FOWLER'S ADM'R *vs.* KNIGHT.

To maintain the action of forcible entry and detainer, the plaintiff is not bound to show that he was in actual possession of the premises when the defendant entered.

Nor is it necessary to show that defendant entered by actual force: if the entry is unlawful, force is implied.

A peaceable entry may be unlawful, and, in legal contemplation, forcible.

If the premises are unoccupied when defendant enters, plaintiff is not bound, on that account, to show title in himself. He need only show his immediate right of possession: the title cannot be adjudicated in this action, or given in evidence, except to show the right of possession and the extent thereof.

If, in such action, the jury find for defendant, they cannot assess damages against the plaintiff: the defendant has his remedy upon plaintiff's bond.

Appeal from the Pulaski Circuit Court.

This was an action of forcible entry and detainer brought by Milton Fowler against John E. Knight, determined in the Pulaski Circuit Court, at the April term, 1848, before Hon. WM. H. SUTTON, Judge.

The declaration alleged that on the 14th day June, 1847, plaintiff was in lawful and peaceable possession of lot 12, in block 136, west of the Quapaw Line in Little Rock, and that on said day, defendant, with force and arms entered upon said premises and dispossesssed the said plaintiff of the same, and still held possession of the said premises, contrary to the Statute, &c.

The Sheriff returned upon the writ, that by virtue thereof, he

had, on the 28th day August, 1847, turned the defendant out, and put the plaintiff into possession of the premises, &c.

The cause was submitted to a jury on the plea of not guilty, and they found for defendant, and assessed his damages at $32, and judgment for restitution, the damages assessed by the jury aforesaid, and costs, was rendered in favor of defendant.

Pending the trial, plaintiff took a bill of exceptions showing the following facts:

Absalom Fowler, Esq., witness for plaintiff, testified that in the latter part of October, or very early in Nov., 1845, after the plaintiff had purchased, at sheriff's sale, the lot of land in controversy and the house and improvements thereon, he, witness, as agent of plaintiff, who was then confined to his room by indisposition, went to Langtree, who was then, and had been for some time previous, in possession of the lot as the tenant, and holding possession of the lot under witness, Sullivan and the Sheriff, pending a suit of attachment against the lot, and informed Langtree that plaintiff had purchased the lot and house, and that witness, as his agent, had been instructed to call on Langtree for the possession thereof; or to rent it to him; and that Langtree then acknowledged himself as tenant of the plaintiff, and agreed to hold possession of the house and lot for the plaintiff as such, and to pay him a reasonable and fair rent therefor, as long as he should thereafter remain in possession thereof. That Langtree continued to occupy said house and lot as plaintiff's tenant for a considerable time thereafter, and, as witness thought, until in the early part of the year 1847. That in March or April, 1847, witness desiring to dispose of a house under his control occupied by Pendleton's family, Pendleton being then from home, understood that nobody was living on the lot and house in controversy, and went to the plaintiff and engaged it for Pendleton's family, under an agreement with Mrs. Pendleton that her husband should pay plaintiff for the use of it whatever it was worth. Plaintiff then had the key of the dwelling house on the lot in his possession, and handed it to witness, who went personally, and examined the house and lot, and put Mrs. Pendleton and family in possession

thereof, as tenants of the plaintiff, and to hold under, and redeliver the same to plaintiff. At that time the doors and windows of the house on the lot were all barred or fastened inside, except one door, which said key opened, and the key was delivered by witness to Mrs. Pendleton, but how long she remained in possession witness did not know.

Plaintiff then proved by Haney that Pendleton was in possession of the house and lot, under the plaintiff in the latter part of May or early in June, 1847, and left them about that time, and that Pendleton, when he so left, sent a key, which he said was the key of the house, to the plaintiff by the witness, and witness thinks he delivered the key to the plaintiff, as he recollected distinctly that plaintiff called on him for the key. The front door of the house on the lot opens by a lock and key, the back door fastens on the inside.

Plaintiff also proved by Brown that he had often been in the house, and that the front door opened by means of a lock and key, and the back door fastened by means of a bar; and his principal knowledge of the house was acquired before Pendleton occupied it, and before it was occupied by the defendant. Witness went to see the house and lot with the view of purchasing them, and did not go in the house then, but walked around it, and all the doors and windows were then closed, but he did not examine whether the front door was locked or the back door or windows fastened; and that after Pendleton left the house and lot, witness saw the defendant in possession of them.

Plaintiff proved by Hutchings that he served a notice on defendant in writing, on the 16th of June, 1847, at the request of plaintiff, to quit the premises in question; and that defendant was in possession of the house and lot about that time. Plaintiff offered to read the notice, with the return of service endorsed thereon by witness, as deputy Sheriff. to the jury, but the court excluded it. Plaintiff then read to the jury the original writ issued in the case, with the Sheriff's return thereon.

The Court permitted defendant to prove that the house and lot in controversy, from and after the 28th day of August, 1847, the

time he was dispossessed by the Sheriff, was of the monthly value of four dollars; to the admission of which evidence plaintiff objected and excepted.

The above being all the evidence introduced by either party, the Court instructed the jury as follows:

"That this is an action of forcible entry, and that in order to maintain it, the plaintiff must prove that the defendant entered upon and took possession of the premises in question, and detained the same with force and strong hand, or by entering peaceably, and then turning out by force, or frightening by threats or other circumstances of terror, the party to yield possession.

"That this action will only lie in such cases as where there is such a degree of force and breach of the peace as would have sustained an indictment at common law.

"That if the jury believe, from the evidence, that the defendant took possession peaceably and without force and strong hand, they must find for the defendant.

"That entering into or upon premises vacant, or unoccupied, peaceably, would not be such an entry or taking of possession as would subject a party to an action for forcible entry.

"And that if the jury believe that the defendant entered into or upon premises vacant or unoccupied, they must find for the defendant."

To the giving of which instructions, plaintiff excepted.

Plaintiff moved the Court to instruct the jury as follows:

"1st. If the jury believe from the evidence that the plaintiff, at and before the time that the defendant entered upon the lot in controversy, had the right to the possession thereof, and the actual possesssion thereof, and defendant entered thereon without his permission and detained the same, after demand made for the possession, they should find for the plaintiff.

"2d. If the jury believe from the evidence, that the plaintiff was entitled to the possession of the lot in controversy, and had actual possession thereof at the time the defendant entered thereon, such entry was in legal contemplation unlawful and forcible;

and the plaintiff would be entitled to recover in the suit unless he permitted the defendant to enter thereon.

"3d. If the evidence justify it, the jury may infer therefrom, that the defendant entered unlawfully and with force, though no witness saw him make the entry."

Which instructions the Court refused to give, and plaintiff excepted.

The Court further instructed the jury:

"That where a person has been in actual possession of real estate, as his own, and finds another person peaceably in possession of it, without his permission, he cannot maintain an action of forcible entry unless he establish a title to the real estate in himself; and further that in this action the defendant may recover damages against the plaintiff, and the jury may assess the same to the extent of the monthly value of the property proved."

To the giving of which instruction plaintiff excepted.

Plaintiff appealed.

Appellant's death was afterwards suggested, and the cause revived in the name of Absalom Fowler as his administrator.

FOWLER & JORDAN for the appellant. The plaintiff's right to recover was restricted by the instruction of the Court to but two of the classes of cases enumerated in the Statute *(Dig. ch.* 71, *Sec.* 2.)

The jury are not presumed to know what degree of force was required to sustain an indictment at Common Law, and the second instruction was calculated to mistify them. Our Statute of Forcible Entry and Detainer is variant from the Common Law.—(3 *Ch. Cr. Law* 1120, 2 *Bac. Abr.* 555 *et seq.)* Nor were forcible entries indictable except by Statute *(ib)* nor is such force requisite to sustain this action. 4 *Bibb.* 389. 3 *J. J. Marsh.* 46. 3 *A. K. Marsh.* 344. 2 *S. Car. Const. Rep.* 489.

It is not essential or admissible for the plaintiff to establish title in this action. *Dig. ch.* 71, *Chiles et al. vs. Stephens.* 3 *A. K. Marsh.* 344. *Beauchamp vs. Morris,* 4 *Bibb.* 313. Possession only is required, and where that is established a bare entry without the

consent of the plaintiff is in contemplation of law a forcible entry. *Brumfield vs. Reynolds,* 4 *Bibb.* 389. *Swatzwelder vs. The U. S. Bank,* 3 *J. J. Marsh* 46. 3 *A. K. Marsh,* 344. *Burt vs. The State,* 2 *Const. Rep. (S. Car.)* 489. *The State vs. Burt,* 3 *Brev. Rep.* 413.

The Statute does not authorize a verdict and judgment against the plaintiff for damages on the plea of not guilty, nor such judgment can be rendered against the plaintiff, as it would be a departure from the issue.

It is the right of the jury to weigh and judge of the effect of the evidence; and if the evidence justify it they may infer that the defendant entered unlawfully, and with force, though no witness saw him make the entry. *Law Rep. Vol.* 9, *No.* 6, *p.* 277. *Crane vs. Lessee of Morris et al.,* 6 *Pet.* 617. *Kelly vs. Jackson, ib.* 629. *Van Ness vs. Pacard,* 2 *Pet.* 148. 16 *Pet.* 323. 6 *Mo. Rep.* 63. 1 *Eng. R.* 430. 1 *Scam. Rep.* 533. 1 *J. J. Marsh.* 39. 3 *Brevard's Rep.* 413.

WATKINS & CURRAN, *Contra.* Forcible entry lies only for one who was in actual possession at the time of the entry: *(Stewart vs. Wilcox,* 1 *A. K. Marsh.* 255. *Childress vs. McGehee,* 1 *Minor* 131) and there must be actual force or intimidation. *Comm. vs. Keeper of Prison,* 1 *Ashmead* 140. *Bird vs. Bird,* 2 *Root* 44. 2 *Chit. Cr. Law,* 1163 *in notes.* 10 *Mass.* 403. 7 *Halst.* 202. 3 *A. K. Marsh.* 296.

A person not having possession in fact at the time of the entry cannot maintain this action. *(Pogue vs. McKee,* 3 *A. K. Marsh.* 127. *McDonald vs. Gayle, Minor* 98. *Hopkins vs. Buck,* 3 *A. K. Marsh.)* and the defendant must enter forcibly when actually held adversely by the plaintiff. *Lane vs. Marshal, Mart. & Yery* 255. *Bennett vs. Montgomery,* 3 *Halst.* 48.

The question of title or right of possession cannot be tried in this action *(People vs. Godfrey,* 1 *Hall* 240;) force is the only subject of inquiry (4 *Bibb.* 312. *ib* 192. 2 *Root* 472:) therefore constructive possession is not sufficient, that being a possession resulting from title.

A judgment for damages follows as a necessary consequence

of a judgment for defendant, who had been dispossessed by the writ in this case.

The plaintiff, to maintain this action, must have had actual, not constructive possession, nor the mere right of possession, at the time of the entry by the defendant, which must have been by force, not peaceably when the premises were unoccupied.

MR. CHIEF JUSTICE JOHNSON, delivered the opinion of the court.

This is an action of forcible entry and detainer, and the main question to be decided is whether the plaintiff in the court below made such a case as to entitle him to a recovery under the Statute. The 2d and 3d sections of chapter 71 of the Digest provide that "If any person shall enter into or upon any lands, tenements or other possessions, and detain and hold the same with force and strong hand, or with weapons or breaking open the doors and windows, or other parts of the house, whether any person be in or not, or by threatening to kill, maim or beat the party in possession, or by such words and actions as have a natural tendency to excite fear or apprehension of danger, or by putting out of doors, or carrying away the goods of the party in possession, or by entering peaceably and then turning out by force or frightening by threats or other circumstances of terror, the party to yield possession; in such case every person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this act;" and that "when any person shall wilfully and with force hold over any lands, tenements, or other possessions, after the determination of the time for which they were demised or let to him, or the person under whom he claims, or shall lawfully and peaceably obtain possession but shall hold the same unlawfully and by force, and after demand made in writing for the delivery of possession thereof by the person having a right to such possession, his agent or attorney, shall refuse or neglect to quit such possession, such person shall be deemed guilty of an unlawful detainer." These two sections are believed to be sufficiently comprehensive to embrace every case where the mere right of possession is involved. If this be true, the whole

matter in controversy between the parties is settled and nothing remains for this Court but to pass upon the several instructions given and refused by the Court, and to point out the errors committed therein.

The ground taken by the defendant below is, that this action lies alone when brought for the entry and detainer, in cases where the party suing was in the actual possession of the property at the time of the entry. We think such is not the true and legitimate construction of the Statute. It is clear that the different sections when compared together and harmonized will lead to a contrary conclusion. The first section declares that "No person shall enter into or upon any lands, tenements or other possessions, and detain or hold the same but where an entry is given by law, and then only in a peaceable manner. It most assuredly would not be contended that because lands were lying unoccupied by the owner of the soil, or even by the party entitled to the possession, and who made no pretence of claim to the fee simple, a mere stranger, without color of right, could be said to have an entry given him by law. It is perfectly manifest that a stranger, under such circumstances, would not be authorized to make an entry, and if he should do so he would be regarded as a trespasser in the eye of the law. This view of the law is strengthened by the 17th Sec. of the act which provides that "In trials under the provisions of this act, the title to the premises in question shall not be adjudicated upon or given in evidence except to show the right to the possession and the extent thereof." The real difference between this action and that of ejectment is that this is confined in its operation to the recovery of the possession, whereas ejectment lies as well to establish the title as the mere right to the possession at the election of the party. This action was designed by the Legislature to come in aid of ejectment, where the mere possession is in dispute, and to afford the party a more speedy and summary remedy by placing him in immediate possession upon his complying with the requisites of the Statute.

We will now proceed to examine the instructions given and

refused by the Court, and endeavor to see how far they square with this construction of the Statute.

The first instruction is not sufficiently comprehensive as it attempts to set out the circumstances and facts which amount to a forcible entry and detainer, and still fails to set out all those specified in the Statute. And it may be regarded as defective in another respect, as it is confined to a forcible entry in terms, and evidently conveying to the minds of the jury that nothing short of actual force would be sufficient, when it is manifest from the first section, when taken in connection with others, that actual force is not alone contemplated, but that implied force is allsufficient, and that the law will presume force in all cases where the defendant entered, and no entry was given him by law. The language of this instruction therefore, though perhaps technically sufficient, was, if taken literally, well calculated to mislead the jury, and the Court should have further instructed that force either actual or constructive would have been sufficient to authorize the action.

The second is a mere assertion of an abstract question of law. It refers it to the jury to decide as to the degree of force that would have sustained an indictment at the common law. It wholly failed to state a supposed state of facts, and then to instruct as to the law arising upon such facts.

The third is also defective as it virtually discards the idea of implied or constructive force. The defendant may have obtained the possession peaceably, and yet he may have used such force in contemplation of law as would have justified a recovery against him.

The fourth is liable to the same objection. It also asserts the doctrine that in case an entry shall be made peaceably, it would not be such an one as to subject the party to an action of forcible entry and detainer. It assumes that, in case the property entered is vacant and unoccupied at the time of the entry, and such entry is made peaceably, the action will not lie. This point was virtually decided in passing upon the third instruction. It is clear that the entry might be made peaceably, and yet if the

party entered as a mere stranger without color of right, the law would imply force and the action would well lie.

The fifth is substantially the same as the third and fourth and consequently subject to the same objection.

The first and second instructions moved by the plaintiff are predicated upon the idea that actual possession, at the time of the entry, is essential to entitle a party to maintain this form of action. This was conceding more than the law required on the part of the plaintiff. These two instructions therefore, not only covered the whole ground of the law involved, but went far beyond it, and consequently could not be denied to the plaintiff if he desired that they should be given in charge to the jury. The third was clearly legal, as it was fully warranted by the testimony in the case. It was not pretended that any one saw the defendant enter, and yet it is clear that, if he entered without color of right, the law would imply force as against the real owner of the soil or the party entitled to the possession.

The last instruction given by the Court, and as it would seem upon its own motion, is clearly erroneous. It is in the very teeth of the 17th Section of the Statute, which declares that the title shall not be adjudicated upon or given in evidence, except to show the right to the possession and the extent thereof. It clearly appears therefore that it is not material under what circumstances the defendant obtained possession, that in order to enable the plaintiff to recover in this form of action it is necessary for him to recover his title to the property, but that it is all sufficient for him to show his right to the immediate possession. The first branch of the instruction is therefore erroneous. The second we consider equally so.

The defendant, in case he shall have a verdict in this form of action, when the case is tried upon the merits, is not entitled to have his damages at the same time and included in the verdict and judgment. It is apparent from the 15th section that the defendant was not entitled to a verdict for his damages, which he had sustained in consequence of being dispossessed of his property. It only provides that in case the verdict is for him, the

Court shall give judgment thereon with costs, and shall also issue a writ of restitution directed to the Sheriff to cause the defendant to be repossessed, and that a clause shall be added commanding the Sheriff to levy the cost of the goods, chattels, lands and tenements of the plaintiff. Nothing is here said in respect to the damages, and nothing is authorized to be levied of the goods and chattels of the plaintiff except the costs of the suit. The 14th section tends strongly to confirm this view as it requires the Sheriff to hold the bond of the plaintiff for the security of the defendant, and that it shall be assigned to such defendant or his personal representatives if judgment be rendered for him in the action.

We are therefore clearly of opinion that the Circuit Court erred both in giving and refusing instructions, and that consequently the judgment ought to be reversed. Judgment reversed and cause remanded.