

RIGHT OF LANDLORD TO REGAIN POSSESSION BY FORCE.

cited, is clearer, and admits of no such ambiguity. See *Harvey v. Brydges*, ante.

If excessive force is used, the landlord is liable for such excess, but only in an action of trespass for assault. Such excess, whether occurring in the entry or subsequent expulsion, does not affect the legality of that entry or of the possession thereby acquired, but merely fails to receive from that possession the protection which a proper use of force would have had. Thus, in *Sampson v. Henry*, 11 Pick. 379; 13 Pick. 36, the landlord though liable for the excess of force in trespass for assault, was not liable in trespass *qu. cl.* It has been intimated that by such excess of force the landlord becomes a trespasser *ab initio*, as his authority to enter is one given "by law" within the distinction taken in the *Six Carpenters' Case*, 8 Co. 146 a; *Whitney v. Sweet*, 2 Fost. 10. But this seems to be a misapprehension. Even if the authority of the lessor to enter, arising from the contract of demise by the expiry of the tenant's title in accordance with its nature or its terms, could not be regarded as given by "the party" rather than by "the law," still "the abuse of the authority of law which makes a trespasser *ab initio* is the abuse of some special and particular authority given by law, and has no reference to the general rules which make all acts legal, which the law does not forbid." *Page v. Esty*, 15 Gray, 198. It was accordingly held in this case that the right of the owner to expel, flowing from title, was not such a special and particular authority, and that the owner was liable only for excess of force. A similar rule was applied in *Johnson v. Hannah*, 1 Strob. 313, and the doctrine of trespass *ab initio* was limited to cases where the act without a license would be a trespass, such as the right to distrain, and did not apply where the entry was under title.

But while it is clearly the English law, and the undoubtedly preponderating opinion in the American courts, that no civil action lies against a landlord for regaining with force the demised premises, unless there is excess of force, and then only for such excess; yet in regard to the statutory process for restitution, we apprehend that in America the prevailing rule is the reverse, and that by this proceeding the landlord may be compelled to give up a possession obtained by violent means. In England, restitution was always the fruit of a criminal process, it being awarded only where the party forcibly entering had been convicted, or at least an indictment had been found, or where the force had been found on inquisition before a justice of the peace,—an officer of purely criminal jurisdiction. See Dalton's Justice, c. 44.* In no case, moreover, was

restitution made, except to a freeholder under the Stat. 8 Hen. VI., or to a tenant for years under the Stat. 21 Jac. 1. Under these statutes, where a writ of restitution was sought it was requisite for the title of the plaintiff to be truly set out, and mere possession made a *prima facie* title, only if not traversed; *Rea v. Wilson*, 8 T. R. 357, 360; 2 Chit. Crim. Law, 1136. But in the United States almost universally restitution is given on a summary civil process. We do not propose here to give in detail the various enactments by which this is conferred, but it may be said generally with substantial accuracy that a bare peaceable possession without title suffices for its maintenance. Taylor, Land. & Ten. (5th ed.) sec. 789, n. 5. This is especially true of the Western States, where this statute was regarded as the means to prevent entirely the use of force in the assertion of title, an evil mainly to be apprehended in a new country; and if force was used, restitution was awarded irrespective of title, the intention being to compel title in all cases to be settled by due process of law: *King v. St. Louis Gas Light 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 *Krezet 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 circuitry 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 case 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,"

* Restitution is made by the justice, or he may certify the finding before him as a presentment or indictment to the King's Bench, as the highest criminal court. In 3 Blackst. Comm. 179, it is said that restitution is made for the "civil injury," and a fine for the "criminal injury." This merely refers to the person who is to receive the penalty imposed, but does not make the proceeding in any

way civil any more than the indictment against common carriers for negligence causing death is under the Massachusetts statute, because the fine goes to the representatives of the deceased."