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Citation Information

Adler, Gerald M.. "Licenses and the Summary Proceedings Provisions." *Osgoode Hall Law Journal* 2.3 (1962) : 335-346.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol2/iss3/4>

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Licences and the Summary Proceedings Provisions

GERALD M. ADLER*

The subtle and technical distinction between lease and licence has provoked several eminent jurists,¹ within the last decade, to comment upon the subject and its effect upon assignees of the land. The issue, in general, has given much trouble to lawyers, both academicians and practitioners since *Wood v. Leadbitter*,² but judicial precedent has so changed the distinction then made, that to apply it rigidly, in the context of today's social and economic development, would tend to incongruity. However, it is not intended in this article to explore the wider field which has been already covered, but to examine, in some detail, the differentiation which is said to exist between lease and licence within the terms of the Landlord and Tenant Act. More specifically the question is whether, *within the terms of the Act*, there is any distinction between the two types of "interest" with regard to the "owner's" right to terminate, or to recover possession from the overholding "occupant".

The recent case of *Willoughby v. Willoughby*³ decided in the Ontario Court of Appeal, held that a licensor could not apply to the Court, under summary provisions of the Act, to recover possession from an overholding licensee who had been given notice to terminate.

Briefly the facts in the *Willoughby* case were that the parties in 1951 and 1958 in the course of their discordant marriage, had entered into two agreements of separation, by which in the result, the husband conveyed, *inter alia*, to the wife their matrimonial home to be held in trust for their daughter; upon whose majority or marriage the property was to vest in the wife absolutely. In return, the wife promised not to lock or put out the husband so long as both parties lived together as man and wife. In 1959, marital relations became strained once again, and the wife removed herself from the premises. She had issued, on her behalf, a demand for possession which was

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¹ Wade, *Licences and Third Parties* (1952), 68 Law Q. Rev. 337; Williams, *Interests and Clogs* (1952), 30 Can. Bar Rev. 1004; Cheshire, *A New Equitable Interest* (1953) 16 Mod. L. Rev. 1; Hanbury, *Licences, A Jonah's Gourd* (1954) Camb. L.J. 201; Stoljar, *Licence Interest and Contract* (1955) 33 Can. Bar Rev. 562; Wade, *What is a Licence?* (1948) 64 Law Q. Rev. 57.

² *Wood v. Leadbitter* 13 M. & W. 838, 153 E.R. 351.

³ *Willoughby v. Willoughby* [1960] O.R. 276, (1960) 23 D.L.R. (2d.) 312.

ignored. As a result, summary proceedings under Part III of the Landlord and Tenant Act were instituted.

The County Court Judge found that the husband's occupation of the premises after the departure of the wife was as a tenant at will. Having found the relationship of landlord and tenant to subsist, he issued an order for possession in favour of the wife. A major question before the Court of Appeal was whether the classification of the parties by the County Court Judge was correct. Morden, J.A., in delivering the judgment of the court, classified the relationship as that of licensor and licensee and concluded:⁴

There remains for determination . . . whether Part III of the act, in view of the definition contained in that Act, can be invoked by a licensor against a licensee. That is a relationship *which does not vest in the licensee any estate or interest in the land*, and the licensor and licensee do not "occupy substantially the position of landlord and tenant." . . . If the right of an occupant is no greater than a personal right conferring on him no interest in the land, he is not substantially in the position of a tenant and *quoad* such a person, the summary procedure authorized by the Act cannot be properly invoked. (emphasis added)

Consequently the Court held that the County Court Judge was without jurisdiction.

I

In view of the fact that the position of a licensor under Part III of the Act had been questioned directly only once before in the reported cases,⁵ it is important to examine whether within the Ontario Act and its previous judicial interpretation, there is any justification for refusing the licensor's application for recovery of possession by way of summary proceedings.

Section 1 of the Landlord and Tenant Act⁶ provides:

1. In this Act,

- (b) "Landlord" includes lessor, owner, the person giving or permitting the occupation of the premises in question and his and their heirs and assigns and legal representatives and in Parts II and III also includes the person entitled to possession of the premises.
- (d) "Tenant" includes lessee, occupant, subtenant, undertenant and his and their assigns and legal representatives.

The provisions which permit an application by a landlord to the County Court Judge against an overholding tenant are to be found in Part III of the Act, section 75 of which provides in part:

75. (1) Where a tenant after his lease or right of occupation . . . has expired or been determined . . . by a notice to quit or notice pursuant to a proviso in a lease . . . or has been determined by any other act whereby a tenancy or right of occupancy may be determined, or put an end to, wrongfully refused or neglects to go out of possession of the land . . . which he has been permitted to occupy, his landlord may apply . . . to the judge of the county or district court of the county or district in which the land lies to make the enquiry hereinafter provided for.

⁴ *Id.* p. 283.

⁵ *Reliance Petroleum Ltd. v. Rosenblood* [1953] O.W.N. 115.

⁶ R.S.O. 1960, c. 206.

(2) The judge shall . . . inquire and determine whether the person complained of was a tenant to the complainant for a term or period . . . that has been determined . . . and whether the tenant holds the possession against the right of the landlord, and whether the tenant, having no right to continue in possession, wrongfully refuses to go out of possession.

Section 77 of the Act empowers the Judge to hear, in a summary manner, the parties and witnesses, and if it appears to him that the tenant wrongfully holds over, he *may* order the issue of a writ of possession.

The precursor of the above sections are to be found in Ontario as early as 1834 in the Upper Canada Real Property Act⁷ of that year. Section 53 of the Act stated:

53. Whereas the wrong committed by tenants in holding over vexatiously and without colour of right after their term has expired *requires a speedy and less expensive remedy than is now provided for by law*; be it therefore enacted . . . that it shall and may be lawful for any landlord whose tenant shall after the expiration of his term . . . refuse upon demand made in writing to go out of possession of the lands demised to him to apply to the Court of King's Bench [and after complying with certain conditions] it shall be lawful for such a Court or Judge . . . to place the landlord in possession of the premises in question.

It should be noted that this Act neither defined the terms "landlord" or "tenant", nor did it give jurisdiction to the court in a case where the tenancy had been terminated by a breach of covenant, but rather was applicable only "after the expiration of his [the tenant's] term".

In 1867, "An Act Respecting Overholding Tenants" was introduced⁸ enlarging not only the provision of the 1834 Act but also its amending Act of 1864.⁹ It included, for the first time, a definition of "landlord" and "tenant" (in substantially the same terms as the present Act), and also provision for summary proceedings. The latter were no longer to be confined to application upon the expiry of the agreement, but were extended to situations where either notice to quit had been served, or the right of occupancy, had been determined in some way. These provision were re-enacted under the Landlord and Tenant Act of 1911¹⁰ and appear without significant change in the current version of the Landlord and Tenant Act.¹¹

Similar legislation is to be found in most of the other common law provinces. It is interesting to note that the 1937 Conference of Commissioners on Uniformity of Legislation had recommended that a Uniform Act be adopted by the provinces. In view of the difficulties that had been encountered in its application and the fact that only a small minority of the provinces adopted the Uniform Act,¹² the conference withdrew its recommendations in 1954. In the Committee's

⁷ Statutes of Upper Canada 4 Will. IV c. 1.

⁸ Statutes of Ontario 31 Vict. c. 26.

⁹ Statutes of Ontario, 27 & 28 Vict. c. 30.

¹⁰ Statutes of Ontario 1 George V c. 289.

¹¹ *Supra* footnote 6.

¹² As of 1954, only Prince Edward Island (1939) New Brunswick (1938) and the North West Territories had adopted the Uniform Act.

report Chief Justice Williams commented that, although there were great differences in the laws of the provinces on the subject, such differences appeared to be unnecessary.¹³ One difference alluded to is to be found in section 19(2) of the British Columbia¹⁴ statute which has extended the applicability of the summary proceedings to

tenancies from week to week, from month to month, from year to year and tenancies at will as well as *all other terms, tenancies, holdings or occupations.*

This provision seems wider than the Ontario counterpart and in terms, it appears to cover all forms of occupancy including a license.

II

The question which arose in the *Willoughby* case was whether a licence fell within the provisions of the Ontario Act. It is submitted that the terms of section 1, defining a landlord as a person "permitting the occupation of the premises" and including for the purpose of Part III "a person entitled to possession of the premises", are *prima facie*, wide enough to include a contractual licensor. The licensee obtains his occupation of the premises by virtue of the permission of the licensor, and upon that permission having been *validly terminated* the licensor, is entitled to occupation. The term "tenant" is stated to include an "occupant". If this term is to have any meaning, it is submitted that it might well include a licensee, for the other forms of occupation with respect to which the landlord gives his permission are dealt with specifically by the other terms of the section.

An additional argument in support of this proposition is to be found under section 2 of the current Act which reads in part as follows:

The relation of landlord and tenant does not depend on tenure, *and a reversion in the lessor is not necessary* in order to create the relation of landlord and tenant; or to make applicable the incidents by law belonging to that relation. . . .

This section appears to have never been judicially considered with respect to its application to a licence.

The legislature when originally enacting this provision seems to have given an indication of what was intended. The current provisions were first enacted by section 3(1) of the 1896 Act,¹⁵ which by its terms, repealed an earlier provision, section 4 of the 1895 Act.¹⁶ However, section 3(2) of the 1896 Act reads:

It is hereby declared that the said section [s. 4 of the 1895 Act] was intended to express the same meaning as this section [now s. 2 of the current Act] and no other.

¹³ Minutes of Thirty Sixth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1954, pp. 18-19.

¹⁴ R.S.B.C. 1960 c. 207.

¹⁵ Statutes of Ontario 59 Vict. c. 42.

¹⁶ Statutes of Ontario 58 Vict. c. 26.

The repealed Section 4 of the 1895 Act, appears to have been intended to found the relationship of landlord and tenant *solely upon contract*:

The relationship of landlord and tenant shall be deemed to be founded *in the express or implied contract* of the parties and not upon tenure or service and a reversion shall not be necessary to such a relation which shall be deemed to subsist in all cases where there shall be an agreement to hold land from or under another in consideration of any rent.

It would seem that the provisions of the 1895 Act were designed, at least, to incorporate within the relationship of "landlord and tenant", one who had gone into possession under an agreement for a lease, but it is submitted, that, since contractual licence also falls within the words of the first phrase of the section, its provisions may be taken to include the contractual relationship of licensor and licensee.

III

Judicial interpretation of the "definition" sections has not thrown much light on the problem of licences before the *Willoughby* case in 1960. The leading Ontario case dealing with Part III of the Act is *Re Mitchell v. Fraser*¹⁸ where Meredith, C.J.C.P., in dismissing an application for a writ of possession brought by a mortgagor, said:

The person entitled to possession of the premises in these proceedings under the enactment respecting 'overholding tenants' must be someone of the *character of a landlord . . . and the occupant must be someone of the character of a tenant.* (emphasis added)¹⁹

The obvious question which arises is how to determine when a person permitting the occupation of premises has or has not the "*character of a landlord*", and similarly when an occupant has or has not the "*character of a tenant.*" The learned Chief Justice suggested that "a person claiming under a paper title" did not have the character of a landlord, while one claiming title "by length of possession" could not have the character of a tenant.

There must be a lease or "*right of occupation*" which has "expired or been determined . . . there must be a demise or an *agreement* under which the tenant is "permitted" to *occupy* the land and this permission must be one which will . . . be *determined by a notice pursuant to a term of the agreement.*" (emphasis added)

It is submitted that a licence falls within the test, inasmuch as a licensee has been held to have a right of occupation, terminable either

¹⁷ This subsection of the 1896 Act does not appear to have been repealed, however the Revised Statutes, enacted in the next year, contained the following section in the Landlord and Tenant Act. "S.3. The relationship of Landlord and Tenant did not since the 15th day of April, 1895, and shall not hereafter depend on tenure and reversion or remainder . . . shall not be necessary in order to create the relationship of Landlord and Tenant or make applicable the ingredients by law belonging to that relation nor shall any agreement between the parties be necessary to give a landlord the right of distress."

¹⁸ (1917) 40 O.L.R. 389.

¹⁹ *Id.* at p. 391.

after notice, or at once, but on giving the licensee reasonable time to vacate the premises.²⁰

The case of *Fyhrrie v. Burke*²¹ would seem to support the proposition that a licence is within the terms of the Act. In applying section 49(1) of the Saskatchewan Landlord and Tenant Act²² [identical to the Ontario Act] Taylor J. stated that the relationship of landlord and tenant did not exist between a purchaser at a tax sale and a tenant of the previous owner, and therefore,

it would be necessary to establish at least *some kind of permission, licence or allowance* constituting a right of occupancy to support such an argument [for an application under the summary proceedings] and none such existed. (emphasis added)

The only other reported Ontario case which specifically dealt with the position of a licensee under Part III of the Act, was *Reliance Petroleum Ltd. v. Rosenblood et al.*²³ There the County Court Judge held²⁴ that

where — the substance of the agreement between the parties is that the grantee is not to hold the right of exclusive possession of the premises, but only a right to use them, the agreement operates as a licence and not as a lease. . . . As I said, upon this ground and *without further consideration and deliberation upon the various arguments advanced by the respondents, I dismiss the application with costs.* (emphasis added)

It is submitted that this decision, unsupported by reasons is not very strong authority for the proposition that a licensee is not an occupant within the meaning of the Act.

IV

The *Willoughby* case specifically holds that a contractual licence is not within the terms of Part III of the Act.²⁵ Upon what principles is such an exclusion based? Clearly, to allow the summary proceedings to be applied to a lessor, who has granted away a 'greater interest' in the premises, but to prohibit the proceedings to a licensor, who has granted away a 'lesser interest', would seem to be incongruous.

It would appear that two questions have to be answered by the County Court Judge in an application under Part III. Firstly, does he have jurisdiction? If so, then secondly, should he make the order sought?²⁶

²⁰ *Winter Garden Theatre (London) Ltd. v. Millenium Productions Ltd.*, [1948] A.C. 173; *Hurst v. Picture Theatres Ltd.*, [1951] 1 K.B. 1; *C.P.R. v. The King* [1931] A.C. 414, 2 D.L.R. 386.

²¹ [1924] 4 D.L.R. 445. See also, *Altbaum v. Northover* [1949] O.W.N. 415, 3 D.L.R. 337.

²² R.S.S. 1920 c. 160.

²³ [1953] O.W.N. 115.

²⁴ *Id.* at p. 116.

²⁵ *Supra*, footnote 3.

²⁶ It is submitted that the Courts have confused these two issues with the result that they often refuse to give relief to the landlord basing the dismissal of the application on the grounds of lack of jurisdiction when in reality, they are exercising their discretion without determining the question of jurisdiction.

To determine the question of jurisdiction under Part III the Court is required to ascertain firstly whether the person still in possession is a "tenant" and secondly whether that "tenant", has any right to continue in possession. It is submitted that in answering the first question the Court is not required to make a distinction between a lease and a licence for the purpose of finding jurisdiction within the terms of Part III of the Act for both a licensee and tenant have the "character of a tenant,"²⁷ to use the words of Meredith J. in *Re Mitchell and Fraser*.

Four propositions are put forward in support of the contention that a licensee and a lessee both stand in substantially the same position with respect to the applicant. Firstly, on the point of *terminating* the interest in question, it is submitted there is no ground for distinguishing between the two types of interest under Part III. Both the lease and the licence are determinable in *some* manner and having been so determined, the duty of the County Court Judge is to enquire whether the "tenant" holds over wrongfully after that interest has been terminated.²⁸ The *manner* in which the licence is determined is completely irrelevant to the question of finding jurisdiction.²⁹

Secondly, as between licensor and licensee there is no argument as to the licensee's derivative "title"—the licensee acknowledges that he derives his right of occupation from the licensor,³⁰ and similarly, a tenant is estopped from denying his landlord's superior title.³¹ This similarity should be contrasted to the situation where an owner of the fee in the land brings an action for recovery of possession against a trespasser. In the latter case, it is clear that the trespasser might well set up the defence of having acquired a title by adverse possession, but in contrasting a lease with a licence this problem does not arise. In *Casey v. Hellier*,³² Lord Esher, M.R. in referring to a rule which is practically identical to the section now under consideration said:³³

²⁷ See footnote 18.

²⁸ As both a lease and licence have this issue in common and must be answered in either case there would seem to be no reason for having to avoid this decision solely on the grounds that the interest is a licence.

²⁹ *Winter Garden Theatre (London) Ltd. v. Millenium Products Ltd. supra*; *Hurst v. Picture Theatres Ltd. supra*; *Bendall v. McWhirter* [1952] 1 All E.R. 1307; *Starkman v. Delhi Court Ltd.*, (1961), 24 D.L.R. (2d.) 152 and *on appeal* (1961), 28 D.L.R. (2d.) 270. At trial Ferguson J. indicated, at p. 155, a distinction should be made between the *power* to terminate a licence and the *right* to terminate it. It is submitted that such a distinction is no longer tenable since, at least, the administration of Equity and Common Law is vested in the same court. Once the court finds the licensor to have no right to terminate, it is submitted that the use of his power to terminate could be restrained by injunction. The Court of Appeal reversed the finding of the trial judge and found the defendants to be trespassers.

³⁰ *Doe d. Johnson v. Baytup* (1835), 3 Ad. & El. 188, 111 E.R. 834.

³¹ *Morton v. Woods* (1869), 38 L.J.Q.B. 81; *Hartcup v. Bell* (1883), Cab. and El. 19.

³² *Casey v. Hellier* (1886), 55 L.J.Q.B. 207.

³³ *Id.* at 208.

Looking at the context of the examples given, I think that the [summary] procedure applies to the most simple cases as *for example* the direct relationship of Landlord and Tenant where there has been an attornment to the landlord, *so that there is no title to prove*.^{34, 35} (emphasis added)

Thirdly, and as a corollary to the above proposition, it is submitted that assignees of the lessor's reversion or of the licensor's fee both stand in the same position with regard to an application under Part III. Where both assignees have taken with notice of the interest of the overholding "occupant", then according to *Bendall v. McWhirter*,³⁶ and *Errington v. Errington*³⁷ such occupancy is binding upon them.

There would seem to be no reason, therefore, why a summary application by the licensor's assignee should be refused, where in similar circumstances an application by the lessor's assignee would succeed. It must be noted that for the licence to be binding, upon the assignee of the licensor's fee two conditions must be satisfied; (a) the licence must have been acted upon and (b) subject to some qualification, the assignee must have had notice. However these conditions do not affect the proposition stated above. If there has been no occupation, clearly it is unnecessary to bring any action under Part III of the Act. As regards (b), if the assignee should claim he took without notice, then by his own objection he is precluded from utilizing Part III because he immediately brings into issue the question of the licensee's derivative title.³⁸

Fourth, it is submitted that the point raised in the *Willoughby* case that a lease creates an estate and a licence does not, is not relevant in an application under Part III. It is conceded that for some purposes such a distinction may be valid and indeed necessary.³⁹ If the lease or licence have either terminated or been determined then it makes no difference in a summary application for recovery of possession. But even assuming there might be a difference in

³⁴ Cf. *Courville v. Pretty*, [1948] O.W.N. 359, *Manitoba Farm Loans Assoc. v. Zalondek*, [1933] 1 W.W.R. 559, 3 D.L.R. 128; *Fyhri v. Burke*, [1924] 3 W.W.R. 329; [1924] 4 D.L.R. 445.

³⁵ See generally, Hill and Redman, *Law of Landlord and Tenant*, 13 ed. 1960 Butterworth, pp. 7-8.

³⁶ *Bendall v. McWhirter*, *supra*. Denning L.J. after holding the licence to be binding on the trustee in bankruptcy said "Every contractual licence imparts a negative covenant that the licensor will not interfere with the use and occupation of the licensee in breach of the contract. This negative covenant is binding on the successors in title of the licensor . . . it does not run with the land so as to give a cause of action in damages for breach of contract against the successor; but it is binding in equity on the conscience of any successor who takes with notice of it. He therefore cannot eject the licensee in disregard of it.

³⁷ *Errington v. Errington*, [1952] 1 All E.R. 149; 1 K.B. 290.

³⁸ In bringing into question the derivative title, the simple relationship of "landlord" and "tenant" in its broadest sense does not exist. One who claims to take an assignment of the reversion without notice of the occupancy immediately brings into question the fundamental basis of the relationship—i.e. initial occupancy or possession with consent or acquiescence.

³⁹ For example it may be material in determining whether an action for trespass will lie. *Hill v. Tupper* (1863) 2 H. & C. 121. This question is discussed in Street, *The Law of Torts*, 2 ed. 1959 Butterworth, pp. 65-68.

effect between the case of a lease which does create an "estate" or "interest" and a licence-agreement which does not, it is submitted that, in view of section 2 of the Landlord and Tenant Act, the classification is without significance. Alternatively, if it is necessary that a tenant have an "estate" or "interest"⁴⁰ to come within the terms of the Act, then it is now arguable that a licence might well be classified as an "interest" in land, albeit an equitable one.⁴¹

Once the issue of jurisdiction has been decided, the question arises as to whether the County Court Judge has any discretion to exercise in the particular case. This problem is not free of doubt. In *Humans v. Doyan*⁴² the Court of Appeal apparently approved the dicta of Riddell J. in the case of *Re Dickinson & Co. and Graham*⁴³ where the learned judge said:

⁴⁰ There is the added problem of deciding what is necessary to constitute an interest—is exclusive possession the crucial test or not? See *Addiscombe Garden Estates Ltd. v. Crabbe*, [1957] 3 All E.R. 563. *Howard v. Shaw* (1841) 8 M. & W. 118; 10 L.J. Ex. 334; 151 E.R. 973; *Errington v. Errington, supra*; *Radaich v. Smith* (1959-60) 101 Comm. L.R. 209. In this last case Windeyer J. said: "And it has been said—especially in connection with family relationships, charity or hospitality that allowing a person to have exclusive possession of the premises does not necessarily indicate a tenancy as distinct from a licence. These distinctions are largely the by-product of rent restrictions, statutes and other legislation. . . . They are all explicable if they mean, and I think they all do, that persons who are allowed to enjoy *sole occupation in fact* are not necessarily to be taken to have been given a right of *exclusive possession in law*. . . . We are not concerned with the way in which a court of equity would control the parties in the exercise of their legal rights, but with the simple question whether at law this document created a lease or a licence." (emphasis added). This judgment cannot pass without some criticism. To say, as Windeyer J. did, there is a difference between sole occupation in fact and a right of exclusive possession in law, only confuses the issue. How can a court ascertain in an "occupation" pursuant to an oral agreement, for example whether exclusive possession was granted in law or merely arose in fact. It is submitted that today an interest in land can mean little more than a contract for a "bundle of rights" to be held by one party against another with reference to the occupation of land. Some contracts create greater "bundles of rights" than others. Agreements obviously are varied in their terms, but it has been held recently in *Re B.A. Oil Co. v. Halpert*, [1960] O.R. 71 and *Re Can. Petrofina Ltd. v. Trudell*, [1960] O.R. 82, that there may still be a grant of exclusive possession in spite of other terms which materially restrict the use of the premises. But why should exclusive possession be the determining factor in this "bundle of rights" when by numerous other restrictions the landlord can effectively control the use to which the premises are put? How many onerous restrictions must be imposed to negative the grant of exclusive possession?

⁴¹ In the *Willoughby* case the Court indicated at p. 283 that "the licensee had at most 'an equity' and not equitable interest", but it is submitted that if such an equity is enforceable as a "clog or fetter like a lien" against the successors of the licensor, then would it not be better to admit as Professor Williams suggests that this right of the contractual licensee, enforceable by equity is, in fact a new interest? See Williams, *Interests and Clogs* (1952), 30 Can. Bar Rev. 1004. The main value in classifying a bundle of rights as an interest in land would seem to be in the ascertainment and determination of the right of an occupant against third parties. Whilst it is true that a lessee has rights *in rem* it is now open to question whether a licensee is not in the same position if the licence be registered under the Registry Act or the owner or his assign has actual notice of it.

⁴² [1945] 2 D.L.R. 312.

⁴³ (1912) 8 D.L.R. 928 at p. 931.

It is not for the County Court Judge to decide whether the right of a tenant should be determined under the Act in question since the jurisdiction is vested in the Court of Appeal by section 79(2).

It is submitted that if this dictum is followed the whole efficacy of the summary proceedings under Part III is destroyed. It would mean that after the County Court Judge has found the relationship of landlord and tenant to subsist, he must reserve the question of discretion to the Court of Appeal. This is objectionable on at least two grounds; (a) it is time consuming, and the summary proceedings are no longer summary and (b) the Court of Appeal must adjudicate without having the opportunity to hear witnesses directly and observe their demeanour.

Assuming for the moment that the County Court Judge does have the right to exercise discretion, then the question arises as to when he should properly do so. The cases seem to indicate that the application should properly be refused where the matters are too weighty to be adjudicated upon in a summary fashion. Illustrative of this principle is the case of *Manitoba Farm Loans Association v. Zalondek*.⁴⁴ There the defendant, Z, occupied his land under an unregistered agreement for sale from an owner-mortgagor. Upon default of the mortgage commitments by the latter, the plaintiff mortgagee foreclosed and served notice to quit on Z. Prendergast C.J.M. and Jennistoun J.A. expressly found that the granting of a new tenancy by the plaintiff to a third party expressly negated any tenancy in the defendant Z and consequently the plaintiffs could not avail themselves of the summary proceedings.

Robson J.A., rather than dismissing the application on the basis of jurisdiction, (which is the effect of the finding of the majority of the judgments), considered the case from the point of view of discretion. After stating that there were plausible grounds for holding that a tenancy by estoppel could have been created, and that the plaintiff's argument that a landlord and tenant relationship existed, he concluded that, in his opinion⁴⁵

These matters [were] too weighty to be adjudicated upon finally in a summary proceeding such as that instituted by the applicant in this case. . . . It would have been better for the learned judge to have exercised discretion against granting the order and left the applicant to proceed by action for possession.

Similarly in *Fitament v. Demich*⁴⁶ the court reviewed the authorities in which discretion in favour of the landlord had been exercised and stated that if it was doubtful whether the granting of a writ of possession would do complete justice to the parties, the writ should be refused.

The situation in which a mortgagee brings an action against a mortgagor under Part III of the Act raises other problems, even

⁴⁴ [1933] 3 D.L.R. 128.

⁴⁵ *Supra*, at p. 134.

⁴⁶ (1951) 2 W.W.R. (N.S.) 522.

where the mortgagor has attorned as tenant. There would seem to be no doubt that an attornment clause in the mortgage deed may, and ordinarily does, create the relationship of landlord and tenant.⁴⁷ But it is suggested that this relationship is designed solely to give the mortgagee additional security by way of the right to distrain.⁴⁸ Ordinarily a mortgagee may choose among the alternative remedies of foreclosure or sale, an action on the personal covenant, or possession, where the mortgage is in default. Indeed, generally he seeks all three concurrently. But an interference in the complicated and conflicting rights of the mortgagor's right to redeem and the mortgagee's right to realize on his security would appear to be a matter too weighty to be dealt with summarily under Part III. Thus, despite the fact that by the terms of the mortgage a relationship of landlord and tenant is created, giving the County Court Judge jurisdiction, it would appear proper for him, in such circumstances to refuse the application⁴⁹ on the discretionary ground.

To return to the *Willoughby* case it is submitted that the court there could have reached the same result more properly, without denying the applicability of Part III to a licensor-licensee relationship in general, by accepting jurisdiction but refusing to exercise discretion. The particular licence situation under consideration containing, as it did, such substantial complications as the trust arrangement and the legal position of a deserted spouse⁵⁰ was simply not an appropriate one to be dealt with by the summary procedure. It is suggested that the correct course should have been to make an application under the Married Women's Property Act, section 12.⁵¹

V

In view of the fact that both a mortgagee and a mortgagor may apply to the Court for relief by way of the Mortgage Act and the Rules of Practice and that a married woman may obtain an order, flexible in its terms, under the Married Women's Property Act, it is

⁴⁷ *Ex p. Jackson, In re Bowes* (1880) 14 Ch. D. 725 at p. 739.

⁴⁸ See Megarry & Wade, *The Law of Real Property* (2nd ed.) Stevens, London 1959 at p. 892. See: *Re Mitchell and Fraser* (1917) 40 O.L.R. 389, 38 D.L.R. 597; *Chalmers v. Freedman* (1909) 18 Man. R. 523, 10 W.L.R. 434; *Gordon v. Fraser* (1918) 43 O.L.R. 31; *Premier Trust v. Haswell* [1937] O.R. 497, [1937] 3 D.L.R. 449.

⁴⁹ *In re Reeve* (1867) 4 P.R. 27 (Ont.).

⁵⁰ See Laskin, *The Deserted Wife's Equity in the Matrimonial Home: A Dissent* (1961) 14 University of Toronto L.J. 67.

⁵¹ Married Women's Property Act R.S.O. 1960 ch. 229. "12(1) In any question between husband and wife as to the title to or possession of property, either party . . . may apply in a summary way to a Judge of the Supreme Court or at the option of the applicant irrespective of the value of the property in dispute, to the Judge of the county or district court . . . and the judge may make such order with respect to the property . . . as he thinks fit." *Dickinson v. Dickinson* [1948] O.W.N. 325, where the court held on an application for partition by the husband, a joint tenant with his wife, that s. 12(1) of the Married Women's Property Act did not apply as there was no question as to title or possession. See *Rush v. Rush* [1960] 24 D.L.R. (2d.) 325. See also Special Lectures, 1961, Law Society of Upper Canada. Collins-Williams, *The Recovery of Land*, p. 29 at p. 45.

suggested that where alternative modes of procedure are open to the parties, then the overholding tenant provisions of the Landlord and Tenant Act are inapplicable. In such situations where the legislature has made available special modes of procedure applicable to certain types of relationships then notwithstanding that there might also be a landlord and tenant relationship, the County Court Judge, in his discretion, may properly refuse to make the order sought under Part III.

It is submitted that on the above arguments there is no logical basis for distinguishing a lease from a licence in a simple case upon a summary application under Part III of the Act. In retaining this dichotomy, it is arguable, perhaps that the courts have found a convenient way of escaping by way of the question of jurisdiction when they wish to avoid settling in a summary fashion a complicated case. But, this way of dealing with the problem may have unfortunate consequences in subsequent cases. A future court faced with a simple licence situation is bound to dismiss the application under Part III even under circumstances in which the summary proceedings would appear appropriate.

If a licence is not to be within the terms of Part III of the Act, then much of the efficacy of summary proceedings is lost. If for example a simple oral agreement has been determined, then as the law stands at present, the County Court Judge must ascertain with considerable precision whether there is a lease or a licence. If he finds the latter to subsist, then the owner must resort to a full scale action for possession, and involve himself in considerable cost. In addition the distinction just drawn may also give rise to an appeal on that fine point of law alone and the "owner" incurs further delay and the risk of increased costs.

The preamble to the first act dealing with overholding tenants stated that circumstances required a more speedy and less expensive remedy than was then provided for by law. It is suggested that the Act as it is presently interpreted in this respect, is completely contrary to the principle established in 1834.⁵²

⁵² *Supra* footnote 7.