of the States. And, indeed, as the reader will recollect, the bulk of the opinion in Swift *v.* Tyson is *dictum*, and against Mr. Justice CATRON recorded a vigorous dissent for the expressed reason that the point had never been raised by the record, argued by counsel or even mentioned in connection with the case until Mr. Justice STORY read his opinion.

One of the evil results of the trust fund explanation is seen in the refusal in Handley *v.* Stutz, following Sawyer *v.* Hoag, to permit one of the stockholders to set off his own claim upon the corporation against the claim of the creditors. This point is not noted by Mr. LEWIS in his syllabus; it is of such importance that it deserves specific mention. To this case Mr. LEWIS has added a valuable annotation, containing a large collection of the authorities upon the trust fund doctrine. Among them we notice a case already referred to—Wood *v.* Dummer—cited as Ward *v.* Dummer.

Mr. LEWIS'S volume is, on the whole, well worth attentive perusal, and to the lawyer with a brief to write it will prove only less useful than to the student who desires to keep abreast of the development of corporation law.

NOTES AND COMMENTS.

[The Editors are not responsible for the opinions expressed in this Department.]

THE HOMESTEAD RIOTS.

The recent disturbances at Homestead have excited some little inquiry, as indicated by communications in the public prints, as to the extent of an owner's right to repossess himself of his property by force without recourse to law, where taken possession of and held with force and threats by persons until then in his employ. Such right undoubtedly existed at common law for a long period, and extended to any disseisin by whomsoever effected. It was termed the right of entry, and was founded on the necessities of the case, which might often require, in justice to

the owner, a speedier remedy than the ordinary process of law could afford.

"But this," says BLACKSTONE,[1] "being found very prejudicial to the peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods even of doing themselves justice," and accordingly the statute of Richard II, C. 7. reads: "And also the King defendeth that none from henceforth make any entry into any lands and tenements, but in case where entry is given by law, and in such case not with strong hand, nor with a multitude of people, but only in a peaceable and easy manner, and if any man from henceforth do the contrary and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will." The second statute of Edward III had already provided against the use of arms to strike terror into persons against whom entry was made, and other statutes followed having a similar purpose, "so that," continues BLACKSTONE, "the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, violence and unusual weapons."

It appears that in addition to the prohibition of these statutes a forcible entry against any one in possession was indictable as a misdemeanor at common law, and the injury was both of a civil and criminal nature, the civil being remedied by immediate restitution, and the criminal by fine and imprisonment.[2] The common and English statute law on the subject has been supplemented by statutes in the various States of this country defining the offence and its punishment. To constitute a forcible entry, it must be with such force and violence as is sufficient to excite apprehension, as distinguished from a simple trespass, and accompanied by a claim to the land, and the party injured must be in actual peaceable possession.

The reason underlying the law, as has been seen, is the maintenance of the public peace. "The public peace,"

[1] Commentaries, Book IV, p. 148.

[2] Commonwealth *v.* Toram, 2 Pars., 413.

says BLACKSTONE,[1] "is superior to any one man's private property, and if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention or endanger the peace of society."

An exception, however, is recognized in the books where an owner is forcibly deprived by his servants of the possession of his property. His right in such case to use force and violence in recapturing it, notwithstanding the statute, was always recognized. The proposition is set forth by HAWKINS, in his Pleas of the Crown, C. 28, § 32, p. 503, as follows: "That no one can be in danger of those statutes by entering with force into a tenement whereof he himself had sole and lawful possession both at and before the time of such entry, as by breaking open the door of his own dwelling or of a castle which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, or by forcibly entering into land in the possession of his lessee at will." Citing Moor, 786, HAWKINS, however, adds the words "sed quære" after the statement, as though being somewhat doubtful himself of its authority. BISHOP, in his work on Criminal Law, however, adopts the proposition as stated by HAWKINS,[2] and it is expressly recognized in Pennsylvania by Judge KING in the case of Commonwealth *v.* Keeper.[3]

Neither the instance cited by HAWKINS of simply breaking open a door, nor the case ruled by Judge KING, involved any injury to the person; but if the rule in all its breadth be conceded, it may readily be imagined how the liberty it allows may result in serious consequences. As an exception to the inhibition imposed by the statutes against a right which formerly had no limitations, it would

[1] Book III, p. 4.
[2] Bishop Crim. Law, § 509.
[3] 1 Ash., 146 (1828).

seem to leave that right in the same position it occupied before the statutes were passed, and might, stated in another way, amount to this: that an owner, whose access to his own property is forcibly or threateningly denied him by his agent, servant or lessee at will, may use the same force and violence in retaking it as if the positions were reversed and he were defending it from attack with violence from outside. Certainly if he is deemed to be still in possession under such circumstances, he is defending his possession in either case. What then has one a right to do in defending his possession?

Where a person is attacked in his own house he need retreat no further; he may turn on and kill his assailant, if this be apparently necessary to save his own life, nor is he bound to escape in order to avoid his assailant.[1] Not only is he excused from retreat when in his own house, but he has the same excuse when pursued into any building out of which he cannot escape without exposing himself to bodily harm.[2] And when resistance to a felonious attempt is concerned (*i. e.*, burglary, or arson, or felonious assault on the person), then the question of the ownership or the purpose of the building does not come up. If such felony is apparently attempted, and if it cannot be apparently prevented except by the taking of life of the assailant, then any person is justified in taking such life. Hence not only the owner of the house, but his friends, neighbors and *a fortiori*, his servants and guests may arm themselves for the purpose.[3]

And for similar reasons the protection of the law is thrown over those who intervene to prevent an apparent felonious attack on a church or bank.[4]

Now the reasoning upon which the owner's right to retake by violence, under the circumstances stated by HAWKINS is based, is not given in the books, though indeed it must conflict with the general reason underlying the law

[1] WHARTON on Homicide, § 541, and see note to § 455 as to the meaning of the term "a man's house is his castle."

[2] Id. § 550.

[3] Id. § 549.

[4] Id. § 551.

against forcible entries, inasmuch as the one case might involve as great a breach of the peace as the other.

It is said the servant's possession is the owner's possession, and we may readily concede that it is not necessary in order to constitute possession that the owner should be personally present on his property; and, further, that in many cases as against third parties the possession of his family, servants or agents is his own possession. But it would seem to be a wide stretch of reasoning to conclude from this that the servant's possession is the owner's possession even as against the owner himself, and when the owner no longer acknowledges him as a servant.

Not less absurd would it be to derive the fiction of possession in the owner, notwithstanding his forcible exclusion, from the constructive seisin in deed which was recognized by the common law in the ancestor for the purpose of inheritance by the heir in the absence of actual entry,[1] or by virtue of conveyance effected under the statute of uses, or for the purpose of enabling an owner out of physical possession to bring a real action, as, for instance, where it was deemed to be an actual seisin for such purpose if a man having title of entry, but not daring to enter through fear of bodily harm, approached as near as he dare and claimed the land as his own.[2] The object of entry and its constructive equivalent in such cases is notoriety of title, and such consideration does not enter into the case in hand, as there can be no question here whose is the title, and even if there were, the question of title does not enter in the case of forcible entry.

But one possible reason would seem, therefore, to remain undisposed of, and that is the one above quoted underlying the right of entry as originally existing before the statutes were passed, to wit, the "necessities of the case which might often require in justice to the owner a speedier remedy than the ordinary process of law," or, in other words, as put by a learned judge, the protection to one's home.

[1] 2 Kent, 385.

[2] See Green *v.* Liter *et al.*, 8 Cranch, 246.

But it is submitted that the very circumstance which would now in the absence of such exception subject the owner to indictment for forcible *entry* would likewise subject the servant to indictment for forcible *detainer*, and if he might at once upon the first act of insubordination of the character mentioned subject himself to arrest, the strong arm of the law would afford a surer and speedier method of giving the owner access to his property without occasioning a breach of the peace, than his own act.

"The same circumstances," says RUSSELL on Crimes,[1] "which make an entry forcible will also make a detainer forcible. And it hath been said that he also shall come under like construction who places men at a distance from the house in order to assault any one who shall attempt to make entry into it."

"If a man undertakes to retain what he knows to be a wrongful possession by force or by numbers reassembling exciting terror he is guilty of a forcible detainer."[2]

The offence in Pennsylvania forms the subject of a separate section of the Act of March 31, 1860,[3] which provides that "if any person shall by force and with strong hand or by menaces or threats unlawfully hold and keep possession of any lands or tenements, whether the possession of the same were obtained peaceably or otherwise, such person shall be deemed guilty of forcible detainer, and upon conviction thereof will be sentenced to pay a fine not exceeding $500 or to undergo an imprisonment not exceeding one year or both or either at the discretion of the Court, and to make such restitution of the lands and tenements unlawfully detained as aforesaid."

There seems, therefore, to be no longer any reason for the exercise by the owner of a right which involves a breach of the peace; and, consequently, *cessante ratione*, *cessat ipsa lex*.

J. PERCY KEATING.

JULY 30, 1892.

[1] 9 Am. Ed., 427.

[2] Am. & Eng. Encyc. of Law. "Forcible Detainer," p. 111, and cases cited.

[3] Purd. Dig., 320.