[697] Alexander and W. C. Rowe now shewed cause. Supposing that the case had not been heard, the magistrates were not bound to proceed when there was reasonable fear of an action, and no indemnity was offered; *Rex* v. *Mirehouse* (*a*). The Act 5 G. 4, c. 83, s. 3, does not imperatively require justices to proceed on a complaint of this kind; the words are, "It shall be lawful for any justice of the peace to commit such offender." [Lord Denman C.J. The justices here had begun to hear the complaint; were not they bound to hear all?] They exercised a discretion, which they had a right to use. And they have, virtually, heard the complaint. [Lord Denman C.J. Then they stopped the party against whom they decided.] The receipts were not denied: then it appeared that there was a disputed marriage, which the parties might try in the Ecclesiastical Court. [Coleridge J. What remedy could the overseers have in the Ecclesiastical Court?] In *Rex* v. *The Justices of Carnarvon* (4 B. & Ald. 86), where the sessions, on the trial of an appeal, refused to hear the respondents' witnesses, this Court would not grant a mandamus to enter continuances and rehear the appeal.

Cresswell, contrà, was stopped by the Court.

[698] Lord Denman C.J. That was a very different case. It is quite clear that the justices have done wrong. They exercised their discretion in deciding at first to hear the case; then they were not right in refusing to hear the whole of the evidence offered. The rule must be absolute.

Littledale, Williams, and Coleridge, Js. concurred.

Rule absolute.

THE KING *against* THE MARQUIS OF DOWNSHIRE. 1836. Justices in Petty Session having made an order for stopping a highway under a local Act giving an appeal, and the time for appeal having elapsed, it cannot be contended, on a prosecution for obstructing such way, that the order was bad because the justices were not properly summoned to the Petty Session. Under stat. 55 G. 3, c. 68, s. 2, enacting that "when it shall appear, upon the view of any two or more" justices, that a highway is unnecessary, the same may be stopped by order of such justices, the order is not valid if it state only that the justices, having viewed the public roads within the parish, &c. (in which the road lies), and being satisfied that certain roads after mentioned are unnecessary, do order the same to be stopped up: and the objection may be taken on such prosecution, and at such time, as above. By a local Inclosure Act, incorporating (so far as its provisions were not repugnant) the General Inclosure Act, 41 G. 3, sess. 2, c. 109, it was enacted that

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husband of the said Sarah Newman Bowman, and alleged that they were never married; that the magistrates by the advice of their clerk thereupon refused to enter upon the case, or allow any evidence to be called to prove the marriage, stating that it was necessary in the first place to establish the marriage in the Ecclesiastical Court. That this deponent was prepared to have proved the said marriage," &c. "That this deponent informed the magistrates that he was prepared with such testimony if they would allow it to be heard; but they positively refused, for the reason before stated, namely, that it was necessary, before such application could be made, to establish the marriage in the Ecclesiastical Court." The clerk to the magistrates stated in his affidavit, that Mr. Saul, the attorney for Wetheral, "proposed to call the said Sarah Newman Ashbridge to prove the marriage, but did not deny the fact of the said receipts having been given, or of the said order of bastardy having been made, whereupon the magistrates, Thomas Atkinson and John Knubley Wilson, Esquires, under the advice of deponent, refused to receive such evidence, considering it a matter of too great importance to try indirectly the validity of a marriage which was alleged to have taken place out of England, and which they thought ought more properly to be brought before an Ecclesiastical Court than to be decided by magistrates at a Petty Sessions." He added his opinion, that the advice he had given was proper, "and that, if the said magistrates heard the evidence proposed to be offered by the said George Saul, they must still decline making any order upon the summons, on the ground of the doubtful nature of the question as to the validity of the marriage, and the consequent risk to which the magistrates would be exposed by reason thereof."

(*a*) 2 A. & E. 632. S. C., as *Rex* v. *The Justices of Somersetshire*, 1 Harr. & Woll. 82.

certain commissioners might set out and appoint highways over the lands to be divided, &c., within the parish of E., or over any of the old inclosed lands in the parish, and divert or stop up any of the present public or private carriage-roads, highways, or footpaths in the parish, observing certain conditions: and that all ways and paths in the parish not so set out or continued should be stopped up and extinguished, and deemed part of the lands to be divided, &c.: provided that no roads through any old inclosures of the parish should be stopped up, diverted, or altered, without an order of two justices. A road, A, through old inclosures in the above parish, opened into the waste, and, at such opening, joined another road, B, which formed a continuation of A, and ran entirely over waste land. No valid order was obtained for stopping road A. Road B was not set out or continued by the commissioners: Held, that this omission did not extinguish road A and create a consequent stoppage of road B; but, on the contrary, that A remaining open for want of an order of justices, as a consequence, B remained open also. Quære, if a road long used as a thoroughfare by the public be lawfully stopped at one end, whether the right of way over the remainder be gone. Per Patteson J., it is not.

[S. C. 6 N. & M. 92; 1 H. & W. 673; 5 L. J. M. C. 72. Referred to, *Bailey* v. *Jamieson*, 1876, 1 C. P. D. 332.]

Indictment for obstructing and keeping obstructed divers horse and carriage ways, pack and prime ways, and footpaths in the parish of Eastbampstead, Berks. Plea, not guilty. By order of **[699]** Parke J.(*a*) the prosecutor delivered particulars of the ways in question, which were nine in number: seven described generally as highways, and two described as footways. On the trial before Parke J. at the Berkshire Spring Assizes, 1834, the following facts appeared. All the ways were ancient public ways.

Highway No. 1 (Bond's Lane), passed through old inclosures, and opened into land which, at the time of making the award after-mentioned, was part of the waste lands in the parish and manor of Eastbampstead.

Highways 2 and 3, and 4, were continuations of Bond's Lane, passing over lands that were waste at the time last-mentioned. (Highway 3 diverged from highway 2: Bond's Lane branched into highways 2 and 4.)

Highways 5 and 6, the latter being a continuation **[700]** of 5, passed over lands that were waste at the time last-mentioned; these highways branched from highway 7, and form a continuation of Hatch's Lane, which was a road passing through old inclosures, and not now in question.

Highway 7 passed out of Hatch's Lane, through old inclosures, and formed a continuation of Hatch's Lane to the northward; branching, to the westward, into highway 5.

(*a*) The order was as follows:—

"The King on the prosecution of William Makepeace, against the Marquis of Downshire.

"Upon hearing Mr. Mascall, of counsel for the prosecutor, and Mr. Richards, of counsel for the defendant, I do order that, upon production of an affidavit by Mr. Handley" (the defendant's attorney), "that on reading the indictment he is unable to understand all the precise tracks indicted, the attorney or agent for the prosecutor shall, at the costs of the prosecutor, within one week after the delivery of a copy of Mr. Handley's affidavit to Mr. Jeyes" (the attorney for the prosecution), "deliver to the defendant's attorney a particular, in writing, of the several highways, pack, and prime ways, and footways, for the obstruction of which the bill of indictment has been preferred and found; and that the prosecutor shall be precluded, at the trial of the indictment, from giving evidence respecting any other highways, pack and prime ways, and footways, than those named in the particular. The prosecutor, with his attorney and one surveyor, to be at liberty to go on the premises on some one day, having given the defendant or his attorney two days' previous notice of the time at which they will attend, and doing no unnecessary damage to the premises. Dated the 30th day of January 1834. J. PARKE."

See *Rex* v. *Curwood*, 3 D. & E. 816.

Footways 1 and 2 passed through old inclosures.

By stat. 1 & 2 G. 4, c. 32, private, "for inclosing lands within the manor and parish of Easthampstead, in the county of Berks," after reciting that there were within the said manor and parish certain open and common fields and commons, heaths, and other uninclosed commonable lands and waste grounds, containing in the whole, &c., and that the Marquis of Downshire was lord of the said manor, and as such entitled to the soil of the said commons, heaths and other uninclosed commonable lands and waste grounds, that the marquis and others were intitled respectively to parcels of the said open and common fields, and were or claimed to be entitled to or interested in the herbage upon, and certain rights of common over, the said open and common fields, and common or waste lands, or some part or parts of them; reciting also the General Inclosure Act, 41 G. 3, sess. 2, c. 109; and that the estates of the several parties lay intermixed, &c., and that if the common fields, commons, &c., were divided, allotted, and inclosed, they would be of greater value; it was enacted that certain persons should be commissioners for putting the Act in execution in such manner, and with such powers, &c., as were in this Act after [701] contained, and with such of the powers and subject to such of the rules, &c., contained in the recited Act, as were not repugnant to, or altered, or otherwise provided for, by this Act.

And by sect. 18 it was enacted (a): "That the said commissioners shall, and they are hereby authorised and required in the first place, before they shall proceed to make any of the divisions and allotments, directed to be made by this Act, to set out and appoint all and every such public carriage roads and highways, in, through, and over the lands and grounds hereby directed to be divided and allotted, or in, through, and over any of the old inclosed lands or grounds within the said parish, as they shall judge necessary, and to divert, alter, turn or stop up any of the present public or private carriage roads or highways, or footpaths, in, through, or over any part of the said parish of Easthampstead as the said commissioners shall think proper, provided the roads and highways to be set out and appointed by the said commissioners, shall be and remain thirty feet wide, at the least, and be set out in such directions, as shall upon the whole, appear to them most commodious to the public; and the said commissioners shall ascertain the same by marks and bounds, and prepare and sign a map, in which such intended roads shall be accurately laid down and described, and cause the same, when so signed, to be deposited with their clerk, for the inspection of all persons concerned; and as soon as may be afterwards, the said commissioners shall give notice;" (directions were then added for giving public notice of the setting out of such roads [702] and depositing of such maps, and also notice of the general lines of such intended carriage roads;) "and shall also appoint, in and by the same notice, a meeting to be held by the said commissioners, at some convenient place," &c. "and not sooner than fourteen days from the date and publication of such notice, to take the same into consideration; and if any person who may be injured or aggrieved by the setting out of such roads, shall attend at such meeting, and object to the setting out of the same, then the said commissioners, together with any justice or justices of the peace, residing or acting in and for the division in which the said parish of E. is situate, and not being interested in the said division and allotment, shall hear and determine such objection, and the objections of any other such person to any alteration, that the said commissioners, with any such justice or justices, may in consequence propose to make; and the said commissioners, together with such justice or justices as aforesaid, shall, and they are hereby required, according to the best of their judgment, upon the whole, to order and finally direct how such carriage roads shall be set out, and either to confirm the said map, or make such alterations therein as the case may require. And all roads, highways, ways and paths, in through and over the said parish of E., or any part thereof, which shall not be set out, or finally ordered and directed to be set out or continued as aforesaid, shall be for ever stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided and allotted by virtue of this Act, and shall be divided and allotted accordingly: Provided always, that none of the present roads" in E. shall be shut up or discontinued, until the [703] roads intended to remain or be the public roads in future shall be set out as by this Act directed, and properly formed and made safe and convenient for horses, cattle, and carriages: "Provided also, that no roads passing or leading through

(a) See the General Inclosure Act, 41 G. 3, sess. 2, c. 109, ss. 8, 11.

any of the old inclosures within the said parish, shall be stopped up, diverted, turned, or in any other way altered, without an order for that purpose, under the hands and seals of two of His Majesty's justices of the peace for the said county of Berks, not interested in the repair of such roads, in the manner and subject to appeal, and giving such notice as is directed by an Act passed," &c., 55 G. 3, c. 68.

The commissioners set out a number of public carriage roads or highways, and likewise certain private roads, which were drawn out on a map, and the map, after notice given and a meeting held according to the Act, was duly confirmed. Among the roads marked as private was Bond's Lane road, described by the commissioners as a "private occupation road or driftway of the width of twenty-five feet," except where it passed through old inclosures, leading from one to another of the public carriage ways newly set out as above stated. Part of this road was comprised in highway No. 1 (Bond's Lane), and part in highway No. 4, above described as a continuation of Bond's Lane over the waste. Three other roads (East Hampstead Park Road, East Hampstead Park Lane Road, and Jenning's Hill Lane Road) were set out in like manner as private, and these were comprised in highway No. 7, above described. Highways 2, 3, 5, and 6, and footways, 1 and 2, were not set out.

[704] For the purpose of stopping certain of the above ways which passed through old inclosures (according to the proviso in sect. 18 of the local Act), three justices, at a Petty Session holden March 23d, 1827, made the following order:—"Easthampstead Inclosure. We Augustus Schutz Esquire, Thomas Garth Esquire, and the Reverend Henry Ellis St. John, clerk, three of His Majesty's justices," &c., "At a Special Session held by us at," &c. "on this 23d day of March 1827, in pursuance of the authority vested in us in and by an Act," &c. (reciting the local Act 1 & 2 G. 4, c. 32, and statutes 41 G. 3, sess. 2, c. 109, and 55 G. 3, c. 68); "or any of them, having particularly viewed the public roads and footway within the said manor and parish of Easthampstead hereinafter particularly described; and we not being interested in the repair of the said roads and footway, and being satisfied that the highways, bridleways, and footways intended to remain and be the public highways, bridleways, and footways in future within the said parish are continued, or have been set out and properly formed and made safe and convenient, according to the provisions and directions of the said first mentioned Act, and that the roads and footways hereinafter described are unnecessary to be continued, do order that the same public roads and footways be stopped up and extinguished, that is to say," Easthampstead Park Road, leading, &c. (describing its direction and termini as the commissioners had stated them in setting out this road as above mentioned; p. 703); Easthampstead Park Lane Road (describing it in like manner); Jenning's Hill Lane Road (describing it in like manner): footway, &c. (describing its course and **[705]** termini). "So that the same roads and footway may be divided and allotted pursuant to the directions of the said first mentioned Act of Parliament. Given," &c.

Signed by the three justices.

The roads were No. 7 of the highways, and the footway No. 2, of the footways, in question on this indictment. One of the magistrates summoned to the Petty Session was not served with the summons till March 20th. The order was confirmed, without appeal, at the Quarter Sessions, holden April 24th.

The commissioners executed their award, August 1st, 1827, specifying therein the several public carriage roads or highways and private roads set out and described by the said commissioners as above mentioned. And, after referring to two orders of justices, made in 1825 (of no importance here), the award proceeded as follows:—"And whereas, in further pursuance and execution of the said three several Acts," &c., Augustus Schutz, &c., "three of His Majesty's justices of the peace for the said county of Berks, at a Special Session held by them in the parish of Easthampstead aforesaid, on," &c. "did order that the several public roads and footway therein and hereinafter described, be thenceforth stopped up and extinguished, that is to say" (then followed a description of the ways mentioned in the order of March 23d 1827, in the words there used); "And whereas the said last-mentioned order at a General Quarter Sessions of the Peace, holden at Newbury, in and for the said county of Berks, on Tuesday, the 24th day of April last, was confirmed, filed, and enrolled among the records of the said sessions: now be it further known that the said Thomas Chapman and Richard Crabtree, as such commissioners as aforesaid, do hereby **[706]** declare and award that the said several roads in the said three several orders, or either of

them, particularly mentioned and described, shall be for ever stopped up and extinguished as public roads; and that the said three several last-mentioned roads, called Easthampstead Park Road, Easthampstead Park Lane Road, and Jenning's Hill Lane Road, shall be for ever hereafter for the exclusive use and occupation of the person or persons whose lands adjoin thereto on either side thereof, and that the said several footways in the said three several orders, or either of them, particularly mentioned and described, shall be for ever stopped up and extinguished."

The waste lands, over which highways 2, 3, and 4, and highways 5 and 6, passed, were allotted to the defendant.

The defence was, that highways 1 to 6, and footway 1, were stopped by the award and the operation of the local Act; that highway 7 and footway 2 were stopped by the order of justices; and that the stopping of these ways had an effect, in addition to that of the Award and Inclosure Act, in extinguishing highways 5 and 6.

The jury found that all the roads which had been the subject of proof were ancient ways; and, under the learned Judge's direction, they returned a verdict of not guilty, leave being reserved to the prosecutor, by consent, to move to enter a verdict of guilty.

Ludlow Serjt., in Easter term, 1834, moved accordingly (*a*)[1]. He contended, as to highway 7 and footway 2, that the order of justices was bad, because the **[707]** summonses to the magistrates to attend the Petty Session were not all delivered in proper time; and because it did not appear, by the order, that it was made upon view, as required by stat. 55 G. 3, c. 68. He took some other objections to the order, upon which the Court gave no opinion (*a*)[2]. He further urged that part of the recital, made by the commissioners in their award, was unsupported by any further proof. Parke J. observed that the award was primâ facie evidence of the facts recited in it; and no further notice was ultimately taken of this head of objection. As to highway 1 (Bond's Lane), and footway 1, he objected that, as they ran between old inclosures, they could not, by the local Act, be stopped without an order of justices; and further, as to highway 1, that, although the commissioners had professed to set it out as a private occupation way, they had not allotted the soil, and that the new denomination they had given it did not, under the circumstances, deprive it of the character it anciently had, of a public highway. And, as to highways 2, 3, 4, 5, 6, he contended that if highways 1 and 7 were not legally stopped, these, being continuations of them, remained open likewise. A rule nisi was granted, against which

Jervis, R. V. Richards, and Talbot, shewed cause in Trinity term 1835 (*b*). First, as to the objections to **[708]** the order of justices. It is contended that the summonses to attend the Special Session appear not to have been all served in reasonable time, and, therefore, that the Quarter Sessions ought not to have confirmed the order, on which point *Rex* v. *The Justices of Worcestershire* (2 B. & Ald. 228), was cited. But no precise rule is there laid down as to the time at which service shall be deemed reasonable; nor can there be a general law on the subject. *Rex* v. *Sheppard* (3 B. & Ald. 414), and *Rex* v. *The Justices of Surrey* (5 B. & C. 241), were also cited: but, in the one case, the order did not purport to have been made at a Special Session at all; in the other, notices had not been served by the proper officer. Neither case is applicable. And the present objection, if available, should have been made the ground of an appeal: the justices in sessions are the proper persons to judge of it. By stat. 55 G. 3, c. 68, s. 4, which is incorporated by reference in sect. 18 of the present Act, if there be no appeal, the order and proceedings are conclusive. On the objection, that the order does not sufficiently appear to have been grounded on the view of the justices, a later case of *Rex* v. *The Justices of Worcestershire* (8 B. & C. 254), was cited. But there the words of the order were:—"We—having upon view found, or it having appeared to us;" the justices did not even assert that they had viewed. Here they say, "We—having particularly viewed the public roads and footway;" "and we, not being interested"—"and being satisfied that the highways," intended to be the public highways in future, are properly formed, do order, &c. Of the two analogous forms

(*a*)[1] Before Lord Denman C.J., Littledale, Parke, and Patteson Js.

(*a*)[2] One of these was, that several roads were stopped by the same order. See *Rex* v. *Milverton*, Mich. t. 1836, where it was held that such an order is bad.

(*b*) Before Lord Denman C.J., Littledale, Patteson, and Williams Js. The case was argued, June 1st and 2d.

(xvi. and xviii.), [709] in the schedule to stat. 13 G. 3, c. 78, one, No. xvi., uses the words, "having upon view found;" but those particular words are not absolutely necessary; and stat. 55 G. 3, c. 68, gives no form of an order for stopping. The argument on the other side seems to assume that the view and the order must take place at once, and the order be worded accordingly; but that is not required.

The main question, however, is, whether the highways 1 to 6 are extinguished by the Inclosure Act and award. Now supposing that highway 1 (Bond's Lane) was not legally stopped, for want of an order of justices, it does not follow that highways 2, 3, and 4, which communicated with it, and ran over the waste, and were not set out as public roads by the commissioners, remained open also. This point arose in the case of *The Marquis of Downshire* v. *Makepeace*, tried at the Reading Spring Assizes 1832, where the present defendant brought trespass against the present prosecutor, and he pleaded a right of way on the same highways which are called 2 and 3 in this cause. Littledale J., in summing up that case to the jury, adverted to the argument on behalf of the plaintiff, which was that, when the Legislature gave power to the commissioners, generally, to stop up roads leading over the lands to be allotted, and empowered them also to stop up roads leading through old inclosures by an order of two justices, the restriction, as to the order of justices, must be confined in its effect to the roads actually within the old inclosures; and the learned Judge added, "I must own that appears to me the right construction of the Act; for it would come to this, that almost all the roads in the lands or commons to be inclosed would lead by one [710] means or the other into roads in the old inclosures, and the result would be, that there could scarcely be a road set out in the whole inclosure except by the concurrence of two justices; and therefore it appears to me the true construction of the Act, that this power for stopping up roads in the old inclosures requiring the concurrence of two magistrates, is to be confined to roads of the old inclosures" (*a*). That argument applies both to highways 2, 3, and 4, and to highways 5 and 6. They are extinguished by the award and Inclosure Act, independently of any circumstance affecting the condition of highway 1 (Bond's Lane) and highway 7, with which they respectively communicate.

Then, as to highway 1 (Bond's Lane). Not only is the stopping of Bond's Lane unnecessary for the purpose of stopping roads 2, 3, 4, but, on the other hand, admitting that Bond's Lane, so far as it passes through old inclosures, would not be stopped by the mere omission of it in the award, it is in effect stopped, because the roads on the waste, highways 2 and 4, which were the continuations of Bond's Lane, are extinguished as public ways by the award. Bond's Lane, then, becomes a mere cul de sac; and such a place cannot be called a highway. In *Wood* v. *Veal* (5 B. & Ald. 454), Abbott C.J. said, "I have great difficulty in conceiving that there can be [711] a public highway which is not a thoroughfare." *Logan* v. *Burton* (5 B. & C. 513), is distinguishable. There a clause in a local Inclosure Act enabled commissioners to stop up old roads in the parish, "besides the roads which passed over the lands to be inclosed," provided it were not done without the concurrence of two justices; and this was held not to be confined to roads lying wholly without such lands; the Court being of opinion that, where a road passed partly through such lands and partly through others, the consent of two justices was requisite for stopping the latter portion; because otherwise, by stopping this, the whole might, in effect, be stopped without such consent. That, however, does not shew that, because highway 1 (Bond's Lane) passes through old inclosures, therefore highways 2 and 4, which communicate with it, could not be stopped without an order of justices, and, being so stopped, produce a consequent stoppage of Bond's Lane. The powers given by the local Act in that case were only an extension of the same powers which are conferred by sections 8, 10, and 11, of the general Act, 41 G. 3, sess. 2, c. 109; here the authority of the commissioners is derived from the local Act, 1 & 2 G. 4, c. 32, s. 18, which re-enacts

(*a*) From the note used by the defendant's counsel in opposing the present rule A rule nisi was obtained for a new trial in *The Marquis of Downshire* v. *Makepeace* (the plaintiff having obtained a verdict); and, upon cause shewn, Hil. t. 1833, the rule was discharged; but it does not appear that the Court decided the above point. Parke J. observed, upon the motion, that, according to the argument used, probably no road in the district could be stopped, since every highway would lead to some road passing through old inclosures.

the General Inclosure Act, but with alterations. It empowers the commissioners not only to set out and appoint highways over the lands to be inclosed (which is the authority given by the general Act), but to divert, alter, turn, or stop up any of the present highways over any part of the parish; and it enacts that all highways in, through, or over the said parish, or any part thereof, which shall not be set out, or finally **[712]** ordered to be set out and continued as aforesaid, shall be for ever stopped up and extinguished. This last provision is independent of their direct power to stop: and the powers given by the clause affect the inclosed lands as well as those to be allotted, except so far as they are controuled by the proviso that no road between old inclosures shall be stopped, &c., without an order of justices. But here the road between old inclosures is not touched by the commissioners; only the continuation of it over the waste is stopped, by not being preserved, and, in consequence, Bond's Lane ceases to be a thoroughfare, and comes within the dictum of Abbott C.J. in *Wood* v. *Veal* (5 B. & Ald. 454). In producing that result, the commissioners do not overstep the particular limitation imposed by the proviso. Besides, this case cannot be assimilated to *Logan* v. *Burton* (5 B. & C. 513), without contending that the highways which form the continuation of Bond's Lane over the waste are one and the same with it; but this would be like arguing that the whole road from London to the north of England was one with Portland Place. The same observations will apply to *Harber* v. *Rand* (9 Price, 58), and *Thackrah* v. *Seymour* (1 Cro. & M. 18), as to *Logan* v. *Burton* (5 B. & C. 513). The effect of omitting to set out a formerly existing way, under the General Inclosure Act, was considered in *White* v. *Reeves* (2 B. Moore, 23). [Patteson J. Bond's Lane is found to have been formerly a public road. The commissioners have not omitted it in their award, but have assumed to make it a private way, or at least treat it as such.] When the continuation over the waste was stopped, Bond's Lane became a cul de sac, and there-**[713]**-fore was as if it had never been public. Under those circumstances the commissioners set it out as an occupation road. Supposing that they had not power to do so, they have not the less stopped it, as to the public, which they had authority to do. [Patteson J. It has been held that, where there never was a right of thoroughfare, a jury might find that no public way existed; but it has never been settled that, where there had been a public right of passing through, the right of way was abolished by stopping one end of the passage.] It is to be assumed that the stoppage is made legally. [Patteson J. That would not make the remaining passage not public. And here, if Bond's Lane was in effect stopped, it should have been allotted according to the local Act.] That provision does not apply where the way is merely stopped by operation of law. [Patteson J. The commissioners have thought this a private road, and treated it as such; and it now turns out to be public. We must deal with it as we can, under the circumstances.]

Then, as to footway No. 1. That is extinguished by the award and local Act, not being set out. It is true that no order of justices was obtained for stopping it, and that it passes through old inclosures; but the proviso, that no "roads" passing through old inclosures shall be stopped without such order, applies only to horse and carriage roads. A distinction is made between footpaths and roads in the beginning of sect. 18, where the commissioners are authorised to "set out and appoint all and every such public carriage roads and highways" over the lands to be allotted, or through the inclosed lands, and to divert, alter, turn, or stop up "any of the present public or private carriage roads **[714]** or highways, or footpaths," "provided the roads and highways to be set out by the said commissioners shall be and remain thirty feet wide at the least." The same kind of distinction runs through the rest of this section. [Patteson J. Acts of Parliament are so loosely worded that an argument from the use of one word in one part of a clause, and another in another, has not much weight with me. I should take "road," here, to mean any thing over which the public has any right to go. Littledale J. The last proviso in the section requires an order in the manner directed by stat. 55 G. 3, c. 68, which does extend to footpaths.]

Ludlow Serjt., Sir W. W. Follett, and Maclean, contrà. First, as to the order of justices for stopping highway 1, and footway 2. The lapse of time may perhaps be an answer to the objection on the insufficiency of the summons. [Lord Denman C.J. We are all of opinion that the order cannot be questioned at this distance of time, unless it be defective on the face of it, or there distinctly appear a want of jurisdiction (*a*).] Then, as to the allegation of view. It is true that *Rex* v. *The Justices of*

(*a*) See *Rex* v. *The Justices of Cambridgeshire*, ante, p. 111.

Worcestershire (8 B. & C. 254), differs from this case, because there the fact of view was only stated alternatively. But Bayley J. says there that "the justices have no jurisdiction to stop up the highway unless they pursue the power given to them by the Legislature;" and that they ought "to shew on the face of the order that they have had a view, and that it had appeared to them on view that the highway was unnecessary. They ought either to use the words **[715]** of the Act of Parliament, or other words of equivalent import." Here, so far as can be collected from the order, the justices may have viewed the road, but have been satisfied by other evidence that it was unnecessary.

Then, as to the other highways. It is said that Bond's Lane was made a cul de sac. If by that process it was stopped, it has been stopped without an order of justices; and, as the road lies through old inclosures, the proceeding is void. The commissioners could not do indirectly what they might not do directly. And, if it was not stopped, the public has still a right to use it. *Wood* v. *Veal* (5 B. & Ald. 454), is no authority; there the question was, whether the public had acquired a new right by dedication: here the public has clearly had the right; and the question is, whether the proceeding adopted had taken it away. At least the public might continue to go as far as the point where the stoppage is said to have taken place. If the effect of extinguishing the roads over the waste be to stop Bond's Lane altogether, it follows that those roads could not legally be extinguished. This was the view taken of a similar case by the Court of Exchequer, in *Thackrah* v. *Seymour* (1 Cro. & M. 18), where Lord Lyndhurst observed, that "no power was given to the commissioners to stop up the part of the way passing over the old inclosure; yet, if they stopped up the part which led over the waste lands, they would thereby, in effect, stop up the way which passed over the old inclosures." [Williams J. It is difficult then to say what effect could be given to the power of stopping roads over the waste; for there can scarcely be a road confined to the waste, and not leading somewhere else. **[716]** Littledale J. According to the argument, a consent of justices would be necessary for almost every road that is stopped or discontinued.] The power to stop without an order of justices was probably meant to apply to private roads over the waste, which often have no communication with the roads passing between inclosures; and to public tracks, also running over the waste, and merely connecting the greater highways. But if highways actually leading through old inclosures may be stopped incidentally, by extinguishing those highways over the waste which are continuations of them, the whole traffic of the district may be intercepted, notwithstanding the privisoes in the Acts of Parliament, by the mere silence of the commissioners in their award. This appears to have been the view taken by the Courts of Exchequer and King's Bench of the cases of *Harber* v. *Rand* (9 Price, 58), and *Logan* v. *Burton* (5 B. & C. 513); and the difference relied upon, between the General Inclosure Act and the local Act here in question, is not sufficient to distinguish those cases from the present.

Then, as to footway No. 1. The words "highways" and "roads," in sect. 18 of the local Act, are loosely employed; but it is expressly said, that "all roads, highways, ways, and paths," not set out or continued under this Act, shall be stopped up and extinguished; and in the final proviso, requiring an order of justices, "roads" is used as a nonem generalissimum, including every kind of way before mentioned. There is no reason that the protection given by the proviso for the public benefit should not extend to footpaths. The proviso refers to stat. 55 G. 3, c. 68, which includes every de-**[717]**-scription of way. And *Thackrah* v. *Seymour* (1 Cro. & M. 18), shews that, under the General Inclosure Act, if a footway runs partly through old inclosures and partly over waste, the mere silence of the commissioners in their award will not extinguish such a way.

Cur. adv. vult.

Lord Denman C.J. in this term (January 26th) delivered the judgment of the Court.

This was an indictment against the defendant for obstructing certain foothpaths and highways in the parish of Easthampstead, in the county of Berks, tried before my brother Park at the Spring Assizes at Reading 1834, when a verdict was found for the defendant, with liberty for the prosecutor to move this Court to enter a verdict of guilty as to all or any of the said roads which, upon the evidence, should not appear to have been legally stopped.

The roads were nine in number; that is to say, Nos. 1 and 2 footways (as laid down in the plans both of the prosecutor and defendant, which agreed), and numbers from 1 to 7 inclusive, highways, the former (No. 1) being called in the evidence, and upon the plans, Bond's Lane, the latter (No. 7) being called in the report "the road to the North," and, by the plans also appearing to go in that direction. Into No. 1 highway (Bond's Lane) ran the roads over certain commons, before their inclosure designated by the Nos. 2, 3, and 4, in both the plans respectively; and into No. 7, or "the road to the North," ran the Nos. 5 and 6, also passing over commons, and also laid down [718] in the plans of the prosecutor and defendant. As to the roads generally, they were found by the jury, or admitted by the defendant's counsel, to have been public; that is to say, the two first mentioned to have been public footways, and the seven last mentioned to have been public highways. The burthen therefore of shewing that they ceased to be such, or, in other words, had been legally stopped, clearly lay upon the defendant.

For this purpose, as to No. 2 footway and No. 7 highway, a certain order of justices, bearing date 23d of March 1827, was relied upon; and as to the Nos. 5 and 6, before described as leading into No. 7, that they were virtually stopped by the same order. As to the rest, viz. No. 1 footway, and No. 1 highway (Bond's Lane), and Nos. 2, 3, and 4, leading into it, certain acts of commissioners, under statute 2 G. 4, session 1821, intituled "An Act for Inclosing Lands within the Manor and Parish of Easthampstead, in the County of Berks," were relied upon. Indeed it was, by some of the counsel for the defendant, contended that what had been done under the above cited Act was effectual for stopping all the roads; and that the order of justices, as to those to which it applied, was ex abundanti cautelâ only, and superfluous.

It may therefore be convenient perhaps, first, to consider the last-mentioned ground of defence, applicable to all. By the Act in question (ps. 12 and 13), commissioners are empowered to make new roads, and also, "to divert, alter, turn, or stop up any of the present public or private carriage roads, or highways, or footpaths" over the said parish of Easthampstead, as they shall think proper. They are also directed to pre-[719]-pare and sign a map, describing the roads, and to give certain notices therein prescribed; and to hold a meeting for the purpose of hearing objections and complaints, in which they are to be assisted by a justice or justices of the peace for the division in which the said parish of Easthampstead is situate: the said commissioners and such justice or justices to have power to confirm or alter the said map. Then comes the clause upon which reliance on behalf of the defendant is placed: "And all roads, highways, ways, and paths in, through, and over the said parish of Easthampstead, or any part thereof, which shall not be set out, or finally ordered and directed to be set out and continued as aforesaid, shall be for ever stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided and allotted by virtue of this Act." It has therefore been argued that, as none of these roads have been set out and continued, they are at once extinguished. We think, however, it is unnecessary to do more than to refer to the proviso contained in the very clause which confers the above mentioned powers upon the commissioners, for the purpose of shewing that the argument has no weight:—"Provided also, that no roads passing through any of the old inclosures within the said parish, shall be stopped up, diverted, turned, or in any other way altered, without an order for that purpose under the hands and seals of two of His Majesty's justices of the peace for the said county of Berks;" which is to be subject to appeal in the manner directed. We consider this to be decisive; and that, consequently, as to No. 1 footway, and No. 1 highway (Bond's Lane), which are uncovered by any such order, they still exist in point of law, as a foot and highway [720] respectively, passing as they do undoubtedly, according to both the plans, through old inclosures. It is scarcely necessary to add, that the force of this proviso seems to have been felt, or else why was an order of justices procured for Nos. 2 and 7 (foot and highway) respectively?

We are next to consider the effect of No. 1 highway (Bond's Lane) existing still, so far as Nos. 2, 3, and 4 highways, leading into it, are concerned. We call them highways, because, as has already been observed, they were found or admitted to be so, subject, of course, to the effect of the proceedings which we have already noticed. Their leading over commons is clearly a circumstance wholly immaterial as to their character of public highway or not; and assuredly they may, and indeed must, be

such, if, in the direction leading from Bond's Lane, they terminate (as in Bond's Lane they do) in an ancient and public highway; the consequence therefore seems to be, and we think is, that, Bond's Lane still remaining in law a highway, those above mentioned (2, 3, and 4,) remain so likewise. It seemed at first as if another course (laid down upon the prosecutor's plan) had been intended to be substituted for, and to supersede, the last mentioned roads, Nos. 2, 3, and 4. It is obvious, however, that this cannot be, for there is no public communication between that course which we are noticing and Bond's Lane, that communication (such as it is) being expressly laid down as a private road.

We are, lastly, to examine the effect of the order of justices, above adverted to, by which (independent of the supposed stoppage by their not being continued as roads by the commissioners) No. 2 footway, and **[721]** No. 7 highway, are supposed to have been legally stopped, or, in other words, we are to examine the validity of the order of justices. That order is (his Lordship here read it). Now, in ascertaining how far this order can be sustained, or not, it is to be premised that it must be made "upon view" of the justices. So says the statute; and accordingly we consider that an enquiry is not open to us, whether any other mode of proof be sufficient to inform and satisfy them. Actual inspection is to be the foundation of their jurisdiction: and perhaps a knowledge of the state of the country (necessary and commodious passage and communication, &c.) may be better so acquired, than otherwise:—so it is written, however. Now, upon this subject of the jurisdiction of justices of the peace, we are not aware that there is any material distinction of this Court between the mode of construction of an order of justices, and a conviction by them, whatever favourable intendment may be made in support of the former, when once the essential point of jurisdiction is established. See the case of *Rex* v. *Hulcott* (6 T. Rep. 583), upon this point. This point, therefore, being (as we conceive it is) perfectly clear, the question is, whether the original allegation of a particular view does necessarily, or by fair construction, extend over the whole order up to the passage which directs the stoppage: or, rather, does not the statement of "being satisfied," &c. stand wholly independent of the original allegation of view? Whatever might have been the inference, if the recital had been continued in an unbroken chain from the beginning to the end, the case is otherwise here. The clause containing **[722]** the original and material allegation of a "view" is separated in a very marked manner from that wherein the satisfaction of the justices, and the grounds of it, are contained. It would be a very violent and forced construction, as we think, to refer the grounds of the procedure by the justices to the view, in the earlier part of the order, rather than to some other means, by which their judgment was influenced, and themselves "satisfied," as declared in the subsequent part of that order. We think that it does not, by any fair or reasonable inference (and such only ought we to apply) follow, that the motive, operating upon the justices, was the view only. They might, consistently with a fair and reasonable construction of the order, have been influenced by other proof. If so, the justices never obtained jurisdiction over the subject, and their order cannot be supported (*a*). And that is our opinion; and, therefore, No. 2 footway, and No. 7 highway, stand in the same position as the other roads, respecting which we have already pronounced our opinion. We have only to add that, the effect of the order of justices being removed, Nos. 5 and 6 (branches, if they may be so called, of No. 7, because leading into it) are in the same situation, with respect to No. 7, that 2, 3, and 4, are with respect to No. 1 highway, Bond's Lane. It is not necessary, therefore, to repeat the reasons which induce us to arrive (as to them) at the same conclusion.

The result therefore is, that a verdict must be entered for the Crown, as to all the roads above particularly specified.

Verdict to be entered for the Crown.

[723] THE KING *against* THE INHABITANTS OF EDGE LANE. Monday, February 1st, 1836. Where trustees are authorised to make a turnpike road from A. to C., the entire road must be completed before the public can be compelled to repair any part. Although the road from A. to B. (an intermediate point) has been

(*a*) See *Rex* v. *The Justices of Cambridgeshire*, ante, p. 111.