

CAMPBELL, *Ap't*, v. WINDHAM.

Proceedings before the selectmen in laying out a highway are not necessarily quashed for error on appeal; but the case may be referred to the county commissioners, upon whose report the decision of the selectmen may be affirmed, modified, or reversed.

APPEAL from the laying out of a highway by the selectmen of Windham, and from the assessment of the plaintiff's land damages. The main reason of appeal from the laying out was want of notice of the hearing to the plaintiff and other persons interested, such as is required by law. There was also a motion to quash the proceedings of the selectmen for the same cause. Facts found by the court.

*G. C. & G. K. Bartlett*, for the appellant.

*The Selectmen*, for the defendants.

ALLEN, J. The plaintiff, taking an appeal from the laying out of a highway over his land by the selectmen of Windham, now moves to quash the proceedings before the selectmen for want of notice. The proceedings before the board of selectmen are not necessarily quashed for error on appeal. The plaintiff cannot complain if the tribunal to which he has appealed shall hear him upon the matters about which he claims he had no opportunity of being heard before the selectmen. The whole case, so far as it is before the court, is referred to the commissioners, who are to consider the matters in regard to which the appeal is taken, and upon their report the decision of the selectmen may be affirmed, modified, or reversed. G. L., c. 69, s. 12; *Peirce v. Portsmouth*, 58 N. H. 311.

The error of the selectmen was not one affecting the merits of the case, as in *Underwood v. Bailey*, 59 N. H. 480, in which the petition was dismissed for the reason that land could not be taken for a highway for the accommodation of an individual without the consent of the owner. To grant the motion made in this case would compel the petitioners for the highway to begin anew and bring the plaintiff here again on appeal, involving the injustice and vexation of circuitry, and furnishing no benefit to which he is legally entitled.

*Motion denied.*

SMITH, J., did not sit: the others concurred.