

RIGHT OF A LANDLORD TO REGAIN POSSESSION BY FORCE.

English courts as to the common law or the construction of ancient statutes are to be regarded of paramount authority." We fully agree with the court in this conclusion, and since both the latest and uniform doctrine of the English courts is, as we have shown, the reverse of that enunciated by the court in this case, we do not doubt that it will be as readily adopted by them; especially as their conclusion in this case meets little more support from American than from English authority. The court rely on the cases of *Moore v. Boyd*, and *Brock v. Berry*, which, we have shown, do not apply; and cite the *dictum* of Wilde, J., from *Sampson v. Henry*, 11 Pick. 379, but do not refer to the decision in the same case, 13 Pick. 36, that trespass *qu. cl.* would not lie, nor to the express adjudication by the same learned judge in *Miner v. Stevens*, 1 Cush. 485, that the lessor might regain possession by force without liability to an action by the lessee, and his unqualified assent to the New York and English law accordingly.

One further ground is dwelt on at length by the court, in support of the action of trespass; that, as the statute of Vermont had reenacted the English statute, 8 Hen. VI. c. 9, which gave restitution and a *qui tam* action with treble damages to the ousted party, he might waive these rights and bring trespass *qu. cl.* instead. The court, in assimilating their statute to that of 8 Hen. VI. do not seem aware that by the latter restitution and the *qui tam* action were given only to freeholders, *Cole v. Eagle*, *supra*; 1 Hawkins Pl. A. B. I., c. 28, sec. 15. The same limitation was put on the new York statute by the court of that State; *Willard v. Warren*, 17 Wend. 257, 261: hardly, therefore, furnishing a precedent for the assertion of these rights by a tenant at sufferance. But had such rights been expressly given to such a tenant by the Vermont statute, it is a novel doctrine that special proceedings in a statute can be waived at will by the party who may be entitled to their benefit, and in lieu thereof an action be maintained which did not lie at common law and was not given by the statute. So far as the restitution is concerned, it is much the same as if in Massachusetts the executors of a person, killed by the negligence of a common carrier, should waive the indictment given by Gen. Stat. c. 180, sec. 34, and claim to recover in tort, because they would have been entitled to the fine imposed upon a conviction. "The form," the court remark, "is immaterial." An extremely convenient but somewhat perilous doctrine. And it should further be observed that, while these statutory rights are expressly limited by the Vermont enactment to the party who has successfully maintained his complaint, the doctrine of the court would allow him in return for giving up rights which he had not shown he was entitled to, to bring an action neither conferred by the statute nor maintainable without it.

In arriving at this conclusion, the court had

to surmount another difficulty, namely, that not merely must the plaintiff under the English statute show a freehold, but if the defendant justifies his entry by title, the *qui tam* action fails. This restriction on the maintenance of the action, the court seem to consider to have arisen from "a blunder, to call it by no severer name," between the statute 5 Rich. II. which did not, and the statute 8 Hen. VI. c. 9, which did give this action. But Fitzherbert, 2 Nat. Brev. 248 H. says, "If a man enters with force into lands and tenements to which he hath title and right of entry, and put the tenant of the freehold out, now he who is so put out shall not maintain an action of forcible entry against him that hath title and right of entry because that that entry is not any disseisin of him." To this a note, said to be by Lord Hale, is appended; viz., "He shall not maintain it on the stat. Rich. II.; sec. 9 Hen. VI. fo. 19, pl. 12, but the party shall make fine to the king for his forcible entry." The meaning of Lord Hale doubtless was, that the action was no more maintainable on the statute of Richard than it was declared to be by Fitzherbert on the statute of Henry, on which this author was expressly commenting. This is clear from the case which is cited by Lord Hale from the Year Books, decided the year after the passage of the statute of Henry, which held expressly, that if the entry of the defendant was with title, no action lay: "but for the force the party entering shall make fine to the king." The decision is exactly given in Lord Hale's note; it runs, "On n'aure action quand il est ouste ove fortmain par un autre, ou entre fuit congeable [justifiable]; per ceo quod pur le fortmain le party convicte fera fine au Roy. . . Et purceo quod le breve reherce le statut. . . et pur ceo qu'il ne dit ubi ingressus non datur per legem, le breve a batist; car si le entre fuit congeable sur le plaintiff, il n'ad cause d'action." The careful reader will be somewhat surprised to find that Lord Hale's note is quoted by the court: "He shall not maintain it by the statute Rich. II. but may by the statute of Henry VI.," thus converting a decision from the Year Book, expressly denying the action, into a statute authorising it, by the deliberate insertion of the words italicized, not one of which is to be found in the author cited. In any tribunal less respectable than the court of Vermont, this might be called by even a "severer name" than "blundering." It may be added, that the law laid down in the case from the 9 Hen. VI. is reaffirmed in 15 Hen. VI. fo. 17, pl. 12.

The general ground on which this case proceeded, that the entry by force being prohibited could confer no legal possession, must be considered as overruled in Vermont by the later case of *Mussey v. Scott*, 32 Vt. 82, where the landlord having a right of entry, violently broke into the premises during the temporary absence of the tenant, and was nevertheless held to have acquired a lawful possession thereby, which he might defend by force against