

was evidence from which it was competent to find a conversion by the defendant.

Exceptions overruled.

BLODGETT, J., did not sit; the others concurred.

TRUSTEES OF DONATIONS v. STREETER.

A mortgagor in possession is liable upon covenants which run with the land.

ASSUMPSIT, for use and occupation. Pleas, the general issue and statute of limitations. The writ is dated August 15, 1882.

January 30, 1824, the plaintiffs, by an instrument under seal, leased the premises to Barker for the term of 999 years at an annual rent of \$36.36. By various conveyances the title to the term came to Douglass, who, October 10, 1867, conveyed the same to the defendant, taking from him a mortgage to secure the payment of the purchase-money. The defendant entered, and had possession until November 25, 1872, when he conveyed the land to Greeley, who paid the mortgage to Douglass, and, September 5, 1874, conveyed the premises to the defendant's wife, who conveyed the same to Chase, March 30, 1875. The defendant occupied the land with his wife, and had the use of it from October 10, 1867, until March 30, 1875. No rent has been paid since 1867. In 1870 the plaintiffs' treasurer made a written demand for the payment of the rent upon the defendant, who soon after called and promised to pay it, but asked for delay. He has never since promised to pay unless an implied promise arose from his continuance in the occupation. The plaintiffs did not know of the conveyance to Chase, nor that the defendant had ceased to occupy until after the commencement of the action, but the deeds were all seasonably recorded. The plaintiffs have leave, if necessary, to amend by adding a count in covenant or debt.

A. S. Wait, for the plaintiffs.

D. H. Woodward, for the defendant.

CARPENTER, J. Assumpsit does not lie. *Gilman v. School District*, 18 N. H. 215; *Little v. Morgan*, 31 N. H. 499; *Knowlton v. Tilton*, 38 N. H. 257; *Brown v. Leavitt*, 52 N. H. 619; *Stebbins v. Insurance Co.*, 59 N. H. 143. The questions arising upon the replication of a new promise (if one was filed) to the plea of the statute of limitations are therefore immaterial. *Rice v. Wilder*, 4

N. H. 336; *Bank v. Sullivan*, 6 N. H. 133; *Downer v. Shaw*, 28 N. H. 155.

If the plaintiffs elect to amend their declaration by filing a count in covenant, the question will arise whether the defendant is liable, as assignee on the covenant, for the payment of rent during the time he was in possession and held the title to the term, subject to his mortgage to Douglass for the purchase-money. Covenants which run with the land attend the legal title. *Walker v. Reeves*, 2 Doug. 461 n.; *Dartmouth College v. Clough*, 8 N. H. 29. A mortgagor in possession as against everybody but the mortgagee, and as against him for all purposes except the security of the mortgage debt, is seized of the fee in the land. *Glass v. Ellison*, 9 N. H. 69; *Smith v. Moore*, 11 N. H. 55; *Great Falls Co. v. Worster*, 15 N. H. 434, 444; *Morrison v. Manchester*, 58 N. H. 560. He may recover its possession in a real action (*Ellison v. Daniels*, 11 N. H. 274), can convey it by deed, and only by deed (*Southerin v. Mendum*, 5 N. H. 431), and it may be levied upon as real property for his debts. *Kelly v. Burnham*, 9 N. H. 20; *Dunbar v. Starkey*, 19 N. H. 160; *Hovey v. Bartlett*, 34 N. H. 278. He is entitled to the benefit of, and may sue and recover on, his grantor's covenants for title, and on all covenants of former vendors which run with the land. *Haynes v. Stevens*, 11 N. H. 28. As an owner of real estate, which must be at least an estate of freehold (*Charlestown v. Acworth*, 1 N. H. 62), he may gain a settlement under the statute. *New London v. Sutton*, 2 N. H. 401; *Pembroke v. Allenstown*, 21 N. H. 107, 114, 115. If a highway is laid over the land, he is entitled to the damages awarded (*Parish v. Gilmanton*, 11 N. H. 294, *Gurnsey v. Edwards*, 26 N. H. 224), and upon his decease it goes to his heirs. *Southerin v. Mendum*, *supra*. In his estate, dower and a homestead may be assigned. *Cass v. Martin*, 6 N. H. 25; *Rossiter v. Cossit*, 15 N. H. 38; *Hastings v. Stevens*, 29 N. H. 564; *Norris v. Moulton*, 34 N. H. 392; *Norris v. Morrison*, 45 N. H. 490; *Pollard v. Noyes*, 60 N. H. 184; *Bank v. Rollins*, 63 N. H. 66. In short, as against all the world except the mortgagee, a mortgagor in possession is as absolute an owner of the land as if the mortgage had no existence. *Bickford v. Daniels*, 2 N. H. 71; *Cavis v. McClary*, 5 N. H. 530; *Bailey v. Metcalf*, 6 N. H. 156; *Bell v. Morse*, 6 N. H. 205; *Sissons v. Bicknell*, 6 N. H. 559; *Robinson v. Leavitt*, 7 N. H. 73; *Rigney v. Lovejoy*, 13 N. H. 247; *Smith v. Smith*, 15 N. H. 55; *Weeks v. Eaton*, 15 N. H. 145; *Dearborn v. Taylor*, 18 N. H. 153; *Lyman v. Hibbard*, 18 N. H. 233; *Wallace v. Goodall*, 18 N. H. 439; *Hutchins v. Carleton*, 19 N. H. 487; *Hobson v. Roles*, 20 N. H. 41; *Whittemore v. Gibbs*, 24 N. H. 484; *Furbush v. Goodwin*, 25 N. H. 425; *Page v. Pierce*, 26 N. H. 317; *Wilson v. Kimball*, 27 N. H. 300; *Johnson v. Brown*, 31 N. H. 405; *Ladd v. Wiggin*, 35 N. H. 421; *Blake v. Williams*, 36 N. H. 40; *Worster v. Great Falls Co.*, 41 N. H. 16; *Bryant v. Morrison*, 44 N. H. 288; *Northy v. Northy*, 45 N. H. 141; *Howe v.*

Wadsworth, 59 N. H. 397, and cases before cited. He must therefore be held liable upon all covenants which run with the land.

If the doctrine of *M. Murphy v. Minot*, 4 N. H. 251, that a mortgagee of the term, though not in possession, is liable on a covenant for rent (doubted in *Lord v. Ferguson*, 9 N. H. 383), is inconsistent with this judgment, it is to that extent overruled. The plaintiffs, upon filing a count in covenant, are entitled to judgment for the amount of the rent from October 10, 1867, to November 25, 1872. After the latter date, the defendant is not liable, although he remained in occupation. *Dartmouth College v. Clough*, 8 N. H. 29.

Judgment for the plaintiffs.

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

FOWLER v. SPRINGFIELD.

A tax upon land of a non-resident owner, assessed to his resident agent, will not be abated because the agent, in giving in his inventory, directed the selectmen to tax it as non-resident unless they would tax it to him at a specified valuation, which was less than the valuation actually put upon it.

PETITION for abatement of taxes assessed to the plaintiff in 1884. Facts found by a referee. The land described in the petition consisted mainly of woodland, without buildings thereon, and was unimproved land, owned by George W. Atwood, a resident of Wilmot. A short time prior to April 1, 1884, the plaintiff was told by Atwood, if the selectmen would put it in for \$200, to have it taxed to the plaintiff, but if not, to have it taxed as non-resident. The plaintiff told Johnson, chairman of the selectmen, what Atwood said, and Johnson, when he made out the plaintiff's blank inventory, made it the sum of \$200, at the plaintiff's request, and the plaintiff then understood that the Atwood land was to be taxed for this amount; but Johnson did not understand at that time or at any time that this sum of \$200 was the sum agreed upon as final or conclusive, but in filling out the blank inventory he was acting as the agent of Fowler and not as selectman of Springfield. The land was taxed to the plaintiff at \$250, which was no more than its value. The selectmen knew that Atwood was owner of the land.

Shirley & Stone, for the plaintiff. Gen. Laws, c. 54, s. 21, provide how this land should be taxed. It could only be taxed to