

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

plaintiff's title thereto. It is familiar learning that a tenant is estopped to deny his landlord's title, either during the term or the continuance of the possession taken under the lease. 1 Washb. Real Prop. 356; *Zeller v. Eckert*, 4 How. 289; *Sawyer v. Sargent*, 7 Pac. Rep. 120.

In his testimony, the defendant says that he was imposed upon in this matter by the agent of the plaintiff, from whom he took the lease. But the circumstances do not support the assertion. The agent simply told the defendant that the plaintiff had the title to the land, and that, if he cut hay on it, without his permission, he would be prosecuted; when the defendant, to use his own language, asked for and obtained the lease, to save trouble. Afterwards, when the mistake was made in listing the section as swamp land, the defendant undertook to take advantage of it, and buy in what he doubtless thought was a paramount title to that of his landlord, and thereby hold the possession in his own right.

There must be a finding for the plaintiff in this case as in the other.

### MANNING v. NORFOLK SOUTHERN R. Co.<sup>1</sup>

(Circuit Court, E. D. Virginia. January, 1887.)

1. RAILROAD COMPANIES—BOND AND MORTGAGE—RIGHT OF BONDHOLDER TO SUE.  
The common-law right to sue upon a bond is not affected by the remedies provided in the mortgage given simultaneously, and for the better securing of the bond, unless the provisions of the mortgage exclude this right in express terms, or by necessary implication.
2. SAME—IMPLICATIONS FROM PROVISIONS OF MORTGAGE.  
The right to sue upon a written obligation admitted to be valid is of too high a character to be taken away by implication, especially if drawn from an instrument other than that which is given in direct and positive acknowledgment of the debt.
3. SAME—ASSUMPSIT BY DISSENTING BONDHOLDERS.  
Dissenting bondholders may sue in *assumpsit* for the amount of their unpaid coupons, notwithstanding the fact that the majority in interest have consented to waive the rights secured by the mortgage.

Common-law action on coupons which had been cut from bonds made and issued by the defendant, and which were secured by a mortgage to Ford & Jordan, as trustees, dated September 1, 1880. The bonds were in the usual form of railroad bonds, and by each of them the railroad company promised to pay \$1,000 to the bearer on September 1, 1920, with interest at the rate of 6 per cent., on the first days of March and September in each year, upon presentation and surrender of the coupons annexed to said bonds as they should severally become due. The bonds further recited that the payment of the principal and interest was secured by the said mortgage upon the terms and conditions set forth therein, and also contained a provision to the effect that, if interest should remain in default for six months, the whole principal sum might, at the option of the bondholder, become forthwith due and payable. The mortgage contained the same provision, making it obligatory upon the trustees to exercise such option, and declare the whole amount due, upon the request of a majority in interest of the bondholders, or, upon like request,

<sup>1</sup>Reported by Theodore M. Etting, Esq., of the Philadelphia bar.