

## STEPHEN DAVIS vs. ENOCH CLEMENTS.

The warrant from selectmen to a surveyor of highways to collect highway taxes, need not be under seal.

The return of a surveyor of highways upon his warrant of his doings is not competent evidence to be offered by him to a jury to prove the facts stated in the return.

THIS was an action of trespass for taking two steers of the plaintiff and converting them to the defendant's own use.

The defendant pleaded that as to the force and arms, &c. he was not guilty; and as to the residue he pleaded in bar that being surveyor of highways, he took the steers as a distress for the non-payment of highway taxes by the plaintiff. The plaintiff replied, that the defendant, of his own wrong and without any such cause as by him alleged took, the steers, &c. and concluded to the country, upon which issue was joined.

The cause was tried here at February term, 1821, when it appeared in evidence, that the defendant was duly chosen surveyor of highways, in Alton, in this county, for the year 1816; that the selectmen of that town committed to him a list of highway taxes to be by him collected, and a warrant to collect the same, but the warrant was not under seal; and in order to prove his proceedings in distraining the plaintiff's oxen, the defendant offered the return of his doings on the back of his warrant to the jury, and the same return was admitted in evidence to the jury by the court, and a verdict taken for the defendant, subject to the opinion of the court upon the validity of the said warrant and upon the admissibility of the said return as evidence to the jury.

*Eastman*, for the plaintiff.

*Barker* and *I. Bartlett*, for the defendant.

RICHARDSON, C. J. The first question which this case presents for our decision, is, whether a seal is essential to the validity of the warrant of a surveyor of highways? The statute of February 27, 1786, entitled "an act for mending and repairing the highways in this state,"<sup>(1)</sup> authorizes every town to raise, at their annual meetings in March, such sum of money as they shall think proper for making, mending and repairing highways and bridges; to be assessed upon the polls and estates of the inhabitants by the selectmen in the same manner the state tax is assessed, and the same act

(1) 1 N. H. Laws 387.

Davis  
vs.  
Clements.

provides that said towns shall choose surveyors of highways, and that "the selectmen shall on or before the first day of June after the choice of such surveyors, limit their several districts and give to each surveyor a list of each person belonging to his district and of their respective proportion of the sum voted to repair the highways as aforesaid." The act then directs surveyors to warn the inhabitants of their respective districts to work on said ways, "and if any person shall refuse, &c. the said surveyor is hereby authorized and required to levy the delinquent's part, or proportion of said money by distress," &c. And the surveyors are directed by the act to settle accounts with and pay the balance if any there be in their hands, to the selectmen, or town treasurer, "agreeable to the warrants or directions given them for that purpose."

Such are the provisions of our statute in relation to the assessment and collection of highway taxes, and the statute does not require a warrant under seal to be delivered to the surveyor of highways in order to enable him to make a distress. It seems now to be well settled that a seal is not essential to the validity of a warrant, unless made so by statute. *Willes Rep.* 411, *Podfield vs. Cabell et al.*—*Buller's N. P.* 83.—3 *Levintz* 204, *Aylesbury vs. Harvey*. We are therefore of opinion that the warrant in this case, although not under seal, was sufficient.

The other question to be settled in this case is, whether the surveyor's return of his doings upon the warrant, was competent evidence to be offered by him to the jury to prove the facts stated in the return? And we are clearly of opinion that it was not competent evidence. His warrant was not returnable process; the statute has made it the duty of surveyors of highways to settle accounts and pay over any balance in their hands to the selectmen or town treasurer, but has not made it the duty of the surveyor to make any return of his doings upon his warrant. Where the law has made it the duty of a public officer to make a return of his doings, and has made him responsible for the truth of his return, a return may be evidence; but this is not that case.

Davis  
vs.  
Clements.

The return of the surveyor in this case is no better evidence for him than his own confessions and declarations would be, and was clearly incompetent evidence to be offered by him to the jury.

*Verdict set aside and new trial granted.*

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ROCKINGHAM, SEPTEMBER TERM, 1821.

EPHRAIM FARNUM vs. THE TOWN OF CONCORD.

Of the liability of towns for injuries resulting from defects in roads and bridges.

THIS was an action of the case brought by the plaintiff to recover the value of a horse alleged to have been drowned in consequence of the neglect of the inhabitants of Concord to repair a highway, which they were by law bound to keep in repair. The cause was tried here at February term, 1820, upon the general issue, when a verdict was taken for the defendant, subject to the opinion of the court upon the following facts.

The highway in question is on the west bank of Merrimack river in the town of Concord, and is, at the place, where the accident happened, about twenty-four feet wide, and the common travelled path is in the centre of the highway. Previous to the 12th May, 1819, there had been a hole in the east side of the travelled path three or four feet deep and about a foot over, and at the same time there was on the west side of the highway nearly opposite to the hole on the east side a hollow place of considerable extent. The distance between the hole on the east and the hollow on the west side of the highway was about twelve feet. On the said 12th May, 1819, the river had arisen so as to overflow the road in this place from one and a half to two feet deep, and Mr. Kent, in whose possession the horse was, coming to the place with the horse in a chaise, and observing the road overflowed and the water very turbid, so that no part of the road could be seen, procured a boy to conduct him through the

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66	544
2	392
67	321
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70	108
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