

the right to the land was determined, the party could not be said to suffer any wrong. But it seems to have been considered as well established law, from a very remote period, that the right to maintain an action of trespass for the recovery of the *mesne* profits, followed as a clear and necessary consequence of the party's having established his right to the land itself. And it appears to be somewhat singular, that, during the period when real actions were much in use, the Legislature should have deemed it necessary to interpose, for the purpose of allowing, by positive provision, the demandant, in many of them, to recover damages, or rents and profits; and yet, that those real actions, so amended and improved, should have been superseded by the action of ejectment, in which, as it now seems to be settled, nothing is recovered but the land, and the party is left, as at common law, to recover the *mesne* profits in a separate action of trespass. But the right to recover the *mesne* profits by way of damages in the modern action of ejectment itself, is recognized by an English statute, passed in the year 1664, and the practice of so recovering them, seems to have prevailed for some time in England, and also in this State. 2 *Bac. Abr. tit. Ejectment, H*; 16 & 17 *Car. 2, c. 8*; *Goodtitle v. Tombs*, 3 *Wils.* 129; *Lewis v. Beale*, 1 *H. & McH.* 185; *Joan & McCubbin v. Shields*, 3 *H. & McH.* 7; *Gore's Lessee v. Worthington*, 3 *H. & McH.* 96.

As early as the year 1667, in a case where lands were settled for the payment of debts, the trustees were held accountable in equity for the rents and profits to the creditors for whom they were received; and in 1685, it was held, by the Court of Chancery, that he who took the *mesne* profits by wrong, was considered as trustee for, and accountable to him who had the right; and thenceforward the Court of Chancery made all persons account for the *mesne* profits they had received, to such persons as had the equitable title. And it is now settled, that where there is a serious difficulty in recovering at law, fraud, concealment, or the like, or where the title is merely equitable, the party may recover the rents and profits in equity. *Norton v. Frecker*, 1 *Atk.* 525. But in Chancery, as in the Courts of common law, there seems to have been always

73 a strong disposition * to keep the adjudication upon the title entirely apart from the direction as to the *mesne* profits. It is not improper that the final decree, settling the right to the property, should also go on and decree an account for the rents and profits; but it is usual, where the property is sold, as in this case, to leave the account of the rents and profits to be provided for in the subsequent and further directions. 1 *Bac. Abr. tit. Accompt, B*; 2 *Bac. Abr. tit. Damages*; *Shish v. Foster*, 1 *Ves.* 88; *Dormer v. Fortescue*, 3 *Atk.* 124; *Pulteny v. Warren*, 6 *Ves.* 73.

Where the party has no equitable ground of relief, and is under the necessity of proceeding at law, by an action of trespass for the