Reported by a Select Joint Committee, consisting of Messrs. Cummings and Doane of the Senate: and Messrs. Lovering of Medway, Payson of Rowley, and Sprague of Bridgewater, of the House of Representatives.

REPORT

RELATING TO THE ENCLOSURE

OF

CAMBRIDGE COMMON.
Commonwealth of Massachusetts.

In Senate, Feb. 21, 1832.

The Select Joint Committee, upon the petitions of Jeduthun Wellington and others, The Town of West Cambridge, The Town of Lexington, The Town of Watertown, and The Town of Waltham, praying for a repeal or modification of the Act of June 5, 1830, authorizing the enclosure of Cambridge Common; and upon the remonstrances of Israel Porter and others, Samuel F. Sawyer and others, and of the Selectmen of Cambridge, against the prayer of said petitions, have had the same under consideration, and

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the following statement of facts, disclosed in a long and arduous examination, conducted by both parties and their counsel.

The tract of land usually denominated "Cambridge Common," and embracing about sixteen acres, was
originally the property of the Proprietors of common and undivided lands in the town of Cambridge, and was granted in 1769, to said town, "to be used as a training field, to lie undivided, and to remain for that use forever." It did "lie undivided," and unenclosed, and without particular appropriation, until under the authority of the act of the Legislature of June 5, 1830, about eight and a half acres were enclosed, for the purposes therein specified, with a permanent fence. The diversion of two public highways consequent upon this enclosing, from their former direct course, constitutes the complaint of the present petitioners.

One of these, the ancient road leading from Watertown to Boston, passed, prior to the enclosing of the Common, over the southerly edge of it, and is diverted from a straight and most direct course, so as to increase the travel from five to six rods. It appeared known, that the ancient course of the road, instead of being straight, approached more nearly the extreme edge of the Common, so as to cause an actual diversion of from two to four rods.

The other, the Concord and Cambridge turnpike road, was originally laid out over the northerly part of the Common in 1805, under a legislative grant. In 1829, the County Commissioners of Middlesex, duly laid out and established it as a free road, the turnpike proprietors having surrendered the franchise for that consideration and the sum of one thousand dollars paid to them by subscription. The enclosure of the Common diverts this road from its course as laid out, so as to increase the distance from thirteen to fifteen rods in forty rods. The remonstrants denied the legality of this road on the ground that the original proprietors
had failed to comply with the conditions of their incor-
poration, and that the subsequent action of the County
Commissioners, being upon the whole line of the road
from Concord, (the part of which above the Arsenal in
Cambridge, had been laid out in 1803, the legality of
which was not disputed,) could only apply to that part
in respect to which the conditions of the grant had
been fulfilled. But this objection was not deemed im-
portant, inasmuch as if the prayer of the petitioners be
granted in either form, the jurisdiction of the County
Commissioners will be restored over the whole line of
both of these roads, as well as over the whole Common,
for the purpose of establishing or legalizing such roads
as in their judgment the public wants may require.

It appeared, that owing to the multiplication and
greater accommodation of other neighboring avenues
to the city, neither of the roads abovementioned are
now much travelled, though since the Concord and
Cambridge Turnpike had become a free road, the
travel on that had somewhat increased.

Besides these principal roads, the common was trav-
ersed by about fourteen other travelled roads, existing
without any legal authority, and crossing each other in
various parts of the common, which being over a loose
and sandy soil, served greatly to impede the public travel,
especially in the Spring and wet seasons; and were
always in the night-time extremely dangerous to stran-
gers who could neither know their number or direction.
Some of these, and particularly one running nearly
through the centre of the common at right angles with
the Concord and Cambridge road, had come to be trav-
elled nearly or quite as much as either of those first
described.
The act of June 5, 1830, which it is now proposed to repeal or modify, authorized the Governor to appoint two commissioners to superintend the enclosing of such parts of the Common as in their judgment public convenience and necessity required, and to make such alterations in respect to the roads traversing it as they should see fit. This act was founded on the petition of Israel Porter and others, setting forth the purposes for which the grant of the Common to the town was made, and representing "that great public inconvenience had been and still was experienced in consequence of said Common's remaining unenclosed; that the public travel over it was divided among a great number of roads which, not having been established by any legal authority, are continually changing their direction," &c. and "that by enclosing the Common, and leaving ample space for such highways as may be necessary, the public inconveniences which have been experienced might be avoided," and concluding with a prayer, "that a special act might be passed, authorizing the enclosing and improving of such a portion of the said Common as may be compatible with the public interest and convenience." This petition was presented to the Legislature of 1829—30, at their winter session, and after the usual reference to a committee, and other proceedings, notice was ordered in the Boston Advertiser, (a semi-weekly paper,) returnable to the June session of the next Legislature. This order being complied with, the customary reference and other proceedings were again had in that Legislature, which resulted in the enactment of the law of enclosure. The commissioners appointed under the law met to execute the duties of their commission, at Cambridge on the twelfth day
of August, A. D. 1830, having given previous notice "in the Bunker Hill Aurora, printed in Charlestown, the Yeoman's Gazette, printed at Concord, and the Boston Patriot, printed in Boston, two weeks successively," the last publication of which was five days before the appointed meeting. The friends of the Common appeared by counsel. Several of the present petitioners from each of the towns of West Cambridge, Lexington, and Watertown, appeared as respondents, on whose motion the meeting was adjourned to the ninth day of the following September, and public notice thereof was given as before, with an additional notice in the Boston Daily Advertiser. At this adjourned meeting, the towns of Lexington appeared by committee, of Watertown, by two of their Selectmen, the Proprietors of Canal Bridge and sundry inhabitants of Lexington, Watertown, West Cambridge, and Cambridge, individually interested, by their counsel. After a full and fair hearing of them, the said commissioners authorized the enclosing now complained of, "altering, discontinuing and annulling all the several roads and ways," passing over the Common, and "laying out and establishing the Watertown and Concord and Cambridge roads, in their present course and direction. The committee advert to the course of Legislation, and the action of the Commissioners on this subject, the more minutely, because much of the argument of the petitioners against the Act of June, 1830, as to its being void and inoperative as a law, was grounded on the supposed collusive or insufficient notice, ordered and given on the original petition of Israel Porter, and the insufficiency of the notice given of the first meeting of the commissioners, and because the conduct of those members of the Legisla-
ture of 1830—31, mainly instrumental in procuring the passage of that act, have been undeservedly impugned in the opinion of the Committee. There is indeed an apparent discrepancy between the recital in that petition of the inducements of Israel Porter and others, to subscribe it and their object as finally consummated, and doubtless two of the city newspapers had a greater circulation among those persons most affected by the enclosing of the Common, than the Boston Advertiser. But this was probably accidental, as throughout a very thorough discussion of this point, nothing appeared to justify the imputation of management or collusion in any stage of the proceedings in either branch of the Legislature, on the part of any of the persons entrusted with the subject.

The subject of the enclosure of the Common has been twice brought before the town of Cambridge under warrants from the Selectmen. The articles or resolutions in the warrant proposed to take measures for a repeal or modification of the Act of June, 1830. In both instances, and at full meetings, the consideration of them was indefinitely postponed by large majorities.

The petitioners now ask for a repeal or such a modification of the act of June 1830, as will restore the jurisdiction of the County Commissioners over the Common, to the same extent as before its enactment. They contend, 1st, that that act is one of extraordinary, unconstitutional legislation, inasmuch as, by creating a special irresponsible commission to determine upon a particular case, falling legitimately within the jurisdiction of a regularly established judicial tribunal, viz., that of the County Commissioners, the Legislature vir-
tually assumed judicial power; and 2d, that the Act of June, 1830, was void and inoperative, because of the insufficiency of the notices abovementioned. 3d. They further contend, that the public wants demand, that the Watertown, and Concord and Cambridge roads should pass, as formerly, across the Common.

The constitutional question, on the ground assumed by the petitioners, belongs to a Judicial, and not Legislative tribunal. As an act of extraordinary Legislation, the Act of June, 1830, will find its parallel in the Legislation of at least two other States in this Union, and some not very remote resemblances in that of our own State. But waiving these considerations, the committee are not satisfied, that the jurisdiction of the County Commissioners over the Common is at all impaired by the provisions of that Act. No part of the act expressly exempts the Common from that jurisdiction, nor can any just implication be found in the penalties provided for "maliciously and wantonly" injuring the enclosing fences, trees, &c., which, it cannot have been intended, should attach to public officers in the conscientious discharge of their official duties. Whether, therefore, the County Commissioners do yet possess their original jurisdiction over the Common land, or that jurisdiction be taken away unconstitutionally or collusively, the remedy for the petitioners is in the judicial courts and not in the Legislature.

If the act of June, 1830, was originally void and inoperative, from want of notice or any other cause, there surely needs not the repealing power of the Legislature to declare it so.

On the question of public convenience and necessity, much contradictory testimony was offered. It ap-
appeared, that the travel of the Concord and Cambridge road was of the inhabitants living on or in the immediate vicinity of that road mainly, and that the travel of the Watertown road was also mainly of the inhabitants of the north part of Watertown, except of such as had occasion to go to the public offices at East Cambridge. Very opposite opinions of the public wants were expressed by persons thus situated and interested, of all classes and professions, while nearly all agreed, that the public would be better accommodated by the enclosing of a portion of the Common, and that the roads, as now made, were more easily travelled than the same roads, as they formerly existed across the Common. It also appeared, that the travel on the road running from the West Cambridge road across the Common to the Appian way, as it is called, (a road existing without legal authority, and crossing the Concord road at right angles nearly,) is as great, or greater, than that of either of the legal roads mentioned. Were an act of legislation now necessary to give the County Commissioners their accustomed jurisdiction over the Common, and the public travel regarded as the only criterion of public accommodation in respect to roads, there can be little doubt, that, if the latter are restored, or re-opened, the other will soon be built also. Yet the inevitable effect of this would be to disintegrate the whole Common, as well as subvert the original purpose of the Proprietors' grant to the town of Cambridge, by reducing any single remaining section of it within too small limits for beneficial use as a training field, and utterly withdrawing all inducements to its preservation as "a public park or promenade" on the part of the trustees named in the act of enclosure. Such a result, both parties
unite in deprecating. Both parties admire the grounds as now laid out, the tasteful arrangement of the walks, and the promising growth of trees that line the margin, and are disposed in the centre of the Common. The entire consecration of this spot to such purposes of public ornament as should be a permanent monument of the refinement and taste of the citizens of that part of Middlesex, and still further distinguish a village already widely and highly distinguished, in which distinction they all have a common property, except as against the legal roads aforementioned, was a common sentiment: and it is deeply to be regretted, that a controversy of so trifling a value (in interest) as this of the diversion of at most four rods in one case, and fifteen in another, in two roads of no great travel, should frustrate or even hazard the gratification of an ambition so laudable.

In considering the question of public convenience involved in this case, the Committee have assumed the principles which are understood to govern County Commissioners in laying out, and discontinuing public roads, and are satisfied, that the public wants do not require the restoration of either the Watertown, or Concord and Cambridge roads to their former direction across the Common, and that the modification or repeal of the act of June 1830, as prayed for, would either be unavailing to the petitioners, or injurious to the public interest. They, therefore, report, unanimously, that no further legislation on the subject is necessary.

J. CUMMINGS, Chairman of Committee.