

CHAPTER VI.

EXTINGUISHMENT AND DIVERSION OF HIGHWAYS.

THE subject of extinguishment includes the subject of diversion, the latter process being only the extinguishment of an existing highway and the dedication of a new highway in substitution for it.

“It is an established maxim,—once a highway always a highway; for the public cannot release their rights, and there is no extinctive presumption or prescription” (a). Nor is the public right over any part of a highway lost by disuse; for instance, where the sides of the way have become covered with furze and heath, and fir trees have been allowed to grow up for twenty-five years, the public have a right to have the trees removed and the whole width of the road preserved free from obstruction (b). And where, in 1871, a piece of land alongside a highway leading over a public bridge was inclosed and allowed to be occupied by W., who acknowledged the title of the highway authority, and W. died in 1890, and the defendant occupied it since and claimed to have acquired a title under the Statute of Limitations, contending that the piece of land was never part of the highway, but there was evidence that before 1871 the piece of land had been used for loading and unloading barges, and for turning cattle on to it when two lots of cattle would otherwise have met on the bridge, SWINFEN EADY, J., held that the piece of land formed part of an ancient highway, and the public right was not lost by the inclosure (c). It is doubtful whether it may ever be presumed, as matter of evidence, that a highway has been legally extinguished (d).

(a) BYLES, J., *Daves v. Hawkins* (1860), 8 C. B. (N.S.) 848.

(b) *Turner v. Ringwood Highway Board* (1870), L. R. 9 Eq. 418. See also *R. v. Edwards*, ante, p. 158.

(c) *St. Ives Corporation v. Wadsworth* (1908), 72 J. P. 73.

(d) In *Representative Church Body v. Barry*, [1918] 1 I. R. 402, the defendants, as a defence to an action for trespass, set up a public right of way. The evidence showed that, if any such public road ever existed, it had been stopped for over 60 years and the public excluded therefrom and a new road made. It was held that the court might and ought to presume a presentment by the Grand Jury under sec. 60 of the Grand Jury (Ireland) Act, 1836 (8 & 7 Will. 4, c. 116), stopping up the old road. And see *R. v. Montague* (1825), 4 B. & C. 598, where it was held, when a public road obstructing a channel once navigable had existed for so long a time that the state of the channel at the time when the road was made could not be proved, it must be presumed, in favour of the existing

Procedure for Extinguishing Highways.—At common law the only legal method of stopping or diverting a highway was by writ of *ad quod damnum*, by means of which the owner of the land over which the highway passed might get his soil discharged of the public servitude or easement. An inquiry was held by the sheriff whether the proposed stoppage or diversion would be injurious to the public, and after such inquiry, the owner might be authorised by licence from the Crown to stop or divert the way (e).

In modern times, highways may be stopped or diverted by an order of justices, a procedure which was introduced in numerous Inclosure Acts, and adopted in the Highway Act, 1835 (f). This procedure, which destroys the public right for all purposes, must be carefully distinguished from the cesser of liability to repair a highway, also effected by order of justices, which leaves the public right of passage untouched (g).

When a highway is legally extinguished, the former rights of property in the land remain, discharged of the public easement. Where a highway, which had been vested in a metropolitan vestry (h), was stopped up by an order of quarter sessions, it was

state of things, that the right of navigation was extinguished by some legal method, and the road could not be removed as a nuisance to the navigation, See also *Leigh Urban District Council v. King*, [1901] 1 Q. B. 747, cited in note (u) to s. 85 of the Highway Act, 1835, *post*. But in *Cababé v. Walton-upon-Thames Urban District Council*, [1914] A. C. 102, Lord Duncedin expressed grave doubts as to whether *Leigh Urban District Council v. King*, *supra*, was rightly decided. In *Cababé's* case the question was raised whether the performance of the formalities required by s. 23 of the Highway Act, 1835, *post*, can be presumed, and Lord Duncedin at [1914] A. C., p. 117, said, "I thoroughly agree with the dictum of HAMILTON, L.J. ([1913] 1 K. B. 493), that this is not the sort of case to which the brocard *omnia præsumuntur rite et solemniter acta* has any application. I do not say that there might not be a case where, if, for instance, the lapse of time was long, and the parish had all along repaired the road, the mere absence of direct proof of the formalities might be held not to be fatal. But each case must be judged of on its own circumstances, and I have, to say the least of it, grave doubts as to whether the case of *Leigh Urban District Council v. King* was rightly decided." See further, notes to ss. 23 and 85 of the Highway Act, 1835, *post*.

(e) *Ex parte Vennor* (1754), 3 Atk. 766.

(f) 5 & 6 Will. 4, c. 50, ss. 84 *et seq.*, *post*; the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 13, *post*. In the absence of an order of quarter sessions, or statutory authority or disturbances by natural causes, there can be no legal extinguishment of a highway (*R. v. Platts* (1880), 49 L. J. Q. B. 848). There are two statutes of Henry VIII. which apply to the Weald of Kent and the County of Sussex respectively, and provide for the diversion of foundrous highways upon the certificate of two justices and twelve discreet men of the hundred—14 & 15 Hy. 8, c. 6 (New Ways (Kent) 1522) and 26 Hy. 8, c. 7 (Highways (Sussex) 1534). Both were repealed in 1767 by the 7 Geo. 3, c. 42, s. 57, but were revived in 1768 by the 8 Geo. 3, c. 5, s. 3.

(g) See the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 21; the Highway Act, 1878 (41 & 42 Vict. c. 77), s. 24.

(h) Under 18 & 19 Vict. c. 120, s. 96.

held that the interest of the vestry in the soil was determined, and that the former owner of the land was entitled to resume possession of the soil without purchasing it from the vestry (i).

If any private rights of way existed over the land before the dedication thereof to the public, they are not affected by the extinguishment of the public right (j).

A way ceases to be a public highway where access to it at either end has become impossible by reason of ways leading to it having been legally stopped up (k).

Extinguishment under Statute.—Any stoppage or diversion of a highway, without such authority as is mentioned above, is *primâ facie* indictable as a nuisance or obstruction of the old highway. But statutory authority is often given, as in Acts authorising the construction of railways and in Defence Acts, for stopping or diverting particular highways (kk).

Such authority need not be conferred by express words. Where the legislature authorises the erection of a building or other works in such a manner as to be physically inconsistent with the continuance of the public right, the right is extinguished by implication, though there are no express words in the Act referring to it (l). But a public right of way is not extinguished by the construction of a railway which crosses it, in the absence of any enactment, the working of the railway not being incompatible with the existence of the public right (m).

Any conditions imposed by the legislature must be strictly complied with; if the statute legalises a nuisance only upon a condition, the defendants cannot justify under the statute without showing that they have performed the condition (n). And when a highway is diverted in the exercise of statutory powers, a duty is cast on those who divert it, to protect, by fencing or otherwise,

(i) *Rolls v. St. George's, Southwark* (1880), 14 Ch. D. 785.

(j) *Cf. Wells v. London, Tilbury and Southend Rail. Co.* (1877), 5 Ch. D. 126. If one part only is stopped up the public right is not extinguished over the whole way, but only over as much as is actually stopped up. See *ante*, p. 10.

(k) *Bailey v. Jamieson* (1876), 1 C. P. D. 329. This was the case of a public footway through certain woods occupied by the plaintiff; so that the rights of the owners of lands adjoining the insulated stretch of highway did not come in question.

(kk) See also, *e.g.*, The Housing, Town Planning, etc. Act, 1909, s. 23.

(l) *Corporation of Yarmouth v. Simmons* (1878), 10 Ch. D. 518. *Cf. Salisbury (Lord) v. Great Northern Rail. Co.* 5 C. B. (N.S.) 174; *Fortescue v. St. Matthew, Bethnal Green, Vestry*, [1891] 2 Q. B. 170; *Melksham Urban District Council v. Gay* (1902), 18 T. L. R. 358.

(m) *Cole v. Miles* (1888), 57 L. J. M. C. 132.

(n) *R. v. Scott* (1842), 3 Q. B. 543.

reasonably careful persons using the highway from injury through going astray at the point of diversion (o).

By the General Inclosure Act, 1845, power is given to stop up, divert and alter roads and ways passing through the land to be inclosed, or through any old inclosures in the parish in which the land to be inclosed shall be situate (p).

Destruction by Natural Causes.—A highway may also be extinguished by the destruction of the land over which it passes.

Where a public right of way existed along the top of an artificial sea-wall or embankment, part of which was washed away by the sea, and the inhabitants of the parish were indicted for non-repair, MAULE, J., directed the jury that the parish were not liable to rebuild the wall. "The interruption of the passage is not from the want of repair but from the sea having washed away the wall or embankment, and there is no longer anything for them to repair" (q).

In *R. v. Bamber* (r), the defendant held lands adjoining the sea; an ancient highway passed over the lands; the sea encroached upon part of the highway and rendered it ruinous, and the earth and soil were washed away, so that the highway became impassable. The residue was too narrow and stood at the edge of a precipitous bank seventy feet deep, and forming an angle of forty-five degrees to the horizon. The Court of Queen's Bench held that the defendant's liability to repair had ceased. Lord DENMAN, C.J., said (p. 287): "Both the road which the defendant is charged with liability to repair, and the land over which it passes, are washed away by the sea. To restore the road as he is required to do he must create part of the earth anew. . . . Here all the materials of which a road could be made had been swept away by the act of God. Under those circumstances can the defendant be liable for not repairing the road? We want an authority for such a proposition, and none has been found."

A highway originally ran down to the sea at right angles to the shore, the land gently sloping to the water's edge. By the encroachment of the waves a portion of the land and the highway were swept away, so that there was left a cliff twenty feet high above the beach, the highway running to the edge and there terminating abruptly. It was held that the parish was not liable to repair, on the ground that the highway, the subject of repair, no longer

(o) *Hurst v. Taylor* (1885), 14 Q. B. D. 918, cited by LUSH, J., in *McClelland v. Manchester (Lord Mayor of)*, [1912] 1 K. B. 118; 76 J. P. 21.

(p) 8 & 9 Vict. c. 118, s. 62. See *Hornby v. Silvester* (1888), 20 Q. B. D. 797.

(q) *R. v. Paul* (1840), 2 Mood. & Rob. 307.

(r) (1843), 5 Q. B. 279.

existed (s). "If there be no longer any highway, if there be nothing which can be effectually restored, by what may be fairly termed repairs, the case does not exist in which the liability is cast on the parish" (t).

In the cases above mentioned, the question involved only the liability to repair. The land over which the highway had passed had in each case been destroyed so completely that it would have been unmeaning to contend that the legal right of passing and repassing over it remained. But in *R. v. Inhabitants of Greenhow (u)*, BLACKBURN, J., used language which suggests that in special circumstances the right of passage may remain, although the obligation to repair has been destroyed. In that case, the highway ran along the slope of a hill several hundred feet above the level of a valley beneath. Two landslips occurred on the slope of the hill, comprising many acres of land, and part of the highway was carried away into the valley below, and its place filled up with earth, stones, and other *débris*. The *débris* was at one point twenty-five feet above, and at another two feet below, the level of the old road, and occupied the line or track of the highway. At the point where it was twenty-five feet above the level of the old road, it had been ascertained by boring that for a depth of 30½ feet from the surface there was nothing but soil, shale, and stones, and that there was no trace of the old metalled road, but the line of it was known and admitted. Evidence was given that it was practicable to form a road along the old track of a similar character to the adjoining part of the old road at a cost of £341. The court, having power to draw inferences of fact, held that there was no proof of such destruction of the highway as to exempt the parish from their liability to repair it. BLACKBURN, J., observed: "Whether a road has been destroyed or not, is a question of more or less, and it is a matter of common sense, that where the road has been swept away and occupied by the sea, you cannot call on the parish to repair it, or in the case of a sea-wall where the public have acquired a right to walk on the top of the wall, the parish could not be compelled to rebuild the wall if it were washed away by the sea. On the other hand, it would be equally impossible to say that, when, in consequence of a landslip or one of those floods which frequently occur in certain districts, the surface of a metalled road is filled up or covered over, the parish is relieved from liability. The same observations apply to the case where a quantity of gravel or *débris* is thrown from above on a highway, and the line of the old road remains as before . . . I think

(s) *R. v. Inhabitants of Hornsea* (1854), 23 L. J. M. C. 59.

(t) MAULE, J., *ibid.*

(u) (1876), 1 Q. B. D. 703.

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.*"

On this view it might well happen that in the commercial sense the subject-matter of repair was destroyed, and the liability to repair was therefore at an end, while the physical possibility of passing and re-passing still remained, and a party could therefore justify passing over the *locus in quo* in exercise of the public right. There does not, however, appear to be any reported case in which this distinction has been acted on.