Co., 34 Mo. 34. In some States it was incorporated into the act, giving the process, that title should not be inquired into therein; Alabama Rev. Code, 1867, sec. 3307; New Jersey, Nixon's Dig. of 1861, p. 301; Iowa Code, sec. 2362; and where not so expressly enacted, the same rule was held to prevail at law. Thus, in the case last cited, following *Krexet* v. *Meyer*, 24 Mo. 107, "lawfully possessed" was constructed to mean merely, "peaceably possessed," and no proof of want of title in the complainant was admissible. The effect has been to produce in some degree the evil sought to be avoided, and a scramble for the possession is the result, as the party first in actual possession, however defective his title or clear his want of one, can only be ousted by the slow process of a real action; and the court will go through the circuity of restoring possession to a tenant at sufferance, whom they will immediately thereafter dispossess on a like summary proceeding brought by the landlord under the other branch of the statute.

But, however widely elsewhere this doctrine may prevail, we doubt if it is the true construction of the statute in Massachusetts. By Gen. Stat. c. 137, sec. 1, it is enacted that "no person shall make entry, &c., except where his entry is allowed by law, and in such cases he shall not enter with force, but in a peaceable manner." By sec. 2, "When a forcible entry is made," &c., "or the lessee holds over," &c., "the person entitled to the premises may be restored to the possession." The language here is unlimited, and every forcible entry is prohibited and made cause for restitution. The words used are only "*may* be restored," but this could hardly be considered to give a discretion. It is apparent, however, that every forcible entry is not ground for restitution, as, for instance, on the possession of a servant: *State* v. *Curtis*, 4 Dev. & B. 222; for there the possession is in admitted subordination to the title. By the Massachusetts statute, restitution is to be made, not to the "complainant," but to the "person entitled." But no special weight can be attributed to this difference of language, as this particular expression was not part of the original Statute of Forcible Entry, Stat. 1784, c. 8, but was introduced from the Stat. of 1835, c. 89, which gave summary process against tenants, when these two acts were incorporated in one in chap. 104 of the Revised Statutes. By the Stat. of 1784, c. 8, restitution was to be made to the "complainant;" and there is no ground for attributing to the legislature, from their adoption of the expression in question, any intention to limit the class of persons who could have restitution, to those who showed title. By the Stat. of 1784, c. 8, it was given to any person dispossessed; for although the general prohibition of force in sec. 1 of chap. 137 of Gen. Stat. was not in the Act of 1784, but was first introduced by the revising commissioners in 1836, yet it was expressly stated by them to have been part of our common law, and its enactment to be merely declaratory; Commissioners' notes to chap. 104; and this has been affirmed in *Commonwealth* v. *Shattuck*, 4 Cush. 141, 144. Hence, though the provincial statute of 13 William III. gave restitution only to a *disseisee*, that is, to a freeholder,—for this statute was derived from and receives the same construction as the statute 8 Hen. VI., see *Presby* v. *Presby*, 13 Allen, 284,—it is clear that the literal construction of the statute of 1784 authorized restitution to every one who complained of dispossession with force.

But though neither the history nor the construction of secs. 1 and 2 of the Gen. Stat. c. 137, discloses any restriction on the class of persons "entitled" to restitution, we think such a restriction is clearly implied from another section of the same statute. It is provided by sec. 9, following sec. 13 of c. 120, that if the title is drawn in question in this proceeding by plea or otherwise, the case shall be removed and the title determined by a higher court. That this cannot refer to the clauses of this chapter relating to process against tenants holding over, is evident, for the estoppel of the tenant in this process, to contest by any plea his lessor's title, has been repeatedly recognized: *Coburn* v. *Palmer*, 8 Cush. 124; *Oakes* v. *Munroe*, *Ib.* 282; *Green* v. *Tourtellott*, 11 Cush. 227. The right to introduce the issue of title can only therefore apply to the process of forcible entry; and title seems recognized by implication as a sufficient answer to the force, and to restitution therefor.

This view is strengthened by the recent decisions, which hold that in this summary proceeding, if the plaintiff's title determines *pendente lite*, judgment for possession will not issue: *King* v. *Lawson*, 98 Mass. 309; *Casey* v. *King Ib.* 503. These were, it is true, cases between landlord and tenant; but the principle upon which they proceed seems clearly to be, that, where the question of title is examinable, possession will not be awarded on a summary proceeding to one who at the time of judgment is not entitled to the premises, whatever right he may have had to institute the proceeding. The title, it may be observed, which determines the right to possession is not merely, as under the English statutes, above referred to, a subsisting freehold or term for years; but is any existing possessory right, which would authorize an action of trespass, and for this a tenancy at will is sufficient; *Dickinson* v. *Goodspeed*, 8 Cush. 119. The construction of the statutes which we suggest, does not therefore trench on the right of possession under any valid title, however slight, and it seems to be a correct conclusion, that in Massachusetts restitution by the summary statutory proceeding will not be given in any case where there is not title enough to maintain trespass; and a landlord may safely regain possession by force if he use no more than is necessary, and will incur no more liability to the statute process than to an action of trespass *qu. cl.* or for assault.—*American Law Review.*