

1810.

Shapley
vs
Alexander

trespass against an *abator* before actual entry. Nor can disseisee against disseisor, except for the *act of disseisin*; but for injuries done *afterwards*, disseisee cannot bring trespass until *actual entry*. 3 *Blk. Com.* 210, states the law in the same manner; as also doth *Bull. N. P.* 86. These three last are elementary treatises, and all cite as their authority for what they have stated, 2 *Roll. Ab.* 553, and *Roll.* cites 19 *Henry VI.* 28, b. And as the authority on which it is founded was during the feudal system, so did the doctrine itself depend entirely upon the principles of the feudal system, and the tenures growing out of it. Under that system no person could have a *freehold* in lands without the concurrence of the lord, and without some act done by the lord giving investiture of the freehold to the tenant. "*Sciendum est feudum sine investitura, nullo modo constitui posse.*" 2 *Craig*, Lib. 2, tit. 2. Upon every *descent* or *alienation*, during times of pure feudal tenure, the lord gave, and therefore he only could change, the *seisin* or *investiture*. 3 *Blk. Com.* 170. Thus, therefore, by the death of the ancestor, the *heir* or *devisee* could not become the *actual tenant of the freehold*, without an act done by the lord, to wit, the giving him *seisin* and *investiture*. And if before this act of the lord, a stranger, who had no right, made entry, and got possession of the freehold, having the *seisin* and *investiture* thereof given to him by the lord, through his connivance, the heir or devisee was obliged to make an actual entry before he could bring trespass; for the *abator* had the *actual freehold* until the entry of the heir or devisee; and no principle can be more clear than that no action of trespass can be supported against the *actual tenant of a freehold*. That the *abator* obtains possession of the *freehold*, and is the tenant of the freehold, the following authorities prove: "*Abatement* is where a person dies seized of an inheritance, and before the heir or devisee enters, a stranger, who has no right, makes entry and gets possession of the *freehold*." 3 *Blk. Com.* 167. These ousters, (that is abatement and intrusion,) are *oustes from freeholds in law*, which is done by getting themselves substituted to be tenants of the lord, instead of the heir, devisee, remainderman or reversioner. *Ibid* 169, 170. If my father dies seized, and no one enters, there is *seisin in law* in the heir, (not in fact till the lord invests him;) and pre-