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

**Indictment.**—The non-repair of a highway or public bridge being a matter of public concern, any credible person who is capable of giving evidence may institute proceedings by indictment in the name of the Crown for non-repair. The defendant in such proceedings is the body or person liable to repair the bridge or highway; *e.g.*, the inhabitants (*kk*) of the county, parish (*l*) or township.

An indictment for non-repair would not lie against the surveyor of highways, who was merely the officer of the parish, nor will it lie against a corporate body, such as a district council, to which the duties and liabilities of surveyor of highways and highway board are transferred by statute (*ll*), except in the case of an indictment directed by a county council under the Highways and Locomotives (Amendment) Act, 1878 (*m*).

The fine imposed upon conviction is to be applied towards the repair and amendment of the highway (*n*).

When the trial results in a verdict of not guilty, a new trial will not be granted, the proceeding being a criminal one in form; but under very special circumstances the court may order all proceedings upon the judgment to be suspended, so as to give an opportunity for the question to be again raised upon a fresh

command the execution of particular works. *Att.-Gen.* v. *Staffordshire County Council*, [1905] 1 Ch. 336; *R.* v. *Oxford and Witney Turnpike Roads (Trustees)* (1840), 12 Ad. & El. 427. In *R.* v. *Wilts and Berks Canal Co.*, [1912] 3 K. B. 623, however, a rule for a writ of mandamus to repair a bridge was made absolute, although the respondents contended that the duty to repair was too vague to be enforced by mandamus. Whether the point was argued on the return to the writ does not appear from the Reports.

(*k*) *Lane* v. *Newdigate* (1804), 10 Ves. jun. 192. In *Rex* v. *Dorset JJ.* (1812), 15 East, 594, a prohibition was refused, the only reported instance of the application being made.

(*kk*) It is not necessary to name the inhabitants. "Si un presentment soit quod via Regia en tiel lieu est decay en defect del Inhabitants de tiel ville, ceo est bon sans nosmer ascun person in certenty." (1610) *Walker* v. *Measure*, 2 Roll. Abr. 79 (L).

(*l*) In *R.* v. *Dixon and Hollis*, 12 Mod. Rep. 198, an indictment against two defendants, who were overseers of the highway, for not repairing or causing to be repaired the highways, was quashed, because an indictment for not repairing must always be against the parish; the overseers not being bound to repair the ways, but only to give notice to the parish to come and repair them.

(*ll*) *R.* v. *Mayor of Poole* (1887), 19 Q. B. D. 608; *Loughborough Highway Board* v. *Curzon* (1886), 16 Q. B. D. 570.

(*m*) 41 & 42 Vict. c. 77, s. 10, *post*.

(*n*) The Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 96. In *Rex* v. *Witney* (1837), 5 Dowl. 728, COLERIDGE, J., stated that the practice of the court was, on conviction, not to discharge the inhabitants until after the road had undergone a winter's wear after the repairs made. The time for doing the repairs may be extended over the winter months (*R.* v. *Walton* (1840), 4 Jur. 195).

indictment (*o*). Where the trial results in a verdict of guilty, an appeal lies in all respects as though the conviction was a verdict in a civil action tried at the assizes (*p*).

An agreement to consent to a verdict of "not guilty" is against public policy and illegal (*q*). The plaintiffs, who were a local board, brought an indictment against the defendants for interfering with and obstructing a highway. At the trial of the indictment an agreement for compromise was made between the solicitors of both parties, and sanctioned by the judge, and was afterwards confirmed by a deed executed by the plaintiffs and defendants. By this deed the defendants covenanted to restore the highway, which they had broken up, within seven years, and the plaintiffs covenanted that when that had been done, they would consent to a verdict of "not guilty" on the indictment. The defendants failed to restore the highway, and the plaintiffs brought an action on their covenant, claiming specific performance and damages. It was held that as the indictment was for a public injury, the agreement to consent to a verdict of "not guilty" was against public policy and illegal, and the plaintiffs could not maintain an action on the defendants' covenant (*q*).

(*o*) *Rex* v. *Wandsworth* (1817), 1 B. & A. 63; *Rex* v. *Sutton* (1833), 5 B. & Ad. 52; *R.* v. *Southampton* (1887), 19 Q. B. D. 590; *R.* v. *Norfolk County Council* (1910), 74 J. P. (Jo.) 113. See also *R.* v. *Duncan* (1881), 7 Q. B. D. 198. This procedure does not lie in the case of an acquittal on indictment for obstruction, as the entry of judgment would not prevent the prosecutors from indicting again if the obstruction continued (*R.* v. *North Eastern Rail. Co.* (1901), 70 L. J. K. B. 548). At the Surrey Assizes on Dec. 6th, 1921, the inhabitants of Ewell, represented by Thomas Oswald Masters, bank manager, and Edward Waterer Martin, magistrate, were found guilty of failing to repair Firtree Road, which carries heavy traffic to and from Epsom race-course. BAILHACHE, J., bound the defendants over, the Epsom Rural District Council undertaking to pay the costs, and, if there was no appeal, the liability for the repair and maintenance of the road. (1921), 85 J. P. (Jo.) 572.)

(*p*) The Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 20 (3), *post*. An appeal also lies from a conviction for obstruction (*ibid.*). As to pleadings and procedure, see Halsbury's Laws of England, vol. xvi. pp. 140-147, and Archbold's Criminal Pleadings, 26th ed., pp. 1347–1380; Indictments Act, 1915 (5 & 6 Geo. 5, c. 90).

(*q*) *Windhill Local Board* v. *Vint* (1890), 45 Ch. D. 351. As to referring an indictment to *arbitration*, it was held in *R.* v. *Blakemore* (1850), 14 Q. B. 544, that an indictment, being a criminal matter, could not be referred to arbitration. But in *R.* v. *Wadhurst*, "Times," March 24, 1864, p. 11, during the trial of an indictment for non-repair, the case was found to turn so much upon the local position and condition of the road that it would be convenient to refer the case to arbitration. A doubt was raised whether that course could be taken with a proceeding which in form was criminal; but the Lord Chief Baron said that was a mere technical distinction, and that in substance and in truth the proceeding was civil. The case was accordingly referred. In *R.* v. *Waterlow* (1882), 73 L. T. (Jo.) 278, at the instance of the judge, DENMAN, J., an indictment was referred by consent to a surveyor, who found the defendant guilty on the main count. On the defendant refusing to give an undertaking to carry out the award, the Divisional Court granted a rule

**Summary Proceedings.**—Summary proceedings before justices can only be taken where the obligation to repair the highway is not disputed (*s*). For the method of procedure in such a case, reference should be made to the provisions in the Highway Acts (*t*). Where these provisions direct proceedings by indictment, such proceedings are proceedings at common law.

It is also open to a parish council, or where there is no parish council, a parish meeting, to resolve that the rural district council as highway authority have failed to maintain and repair any highway in a good and substantial manner and thereupon to make complaint to the county council. The county council may after due inquiry take steps with regard to repairing the highway (*u*).

No action can be maintained against the inhabitants of a parish for an injury sustained by an individual in consequence of non-repair of a highway, nor against the inhabitants of a county for an injury sustained in consequence of non-repair of a county bridge (*x*). Nor will an action for particular damage resulting from non-repair lie against a surveyor of bridges (*y*), or a surveyor of highways (*z*), the surveyor being only the officer of the county or parish (or now the district council). Where the duties of surveyor are transferred to a corporate body, such as a highway board, a local board of health or district council (*a*), a metropolitan vestry or borough council (*b*), or a town or county council (*c*), the same immunity from action remains. "In the case of mere non-feasance, no claim for reparation will lie except at the instance of a person who can show that the statute or ordinance under which they act imposed upon the commissioners a

*nisi* calling upon him to show cause why the agreement (if any) to refer should not be made a rule of court. *Semble*, if that procedure failed, the prosecution could only set the case down again and obtain the verdict of a jury. In *R.* v. *Lincombe and Widcombe* (1816), 2 Chit. 214, BAYLEY, J., refused to quash an indictment against a parish for not repairing on an affidavit that the way was *already in repair*, and said that the defendants should take a rule *nisi* why they should not be discharged, on pleading guilty and paying a small fine.

(*s*) The Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 94, *post*.

(*t*) The Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 94—98; the Highway Act, 1862 (25 & 26 Vict. c. 61), ss. 18, 19. See also the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 10.

(*u*) The Local Government Act, 1894, s. 16, *post*.

(*x*) *Russell* v. *Men of Devon* (1788), 2 T. R. 667.

(*y*) *McKinnon* v. *Penson* (1853), 8 Ex. 319; in Ex. Ch. (1854), 9 Ex. 609.

(*z*) *Young* v. *Davis* (1862), 7 H. & N. 760; in Ex. Ch. (1863), 2 H. & C. 197.

(*a*) *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, approving *Gibson* v. *Mayor, etc. of Preston* (1870), L. R. 5 Q. B. 218.

(*b*) *Parsons* v. *St. Matthew, Bethnal Green* (1867), L. R. 3 C. P. 56.

(*c*) *Maguire* v. *Liverpool Corporation*, [1905] 1 K. B. 767.

duty toward himself which they negligently failed to perform" (*d*). "It must now be taken as settled law that a transfer to a public corporation of the obligation to repair does not of itself render such corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the legislature has used language indicating an intention that this liability shall be imposed" (*e*). Hence an action for damages will not lie for non-repair, even in cases where non-repair constitutes an indictable breach of duty (*f*). Where in an action to recover damages for injury to the plaintiff's property arising from the fall of an overhanging road, consequent upon the giving way of its retaining wall which the defendant corporation was under a statutory duty to maintain for the purposes merely of road conservancy, it appeared that the result was due to original defects in the structure of the wall, and that the defendant corporation was not negligently ignorant thereof, and not guilty of misfeasance, it was held that the defendants were not liable as there was nothing in the statutory provisions constituting them to render them responsible in respect of such injury (*g*).

Where a local authority neglected to lop the branches of certain trees growing in a park which was under their control and management by statute so that they overhung a highway, and the plaintiff in driving along the highway came in contact with a branch and suffered personal injuries, it was held that this being mere non-feasance the local authority were not liable (*h*). Where the plaintiff's horse slipped on a pool of pitch or tar with which the road had been constructed a long time before the accident, and which had oozed up during hot weather between the setts of wood or stone from the asphalte, it was held that there was no evidence of misfeasance on the part of the highway authority (*i*). Where a highway authority neglected to clean out a highway ditch which it was their duty to clean out, and in consequence of such neglect the water overflowed and damaged the plaintiff's land, it was held

(*d*) *Sanitary Commissioners of Gibraltar* v. *Orfila* (1890), 15 App. Cas., p. 411. See also MATHEW, J., in *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B., p. 68.

(*e*) *Municipality of Pictou* v. *Geldert*, [1893] A. C. 527; *Maguire* v. *Liverpool Corporation*, [1905] 1 K. B. 767.

(*f*) *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433.

(*g*) *Sanitary Commissioners of Gibraltar* v. *Orfila* (1890), 15 App. Cas. 400. See also *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433; *Hartnall* v. *Ryde Commissioners* (1863), 4 B. & S. 361, if not overruled, can only be supported as a decision on the wording of the special Act in question; *Ohrby* v. *Ryde Commissioners* (1864), 5 B. & S. 743.

(*h*) *Tregellas* v. *London County Council* (1897), 14 T. L. R. 55.

(*i*) *Holloway* v. *Birmingham Corporation* (1905), 69 J. P. 358.

that this was a case of non-feasance for which they were not liable in damages (*k*). Similarly, where a road was paved with wood and there was no evidence that the use of wood for that purpose amounted to negligence, failure to maintain the wood in repair was held to be non-feasance only (*kk*).

If, however, misfeasance can be proved, an action will lie (*l*). Where a metropolitan borough council which was both a sewer authority and highway authority negligently filled in a sewer trench which they had opened in a street and left a heap of rubbish in the street which had been shot there by a person over whom they had no control, and the plaintiff's cab, in order to avoid the trench, was driven into the heap and the plaintiff was injured, it was held that the chain of events was sufficient to establish a case of misfeasance against the local authority, and the plaintiff was entitled to recover (*m*). And where a highway authority had made up and constructed a street leaving an unfenced ravine at one end of it, in the nature of a hidden trap, so that the plaintiff drove his motor car over a precipice down into the ravine and was injured, he was held entitled to damages for misfeasance (*mm*).

Where, however, the plaintiff was injured by his pony stepping through the crust of a highway and falling, and the jury found that the accident was caused by the negligent construction of a drain by the defendants' predecessors in the office of highway authority, the Court of Appeal held that, as a result of the rule that the right of action for damages against a highway authority runs only from actual damage accrued, the preceding authorities were not under any liability which could be passed on to their successors; and further that, on the true construction of the Acts of Parliament creating the successive highway authorities, there was nothing to make any such authority liable for its predecessors' acts of misfeasance (*n*).

(*k*) *Irving* v. *Carlisle Rural District Council* (1907), 71 J. P. 212.

(*kk*) *Moul* v. *Tilling Ltd. and Croydon Corporation* (1918), 88 L. J. (K. B.) 505; 34 T. L. R. 473. *Query*, per LUSH, J., whether a highway authority may not be liable if they repair part of a road and leave part in a dangerous condition?

(*l*) *Foreman* v. *Mayor of Canterbury* (1871), L. R. 6 Q. B. 214; *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256.

(*m*) *Shoreditch* (*Mayor, etc. of*) v. *Bull* (1904), 90 L. T. 210. And see *Dawson* v. *Bingley Urban District Council* (1911), 27 T. L. R. 308. See further as to misfeasance, *post*, pp. 125, *et seq.*, and the notes to s. 144 of the Public Health Act, 1875.

(*mm*) *McClelland* v. *Manchester* (*Lord Mayor of*), 28 T. L. R. 21; [1912] 1 K. B. 118. (As to the headnote in this case, see observations by BANKES, L.J., in *Sheppard* v. *Glossop Corporation*, [1921] 3 K. B. 132.) Followed in *Thompson* v. *Bradford Corporation*, [1915] 3 K. B. 13. And see *Parkinson* v. *West Riding County Council*, 20 L. G. R. 308, where neglect to fence or light a newly metalled road insufficiently rolled, the stones in which became scattered by heavy traffic during the night, was held to be misfeasance.

(*n*) *Nash* v. *Rochford Rural District Council*, [1917] 1 K. B. 384, and see note (*c*) to s. 57 of the Highway Act, 1835, *post*.

But "an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair" (*nn*). There is no reported case in which a person liable *ratione tenuræ* has been held liable for damage resulting from mere non-repair, and there are several dicta recognising and disputing the liability (*o*); but the liability to action has been supported in the case of a duty to repair by charter (*p*).

No action will lie against the Postmaster-General for the negligent acts of one of his subordinates in relaying an excavation in a highway whereby the plaintiff fell and suffered injury (*q*).

(*nn*) Lord KENYON, C.J.: *Russell* v. *Men of Devon, ubi supra.*

(*o*) Lord TENTERDEN, C.J.: *Mayor, etc. of Lyme Regis* v. *Henley* (1832), 3 B. & Ad. 90; POLLOCK, C.B.: *McKinnon* v. *Penson* (1853), 8 Ex. 327; *Bathurst* v. *Macpherson* (1879), 4 App. Cas. 269, in favour of the liability; *contra*, MARTIN, B., in *Young* v. *Davis* (1862), 31 L. J. Ex. 254. See also Lord RUSSELL, C.J., and RIDLEY, J., in *Rundle* v. *Hearle*, [1898] 2 Q. B. 83.

(*p*) *Mayor, etc. of Lyme Regis* v. *Henley* (1832), 5 Bing. 91; affirmed (1834), 1 Bing. N. C. 222.

(*q*) *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178.