the defendants on an indictment charging the parish with non-repair of that part of the road, for it would be absurd to require the parish to do repairs which from the nature of things must always be ineffectual (*d*). So where part of a road has been carried away by a landslip, and its place supplied by earth, stones, and other rubbish, it is a question of fact whether the road has been wholly destroyed, in which case the liability to repair is at an end, or whether it is practicable to form a permanent and passable road along the old track (*e*).

What constitutes, or forms part of, the highway for the purpose

(*a*) *Rex* v. *Brighton Corporation, Ex parte Shoesmith* (1907), 96 L. T. 762, reversing the Divisional Court, 70 J. P. 377.

(*b*) *Lodge Holes Colliery Co.* v. *Wednesbury Corporation*, [1908] A. C., reversing C. A., [1907] 1 K. B. 78, and restoring decision of JELF, J., [1905] 2 K. B. 823. See *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 73 J. P. 477, *post*, where what was done by way of repair and restoration was reasonable.

(*c*) Com. Dig. Chimin, A. 4; *R.* v. *Stretford* (4 Anne), 2 Ld. Raym. 1169.

(*d*) PATTESON, J., in *Rex* v. *Landulph* (1834), 1 Moo. & R. 393.

(*e*) *R.* v. *Greenhow* (1876), 1 Q. B. D. 703. BLACKBURN, J., said: "I think that in drawing such an inference it would always be a question of more or less, and for my part, the operations which are described as necessary do not seem to me to involve any enormous difficulty. Therefore, in drawing my inferences of fact, I think it cannot be said that the road was annihilated, and that it was impossible, in a commercial sense, to repair it, that is, that it would cost more than the subject-matter of repair is reasonably worth" (*ibid.*, p. 708).

of repair is also a question of fact. Thus, where a highway is supported by a retaining wall, it is a question of fact for the jury whether or not the wall is part of the highway and as such repairable by the parish (*f*). Where a wall supporting the highway belongs to a private person and the public have acquired a prescriptive easement of support as against him, he is not obliged to repair the wall; and if he has in fact done repairs, these will be deemed to have been done for his own convenience and will not be evidence of any liability to repair (*g*). Where a wall which does not form part of the road, but is necessary for the support of the road, falls and does damage to adjoining property, the highway authority is not liable (*h*).

In the case of a highway by the sea, land lying between the highway and the sea may be deemed part of the highway for the purpose of protecting the highway from the sea, and therefore for the purpose of repair and maintenance. Accordingly, in a dispute between a county council and an urban council as to a main road which ran by the sea, where the arbitrator found that an esplanade, a sea wall, and certain groynes on the shore were all necessary for the protection of the road, the House of Lords approved of the finding, and held that he was justified in awarding the expenses of maintenance of these things as part of the repair and maintenance of the main road (*i*).

Where a street is dedicated to the public, the flagstones of the pavement forming the roof of a cellar underneath, the pavement is to be repaired by the parish; and if they cannot repair the way without repairing the roof of the cellar, they are bound to do it, because the wear is theirs and they ought to remedy it; but it is a question of fact whether any part is part of the pavement repairable by the parish or part of the cellar repairable by the owner of it (*k*).

Whether a particular structure is a bridge repairable as such by the county, or a mere culvert or other small or slight structure, repairable by the parish as part of the highway, is a question of fact (*l*).

A parish cannot be compelled at common law to widen a highway which is so narrow that people cannot pass without danger

(*f*) *R.* v. *Lordsmere* (1886), 54 L. T. 766. In *Att.-Gen.* v. *Staffordshire County Council*, [1905] 1 Ch. 336, JOYCE, J., refused a declaration that a county council were liable to repair and maintain embankments and walls alleged to be necessary for the existence of a main road.

(*g*) *Stockport, Hyde and Macclesfield Highway Board* v. *Grant* (1882), 46 L. T. 388; *Short* v. *Hammersmith Corporation* (1910), 75 J. P. 82.

(*h*) *Sanitary Commissioners of Gibraltar* v. *Orfila* (1890), 15 App. Cas. 400.

(*i*) *Sandgate Urban District Council* v. *Kent County Council* (1898), 79 L. T. 425.

(*k*) *Hamilton* v. *St. George's, Hanover Square* (1873), L. R. 9 Q. B. 42.

(*l*) See *post*, p. 104.

to their lives (*m*). For "the inhabitants of a parish as such have no power, except by Act of Parliament, to purchase at their own expense, land for the purpose of widening a road; and if they could be compelled to buy land for such a purpose, I do not see why they should not also be compelled to buy houses, and then the inhabitants of the parish of St. Andrew, Holborn, might be compelled to purchase and pull down the houses on one side of the north end of Chancery Lane, and so make the road wide enough for two carriages to pass, which they cannot do at present" (*n*). Various statutory provisions have been made with reference to the widening and improvement of highways (*o*).

There is no obligation on the parish to fence an ordinary highway (*p*). Where trustees under a road Act had turned a road through a churchyard and made fence walls at their own expense, and repaired them for several years, it was held that they could not be compelled to continue such repairs, there being no express provision in the Act to make them liable, and the obligation to repair the road applying only to the surface over which the subjects had a right to pass (*q*). And a canal company may be relieved by their private Act of any obligation to keep in repair the fences to approaches leading to a bridge constructed by them over their canal (*r*). But where a fence or wall protecting a highway against a precipice forms part of the highway, the parish will be liable to indictment if it is suffered to become dangerous by reason of non-repair; whether it does form part of the highway or not, is a question of fact, not of law (*s*). There is no general law imposing upon the owner of lands adjoining a public highway the obligation to maintain and keep up the fences (*t*); but if he allows his fence to get into such a dangerous condition as to be a nuisance to those

(*m*) *R.* v. *Stretford* (4 Anne), 2 Ld. Raym. 1169; *cf.*, as to county bridge, *Rex* v. *Devon* (1825), 4 B. & C. 670.

(*n*) ABBOTT, C.J.: *Rex* v. *Devon*, *ubi supra*.

(*o*) See, *e.g.*, the Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 82 *et seq.*; the Highway Act, 1864 (27 & 28 Vict. c. 101), ss. 47, 48; the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11; the Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63); the Development and Road Improvement Funds Act, 1909 (9 Edw. 7, c. 47), s. 8, as amended by the Roads Act, 1920 (10 & 11 Geo. 5, c. 72); the Ministry of Transport Act, 1919 (9 & 10 Geo. 5, c. 50), s. 17.

(*p*) As to the duty to fence under a local Act, see *Mayor, etc. of Rotherham* v. *Fullerton* (1884), 50 L. T. 364.

(*q*) *Rex* v. *Commissioners of Llandilo Roads* (1788), 2 T. R. 232.

(*r*) *Att.-Gen.* v. *Oxford Canal Navigation* (1903), 72 L. J. Ch. 285, *post*, p. 114. The court suggested that the duty to repair the fences was probably on the highway authority.

(*s*) *Rex* v. *Whitney* (1835), 7 C. & P. 208; *R.* v. *Lordsmere* (1886), 54 L. T. 766.

(*t*) *Potter* v. *Perry* (1859), 23 J. P. 644.

who use the highway, he will be liable to any person suffering injury in consequence of the nuisance (*u*).

It is sometimes necessary to distinguish the repairs, which a surveyor of highways may do, from the repairs which the parish can be compelled by indictment to do. Thus, where a highway had subsided several feet, and a local board, acting as surveyors of highways, restored it to its former level, it was held that this was done in exercise of the powers which highway surveyors have; although, if the road could have been made safe and fit for ordinary traffic at the level to which it had sunk, an indictment for not raising it to the former level would have been unsustainable (*x*). In exercising such powers the surveyor is not entitled to overload the surface by putting on it materials not justified by the easement (*y*), so as to enlarge the public right or make the public right more onerous to the owner of the soil (*z*). Nor is he entitled to alter the level of the highway to the detriment of an adjoining owner who has a right of access to it at the existing level (*a*).

Liability to Repair Bridges.—Under the Statute of Bridges (*b*), which is declaratory of the common law, the liability to repair bridges of public utility falls primâ facie on the inhabitants of the county, as the repair of ordinary highways is imposed on the inhabitants of the parish. "A parish as to highways, and a county as to bridges, are precisely on the same footing" (*c*). Under the Annual Turnpike Acts Continuance Act, 1870, it was enacted that where a turnpike road should have become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road should become county bridges. Where a bridge has been built prior to Lord Ellenborough's Act, the county can only avoid their common law liability to repair it by showing that the liability to repair is on some other person than themselves (*d*).

(*u*) *Harrold* v. *Watney*, [1898] 2 Q. B. 320.

(*x*) *Burgess* v. *Northwich Local Board* (1880), 6 Q. B. D. 264; *cf. Pearsall* v. *Brierley Hill Local Board* (1883), 11 Q. B. D. 735.

(*y*) *Burgess* v. *Northwich Local Board, ubi supra.*

(*z*) *Sutcliffe* v. *Sowerby* (1859), 1 L. T. (N.S.) 7; *Radcliffe* v. *Marsden Urban District Council* (1908), 72 J. P. 475.

(*a*) See *Burgess* v. *Northwich Local Board, supra*; *Pearsall* v. *Brierley Hill Local Board, supra*; but see also observations by BRAMWELL, L.J., in *Nutter* v. *Accrington Local Board* (1878), 4 Q. B. D. 375; *Atherton* v. *Cheshire County Council* (1896), 60 J. P. 6.

(*b*) 22 Hen. 8, c. 5, *post.*

(*c*) LITTLEDALE, J., in *Rex* v. *Oxfordshire* (1825), 4 B. & C. 194; *R.* v. *Surrey* (1810), 2 Camp. 455; *Att.-Gen.* v. *West Riding of Yorkshire County Council* (1903), 67 J. P. 173; *Att.-Gen.* v. *Berks County Council*, Times, June 24th, 1901.

(*d*) The County Bridges Act, 1803 (43 Geo. 3, c. 59), s. 5.