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The Liability Ratione Tenurae is an Obligation to the Public

The Law presumes that when a liability ratione tenurae was created by Grant, Charter or Statute, it was for the public benefit and was a public obligation whose performance could be enforced by indictment.

(Lyme Regis Corporation v Henley (House of Lords 1834) 1 Scott 29 at 49 :-
When considering a liability ratione tenurae, imposed upon a corporate body by the King to keep in repair defences against the sea. Mr Justice Park stated
"It is admitted, that, if their liability arose by prescription, they would be indictable . . . . . Now, we are unable to see any sound distinction between a liability by prescription, and a liability arising within the time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant; but it necessarily implies some legal origin . . . . . Where the King, for the benefit of the people, has made a certain grant, imposing certain public duties, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action"

"Tenure" is defined in Jacob's 'New Law Dictionary' (5th Ed. 1744) as meaning **"The manner by which Lands or Tenements are held or the Service which the Tenant owes to his Lord. There can be no Tenure without some Service because the Service makes the Tenure (1 Inst.1, 93). Tenure may be of Houses, Land or Tenements but not of a rent or Common. All Lands in the Hands of a Subject are held of some Lord or Landlord by Tenure or Service; And all the Lands and Tenements in England are said to be holden either mediately or immediately of the King, and therefore he is Summus Dominus supra omnes (2 Inst. 531)".**

The word "ratione" is defined as meaning **"by reason of".** And the phrase "ratione tenurae" is likewise defined as **"by reason of <u>one's tenure</u>".** Law reports confirm that when the words extend to "ratione tenurae suae" the meaning changes to **"by reason of <u>his own tenure</u>".** The law further holds that the phrase "ratione tenurae or prescriptionis" means **"by reason of it right or duty of tenure or prescription".**

The law holds that all liabilities ratione tenurae stem from a legal origin. Such liabilities having arisen in the first instance as a condition of the grant of tenure. Without exception, the object of any liability ratione tenurae was some form of public benefit. Thus the obligation to repair harbours, bridges and roads became attached to the tenure of certain lands. All liabilities ratione tenurae were an obligation to the public. Grants ratione tenurae were never made, nor intended to be used, to keep in repair the private possessions of individual persons. The public could enforce the performance of the liability by indictment. An indictment could only be brought in the name of the public.

Thus, there is a very powerful presumption, that any road or bridge which was required to be repaired ratione tenurae was (and is) a public way. A way which was of benefit to the public, and which was used by them, and which could be the subject of an indictment when out of repair.

There is absolutely no evidence, and no legal authority, which even suggests that a road repairable ratione tenurae could be any other than a public way. There are many reported cases involving ratione tenurae. Without exception every one of them is concerned with proving the liability to repair, and/or how to enforce that liability. There is no case whatsoever which states

that roads repairable ratione tenurae may not be used by the public and originated from a private grant to a private person.

Furthermore, because Parliament accepted that the repair of roads ratione tenurae was for the benefit of the public, it enacted at section 33 Highway Act 1835 that **"Certain persons to be exempt from payment of highway rate".** Those repairing roads ratione tenurae were therefore exempt from paying highway rates for the rest of the parish roads. It was therefore generally accepted that ratione tenurae roads were part of the parish highway network. Otherwise, the exemption would not have been granted. Because, it would have been of no concern to the legislature when drafting a highway statute - and it would have been of no benefit to the parish.

Further confirmation that the law regarded ratione tenurae roads as highways was the fact that **"Fines for not repairing roads ratione tenurae are payable to the surveyors of the highways"** (Glen 1865 page 178 citing R v Wingfield 1 W.Bl 602). Fines imposed upon private persons for the upkeep of strictly private roads, for the benefit of other private persons, would not have been paid to the surveyors of highways.

The law with regard to ratione tenurae is ancient and complex. Law reports are numerous. Text book references are many. I refer the reader to the list of reference sources set out below : 'A Brief Outline of the Law and its Application'.

In essence, the liability ratione tenurae stems from a grant by the Crown prior to the statute Quia Emptores cap. 1 (1290) 18 Edw. 1. Unless that is, it originated by Grant, Charter or Statute at a later date. In the absence of any evidence of such grant the law presumes that the very words 'ratione tenurae' may themselves be taken as **"implying immemoriality"** (Glen (1883) page 108 citing R v Stoughton 2 Wms. Saund. 462 Ed.1871).

Following the Conquest, the King was ultimately responsible for the repair of essential public necessities such as harbour, bridges and roads. This was a public obligation which the King owed to his subjects. As Lord Hale stated **"all things of public safety and convenience being in a special manner under the king's care, supervision and protection"** - De Jure Maris, page 8 (cited by Glen (1883) page 65).

As lands were distributed, for services rendered by "Knight Service" to the King, the obligations arising upon those lands passed from the King to the new owners. But the obligation ratione tenurae to the "King's liege People" still remained paramount. In turn, as lands were further divided, the obligations passed to the Lord of the Manor who then **"threw this duty upon the whole body of tenants of the Manor, their several obligations being in some way adjusted and enforced by the Court Leet"** (Webb - page 5 'The Story of the King's Highway').

Although lands became more fragmented and diverse, the original obligation to the public remained absolute. The person liable for that obligation being the occupier for the time being, rather than the owner of the land to which the liability was attached.

The law holds that the liability ratione tenurae can be enforced against any one of a group of persons occupying land or buildings upon which the original liability rests. That person can then enforce a contribution towards the whole cost from other occupiers (R v Bucklugh (1704) 1 Salk. 358). In turn, those persons may then compel any owner of the premises to recompense them for their share of the total liability (Baker v Greenhill (1842) 3 QB 148).

As the many law reports confirm, the liability ratione tenurae applied to a great variety of public obligations. Thus harbours - ports - havens - staiths - landing places river banks - sea shores - mounds - ditches - buildings - bridges - roads - pavements causeways - bridleways - footways -

church buildings and church furniture - could all be required to be repaired by the occupiers of premises which were liable to that particular obligation.

Furthermore, certain public positions, such as Reeve or Tythingman, were sometimes required to be occupied by those persons who, by the tenure of certain premises, inherited the obligation to fill that position. For example, on 7th October 1590, the Methley Court Rolls record that Richard Shann was obliged to be Reeve for one year because he occupied a certain bovate of land in the manor.

Sometimes the obligation extended to huge areas of land and involved many persons. For example, the drainage system of the Somerset Levels was required to be kept in repair ratione tenurae by occupiers of lands within the Levels.

As to the repair of churches. The Thoresby Society 1902 (Vol.X1 Part 11 page 241) states **"The duty of repairing the parish church is analogous to the duty of repairing the county bridges; it is planted in the soil and to the soil it has ceded; it is apportioned according to hide or acreage" .**

There is no recorded instance of the liability ratione tenurae being applicable to the repair of the private possessions of a private person. The liability is only applicable to certain public necessities, which were, when the obligation first arose, essential to the very well-being of that community. In other words the liability ratione tenurae is an obligation to the public. Therefore, roads repairable ratione tenurae are roads which can be used by the public.

It was held by the House of Lords in Lyme Regis v Henley (1834) 1 Scott 29, that the obligation ratione tenurae is a matter of public concern, even when it may only apply to the inhabitants of a single township (page 48). It was further held at pages 45-46 that the obligation was **"of so general and public concern that an indictment will lie for the breach of it"**

Lyme Regis v Henley therefore equates the inhabitants of a single township with the general public. In so doing it was following the accepted common law at that time. A year earlier Littledale J. in R v Leake (1833) 5 B & Ad.469 at 484 also equated parishioners with the public per se. He held regarding the road at issue "**the adoption of a parish is no more than use of it by the public;the parish are merely part of the public . . . . . If a road has been used by people in the parish, it furnishes evidence pro tanto of it being a way for the rest of the public"**

As to "who are the public" - see 'Byway and Bridleway' 1997/8/53; 'Rights of Way Law Review' 1998 s.6.3 p.55; Lord Coleridge in R v Southampton(1887) 19 QBD 590 at 598 said - **"the word 'public' . . . cannot mean that it is 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 ever use a particular road or bridge"**; Lord Wright M.R. in Jennings v Stephens (1936) 1 Ch 469 at 476 also held - **"The public . . . may mean for practical purposes only the inhabitants of a village"**)

The law thus holds that the liability ratione tenurae is an obligation to the public. The public may therefore seek indictment against those failing to carry out that obligation. It is well-established law that only matters concerning the public may be the subject of an indictment.

The mode of prosecution is significant. Because as Hawkins stated in 'Pleas of the Crown', at page 289, only matters **"of a public nature" . . . .** (are indictable) **. . . . "but no injuries of a private nature, unless they concern the King".**

For an indictment concerning a ratione tenurae road to be good the road in question must be a highway (Glen (1883) page 124 citing 1 Hawk PC 703-4). Therefore, if the public could seek indictment when a ratione tenurae road was out of repair - it must follow that the road in question was a highway.

Thus, by reason and logic, it must also follow that all ratione tenurae roads are highways. Because, if a ratione tenurae road was a strictly private way, the public would have no cause for action to enforce repair. There is no reported case where indictment was held to be bad because a ratione tenurae road was found not to be a highway.

Pratt & Mackenzie's 'Law of Highways' 19th Ed. pp.68-69 (the law as stated 1.11.51) considers three various opinions about the nature of the liability. It concludes :-

1 - that Lord Coke and others regarded the liability ratione tenurae as a species of prescriptive liability. Lord Ellenborough CJ thought that ratione tenurae was a term which had arisen as a more definite mode of pleading a prescriptive obligation (R v Kerrison (1813) 1 M & S 435).

2 - that **"The liability may be regarded as a condition annexed to the grant of lands, whether by a subject or 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 tenurae.**

3 - that **"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 tenurae 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"**

A Brief Outline of The Law and its application

1189
Ancient books and reported cases confirm that in the strict legal sense all liabilities ratione tenurae originated before 'time immemorial' (1189 : the first year of the reign of Richard the First). The exceptions to the rule being lands granted by the King by Deed or Charter, or, by a Statute enacted by the King's Parliament. Wills J. in Ferrand v Bingley UDC (1903) 2 KB at 451, held that **"In the strict sense of the term the liability ratione tenurae unless arising by a grant by the Crown, must have its origin in a grant prior to the statute Quia Emptores".**

1290
Quia Emptores (1290 Chapter 1 18 Edw.1). This was a statute concerning the buying and selling of land : **"Freeholders may sell their lands: so that the Feoffee do hold of the Chief Lord".** As a consequence, with the exception of the Crown, it became no longer possible to convey land to someone in such a way as to render them liable to repair a public necessity ratione tenurae. The Crown however could still make a grant of lands, by Deed, Charter or Statute, which included the liability ratione tenurae as a public obligation.

The Law thus developed that every liability ratione tenurae, which was not created by a grant from the Crown, must have originated and existed before Quia Emptores..

1325
The Statute for View of Frankpledge was enacted in 1325 (18 Edw. 2). Its 34 clauses covered all matters and nuisances about which the **"Stewards in their Leets shall enquire"** (the Steward being the direct representative of the Lord). It was still in operation in Methley in 1590 (see below) and elsewhere for several centuries later. It was not finally repealed until 2005 (Statute Law Revision (Pre - 1922) Act 2005)

Clauses 8 -10 had a direct bearing on the existence, continuation, and maintenance of highways : -

"8 - Of walls, houses, dykes, and hedges set up or beaten down to annoyance"
"9 - Of bounds withdrawn and taken away"
"10 - Of ways and paths opened or stopped"

Under the powers of the statute, those public necessities which were repairable ratione tenurae were inspected on a regular basis, and all persons committing nuisances were brought before the Court Leet.

1331 to 1590

In 1331, The Manor Court or Court Leet of Methley (West Riding of Yorkshire) convened to enforce and obey the requirements of the 1325 statute. It continued to meet for the next 265 years at least (the records of the Methley Manor Rolls only date from 1331 to 1590).

The court rolls confirm that the Steward of the Manor was delegated by the Lord to represent him at the Court Leet. In turn, he delegated the tasks of inspection, inquisition and presentment to 'The Jurors' of the Court Leet. It thus became their onerous 'duty' to present their neighbours who were offending the **'custom of the manor'.** Thus those persons liable ratione tenurae for repairing ways were regularly brought before the court because they had failed to perform their obligation.

If the jurors, as a body, failed to carry out their duty, each of them, as individuals, could be fined by the court (as were the Methley jurors in 1465). Thus, the rolls confirm that the Statute for the View of Frankpledge was rigorously enforced, without fear or favour, and persons both high and low were obliged to obey the custom of the manor.

As the Webbs pointed out ("The Story of the King's Highway" page 2) **"If no man committed any new annoyance, or refrained from fulfilling any old obligation, it was assumed that all would be well".**

1542 to 1562

The Manor Rolls of Methley contain many records of persons ordered to repair the ways which by customary tenure they were obliged to do. To cite just two instances regarding ways leading to common meadows :-

"33 Henry 8 - 28 June1542 - It was enjoined on the Inhabitants that . . . . all who have any lands or meadows in the Northinges or Cowshotfen & the Okinge & Ledderfurthe, that they shall have carried one wagon of stone for each acre of meadow there for repairing the lane called Morehouselaine & the Cutlerlaine. Penalty for each xijd"

"4 Eliz - 21 April 1562 - Paines that everie one that hath anie land in Cutlerlaine shall carrie one load of stones thereunto before the Feast of St.Jo. : the Baptist - Pain xijd".
"Likewise for the waie adjoining upon Northings, Ledderforth & Thorpings, pain as aforesaid"

The Rolls thus confirm that the ways alongside and leading to the common fields and meadows (known as "ings") were repairable by those who held land there.

1590

The Methley Manor Rolls also confirm that the position of Reeve was an obligation to the Inhabitants of the Manor arising from a liability imposed upon the tenure of a certain parcel of land. A 'Reeve' was the "Chief Magistrate of A Town", or a "Bailiff or Steward of the Manor", or a "Local Official". He therefore exercised authority and administered the law within the township for the public good :-

"32 Eliz. - 7 October 1590 - Inquisition taken there for the Lords by the oath of . . . . . (twelve named jurors) . . . Sworn etc. Who say on their oath that Richard Shann Senr. Ought to be Reeve for a bovate of land called Samondokgange for the following year who was admitted & sworn to that office to fulfil it in the manner he ought"

1670
Section 2 of The Bridges Act 1670 (22 Car. 2 c.12) enacted that lands given for **"the maintenance of causeys, pavements, highwayes and bridges"** be farmed at the most improved yearly value without fine. The Act thus confirmed that lands were given for the maintenance of highways and bridges. Seemingly, as it was a Public Act, the resulting liability ratione tenurae was an obligation to the public (see Shaw - 'Parish Law' (1750) page 279)

1736 to 1772
'A New Law Dictionary' by Giles Jacob - 3rd Ed. 1736, 5th Ed.1744 and 9th Ed 1772, states that **"A Highway lying within a Parish, the whole Parish is of Common Right bound to repair it; except it appears that it ought to be repaired by some particular Person either ratione tenurae, or by Prescription . 1 Vent.183, Style163."**

1738
The Purton Inclosure Award, in the County of Wiltshire, made on 11 April 1838 directed that the public roads be repaired by what amounted to ratione tenurae. The Award states **"We . . . Order . . . That all the Said Publick Roads . . . Shall be from henceforth for Ever repaired and Maintained by the respective persons through and next Adjoining to whose Allotments or Shares the Said Publick Roads Shall lie and pass for so much and Such part of the Said Roads".**

It seems likely that the awarded roads were set out in lieu of ancient roads which crossed the former commons and common pastures, and which were repaired in a similar manner by those who had common rights. Thus the Commissioners followed the common law principle in operation at that time (R v Fleck now (1758) 1 Burr. 461)

There can be no doubt that, although the awarded public roads were required to be repaired for ever by the adjoining occupiers (or owners), there was no restriction on public passage. Under common law the Inhabitants at Large of Purton could still seek indictment if any of the adjoining occupiers failed to carry out necessary repairs. (I am grateful to Bill Riley for this unusual example of repair 'ratione tenurae')

1773
Section 23 of the Highway Act 1773 gave the parish surveyor power to give an information to justices to compel persons, who were responsible to maintain roads ratione tenurae, to carry out their obligation within a limited time.

Section 65 of the Act gave the Inhabitants at Large the power to prosecute by indictment a person liable ratione tenurae for not repairing a highway in the parish.

1789
Burn in Vol. 2 of the 16th Edition of 'The Justice of the Peacer and Parish Officer' (1789) considered the repair of highways and "Who are liable to repair". At that time the law held that it was not sufficient to show that persons were bound from time immemorial, it was also necessary to show how they were bound, and whether they had ever repaired the way ratione tenurae - citing Bur.Mansf.2700"

1789 to 1791
The Methley Inclosure Award (1789) was made under the Act of 26 Geo 3 c.24 (1786). Following its inrollment in 1790 a series of indictments, under section 3 Malicious Injury Act 1768, were

commenced against 12 persons for breaking fences. It was pleaded in defence that no new highway had been set out in lieu of the old highway stopped up. In his written opinion, prepared for the prosecution, dated 26 January 1791, Samuel Buck, Leeds considered the matter of the new roads set out in lieu of old roads which were repairable ratione tenurae. The document is headed "Case for Mr Recorder's Opinion" .

After considering the words in the Act and Award the writer continues and states : -
"If in the Award there had been no Directions by whom the new Roads were to be repaired, it would have become necessary for them particularly to have specified in Lieu of what ancient Road every new Road was set out, and in Cases where the ancient Roads were to be repaired ratione tenurae they must have specified what each particular portion of these new Roads were set out for the respective portions of the old Roads, that each person might have known what proportion of the new Road he was then for ever after to be liable ratione tenurae to repair - This would have been endless, & would have created the greatest confusion - They have therefore in my Opinion very wisely avoided this difficulty, and have compleatly answered the intent of this Act of Parliament by particularly directing by whom each Road set out by them shall be repaired" (Transcript from original papers held at Leeds Archives within the Mexborough Collection No.834)

Note - the Methley Act at page 18 enacted that **"all such public and private High-ways shall from Time to Time, be repaired and kept in Repair by such Person or Persons as is or are now by Law chargeable with the Repairs of the several public Highways, in lieu of which such new ones shall be respectively assigned and laid out as aforesaid"**. The Award, after setting out public and private roads directed that **"the same private roads . . . . shall . . . be repaired . . . in such manner as the said public highways before mentioned are hereinbefore directed to be made and repaired"**. The Award further directed that certain named private roads were to be kept in repair by adjoining occupiers **"in like manner as other roads repairable ratione tenurae are or ought to be by the Laws of this Realm repaired and kept in repair".**

In a earlier document prepared for the same court prosecution (15 July 1790) The Commissioners stated **"We shall contend, not only that the new roads** (i.e. the awarded "private roads") **are much more convenient than the old ones to everybody having occasion to use them (except the Appellant) and not more inconvenient to him" . . . . . "Two of the Commissioners, will produce the Map of the Parish, and prove that the New Roads are much more convenient than the old ones to every Body, except the Appellant, and as convenient to him as any Road can be unless made for his own private particular purpose"** (as underlined in the Court Papers).

These two documents were prepared for criminal proceedings, which, if proven, could result in the fence breakers being sentenced to seven years transportation. Therefore, the documents must be construed as reflecting an accurate state of the law at that time as regards ratione tenurae roads.

Every new road leading from Methley Town Street to the main highway (Leeds and Pontefract Road) was awarded as a **"Private Road"** (either repairable by the parish or repairable ratione tenurae). Thus the inference arises, from the above court papers, that those private roads were intended to be used by the public. Otherwise, the inhabitants of Methley would have been prisoners in their own back yards.

It is significant that when the first railways plans for Methley were presented to Parliament in 1835, each and everyone of the awarded ten private roads leading from Town Street to the Main Road was stated to be a **"Public Road"** owned by the **"Surveyor of Highways".** One of these roads was awarded in 1789 as being repairable ratione tenurae.

1829

Robert Wellbeloved deals at length with the **"Liability of those who are bound to repair, by reason of inclosure, or by prescription"** in his 'Treatise on The Law relating to Highways' (1829). Of particular importance to the matter at issue is his explanation of the origin and evolution of the law in relation to ratione tenurae.

"Where lands bound to the repair of a bridge or highway ratione tenurae, are conveyed to several persons, every one of the grantees, being a tenant of any parcel, is liable to the whole charge and must have contribution from the others. Therefore, where a manor, so bound, was conveyed to several persons, it was held that a tenant of any parcel, either of the demesnes or of the service, was liable to the whole repair, and might call upon the tenants of the residue to contribute. And that the grantees are chargeable with the repair, though the grantor should convey the lands or manor discharged of the burthen; in which case the grantees must have their remedy over against the grantor. And the reason seems to be, because the whole manor of land, being once chargeable with the repair, shall remain notwithstanding any act of the owner. For the law will not suffer him to apportion the charge, and so make the remedy for the public more difficult; or by alienations to insolvent persons to render the remedy against such persons quite frustrate" (pages 99-100).

1834

The law as to the application and enforcement of the liability ratione tenurae was affirmed by the House of Lords in the matter of The Mayor and Burgesses of Lyme Regis v Henley (1834) 1 Scott 29 to 50. This case has never been overturned and remains the authority as cited by Halsbury and others.

The case confirms that a liability affecting a particular township only is an obligation to the public per se who may seek indictment to have that liability enforced in the public interest.

1835

The Highway Act 1835 enacted at section 33 that **"Certain persons to be exempt from payment of highway rate"** . Such persons included those liable ratione tenurae for repairing a highway. Pratt & Mackenzie 19th Ed. 'Law of Highways' (1952) at note (d) page 158, confirms that those liable ratione tenurae to repair a highway were exempt from the payment of the highway rate.

This statutory exemption adds weight to the presumption that roads repairable ratione tenurae were expected to be used by the public. Most certainly those who were liable to repair strictly private roads and easements (over which the public had no rights of way) were granted no such exemption from highway rates.

Section 62 of the Act enacted that **"Highway repairable ratione tenurae, etc. may be made a parish highway"**

The Statutory Forms to assist the enforcement of the Highway Act included :-

(a) No. 43 **"Order for a Road repaired ratione tenurae to be made a Parish Highway"**
(b) No.66 "**Plea that others ratione tenurae are bound to repair**"

1862 to 1864

Section 34 Highway Act 1862 (as amended by section 23 Highway Act 1864) enacted that **"Expenses of repair of highways may be recovered from party liable to repair ratione tenurae".**

Section 35 of the 1862 Act also enacted that "**Highways repairable ratione tenurae may be made repairable by the parish".**

1865

Glen also deals at length with "Highways repairable ratione tenurae, etc" in the 2nd Ed. of "The Law of Highways" (1865). He makes the point that the liability ratione tenurae must have existed

from time immemorial. He cites R v Stoughton 2 Wms. Saund. 462 (query date) where it was held that it was not necessary to allege the origins of the liability, because the term ratione tenurae itself **"implies immemoriality".** Therefore it was sufficient to allege the liability to be one of ratione tenurae.

1877 to 1937

The five volumes of "Questions and Answers from The Justice of the Peace" (1877 - 1937) demonstrate how important was the question of the liability to repair highways ratione tenurae. The questions raise many and varied aspects of the liability. The contributors also indicate how widespread was the liability ratione tenurae, even to the extent, in one township, of there being no township roads repairable at public expense. A question posed to the "Justice of the Peace, August 30, 1902" (p.558) reads :-

Highway-Repairable ratione tenurae-Exemption from highway rate-Main Road

"All the roads in the township A. are repairable ratione tenurae with the exception of one main road. To maintain this main road rates have been levied throughout the township since 1835, and up to the time it was taken over by the county council. As there are no township roads there has never been any highway rate other than the one just mentioned, and this fact would point to the conclusion that those liable for the maintenance of roads ratione tenurae should now be exempted from contributing to the call of the rural district council for highway purposes. Does the fact of a rate having been levied for the purposes of the main road in the township affect such conclusion "

The answer stated **"It is now well settled that property which is liable to repair ratione tenurae will not be liable to contribute to highway expenses** (citing authorities) **. . . . Any property in question which is liable to repair ratione tenurae will not be liable to contribute to the call of the rural district council for highway purposes" .**

1883

Glen's later work "The Law relating to Highways" (1883) also deals at length with ratione tenurae on pages 107-116. He addresses the law in relation to the subject in detail and cites many cases and authorities.

1894

Section 25(2) of the Local Government Act 1894 enacted that if a person liable to repair a highway ratione tenurae failed to do so, after being requested by the district council, the council could repair the highway and recover the expenses from the person so liable (see the commentary on the sub-section at page 427 'Pratt & Mackenzie's Law of Highways' 19th Ed.1952) where Walton J. is quoted as stating that the liability ratione tenurae can arise even if the way was set out within legal memory (Esher and Dittons UDC v Marks (1902) 71 LJ (KB) 309).

1912

Hampton Copnall in the 2nd Ed "The Law relating to Highways" (1912) states (page 214) that **"A liability, similar to the liability to repair ratione tenurae, may be imposed by statute (R v Sheffield Canal Co.(1849) 13 QB 913) or by a grant from the Crown".** He also confirms that persons liable ratione tenurae are still entitled to the benefit of exemption **"now that highway expenses are raised as part of the general expenses of a district council"** (page 215).

1929

Section 38 of the Local Government Act 1929 contained a **"Saving as to highways repairable by persons other than highway authorities".** The note to the section in "Glen's Local Government Act 1929" (page 100) states **"The present section preserves the private liability, which may arise either (a) ratione tenurae, (b) ratione clausurae, (c) ratione nocumenti or (d) by statute".**

1949

On the 19th July 1949 the House of Commons considered Clause 47 of the National Parks and Access to the Countryside Bill. Some 357 members were present. The Government insisted that the liability to repair public paths ratione tenurae remain within the legislation. The opponents of the Clause believed otherwise, and argued that all such public paths should, in future, be repaired at public expense only. The Government won the vote by 260 votes to 97 and Clause 47 eventually became section 47 of the Act (see 'Hansard' HC Deb 19 July 1949 cc 1237-55).

Section 47(1) enacted that from 16th December 1949 all public paths then in existence became repairable by the inhabitants at large (i.e. by the Parish).
Sub-section (3)(a) further enacted that a person liable to repair by reason of tenure was not released from his obligation.
Sub-section (3)(b) confirmed that if the highway authority repaired the public path in question it could recover the cost from the person so liable.
Sub-section (3)(c) took the matter one stage further and allowed the person charged with the cost of repair to recover from some other person.

Thus sub-section (3) confirmed the common law, which held that the liability to repair ratione tenurae can only be enforced against the occupier (1 Roll Abr. 300) who can in turn recover from the owner of the land (Baker v Greenhill (1842) 3 QB 148)

1959
Section 38(1) of The Highways Act 1959 abolished the duty of the Inhabitants at Large to repair highways. The Act repealed section 47 NPAC Act 1949 but incorporated the provisions of the section within section 38(2)(a).
Sections 52 to 58 dealt with the "Maintenance of privately maintainable highways". Sections 59 and 60 dealt with "Enforcement of liability to maintain highway" and section 62 enacted "Further Provisions for enforcement of liability to maintain privately maintainable highways"

1973
Paras 262-265, Volume 21, of 'Halsbury's Laws of England' (4th Ed. 1973) deal with "Liability by reason of tenure" .

The book recites the common law and comments on the accepted reported cases. Doubt is raised whether the liability ratione tenurae can be established by "private gant or covenant" as opposed to a royal grant : **"In two cases attempts to establish such a liability on the srength of private grant failed : see R v Scarisbrick Inhabitants(1837) 6 Ad & El 509; R v Beeby (1839) 8 LJMC 38". It is not clear whether any private grant or convenant could give rise to a liability enforceable in the same way as for public highways : cf Lyme Regis Corpn v Henley (1834) 2 Cl & Fin 331,HL"**

This paragraph supports the reasoning that grants giving rise to the liability ratione tenurae must stem from an intention to protect a public benefit. Thus a private grant for the purpose of protecting a purely private benefit falls outside the scope of the liability ratione tenurae.

Para 263, when considering the "Enforcement of liability by reason of tenure", confirms that the liability can only be enforced against the occupier of land carrying the burden. Any agreement by a vendor to repair only operates between him and the
purchaser **"and does not discharge the purchaser from liability to the public".**

<u>Halsbury therefore confirms that the liability ratione tenurae is an obligation to the public.</u>

1980
Section 43 of the Highways Act 1980 gives Parish Councils the power to maintain any public path within the parish. But, the section retains the duty of other persons to maintain paths for which they are liable ratione tenurae.

Section 44 of the Act allows persons, liable ratione tenurae, to enter into an agreement with the highway authority to also maintain other highways presently maintainable at the public expense. However the overriding duty of the highway authority remains as before regarding such roads.

Section 56(1)(a) deals with the "Enforcement of liability for maintenance" of ways maintainable by reason of tenure.

Section 57 makes provisions for "Default powers of highway authorities in respect of non-repair of privately maintainable highways".

1991

The Rights of Way Law Review addresses the question of "Private duties of highway maintenance" at section 5.2 pages 1-11 (February 1991). Barrister Paul Coughlan states **"It is difficult to prove the existence of a private liability to maintain a highway, a concept steeped in antiquity. However, in such cases the highway authority now usually shares responsibility for maintenance. Consequently users may proceed against the authority, leaving to it the perplexities of establishing the private liability and obtaining reimbursement"**

For a long time the law has held that if a way or bridge is repairable ratione tenurae the indictment may properly be brought against the county or the highway authority. This was confirmed by Lord Campbell C.J. in R v The Inhabitants of the County of Bedford (1855) QB 81 at 84-86 who held that because of the public interest factor in such matters the county was the right party to indict even though another was liable ratione tenurae to repair.

Thus, with regard to complaints under section 56 Highways Act 1980 the proper party to serve the complaint upon is the Highway Authority. The reason being that, because of section 47 NPAC Act 1949, it has a joint/dual liability to maintain any public path in existence before 1949 (see pages 569-573 21st Ed. Law of Highways, Pratt & Mackenzie 1967).

The excellent article by Paul Coughlin (above) is a learned treatise upon the matter of ways repairable ratione tenurae and as such should be read alongside this paper. He cites and discusses many cases, statutes and authorities. The article implies that the liability to repair a way ratione tenurae is an obligation to the public. It further confirms that the Prescription Act 1832 is not relevant to the matter of ratione tenurae because **"its terms are solely directed towards the acquisition of private rights (i.e. easements and profits)".** Thus, in essence, the article supports the conclusions set out below.

1997

Charles Arnold-Baker and Paul Clayden, 5th Ed. Page 321 "Local Council Administration" (1997) state :-

"In a few cases a footpath or bridleway repairable by the public, is in fact repairable by a private person by reason of tenure of the land, prescription or under the terms of an inclosure award. In such a case, if the highway authority thinks that it is out of repair it may do the work itself and recover the cost under a magistrates order"

The book therefore confirms that the liability to repair a public path ratione tenurae may be created by an inclosure award. Thus equating repair ratione tenurae with a public way.

1999

In a letter dated 7 January 1999, the Land Charges section of North Yorkshire County Council replied to a person inquiring about ratione tenurae roads. The Group Engineer stated **"The general presumption is that Ratione Tenurae Roads are public roads which can be used by vehicles but not maintained by the Highway Auithority".**

In essence this states the legal position. But not all ratione tenurae roads are public carriageways, some are only public bridle roads or public foot roads.

2001
The last new approach to the subject of ratione tenurae is probably that of the Law Commission consultative document "Land Registration for the Twenty-First Century" (2001). At page 80, paras 5.32 and 5.33, the Commission considered the inclusion of the tenurial obligations to repair highways set out within the "overriding interests" clause of section 70 (1)(b) of the Land Registration Act 1925.

The Commission concluded (as regards tenurial obligations to repair highways) **"that such rights are probably obsolete, at least for all practical purposes"**

The Commission also stated (as regards sections 56 and 57 of the Highways Act 1980) **"These sections serve perhaps as a warning of the dangers of retaining provisions on the statute book in respect of liabilities which are obsolete. The mere fact that statutory provisions refer to tenurial liabilities to maintain highways encourages the belief that such obligations are still extant".**

However, despite the conclusions of the Commission, sections 56 and 57 of the Highways Act 1980 remain good law until repealed by Parliament.

2007
Inspector Alan Beckett considered the matter of ratione tenurae in his decision letter (23.11.07 : C9499/7/7) concerning two roads in the Yorkshire Dales National Park.
It was common ground between all parties that the roads shown on the list of streets as being maintainable ratione tenurae were highways. Both roads were so designated, the matter at issue being the status of those roads.

The Inspector found that **"the award also made the proprietors liable for continued maintenance of all the roads mentioned in the award. From 1771 that section of Moor Head Lane . . . has thus been maintainable ratione tenurae".**

He dismissed the objector's argument that the roads were private roads and that any vehicular rights which existed over them were merely for the occupation of the adjoining lands. He concluded that both roads were Byways Open to all Traffic notwithstanding that they were privately maintainable by reason of tenure.

Conclusion

The Law relating to private easements and strictly private rights of way is silent about the term "ratione tenurae" (see Lord Scott in R (Godmanchester Town Council) v Secretary of State for DEFRA (2007) UKHL 28 paras 62-63 re the difference between the creation of private easements and public rights of way). Such private easements have never been repairable ratione tenurae. Thus the liability ratione tenurae walks together, hand-in-hand, with an obligation to repair a public benefit, rather than with an obligation to benefit a private possession.

All liabilities ratione tenurae stem from the tenure of lands dating back to 1189. Exceptions to the rule of 'time immemorial' have been recognised by the Courts with regard to a grant from the Crown by Deed or Charter, or by an Award made under an Inclosure Act. The liability only concerned matters of benefit to the public, for example, the repair of harbours, bridges, ways.

When used in connection with a road or way the very words “ratione tenurae” imply “immemoriality” and raise the presumption that the way in question is a highway. Countless references, law reports, and statutes, link the words “ratione tenurae” with the word “highway”, and never, ever, with a strictly private easement of way.

The very fact that those who repaired highways, because of a liability ratione tenurae, could then claim exemption from the payment of highway rates for the rest of the parish highways, is strongly indicative of a public obligation.

For many centuries the Law held that the burden of keeping the highways in repair rested firmly with the parish. The parish could only avoid that liability by proving that some other particular person or body should repair ratione tenurae (or by inclosure or prescription). When the parish sought, by indictment, to compel performance of the liability of others, any resulting fines were paid to the parish highway surveyor. A further indication that the liability was a public obligation.

Notwithstanding any private liability to repair the ultimate burden remained with the parish (see Lord Halsbury L.C. - Sandgate UDC v Kent County Council (1898) 79 LT 425 at 427 - **“over and over again it has been decided that where a person is bound ratione tenurae to repair a main road, and becomes insolvent, the obligation immediately falls upon the parish, and that the parish or the authority whatever it is, is bound to take upon itself the repair. You cannot for reasons of public policy which are obvious enough, allow the roads to get out of repair. The obligation has always been held to be absolute and everlasting, and you cannot get rid of it except by statute”**

The liability ratione tenurae is therefore essentially an obligation to the public. It was (and still is) a liability which could only be enforced by the Criminal Courts. In ancient times the enforcement was by initially by means of Presentment to the Court Leet, and later by Presentment and Indictment to the Justices at Quarter Session. Today enforcement is by way of Complaint in the Crown Court under section 56 of the Highways Act 1980, and under section 57 of the Act in the Magistrates’ Court.

There is a misconception that all ways repairable ratione tenurae are public carriage roads. In the light of the evidence to the contrary this belief cannot be upheld. Therefore, a way repairable ratione tenurae may be either a foot road, a bridle road, or a carriage road.

All the evidence indicates that ways repairable ratione tenurae are highways. There is absolutely no evidence to the contrary which indicates that such ways are not highways. There is thus an overriding presumption that all ways recorded to be repairable ratione tenurae are highways.

It is therefore sufficient to prove the ancient repair obligation for the presumption of highway to be raised.

It thus follows, that if a way was directed to be repaired **“in like manner as other roads repairable ratione tenurae are or ought to be by the Laws of this Realm repaired and kept in repair”** (to quote the Methley Inclosure Award of 1789) that way was intended to be used by the public of the locality at that time, and is a highway of some status today.

In 1789 the **‘Laws of this Realm”** referred to by the Methley Award were :-
(a) Quia Emptores (1290) c.1 18 Edw. 1
(b) Statute for the View of Frankpledge (1325) 18 Edw. 2
(c) Bridges Act (1670) 22 Car.2 c.12 section 2
(d) Highway Act (1773) 13 Geo 3 c.78 sections 23 and 65
(e) The common law
(f) The customary law of the Methley Manor Court dating back to time immemorial

Finally - there is no doubt that a proven liability to repair a way ratione tenurae is an obligation to the public of the locality in which that particular way is situated. As Lyme Regis v Henley (1834) confirms, even where the liability ratione tenurae is for the benefit of one township only, that liability is an obligation to the public per se, who can enforce its performance, by indictment, in the public interest.

Therefore, in the absence of any lawful authority to the contrary, it thus follows that if a way is required, by a grant of legal origin, to be repaired ratione tenurae, that liability is an obligation to the public . Any ratione tenurae way must therefore be for the use and enjoyment of the public, and as such, may lawfully be used as a highway.

Colin Seymour October 2009