courts that these statutes are special, subjecting the offender only to the penalties named therein, and do not affect the civil character of the act. But two decisions—one of them an extra-judicial Nisi Prius ruling, and the other a majority opinion—break the nearly uniform current of authority, and treat the lessor as a trespasser, and liable as such to his tenant at sufferance. Neither of them however—although they are the sole reliance of the American courts that have held the lessor to such a liability—sustain an action of trespass *qu. cl.*, but only of trespass for assault, and both were shaken and finally overruled by repeated decisions in the Courts of Exchequer, King's Bench, and Common Pleas.

For the doctrine seems early to have been established that the removal of the tenant by force, unless excessive, was not of itself the subject of a personal action, but depended on the title to the possession, and hence that *liberum tenementum* was a good plea to such a removal as well as to trespass *qu. cl.* Thus in *Taylor* v. *Cole*, 3 T. R. 292, in an action of trespass *qu. cl.* with a count for expulsion, a plea of justification of the entry under process was held a defence to both counts. The occupant yielded without forcible resistance to the expulsion, but it was held generally that expulsion was mere matter of aggravation to the trespass to the land, and was answered with this by a plea of title unless there was undue force and the plaintiff new assigned for an assault. The principle established by this case was, therefore, that a party regaining possession by title might assert that possession and expel the occupant with any proper amount of force. The sufficiency of title, as a justification, was again declared in *Argent* v. *Durrant*, 8 T. R. 403, where a lessor was held not liable for entering and pulling down a wall, while the tenant held over, and was carried still further in *Butcher* v. *Butcher*, 7 B. & C. 399, where a freeholder after entry was allowed to treat the party who persisted in remaining as a mere wrong-doer, and to maintain trespass *qu. cl.*, against him.

While these last two cases sustain the right to expel after a peaceable entry, they do not determine how much force in entering could be justified under color of title, or whether a violent entry, because criminal, was civilly illegal. But in *Taylor* v. *Cole*, *supra*, the principle that a legal possession can be acquired by an entry though made with such force as to be criminal under the Statutes of Forcible Entry and Detainer is very distinctly intimated by Lord Kenyon, who says, "It is true that persons having a right are not to assert that right by force; if any violence is used it becomes the subject of a criminal prosecution." And in *Taunton* v. *Costar*, 7 T. R. 431, the same eminent judge distinguished between the the penal consequences of a forcible entry and its civil effect still more clearly, saying, "Here is a tenant from year to year whose term expired. . . . . He now attempts to convert the lawful entry of his landlord into a trespass. If an action of trespass had been brought, it is clear the landlord could have justified under a plea of *liberum tenementum*. If, indeed, the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry, but there can be no doubt of his right to enter upon the land," &c. In *Turner* v. *Meymott*, 1 Bing. 158, the point was directly decided. There the landlord, on the determination of a tenancy at will, broke into the house with a crowbar, tenant being absent, but having left furniture in the house, and resumed possession. It had been settled long before that such an entry into a dwelling-house was *per se* indictable.‡ The tenant brought trespass, *qu. cl.* on the ground that the entry, being a criminal act, was not a legal repossession, but a trespass, and obtained a verdict. It was strenuously urged in its support, that a right to regain possession by force would render the action of ejectment superfluous, and that it was absurd to hold an act legal for which an indictment lay. But the court at once set the verdict aside, saying, "It must be admitted that [the landlord] had a right to take possession in some way. . . . If he has used force that is an offence in itself, *but an offence against the public*, for which if he has done wrong he may be indicted.

It seemed well settled, therefore, that a legal possession might be regained by force with no other risk than that of an indictment; and no distinction was taken between force to the premises and to the person of the tenant, nor could any be made, as each is alike indictable under the statute; § and further, that when the lessor had repossessed himself, he could expel the occupant with necessary force. So stood the law when the case of *Hillary* v. *Gay* arose at Nisi Prius. The action was trespass *qu. cl.*, with counts for expulsion, &c., and the facts were that after the plaintiff's tenancy at will had expired, the landlord distrained, and then entered peaceably, and, when in, removed plaintiff's wife and goods without unnecessary force. The defendant pleaded the general issue, and relied on his title, citing *Turner* v. *Meymott*, to show his right to assert that title by force; but Lord Lyndhurst, who presided, distingnished that case on the ground that there the tenant was not in possession, adverted also to the fact that here the tenancy had not determined, as the landlord by distraining had reaffirmed it, and, in a brief opinion, said, "The conduct of the landlord cannot be justified. If he had a right to the possession, he should have obtained that possession by legal means." This is the whole case. The landlord had no right after distraining to enter at all, as by that act the tenancy was restored: (Taylor, Land, & T. sec. 485), and he was liable

‡ *Rex* v. *Bathurst*, 3 Burr. 1710, per Mansfield, C. J., Wilmot and Yates, JJ.

§ *Rex* v. *Bathurst*, *supra*; *Willard* v. *Warren*, 17 Wend. 257, 262.