FLEEMAN ET AL. *vs.* HOREN ET AL.

If the plaintiff, in an action of forcible entry and detainer, dismiss his suit, after execution of the writ, as he has a right to do, the court ought to render judgment that the defendant be restored to the possession of the improvement and for costs.

The act of the Legislature providing for the action of forcible entry and detainer, adjudged to be constitutional.

Appeal from the Circuit Court of Franklin county.

This was an action of forcible entry and detainer, under the Statute, brought by Josiah F. Horen and James B. Simpson, against Rebecca L. Fleeman and James M. Leggett, and determined in the Frank-

lin Circuit Court, at the August term, 1846, before the Hon. RICHARD C. S. BROWN, Judge.

The writ was executed, and the plaintiffs put in possession of the improvement for which the suit was brought. The plaintiffs, at the return term of the writ, moved the court to strike the case from the docket, on the grounds: 1st. That the proceedings are in derogation of the 10th section of the bill of rights, and the law on which they are founded is unconstitutional and void; 2d. That the law is so fatally defective that no legal proceedings can be had thereon. The court sustained the motion, and dismissed the case. The defendants then filed a motion for their costs, and for a writ of restitution; the court overruled their motion, and they appealed to this court; and assign for error the sustaining of the motion of the plaintiffs below, and the overruling of their motion.

BATSON and RINGO & TRAPNALL, for appellants. The court clearly acted on the assumption that the act was unconstitutional, and that it had no jurisdiction in the cause, and could make no order in it. With what provision of the constituion this act is in conflict, we are unable to discern, and therefore presume that there is no reason why the act should not have been enforced, and a writ of restitution awarded and a judgment for costs.

The act of plaintiff below in moving the court to quash his own writ, is, in its legal effect, a discontinuance of the suit, and an admission of record that he is not entitled to his said action. The question, then, is: 1st. Is he entitled to discontinue, or dismiss his suit? and, 2d. If so, what is the consequence of his retraxit, discontinuance, or dismissal of his suit?

As to the first question—we concede the right to every plaintiff to enter a retraxit, discontinue or dismiss his suit, at any time before trial, at will, unless sustained by some positive law.

But, as to the second—we insist, that by bringing the suit, he has submitted himself to the jurisdiction of the court; and that, to prevent him from gaining an advantage of his adversary and holding possession of property acquired by virtue of the process of the court, which he now admits of record, he is not by said process entitled to keep,

and also to avoid a multiplicity of suits, the court, when he so abandons or refuses to prosecute his suit, is bound to restore to the defendant the property for which he was divested by such illegal and fraudulent use of its process, and peremptorily award such process as shall be necessary to restore the property to the possession of the defendant: and having refused to make such award, the judgment in this case is incomplete, and withholds from the defendants below redress to which the law entitles them, and they are entitled to a reversal of judgment of the court, denying them a writ of restitution and refusing to adjudge them their costs.

NO COUNSEL, contra.

OLDHAM, J. The plaintiffs below were entitled to dismiss their suit, if they saw proper to do so, and the court committed no error in sustaining their motion. Upon the order dismissing the suit, the court should have rendered judgment, that the defendants be restored to the possession of the improvement of which they had been dispossessed by the process of the court, and also judgment for the costs of the defendant. Restitution should have been awarded, placing the parties in *statu quo,* leaving their rights to be settled by law. *Com.* v. *Bigelord,* 3 *Pick.* 31. *People* v. *King,* 2 *Caines Rep.* 98, 10 *J. R.* 304.

We do not conceive that the act of the Legislature, under which the proceedings in this case were adopted, is unconstitutional. It was intended as a speedy and efficient remedy for the cases specified in the act, leaving the rights of the parties to be settled by the adjudication of the court in which the plaintiff's possession under the process will be confirmed, or restitution awarded to the defendant according to the verdict of the jury.

It cannot be contended, that the 10th section of the bill of rights contained in the constitution, precludes a party from bringing his action of replevin, by which he may obtain immediate possession of his property, which has been wrongfully taken or wrongfully detained from him, leaving the title to be determined by the subsequent adjudication of the cause by the court. The objection may be urged with as much

propriety and force against that action, as the one under consideration. A party, however, cannot be permitted to abuse the process of the court, so as to obtain possession of the property, and then dismiss his suit without submitting his title to the investigation of the court, and retain his possession thus improperly acquired.

The decision of the Circuit Court, in overruling the motion of the defendants below, for re-possession and costs, is erroneous, and must be reversed, and the cause remanded, to be proceeded in according to law, and not inconsistent with this opinion.