

refused to give the direction, being of opinion that the judgment in the action of ejectment was legal and sufficient evidence to support this action for the mesne profits. The defendant excepted; and the verdict and judgment being against her, she brought the present writ of error.

1810.

 Shipley
 vs
 Alexander

The cause was argued before BUCHANAN, GANTT, and EARLE, J.

T. Buchanan, for the plaintiff in error. The question is, whether or not *mesne profits* can be recovered during the pendency of the action of ejectment in the appellate court, and where the plaintiff is not in possession of the land, for the profits of which the action is brought? No person can support an action of trespass, unless he is in possession. An heir or devisee cannot support trespass before entry—after an entry, the law refers the entry to the time his right accrued. So here, the defendant in error could not support the action, not having obtained possession under his judgment in ejectment; if he had obtained such possession, his entry would have related to the time his title accrued. He cited *Bull. N. P.* 86. *1 Esp. Dig.* 444. *Aslin vs. Parkin*, 2 *Burr.* 665. *Compere vs. Hicks et al.* 7 *T. R.* 723; and 3 *Blk. Com.* 210.

Martin, for the defendant in error. The case of *Aslin vs. Parkin*, 2 *Burr.* 665, was an action for mesne profits brought after judgment by default against the *casual ejector*, in an ejectment, in the name of the lessee of the *nominal plaintiff*, against the *tenant in possession*. It was objected that the action could not be supported without proving *actual entry* in the plaintiff; and as the plaintiff was *nominal*, no actual entry could be proved to have been made by him. The court determined the action to be sustainable, and that it made no difference whether the judgment was on verdict or by default. The case of *Compere vs. Hicks et al.* 7 *T. R.* 723, is that of a fine; and it is a fixed principle of law, that there must be an *actual entry* to avoid a fine, before ejectment or trespass can be brought. Neither of these cases militates even in appearance against the decision of the court below in this case. In *1 Esp.* 404, we are told that a person cannot maintain an action of trespass before an *entry and actual possession*, though he hath the *freehold in law*. Hence, therefore, the heir cannot bring