1810.

Johnston vs Cope

Such is considered to be the law in this state. The plaintiff in ejectment may bring an action of trespass for the mesne profits, pending a writ of error. *Run. Eject.* 423. *Donford vs. Ellys*, 12 *Mod.* 138.

BUCHANAN, J. delivered the opinion of the court. The court agree with the court below in the opinion contained in the bill of exceptions on which this case is brought up.

The question is, whether, in an action of trespass brought in the name of the lessor of the plaintiff against the tenant in possession, for mesne profits, from the time of the demise, it is necessary for the plaintiff to prove an entry or actual possession in him after the recovery in ejectment?

On that question the court have no doubt.

The tenant in possession is estopped by his confession of lease, entry and ouster, and cannot controvert either the title or possession of the plaintiff; and it is sufficient for the plaintiff to produce the judgment alone, without showing the writ of execution executed, or possession acquired in any other manner.

JUDGMENT AFFIRMED.

JOHNSTON vs. COPE *et al.*

JUNE.

In *assumpsit* on a verbal agreement to recover the price paid for merchandize proved to be unsound, sold and delivered by the defendants to the plaintiff,—*Held*, that the bare circumstance of selling goods and chattels for a full price, does not of itself raise a warranty; and that the seller is not responsible for their unsoundness, unless he warranted them to be sound, or knew they were not at the time of the sale, in which latter case he would be liable for the fraud

APPEAL from *Baltimore* County Court. *Assumpsit* by the appellant against the appellees, on an agreement for the sale of six bales of linens called *Flanders* sheetings, to be furnished and supplied by the latter to the former, of good and merchantable linens, at and for a large sum of money, and for which payment had been made. The declaration stated, that although six bales were afterwards delivered, yet they were not good, sound, merchantable linens, but on the contrary bad and unmerchantable, &c The general issue was pleaded; and at the trial the plaintiff prayed the court to direct the jury, that if they should be of opinion from the testimony, that the merchandize in question was sold to the plaintiff for the full merchantable price, that it implies a warranty that the same was, at the time of the sale, good, sound and merchantable; and that if the merchandize in question was unsound, and that unsoundness was not obvious to the buyer at the time of the sale, in the state in which such goods are usually sold, the plain-