

Hartshorn
vs.
Hubbard.

It was intimated in the case of *Brown vs. Cram*, that to take from the mortgagee the right of possession, there must be an express stipulation in the deed, that the mortgager shall retain the possession. But that was not a point decided. And we are of opinion, that where it appears from the terms of the condition by necessary implication, that it must have been the understanding of the parties that the mortgager should retain possession, unless the condition be broken; the mortgagee can neither enter and expel, nor maintain a writ of entry against the mortgager, until the condition is broken, or some waste done.

In this case, the necessary implication is, that the tenant was to retain possession, for he was to deliver half the produce, and carry on the farm; and we are of opinion, that he is entitled to

Judgment.

CHESHIRE, MAY TERM, 1822.

ANNA YORK vs. ZEBINA JONES.

Where *A.* having leased lands to *B.* at an annual rent, and before any rent became due, conveyed the reversion to *C.*, who conveyed the same to *B.*; it was held, that the rent passed as incident to the reversion, and became extinct. Upon a general demurrer, it is no objection to a plea, that it amounts to the general issue.

THIS was an action of debt. The first count was as follows: "For that the plaintiff, on the 16th July, 1817, demised, granted, and to farm let the following tract of land, with the dwelling-house and barn thereon, situate and being in said Claremont, &c., to hold and occupy for the term of seven years; in consideration whereof the said *Jones*, by his deed dated as aforesaid, in court to be produced, covenanted to pay to the plaintiff the sum of \$40 annually as rent; the first payment to be made on the first day of January, 1819; whereby the said *Jones*, on the 1st January, 1819, at said Charlestown, became indebted to said *Anna* in the same sum, rent as aforesaid, for the year then ending. Yet," &c.

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“ Also, for that the said *Anna*, on the 16th July, 1817, at
 “ said *Claremont*, by his certain indenture between the
 “ plaintiff on the one part, and the said *Jones* on the other
 “ part, in court to be produced, demised and to farm let un-
 “ to the said *Zebina* a certain tract of land (as in the first
 “ count) for the term of seven years, yielding and paying the
 “ said *Anna* as rent annually \$42; the first payment to be
 “ made January 1, 1819, by force whereof the said *Zebina*
 “ entered into the premises demised as aforesaid, and held
 “ the same for the term of one year, and at the expiration
 “ thereof was due to the said *Anna* from the said *Zebina*
 “ \$42 for the rent of the demised premises. Yet,” &c.

The defendant pleaded in bar, that on the day of the
 date “ of the said *Anna's* lease aforesaid to the said *Jones*,
 “ the said *Anna* was sole seized of the said reversion of the
 “ said leased premises in fee simple, and being so seized on
 “ 25th September, 1818, the said *Anna*, by her deed of that
 “ date, conveyed the said reversion in fee simple to one
 “ *Christopher York Alden*, who became seized thereof in fee
 “ simple, and the said rent as incident thereto; and the said
 “ *Alden*, being so seized of the said reversion in fee simple,
 “ afterwards on the same 25th September, 1818, by deed of
 “ that date, conveyed the said reversion in fee simple to the
 “ defendant, in virtue whereof the said *Jones* became seized
 “ of an estate in fee simple in the said leased premises,
 “ whereby the said term, created by said lease, became
 “ merged in said estate of inheritance, and said rent reserv-
 “ ed became extinct.”

To this plea the plaintiff demurred, and assigned for cause,
 “ that it was argumentative.”

Sumner, for the plaintiff.

Upham, for the defendant.

RICHARDSON, C. J. The proper plea in this case would
 have been the general issue of *nil debet*; (1) and the only ob-
 jection to the plea of the defendant in point of form seems to
 be, that it amounts to the general issue. But the plaintiff
 cannot avail himself of this objection upon a general demur-

(1) Cro. Ja.
227.—1 Chitt.
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rer, as this demurrer must be considered. 1 *Chitt. Pl.* 498.
—1 *Saund.* 161, note 1, and 337, b., note 3.

Before any rent became due, the plaintiff's reversion passed to the defendant, and there is no doubt that the rent passed as incident to the reversion, and became extinguished. 10 *Coke* 127, *Clune's case*.—*Cro. Ja.* 309, *S. C.*—*Yelv.* 167.

We are therefore of opinion, that the plea is a sufficient answer to the action, and that there must be

Judgment for the defendant.

DOROTHY WENDELL vs. DARIUS BLANCHARD *et al.*

Possession of land is evidence of title to be left to a jury.

A disseisin, which disables the disseisee to maintain trespass for acts done upon the land after the disseisin until he re-enters, must be an actual dispossession and holding out of the disseisee.

TRESPASS *quare clausum fregit*. The declaration alleged, that the defendants on the first day of November, 1819, and on divers other days between that day and the first day of June, 1820, broke and entered the plaintiff's close in Springfield, in this county, and cut trees, &c.

The cause was tried here at October term, 1821, upon the general issue, when it appeared in evidence, that *John Wendell*, from whom the plaintiff derived her title in 1802, caused the lot, in which the trespass was alleged to be done, to be surveyed; and the plaintiff in 1816, by a memorandum in writing, leased a part of the same lot. It also appeared, that the said *John Wendell* was the lawful owner of several proprietors' shares in said town of Springfield.

On the part of the defendants, it was proved, that in 1815 one *Powars* entered into the said lot, and made maple sugar upon it in the winters of 1816, 1817, 1818 and 1819; and that the defendants entered under *Powars* and cut the trees. It also appeared, that the lot was wild and uncultivated.

The court instructed the jury, that the entry and survey of the lot in 1802 by *John Wendell*, were evidence of title sufficient to enable the plaintiff to maintain the action, unless rebutted by better evidence of title on the part of the defend-