

clusion be impeached or contradicted in this action by oral evidence as to the character of the land. Subject to the power of a court of equity in certain cases to correct or set aside the final action of the department for fraud or mistake, not a mere error of judgment, in disposing of the public lands, its decisions on questions of fact cannot be reviewed or called in question elsewhere. *Johnson v. Towsley*, 13 Wall. 72; *Sharp v. Stephens*, 6 Sawy. 48. Therefore the oral evidence offered by the defendant, concerning the swampy character of this land, is incompetent, and cannot be considered.

The state was the grantee in both these grants. It accepted the land as part of the wagon-road grant, or allowed its grantee or agent to do so. At least there is no evidence that it ever selected this section under the swamp-land grant, and presented it for certification as part thereof. And while this may have been done, it is morally certain that it was not done until after the premises were certified to the grantee of the state under the wagon-road grant, nor until the grant had lapsed, for want of selection, within the time prescribed. The non-action of the state in this matter probably arose from the fact that it was thought best that the land should go to the construction of the wagon road, which was then regarded as a meritorious enterprise. For long after this swamp-land grant was made no interest was taken in it, nor was it generally understood that there was any considerable quantity of land in the state to which it was at all applicable. For 10 years the state took no steps to secure any land under it, preferring, as it appears, to make its selections under the grants for the benefit of roads and schools. The fact that some portions of these selections were damp enough to be called swamp was no objection to them, but often a recommendation; and in my judgment, it would have been well if that policy had been continued. But, be that as it may, in the meantime this land was formally selected and certified to the state as wagon-road land, with its acquiescence, if not active concurrence, and it is now estopped, as against the plaintiff, to deny that the premises are included in such grant, or to assert that it acquired them under the swamp-land grant. And if the state is so estopped, so is its grantee, the defendant.

The defendant defends for the whole of the W.  $\frac{1}{4}$  of section 21, but it does not appear, from his own showing, that he has any claim to the N.  $\frac{1}{4}$  thereof. His purchase from the state only includes the E.  $\frac{1}{4}$  and the S. W.  $\frac{1}{4}$  of the section. But the claim of the defendant to be the owner of any part of the premises on the facts proven must fail on either of the following grounds: (1) At and before the defendant's purchase from the state under the swamp-land grant, the right of the state thereunder had lapsed and become of no effect. (2) The land was already certified to the grantee of the state under the wagon-road grant by the secretary of the interior, which certification is a final decision of the question as to the character of the land, and the grant under which it properly belonged, by a tribunal having exclusive jurisdiction of the same. (3) The defendant, as the grantee of the state, against the plaintiff, is estopped to assert or maintain that the premises inured to the state under the

swamp-land grant, because the latter, in effect, procured the same to be certified to the plaintiff's grantor under the wagon-road grant.

In conclusion, I find that the plaintiff is the owner of the land in fee, and entitled to the possession thereof. But no damages can be received for the occupation of the premises under the allegation in the complaint that the defendant wrongfully withholds the possession of the same from the plaintiff, to his damage \$1,000. An action to recover damages for the wrongful occupation of real property is the equivalent of the common-law of action of trespass for mesne profits. A cause of action for damages for withholding the possession of real property may be joined with one to recover such possession. But it must be separately stated, and the statement must contain facts sufficient to support a separate action thereon. Ordinarily, only nominal damages can be recovered on the *ad damnum* clause for an ouster, in an action to recover possession of real property. *Wythe v. Myers*, 3 Sawy. 598; *Larned v. Hudson*, 57 N. Y. 151.

The evidence as to the value of the rents and profits of the land was admitted on the trial, subject to the objection that the complaint contained no statement of a cause of action therefor. The ruling on this point makes it unnecessary to consider the character or value of the improvements put on the land by the defendant. The plaintiff can recover nothing for rents and profits, and therefore there is nothing to set off the value of the improvements against. Probably this result is not materially unjust to either party.

In support of my conclusions in this case, I refer generally to *Cahn v. Barnes*, 7 Sawy. 48, 5 Fed. Rep. 326. The important questions involved herein were considered in that. I have gone carefully over the ground again, in the light of the able and exhaustive argument of counsel for the defendant, but find no cause to change my opinion on the subject.

There must be a finding for the plaintiff that he is the owner of the premises, and entitled to the possession thereof.

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CALIFORNIA & OREGON LAND CO. v. MUNZ.

(Circuit Court, D. Oregon. February 14, 1887.)

DEADY, J. This action is brought by the plaintiff, a corporation duly formed under the laws of California, against the defendant, a citizen of Oregon, to recover the possession of the E.  $\frac{1}{4}$  of section 21, in township 36 S., of range 14 E. of the Willamet meridian. It was heard and submitted with the foregoing case of *Pengra v. Munz*, ante, 830.

The facts and circumstances of the two cases are similar, except that in this case the defendant, on June 25, 1880, took a lease for one year from the plaintiff for the north half of the section at a rent of \$80, and covenanted therein to surrender the premises to the lessor at the end of the term. The lease was evidently intended to cover the east half instead of the north half of the section, as that was the portion belonging to the lessor. But it took effect at least as a lease of the north-east quarter, and by reason of it the defendant is estopped to deny the