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.

The conditions of the liability of the county to repair new bridges are set out at p. 105, *post*.

A sub-division of a county, such as a hundred, may be liable by immemorial custom to repair bridges within it. And it is no objection to such immemorial custom that the constitution or boundaries of the hundred have varied within time of legal memory (*e*). So a parish (*f*) or a township (*g*) may be indicted for non-repair of a particular bridge, or part of a bridge within it, on the ground of immemorial usage alone; and it is not necessary to state any consideration for such liability.

A corporation may be liable by prescription, and a corporation or an individual may be liable *ratione tenuræ* to repair a particular bridge on the principles already explained with reference to highways (*h*). Such private liabilities may be proved by usage to repair; and the county or sub-division of a county may be exempted by establishing the existence of such a private liability. All public bridges are primâ facie repairable by the inhabitants of the county, without distinction of foot, horse, or carriage bridge, unless they can show that others are bound to repair particular bridges (*i*).

By the Local Government Act, 1888 (*k*), all business formerly done by quarter sessions in relation to bridges and roads repairable with bridges was transferred to the county council.

What is a "Bridge"?—The true import of the word "bridge" includes by implication the words *super flumen seu cursum aquæ* which occurred in the ancient form of indictment, but are now often omitted; in other words, no structure can be a bridge which is not erected over water flowing in a channel between banks more or less defined, although such channel may be occasionally dry (*l*). A bridge over a canal is *super flumen seu cursum aquæ*, for however sluggish and intermittent the flow may be, there is a flow

(*e*) *Rex* v. *Oswestry* (1817), 6 M. & S. 361.

(*f*) *R.* v. *Hendon* (1833), 4 B. & Ad. 628.

(*g*) *Rex* v. *West Riding of Yorkshire* (1821), 4 B. & Ald. 623.

(*h*) *Ante*, p. 89. In *Birmingham Canal Navigation Proprietors* v. *Hickman* (1892), 56 J. P. 598, it appeared that by a private Act (5 Will. 4, c. xxxiv) a canal company were to make such bridges over their canal as two or more justices should from "time to time judge necessary and appoint for the use of the owners or occupiers of the lands adjoining" the canal. The respondent was an adjoining land owner, and claimed to have a bridge made to connect his works on both sides of the canal. The justices had found such a bridge necessary. The Court of Appeal held that the canal company were bound to erect such a bridge.

(*i*) Lord ELLENBOROUGH, C.J., in *Rex* v. *Salop* (1810), 13 East, 95.

(*k*) 51 & 52 Vict. c. 41, ss. 3 (viii), 6, 11, *post*.

(*l*) *Rex* v. *Oxfordshire* (1830), 1 B. & Ad. 289.

of water (*m*). Where the road by which a bridge was approached passed between meadows which were occasionally flooded by a river, and, for convenient access to the bridge, a raised causeway had been made having arches or culverts at intervals for the passage of the flood water, it was held that such arches did not form a bridge, the occasional flooding of the meadows not amounting to a *flumen* or *cursus aquæ* (*n*). But there is no general rule of law that arches, under which there is not a constant running stream, cannot form a part of a county bridge (*o*). Where a highway was carried over a structure, 1,275 yards in length, consisting of forty-two arches in all, there being five arches at one end crossing the river Trent, and eight arches at the other end under one of which a brook constantly flowed, the intermediate space being a raised causeway across low meadows, consisting of twenty-nine arches under most of which there were pools of stagnant water at all times, and under all of which the waters of the Trent flowed in time of flood, the court held there was no rule of law to prevent the whole structure, including the intermediate arches, being treated as one county bridge. In this case the county had immemorially repaired the whole structure, and 300 feet of the highway at one end of it, and had also rebuilt and widened twenty-two of the twenty-nine arches; which facts were held to be conclusive against the county that the whole structure was one bridge (*p*).

But every structure which enables a passenger to cross a running stream is not a county bridge (*q*). It is a question of construction and magnitude (*r*); and a small or slight structure carrying a highway over a stream may be repairable as part of the ordinary highway. Thus, an ancient footbridge, formed by three oak planks, nine or ten feet long, with a handrail, carrying a public footpath over a small stream, was held not to be such a bridge as the county would be liable to repair as a county bridge (*s*). So, where a stone arch without parapets, nine feet wide, was built across a millstream, five feet and a-half above the water, it was held to be a question of fact whether or not it was a bridge; and the fact that there were no parapets was held to be relevant, though not decisive, to show that it was not a bridge, but a mere culvert

(*m*) WARRINGTON, J., in *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909), 73 J. P. 477.

(*n*) *Rex* v. *Oxfordshire, supra.*

(*o*) *R.* v. *Derbyshire* (1842), 2 Q. B. 745.

(*p*) *Ibid.* See also *Rex* v. *Oxfordshire* (1827), 1 B. & Ad. 297 n.

(*q*) Lord CAMPBELL, C.J., in *R.* v. *Southampton* (1852), 18 Q. B. p. 853.

(*r*) BLACKBURN, J., in *R.* v. *Lancaster* (1868), 32 J. P. 711.

(*s*) *R.* v. *Southampton* (1852), 18 Q. B. p. 841.

repairable as part of the highway (*t*). Where a ditch or cutting had been made, originally as a boundary ditch, in the reign of Elizabeth, but afterwards used solely for the purpose of draining moss lands, and prior to 1812, the highway was carried over it by means of a wooden trunk or tube through which the water flowed, and in 1812 the highway was improved, and the wooden trunk converted into a solid stone culvert, and in 1840 this was replaced by a larger structure formed of dressed stones, laid and built up in the bed of the stream on each side, and roofed with flat covering stones, the court decided in point of fact that this was a culvert and not a bridge (*u*).

If a particular structure is found to be a bridge, and the jury find that the bridge is better for the public than a culvert, it is not enough to exonerate the county that the jury also find that a culvert would have been sufficient (*x*).

Conditions of Liability of County.—"The general principle is established by a great variety of cases, that if a bridge be built by an individual, etc., township, or parish, which they were not bound to build or keep in repair, but which is used by the public, and is found a public benefit, the burden of repairing it falls upon the county at large" (*y*). "If a private person built a private bridge, which afterwards becomes of public convenience, the whole county is bound to repair it" (*z*).

The conditions on which a bridge built by a private individual becomes repairable by the county are the following:

(1) It must be dedicated to and used by the public.
(2) It must be of public utility.
(3) If first built after 1803 it must have been built under the direction or to the satisfaction of the county surveyor.

The decision in *R.* v. *Southampton* (*zz*) goes beyond all previous cases by requiring

(4) That the bridge must be adopted by the inhabitants of the county.

And it seems that the public user and public utility must now be taken to be important only as evidence of such adoption.

(1) and (2) *Public User, and Public Utility.*—Public bridges "might safely be defined to be such bridges as all his Majesty's subjects had used freely and without interruption as of right, for a

(*t*) *Rex* v. *Whitney* (1835), 3 A. & E. 69.
(*u*) *R.* v. *Lancaster* (1868), 32 J. P. 711.
(*x*) *R.* v. *Inhabitants of Lancashire* (1831), 2 B. & Ad. 813.
(*y*) Lord ELLENBOROUGH, C.J.: *Rex* v. *Surrey* (1810), 2 Camp. 455.
(*z*) *Per cur. R.* v. *Wilts* (3 Anne), 6 Mod. 307.
(*zz*) (1887), 19 Q. B. D. 590.

period of time competent to protect them and all who should thereafter use them, from being considered as wrongdoers in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use might be questioned" (*a*).

The nearest approach to a judicial definition of public utility is implied in the case of *Rex* v. *Oxfordshire* (*b*); from which it appears that bridges are of public utility when the public derive a benefit from them by having their passage along the highway improved or facilitated. The question related to ancient arches in a raised causeway across certain meadows which were occasionally flooded, and the road over the arches was a public highway and of great traffic. "It does not appear," said LITTLEDALE, J., "that the passage of the public along the highway is improved by these arches. They may be necessary only for the purpose of draining the adjoining land, and in that case, would be beneficial only to the owners of those lands" (*c*). In other words, a bridge of public utility may be defined as one which benefits the public by removing a substantial inconvenience, or supplying a felt necessity.

A bridge in a highway is a public bridge for all purposes of repair connected with the Statute of Bridges (*d*); and where a bridge, situated in a highway, has been used for many years by all persons as a public bridge, and is also of great public use and convenience, it is a bridge repairable by the county (*e*).

Where a township, liable by custom to repair a footbridge in a highway, beside a ford for horses and another ford for carriages, took down the footbridge, and erected near its site a carriage bridge which was afterwards constantly used by all persons passing that road, it was held that the new bridge was repairable by the county (*f*). So where an old wooden footbridge, used by carriages only in times of flood, and immemorially repaired by the parish, was accidentally destroyed, and a brick carriage bridge was built on the same site by turnpike trustees, which was afterwards constantly used by all carriages passing that way, it was held that the burden of repairing the new bridge must be borne by the county at large (*g*).

Where turnpike trustees erected a bridge of public utility, it was held that such bridge was repairable by the county; and the fact

(*a*) *Per cur. Rex* v. *Bucks* (1810), 12 East, 192. The status of a bridge erected pursuant to a private Act will depend upon the provisions of such Act.

(*b*) (1827), 1 B. & Ad. 297 n.

(*c*) *Ibid.*

(*d*) *Per cur. Rex* v. *Bucks* (1810), 12 East, 192. (*e*) *Ibid.*

(*f*) *Rex* v. *West Riding of Yorkshire* (1770), 5 Burr. 2594.

(*g*) *Rex* v. *Surrey* (1810), 2 Camp. 455.

that it was a highway, and used for all the King's subjects, was held to be evidence of its being a public bridge, and of utility to the public (*h*). And the liability of the county is not destroyed by the fact that the trustees possess an auxiliary fund for the purpose of repairing the bridge (*i*). If turnpike trustees construct a wooden footbridge along the outside of the parapet of an ancient carriage bridge, partly connected with it by brickwork and iron pins, and partly resting on the stonework of the bridge, the footbridge is not parcel of the carriage bridge so as to be repairable by the persons liable *ratione tenuræ* to repair it, and consequently the county is liable to repair the footbridge, if it has been constantly used by, and affords great accommodation to, the public (*k*).

The same principles apply to the case of bridges erected by the Crown, as by a private individual. Thus, where Queen Anne, in 1708, for her greater convenience in passing to and from Windsor Castle, built a bridge over the Thames at Datchet, in the common highway leading from London to Windsor, in lieu of an ancient ferry, with a toll, which belonged to the Crown; and she and her successors maintained and repaired the bridge till 1796, when, being in part broken down, the whole was removed, and the materials converted to the use of the King, by whom the ferry was re-established and maintained for the use of the public, toll free; it was held on an indictment against the county thirteen years after, that the bridge had become a common public bridge, and, therefore, that the county were liable to rebuild and repair it (*l*). "We are of opinion that this bridge, situate in a principal highway, and used as it so long was for all persons as a public bridge, and being also of great public use and convenience, was and is a bridge repairable (as to the half-part now in question) by the county of Bucks, in which it was until the period of its late dilapidation and destruction situate" (*m*).

On an indictment against a county for not repairing a certain public bridge, erected in the King's highway, across the river Tave, it was pleaded and proved that the bridge had been erected by the owner of certain tin works, for his private benefit and utility, and for making a commodious way to his tin works, and that he and the tenants of the tin works enjoyed a way over the bridge for their private benefit and advantage; it further appeared that the business of the tin works could not be carried on without the use of the bridge; but it also appearing that the public had

(*h*) *Rex* v. *West Riding of Yorkshire* (1802), 2 East, 342.
(*i*) *Rex* v *Oxfordshire* (1825), 4 B. & C. 194.
(*k*) *Rex* v. *Middlesex* (1832), 3 B. & Ad. 201.
(*l*) *Rex* v. *Bucks* (1810), 12 East, 192. (*m*) *Ibid.*, *per cur.*

constantly used the bridge from the time of its being built, Lord KENYON, C.J., directed the jury to find a verdict for the Crown (*n*). Where a person erected a mill and dam for his own profit, thereby slightly deepening the water of a ford through which there was a public highway, but the passage through which was before such deepening very inconvenient, and at times unsafe to the public, and the miller afterwards built a bridge over it, which the public always afterwards used, it was held that the county were liable to repair the bridge (*o*).

(3) *Satisfaction of County Surveyor.*—Lord Ellenborough's Act, 1803 (43 Geo. 3, c. 59), s. 5, enacted that no bridge hereafter to be erected or built in any county by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed and taken to be a county bridge, or a bridge which the inhabitants of any county shall be liable to repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor; and, since this statute, the satisfaction of the county surveyor is a condition precedent to the liability of the county to repair new bridges (*p*). Where, however, a bridge was built prior to Lord Ellenborough's Act, a county council can only escape this common law liability to repair the bridge by proving that the liability to repair is on someone else (*q*).

(4) *Adoption by the Inhabitants of the County.*—Where the owners of a building estate built a bridge over the river Itchin, in order to connect it with an old highway running into the town of Southampton, and dedicated the bridge with the new road to the public and it was constantly used by the residents in the neighbourhood as a public bridge, the court held that the real question for the jury was, whether on the whole facts the county had adopted

(*n*) *Rex* v. *Glamorgan* (1788), 2 East, 356 n.

(*o*) *Rex* v. *Kent* (1814), 2 M. & S. 513. This has been supposed to be a case of doubtful authority; and it has been satisfactorily shown that the court took a mistaken view of a case in 1 Roll. Abr. 368, which has always been considered good law. See *R.* v. *Ely* (1850), 15 Q. B. 827. But the facts show that the public inconvenience was only slightly increased by the erection of the mill, and the bridge was, therefore, of public utility by removing an existing inconvenience; and unless the inconvenience had been *created* by the person who built the bridge, the principle of the case in Roll. does not apply. See *post*, p. 115.

(*p*) See also the Highway Act, 1878 (41 & 42 Vict. c. 77), ss. 21, 22, which enables the county authority to accept bridges built before 1878, without the superintendence provided in Lord Ellenborough's Act, if they are certified to be in good repair and condition; and also to contribute to the cost of bridges newly erected after 1878.

(*q*) *Att.-Gen.* v. *West Riding of Yorkshire County Council* (1903), 67 J. P. 173.

the bridge so as to be liable to repair it (*r*). Lord COLERIDGE, C.J., in whose judgment GROVE, J., POLLOCK, B., and HAWKINS, J., concurred, said:

"User by the public has in all cases been treated as an element in determining the liability of the county to repair a bridge; but the word 'public' in this connection must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who can use a particular road or bridge. In the present case, however, there is no doubt abundant proof of the user of the bridge by, and of its utility to, the public confining the meaning of that word to that portion of the public which used it. . . . In all these cases, therefore, the question is one of evidence for the jury. Utility is but one element to be considered in determining the question of liability, and it is for the jury to say in each particular case whether the amount of utility is sufficient to satisfy that element, and further, whether the amount and character of the user are sufficient to transfer to the county the burden of repair. It may be that a bridge built by a private individual for his private ends becomes in time of great utility to the public, and is largely used by them, and it would be for the jury in such a case to say whether, under the circumstances, the public utility and user of the bridge were sufficient to bind the county to repair it; the evidence may or may not be sufficient to fix them with liability, but it is for the jury to decide."

After referring to the cases of *Rex* v. *West Riding of Yorkshire* (*s*), *Rex* v. *Kent* (*t*), *Rex* v. *Glamorgan* (*u*), Lord COLERIDGE continued: "We do not desire to intimate the slightest doubt of the correctness of the law laid down in those cases, which we take to be this: that if a private bridge has been built by a private man for his private ends, and it turns out in course of time to be useful to the public and to be used by the public (in the sense of the word which I have explained), those facts are strong and cogent (although not necessarily conclusive) evidence upon which a jury would be warranted in finding, and a judge would be justified in telling them that they might or ought to find (though not as a matter of law, but as fact), adoption of the bridge by the county in the sense that I have explained, and consequent liability of the county to repair. We also think that the law laid down in those cases is all the stronger if the bridge about which the dispute

(*r*) *R.* v. *Southampton* (1887), 19 Q. B. D. 590.
(*s*) (1802), 2 East, 342.
(*t*) (1814), 2 M. & S. 513.
(*u*) (1788), 2 East, 356 n.

arises is part of an existing highway, and has its *termini* in the highway; the argument for the prosecution would be much more cogent in such a case, for if the bridge were not useful to and used by the public, it would be a nuisance if built in the public highway" (*x*).

(*x*) This important case presents so many difficulties that it has been thought best to give the leading parts of the judgment at length. The law was formerly supposed to be that a bridge, dedicated to, and freely used by the public, if proved to be of public utility, is repairable by the county, provided, in the case of a bridge built after 1803, that the conditions laid down by Lord Ellenborough's Act have been fulfilled. In *Robbins* v. *Jones* (1863), 15 C. B. (N.S.) 221, the court stated, as a commonplace of law, that "a bridge made by a private individual at an ancient ford, if useful to the public, is to be repaired by them, and not by the builder"; the public burden was thrown by law upon the county; and no previous case has decided that adoption by the county is necessary to render the county liable.

But a broad distinction was drawn between public user and public utility, which does not seem to have been prominently present to the mind of the court in *R.* v. *Southampton*. User is no doubt evidence, but far from conclusive evidence, of public utility; and even if a bridge is freely and constantly used by the public, yet, if the public could have got on very well without it, public utility is not established. In *R.* v. *Southampton*, both WILLS, J. (17 Q. B. D., p. 431), and Lord COLERIDGE, C.J. (19 Q. B. D., p. 599), treat it as abundantly proved that the bridge in question was of public utility. But MATHEW, J., in his summing up (19 Q. B. D., p. 595), said: "It is said that this road brings Southampton into easy communication with Chichester and Portsmouth. Is that the reason why the bridge was put there? People had been living there for centuries without it; do you think there was on this account any anxiety on the part of the county to have a bridge there?" And, again, the learned judge said (p. 596): "The inhabitants found their way to and from Southampton previously without this bridge, and without any inconvenience as far as we can see." On these facts, it is submitted, the jury would have been amply justified in finding that the bridge, though used by the public, was not of public utility. It might, of course, become so in time, when the suburb extended and the district became populous, so that the bridge was no longer convenient merely to the owners of, and the residents upon, the building estate.

The effect of the judgment is understood to be that public user and public utility are now important only as evidence of adoption by the county. The only clear authority as to acquiescence or adoption by the county is the dictum of BAYLEY, J., in *Rex* v. *St. Benedict* (1821), 4 B. & A. 447: "In the case of bridges, there always is what is to be considered as an acquiescence by the county. The county is not liable except for bridges made *in highways*; the making of the bridge, and thereby obstructing the road while the bridge is making, may be treated as a nuisance, and the county may, if it think fit, stop its progress by indictment, and the forbearing to prosecute in that way is an acquiescence by the county in the building of the bridge." But the view that adoption by the parish is necessary to make a highway repairable by the parish, which BAYLEY, J., justified by similar reasoning, was expressly overruled in *Rex* v. *Leake* (1833), 5 B. & Ad. 469. Lord ELLENBOROUGH certainly speaks of the public *adopting* the bridge, and *acquiescing* in its erection by passing over it, and by not treating it as an indictable nuisance; but he very clearly indicates his meaning in the following passage (2 East, p. 349): "The rule laid down by Mr. Justice ASTON, in the *Glusburne Bridge Case* (1770), 5 Burr. 2594, seems to be the true

Repair and Rebuilding of Bridges.—The duty of repairing includes the duty of rebuilding when necessary. Thus, when a bridge built by a township, but of public utility, was accidentally destroyed, it was held that the county was liable to rebuild it (*y*). So, where a public bridge built by Queen Anne, and constantly repaired by her successors, became ruinous, and the King removed it and converted the materials to his own use, it was held, on an indictment thirteen years after, that the county must build a new bridge (*z*).

A county is not under any obligation at common law to widen a bridge, even if it is "so narrow that the King's subjects cannot pass without danger of their lives and loss of goods" (*a*). But, under Lord Ellenborough's Act, the justices at quarter sessions have power to order narrow and incommodious bridges to be widened and improved, or, if necessary, rebuilt; and statutory powers are also given for the purchase of necessary land and buildings (*b*). And under the Ministry of Transport Act, 1919, on an appeal to the Minister in respect of any restriction upon traffic over a bridge, he may make such order as he thinks fit for the strengthening and maintenance of the bridge, and the apportionment of any expenditure involved, provided that the liability of no railway or canal company shall be increased (*bb*). Any person or persons liable to repair a bridge had power to widen it; but they could not by widening it discharge their liability or throw their liability upon the county. Where a township had repaired an

one; that if a man builds a bridge, and it becomes useful to the county in general, the county shall repair it. He says nothing about the *adoption* of it by the public; and there is good sense in not relying on that except as *evidence* of its being a public bridge, and of utility to the public." Lord ELLENBOROUGH clearly thought, with Sir W. BLACKSTONE (*Rex* v. *West Riding of Yorkshire* (1770), 2 W. Bl. 685), that public utility is the "grand criterion," adoption by the public being only evidence of public utility; it is a very different thing to say that public utility is only evidence of adoption by the county.

(*y*) *Rex* v. *West Riding of Yorkshire* (*Glusburne Bridge*) (1770), 5 Burr. 2594; 2 W. Bl. 685.

(*z*) *Rex* v. *Bucks* (1810), 12 East, 192.

(*a*) *Rex* v. *Devon* (1825), 4 B. & C. 670; overruling a dictum of Lord KENYON, C. J. (*Rex* v. *Cumberland* (1795), 6 T. R. 194), that "if a bridge, used for carriages, though formerly adequate to the purposes intended, were not now of sufficient width to meet the public exigencies, owing to the increased width of carriages, the burden of widening it must be borne by those who are bound to repair the bridge." This was doubted by Lord ELDON, L.C., in the House of Lords, but there the case was decided on other grounds (*Cumberland* v. *Rex* (1803), 3 B. & P. 354).

(*b*) 43 Geo. 3, c. 59, s. 2; 54 Geo. 3, c. 90; s. 1, *post*. See also 14 Geo. 2, c. 33, s. 1, *post*.

(*bb*) 9 & 10 Geo. 5, c. 50, s. 11, *post*.

immemorial public bridge, but it appeared that in one year within memory they had widened the roadway of the bridge from nine to sixteen feet, it was held that, whether the added part was repairable by the township or not, the prescriptive liability to repair was not destroyed by the alteration. Lord DENMAN, C.J., and PATTESON, J., also expressed the opinion that the township must repair the whole bridge, the added part not being a new bridge repairable by the county, but the widening of the bridge being only a mode of repair (*c*). But, where certain townships, immemorially liable to repair a public footbridge, enlarge it to a carriage bridge, the county cannot discharge themselves of the duty of repairing the new bridge by pleading the prescriptive liability of the townships, though the townships remain liable to repair the bridge as a footbridge, that is, *pro ratâ* (*d*). An ancient carriage bridge was repairable by P., *ratione tenuræ* of certain lands, and turnpike trustees constructed a wooden footbridge along the outside of the parapet of the carriage bridge, partly connected with it by brickwork and iron pins, and partly resting on the stonework of the bridge; it was held that the footbridge was not repairable by P. as parcel of the carriage bridge, but was a distinct structure repairable by the county (*e*).

But where a township, liable to repair a public footbridge, built a new carriage bridge near its site, and pulled down and sold the materials of the old footbridge, it was held that the new bridge was repairable by the county (*f*). And where an old wooden footbridge used by carriages only in time of flood was repairable by the parish, and certain turnpike trustees built on the same site a much wider bridge of brick, which was constantly used afterwards by all carriages passing that way, Lord ELLENBOROUGH, C.J., held that the new bridge, being different in structure and materials and applied to very different uses, must be repaired by the county at large (*g*).

The widening or enlarging after 1802 of a bridge erected before that year, does not bring it within the operation of Lord Ellenborough's Act, as regards the superintendence or satisfaction of the county surveyor (*h*).

(*c*) *R.* v. *Adderbury East* (1843), 5 Q. B. 187.

(*d*) *Rex* v. *West Riding of Yorkshire* (1788), 2 East, 353 n.

(*e*) *Rex* v. *Middlesex* (1832), 3 B. & Ad. 201.

(*f*) *Rex* v. *West Riding of Yorkshire* (1770), 5 Burr. 2594.

(*g*) *Rex* v. *Surrey* (1810), 2 Camp. 455. It seems that the liability of the parish was at an end and did not remain *pro ratâ*. *Cf. R.* v. *Barker* (1890), 25 Q. B. D. 213.

(*h*) *Rex* v. *Lancashire* (1831), 2 B. & Ad. 813; *Rex* v. *Devon* (1833), 5 B. & Ad. 383.

Liability to Repair Approaches (*i*) to Bridges before and after 1835.—The highways at the ends of bridges were formerly considered as excrescences of the bridges themselves, and were accordingly primâ facie repairable with the bridges by the county (*k*). The Statute of Bridges enacted that "such part of the highways as lie next adjoining to the ends of any bridges distant from any of the said ends by the space of 300 foot, be made, repaired, and amended as often as need shall require" (*l*). The object of this enactment in specifying the distance of 300 feet from the ends of bridges was to reduce to more convenient certainty what should in all cases thereafter be considered as the extent and limit of the common law liability (*m*). "The county is by law bound primâ facie to repair the road at the ends of every bridge, which bridge it is bound to repair; the statute has fixed the length at 300 feet" (*n*). And, therefore, where a new bridge of public utility was built in an old highway repairable by a parish or township, the obligation of the county to repair the bridge drew with it the charge of repairing the highway for 300 feet at each end of it, the parish or township being thereby relieved from liability (*m*).

A county may thus be liable to repair, as part of a bridge, 300 feet of highway lying in another county; but if a new bridge is erected as a ford in that stretch of highway, and is adopted by the public as of public utility, the latter county must repair it as a substantive bridge (*o*). A party who is liable by prescription to repair a bridge is also primâ facie liable to repair the highway to the extent of 300 feet from each end; and this presumption is not rebutted by proof that the party has been known only to repair the fabric of the bridge, neither the county nor the parish having been known to repair, and the only repairs in evidence having been done by turnpike commissioners (*p*).

Where, under a local Act, power was given to a canal company to intersect a public highway by a canal on condition that a bridge

(*i*) "'Approaches' means that which brings you up to the bridge" (WIGHTMAN, J., in *North Staffordshire Rail. Co.* v. *Dale* (1858), 27 L. J. M. C. 150).

(*k*) Lord ELLENBOROUGH, C.J.: *Rex* v. *West Riding of Yorkshire* (1806), 7 East, 588.

(*l*) 22 Hen. 8, c. 5, s. 7, *post*.

(*m*) *Rex* v. *West Riding of Yorkshire* (1806), 7 East, 588; affirmed in House of Lords, *sub nom.*, *West Riding of Yorkshire* v. *Rex* (1813), 5 Taunt. 284; *North Staffordshire Rail. Co.* v. *Hanley Corporation* (1909) 73 J. P. 479.

(*n*) Lord ELDON, L.C.: 5 Taunt., at p. 300.

(*o*) *Rex* v. *Devon* (1811), 14 East, 477.

(*p*) *R.* v. *Mayor, etc. of Lincoln* (1838), 8 A. & E. 65.

was erected over the canal at the point of intersection and kept in repair by the canal company or their successors, it was held that the effect of the provision was that there should be a convenient passage over the canal, and that this involved the necessity on the part of the canal company or their successors of erecting and keeping in repair the bridge and approaches (*q*). Where the local Act is passed since the Statute of Bridges, the obligation to repair extends only to the bridge and the actual approaches thereto (including the roadway) and does not necessarily extend to a distance of 300 feet from each end of the bridge (*r*). A canal company may be relieved by their Act of the obligation to keep in repair the approaches or the fences on the approaches. Thus, where by their Act passed in 1829, the bridges constructed over their canal by the canal company were vested in the company, and a section in the Act provided that the company should not be liable to repair any part of the road approaching any bridge over the canal after such roads had been first made and used for one year, and then put into good and sufficient repair by the company, beyond or further than the extremity of the wing walls of any such bridge, but nothing therein contained should be construed to exonerate the company from the future repair of all such bridges and wing walls, ramparts, and side banks thereof, it was held by the Court of Appeal that the Act drew a clear distinction between the bridges as such, which were vested in the company, and the approaches to the bridges which were not vested in the company, and which they were now relieved from all liability to keep in repair (*s*). It was also held that the company were not liable to repair the fences to the approaches (*s*).

Under the Highway Act, 1835, the common law rule is altered in the case of bridges built after 1835, the highways leading to, passing over, and next adjoining to such bridges being repairable by the parish, person, or body politic or corporate, or trustees of a turnpike road who were by law before the erection of the said bridge bound to repair the said highways; but this is not to exonerate or discharge any county from repairing the walls, banks, or fences of the raised causeways and approaches to any such bridge, or the land arches thereof (*t*).

(*q*) *Nottingham County Council* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1894), 71 L. T. 430.

(*r*) *Hertfordshire County Council* v. *New River Co.*, [1904] 2 Ch. 512; *Rex* v. *Staffordshire and Worcestershire Canal Co.* (1901), 65 J. P. 505.

(*s*) *Att.-Gen.* v. *Oxford Canal Navigation* (1903), 72 L. J. Ch. 285. The road was a main road, and the court thought that the obligation probably lay on the county council.

(*t*) 5 & 6 Will. 4, c. 50, s. 21, *post*.

As regards bridges which became county bridges under s. 12 of the Annual Turnpike Acts Continuance Act, 1870, it was provided that such bridges should be treated as if they were bridges built subsequently to the passing of the Highway Act, 1835.

Bridges necessitated by Private or Statutory Undertakings or Built under Statutory Powers.—There are certain exceptional cases in which bridges built by private persons for the use of the public are not repairable by the county but by the builders. Where a person for his private purposes creates a necessity for a public bridge, as by deepening a public ford, cutting a new channel across a highway, or otherwise, and builds a bridge in order to restore the public power of passage, he is liable to keep the new bridge in repair for the use of the public. In some cases this liability is expressly imposed by statute, but a similar obligation was recognised by the common law.

In an early case it is said: "If a man erect a mill for his own profit, and make a new cut for the water to come to it, and make a new bridge over it and the subjects used to go over this as over a common bridge, this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit" (*u*).

A navigation company was empowered by a local Act to make a certain river navigable and to take tolls, and to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient in their room; the company having, by deepening the bed of the river, destroyed a ford across it in the common highway, and built a bridge for the use of the public, it was held that the company were under a continuing liability to repair the new bridge (*x*). So, where certain persons, authorised by Act of Parliament to make a river navigable and to cut the soil of any persons for making any new channel, cut through a highway and rendered it impassable, and a bridge was built over the cut over which the public passed, and which had been repaired by the proprietors of the navigation, it was held that the proprietors and not the county were liable to

(*u*) 1 Roll. Abr. 368. Lord ELLENBOROUGH, C.J., in one case expressed the opinion that this case constituted an anomaly in the law and was at variance with all the cases (*Rex* v. *Kent* (1814), 2 M. & S. 513), and on inspecting the record of the case supposed to be cited by Rolle, the court concluded that the report was erroneous, and that no such question as supposed by Rolle was decided or could properly have been argued in the case in question. But the accuracy of Rolle's statement has been vindicated (see *R.* v. *Ely* (1850), 15 Q. B. 827, and note at p. 845), and the principle has been repeatedly recognised and followed.

(*x*) *Rex* v. *Kent* (1811), 13 East, 220; *Rex* v. *Lindsey* (1811), 14 East, 317.

repair (*y*). Where certain adventurers for draining fen lands made a cut in the highway for the benefit of their lands, and a bridge was built over it and maintained by the adventurers until, by a statute of Charles II., the property in the cut and its banks, and in the bridge, and in the lands benefited by the cut, were vested in the conservators of the Fens, who afterwards maintained the cut for their own benefit and repaired the bridge, it was held that the conservators and not the county were bound to repair the bridge. PATTESON, J., in delivering the judgment of the court, stated the principle of the cases as follows: "Where the act making the bridge necessary, though authorised to be done, interferes with the public right, is done primarily for private purposes, and the public use, from which the public benefit is inferred, is to be referred only to the act, because made necessary by it, the public indeed remaining only with the same convenience which it had before, the authority to do the act is conditional only, equally whether the condition be expressed or implied; and the condition also in both cases continuing so long as the act continues whereby the public right is interfered with" (*z*).

The increased use of highways by reason of the development of motor traction has raised an important question as to what liability to strengthen bridges rests upon persons who, acting under statutory power, have cut into highways and built bridges for the purpose of their undertakings. The question was raised in two recent cases, viz. *Att.-Gen.* v. *Sharpness New Docks and Gloucester Canal Co.*, [1915] A. C. 654; and *Att.-Gen.* v. *Great Northern Rail. Co.*, *infra*. In the first of these cases the Canal Act authorised the making of a canal and provided that the company should not make the canal across any highway until they should at their own proper charges have made such bridges over the canal, and of such dimensions and in such manner as the commissioners appointed under the Act should adjudge proper. It further provided that all such bridges to be made "shall from time to time be supported, maintained, and

(*y*) *Rex* v. *Kerrison* (1815), 3 M. & S. 526. In this case the defendants relied on *Rex* v. *Kent* (1814), 2 M. & S. 513, but BAYLEY, J., distinguished that case on the ground that there the public derived a very essential benefit from the bridge in substitution for an inconvenient passage through the ford. It seems to be a question of fact and of degree whether the act of the undertakers has the effect of making an inconvenient passage somewhat more inconvenient, merely incommoding the passage, or of creating a necessity for a bridge by totally depriving the public of the means of using the highway. And in *Macclesfield Corporation* v. *Great Central Rail.*, [1911] 2 K. B. 528, it was held that upon the true construction of a Private Act a canal company, and not the highway authority, was liable to repair the roadway over the bridge as well as the fabric of the bridge itself; but the authority, who had done the repairs themselves, were held not entitled to recover their expenses from the company, as they had repaired the roadway merely as volunteers.

(*z*) *R.* v. *Ely* (1850), 15 Q. B. 827.

kept in sufficient repair by the said company." The bridges were made in 1812 in accordance with the requirements of the commissioners, but became unable to bear the increased heavy traffic of recent years. The House of Lords decided that the question whether the company were liable to repair the bridges in such a way that they would be sufficient to bear the ordinary traffic which might at the present time be reasonably expected to pass along the highways carried by them over the canal depended exclusively on the wording of the Canal Act, and that no analogy was to be drawn from the common law; that the Act said clearly that what was to be maintained and kept in repair was the bridges which the commissioners had judged necessary; and that the Act did not require the construction of new bridges.

As regards bridges which are necessitated by railways crossing highways, the construction and repair of such bridges, either over or under the railway, are provided for by the Railways Clauses Consolidation Act (*a*). In the other case above referred to, decided mainly on the construction of s. 46 of this Act (*aa*), the House of Lords by a majority of four to one (Lord HALDANE dissenting) decided that a railway company is liable to maintain a bridge in the same condition as to strength in relation to traffic as it was at the date of completion, and that a company is not liable to improve and strengthen or reconstruct a bridge to make it sufficient to bear the ordinary traffic of the district which might reasonably be expected to pass over it according to the standard of the present day. The same Act also makes provision for a railway crossing certain highways on the level (*b*). When the special Act is silent as to any obligation to repair the roadway upon the inclined approaches leading to a level crossing, the obligation to repair is on the railway company (*c*).

Where bridges are built under statutory powers for the public convenience, *e.g.*, by turnpike trustees, they are repairable as public bridges by the county (*d*), provided the conditions imposed by Lord Ellenborough's Act are complied with (*e*).

But where a private person was authorised by statute to build a bridge for the public convenience and to take tolls for the use of it, and in case the bridge became dangerous or impassable, to set up a ferry near it with the like tolls, "provided that the ferry

(*a*) 8 Vict. c. 20, ss. 46, 49—52, *post*.

(*aa*) *Att.-Gen.* v. *Great Northern Rail. Co.* (1916), 2 A. C. 356.

(*b*) 8 Vict. c. 20, s. 46, *post*; *Oliver* v. *North Eastern Rail. Co.* (1874), L. R. 9 Q. B. 409.

(*c*) *Hertfordshire County Council* v. *Great Eastern Rail. Co.*, [1909] 2 K. B. 403.

(*d*) *Rex* v. *West Riding of Yorkshire* (1802), 2 East, 342.

(*e*) 43 Geo. 3, c. 59, s. 5; *Rex* v. *Derby* (1832), 3 B. & Ad. 147.

shall not continue longer than is necessary for repairing or rebuilding the bridge"; and a subsequent statute, reciting that the tolls had been found inadequate to the expense of building and keeping in repair the said bridge, authorised the proprietor to take increased tolls; it was held that the taking of the tolls was on condition and in consideration of building and maintaining the bridge; that the proprietor of the bridge, at least so long as he remained proprietor and took the tolls, was bound to reinstate the bridge and maintain it in a state practicable for passage, and that, on the bridge becoming ruinous, he was not entitled to set up a permanent ferry and take the authorised tolls for its use (*f*).

Remedies for Non-Repair.—The two most common remedies for enforcing the liability to repair are indictment at common law (*ff*) and summary proceedings under the Highway Acts; a remedy sometimes adopted is by an action in the name of the Attorney-General for a declaration and an injunction (*g*). There are other remedies, but not in common use, such as presentment (now in use only with regard to public bridges) (*gg*); criminal information, at suit of the Attorney-General, a remedy seldom resorted to because the fine imposed cannot, as in indictment, be expended on the repair of the highway (*h*); *mandamus* where there is a statutory obligation to do prescribed works (*i*); and injunction (*k*).

(*f*) *Nicholl* v. *Allen* (1862), 1 B. & S. 916; affirmed in Ex. Ch., *ibid.*, 934. The former statute made the bridge extra-parochial and declared that it was not to be deemed a county bridge.

(*ff*) Where a person intends to present a bill of indictment to a grand jury for non-repair or obstruction and the defendant has not been committed for trial, he (the prosecutor) must give notice of his intention to present the bill to the clerk of the assize or clerk of the peace more than five days before the commission day or day appointed for holding the court of quarter sessions, as the case may be (8 Edw. 7, c. 41, s. 1 (5)).

(*g*) See article in J. P. Jo., Aug. 15, 1914, on "The Attorney-General as Protector of Public Rights of Way."

(*gg*) Abolished as to highways by the Highway Act, 1835, s. 99.

(*h*) Bac. Abr. tit. Highways G. In *R.* v. *Pocock* (1851), 17 Q. B. 34, it was held that trustees appointed under a local Act for the purpose of repairing roads in a district, with power to contract for executing such repair, are not chargeable with manslaughter if a person, using one of such roads, is accidentally killed in consequence of the road being out of repair through neglect of the trustees to contract for the repairing of it.

(*i*) *R.* v. *Trustees of Luton Roads* (1841), 1 Q. B. 860; *R.* v. *Birmingham and Gloucester Rail Co.* (1841), 2 Q. B. 47; *Ex parte Exeter Road Trustees* (1852), 16 Jur. 669; *R.* v. *South Eastern Rail. Co.* (1853), 4 H. L. C. 471; *Rex* v. *Severn and Wye Rail. Co.* (1819), 2 B. & Ald. 646; *Rex* v. *Dean Inclosure Commissioners* (1813), 2 M. & S. 80; *R.* v. *Bristol Dock Co.* (1841), 1 G. & D. 286; *R.* v. *Manchester and Leeds Rail. Co.* (1838), 8 A. & E. 413.

But where the liability to repair is general, mandamus will not issue to