plea of title, was declared in *Merriam* v. *Willis*, 10 Allen, 118, and the right to expel with necessary force affirmed in *Pratt* v. *Farrar*, *Ib.* 519, 521, and decided in *Morrill* v. *De la Granja*, 99 Mass. 383. Clearly, therefore, no civil action is maintainable in Massachusetts by inference from the general prohibition of the statute.

It will have been apparent from the cases cited in this discussion and the principle upon which they have gone, that no such distinction exists as has sometimes been intimated, restricting the right to expel to cases where the entry has been peaceable. No such distinction has ever been decided to obtain, but the doubt has arisen from the language of the courts; as, for instance, in *Mugford* v. *Richardson*, *supra*, where it is said, "the landlord being in peaceable possession had the right to use force," &c., whence the inference has been suggested that such peaceable possession was a condition precedent to the right to expel. But it has been clearly established from the cases, that the possession gained by force is as legal as if gained peaceably and equally efficient to revest title, the criminal liability in no way affecting the efficacy of the entry civilly.

A doubt might also arise from a hasty perusal even of some of the cases which authorise a forcible repossession by the lessor, from the terms employed by the courts to describe the amount of force permissible. Thus in *Winter* v. *Stevens*, 9 Allen, 526, 530, it is said that a tenant at sufferance may be ejected "by force if reasonable and without a breach of the peace, and not disproportionate to the exigency." But any force applied to a person against his will is an assault and a breach of the peace. The exception intended is merely excessive force. The language of Parke, B., above 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. *Hannahan*, 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; *Rex.* 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*

* "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."