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 Henniker v. Hopkinton.
 

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and may maintain a real action or trespass against the debtor continuing in possession after the levy.

The same doctrine has been recognised in this State, *Bell v. Ham*, 16 N. H. Rep. 302, in which it was held that an extent of an execution gave seizin to the creditor, as against the judgment debtor in possession.

We have no hesitation in holding in the present case that the defendants were trespassers after the levy and demand of possession.

*Judgment on the verdict.*

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 HENNIKER v. HOPKINTON.

If the two termini of a line between two towns be established, the line will be deemed a straight one unless the contrary appear by description, or by perambulations of selectmen.

If the monuments ascertained leave it doubtful where the perambulated line is, the original presumption will prevail.

PETITION, to establish the line between the towns of Henniker and Hopkinton. The parties agreed to the following statement of facts:

By the original plans the line between the two towns is a straight one. There is no dispute about the bounds at the ends of the line at the corners of the towns. In 1792, the line was perambulated by a committee of the two towns, appointed for that purpose, and the record of their doings shows that they commenced at the southerly end of the line, and run north, 18 deg. west, 6 miles and about 160 rods, to the north end of the line, and

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*Henniker v. Hopkinton.*

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“set stakes on said line, forty rods distant from each other, which we agree to be the line between Hopkinton and Henniker.”

In 1800 the line was perambulated by the selectmen of said towns, the record of whose doings shows that they commenced at the north bound, and run south, about 18 deg. east, about 6 miles and 160 rods, “to the south bound,” and renewed the stakes and stones, and spotted the trees on said line again, which the committee from said towns did November the twentieth, one thousand seven hundred and ninety-two.

In 1808 the line was perambulated by the selectmen of said towns, and the record of their doings shows that they commenced at the north bound, and run south about 17 deg. east, 6 miles and 232 rods, to the south bound, and renewed the marks and bounds on said line, which the committees of said towns agreed to, November the twentieth, one thousand seven hundred and ninety-two.

In 1817 the line was again perambulated by the selectmen of said towns, and the record of their return shows that they began at the north bound, and run south about 17 deg. east, 6 miles and 232 rods, “to the south bound,” and have renewed the marks and bounds on said line.

In 1824 the records show that the selectmen began at the north bound, and run south about 17 deg. east, to the south bound, and have renewed the marks and bounds on said line, which the committee of said towns agreed to, November 20, 1792.

In 1831 it appears from the record that the selectmen began at the north bound, and run south about 17 deg. east, 6 miles and 232 rods, to the south bound, and have renewed the marks and bounds on said line, which the committee of said towns agreed to November 20, 1792.

In 1838, it appears by the records that the selectmen began at the north bound, and run south about 17 deg. east, 6 miles and 230 rods, to the south bound, but say noth-

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Henniker v. Hopkinton.

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ing about renewing any bounds. No intermediate bounds have ever been mentioned or described, except as above, and no stakes, or stakes or stones, were recognized by the selectmen in their perambulation, either in 1831 or 1838; and none are now to be found.

On the northerly end of the line for some mile and a half, and mostly in the woods, are a number of marked trees, which are marked on each side; and some of them appear, by cutting into them, to have been marked half a century or more ago, and appear to have been re-marked a number of times since. Others appear to have been marked more recently, though marked in the same way. It is not contended, by either of the parties, that these trees are on a straight line between the corner bounds; neither are they all on a straight line with themselves.

From the north bound, about eighty rods southerly, is an old oak tree, which apparently has been marked on each side, as long and as often as any of the trees, and this, by the compass, stands south not quite twelve deg. east from the north corner bound; but it is admitted by both parties that on some parts of the northerly end of the line the needle will not traverse on a straight line.

There are two or three trees, bearing similar marks to others, standing so far from the general range of most of the marked trees that neither party claim them as line trees, nor do they know by whom or for what purpose they were marked.

Upon the foregoing facts, should the line be established as a straight line, without regard to spotted trees, or should it be established on the general range of spotted trees?

As the opinion of the court may be upon this question, the selectmen are disposed to establish the line, without the interference of a committee.

*Smith*, for Henniker.

*Chase*, for Hopkinton.

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*Henniker v. Hopkinton.*

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WOODS, J. The presumption is, that where the two termini of a line constituting the boundary between two parcels of land are established, and no intermediate point is indicated in the description, the line is a straight one. This presumption must prevail, if the selectmen cannot be shown to have established a line deflecting from such a course.

Whether they have done so in this case is a question of fact, which the committee must, upon view of the monuments, decide. This fact must be made out, or the presumption will prevail in favor of the straight line.

But the court cannot, upon the case shown, determine how the truth is, and the case must be discharged, and, unless otherwise disposed of, referred to a committee, with instructions in conformity with this opinion.

*Case discharged.*